APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANTE DANIL CARTER, Defendant and Appellant.	E072834 (Super.Ct.No. RIF1880136) OPINION

APPEAL from the Superior Court of Riverside County. Steven G. Counelis, Judge. Affirmed.

Matthew Barhoma for Defendant and Appellant.

Xavier Becerra and Rob Bonta, Attorneys General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

In the early morning of November 11, 2016, the body of Eric Burniston (Burniston) was found on a remote street in the City of Corona with two gunshot wounds to the head. Investigators determined that Burniston's identity was linked to an extensive operation that used the personal identifying information of numerous individuals to obtain fraudulent loans from various financial institutions. While the operation involved the use of many names and identities, the only identity referenced more prevalently than Burniston's was that of defendant and appellant Dante Danil Carter.

Ultimately, defendant was convicted by a jury of first degree murder in connection with Burniston's death (Pen. Code,[1] § 187, subd. (a), count 1), as well as numerous other offenses involving the possession of firearms, identity theft, and financial crimes.[2] Additionally, the jury found that defendant intentionally killed Burniston by means of lying in wait (§ 190.2, subd. (a)(15)) and discharged a firearm causing death in the commission of the murder (§ 12022.53, subd. (d)). Defendant was sentenced to life imprisonment without the possibility of parole for the murder conviction and a

---

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

[2] Specifically, in addition to murder, defendant was convicted of three counts of the unauthorized possession of a firearm (§ 29800, subd. (a)(1), counts 2-4); one count of the unauthorized possession of ammunition (§ 30305, subd. (a), count 5); four counts of grand theft from a financial institution (§ 487, subd. (a), counts 6-9); three counts of false personation (§ 530, counts 10-12); five counts of identity theft (§ 530.5, subd. (a), counts 13-17); two counts of possessing a falsified driver's license for the purpose of forgery (§ 470b, counts 18 & 19); and 10 counts of money laundering (§ 186.10, subd. (a), counts 20-29). The jury also found that defendant committed two or more theft-related felonies that involved taking more than $500,000. (§ 186.11, subd. (a)(2).)

consecutive indeterminate term of 25 years to life in state prison for the personal discharge of a firearm.[3]

On appeal, defendant raises claims of error related only to his murder conviction. Specifically, defendant claims (1) the prosecutor committed misconduct warranting reversal under *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*) in questioning defendant during cross-examination; (2) the trial court erred in admitting evidence of prior, uncharged misconduct; (3) the trial court erred in excluding evidence of third party culpability; and (4) the cumulative impact of these errors requires reversal even if any individual error was not sufficiently prejudicial to independently warrant reversal.[4] We find no merit in defendant's arguments and affirm the judgment.

II. FACTS AND PROCEDURAL HISTORY

A. *Background, Facts, and Charges*

Defendant was involved in an extensive operation that involved obtaining the personal identifying information of numerous individuals; using that information to

---

[3] Defendant was also sentenced to a consecutive determinate term of 21 years four months for the other charges.

[4] In his reply brief, defendant also claims that he was deprived of his right to defend himself when his original appellate counsel failed to provide unspecified "seminal and important aspects" of the transcripts of proceedings to substitute appellate counsel. However, "we cannot address matters that are outside of the record on appeal or issues that do not arise from the portion of the litigation underlying the appeal in question." (*Kinney v. Overton* (2007) 153 Cal.App.4th 482, 485; *People v. Croft* (1955) 134 Cal.App.2d 800, 804 ["No facts outside the record . . . can be considered on appeal" and "[s]tatements in briefs are not part of the record on appeal."].) Matters that involve examination of the conduct of appellate counsel clearly fall outside the scope of review on an appeal from the judgment.

create false documents; and using those false documents to open bank accounts, obtain loans, and open lines of credit with various financial institutions. The money obtained from these financial institutions would then be diverted to defendant through various accounts designed to mimic legitimate businesses, as well as various shell companies.

One of the ways defendant would obtain personal identifying information for use in his operation was to befriend young adults and offer them an opportunity to go into business with him. He would provide these individuals with small payments, while using their identities to obtain much larger sums of money. Burniston, along with two other young men, B.B. and B.C., were among the individuals who provided their personal identifying information to defendant.

In the early morning of November 11, 2016, Burniston's body was discovered on a street in the City of Corona. His body was discovered on the ground behind his parked vehicle with two gunshot wounds to the head. Ultimately, defendant was charged with first degree murder in connection with Burniston's death (§ 187, subd. (a), count 1), as well as numerous other charges related to the possession of firearms, identity theft, and various financial crimes.

B. *Relevant Evidence at Trial*[5]

1. Crime Scene Evidence

An investigator with the Riverside County Sheriff's Department testified that he was dispatched to the scene of a suspected murder in the early morning of November 11, 2016. He arrived at a location off of Temescal Canyon Road near the border of the City of Corona, which he described as rural and surrounded by open fields but located on the outskirts of a nearby residential community. At the scene, the investigator observed a body on the ground lying near the rear end of a parked, red vehicle. The body appeared to have two gunshot wounds to the head. Investigators located two nine-millimeter shell casings near the body and later identified the body as that of Burniston.

Two residents who lived in the residential community near the crime scene also testified at trial. The first resident testified that, on November 11, 2016, between the hours of 12:00 and 2:00 a.m., she left her home to pick up her son, following his return from a school field trip. As she left her residential community, she observed two vehicles parked in tandem on the side of the road, and she observed two men walking toward the rear of the second vehicle. She described the first vehicle as black or dark-colored and the second as red. After picking up her son, she took the same route home and, this time, she observed a body lying behind the red vehicle, a new vehicle that had stopped along

---

[5] As already noted, defendant was charged and convicted of numerous offenses related to firearm possession, identity theft, and financial crimes. However, because defendant has not alleged error with respect to these convictions on appeal, we summarize only the evidence relevant to the murder conviction.

the road, and the driver of that new vehicle attempting to render assistance. The dark vehicle she previously had observed was no longer present.

The second resident testified that on November 11, 2016, he was driving home from work when he noticed a red vehicle parked on the side of the road. After he drove past the vehicle, he observed a body lying on the ground behind the vehicle. The resident stopped his vehicle, exited, and walked over to see if any assistance was needed. When the individual did not seem to respond, the resident called 911. A few minutes later, the first resident who testified drove up and also stopped to render assistance.

2. Testimony of S.A.

S.A. testified she had been in a dating relationship with Burniston from 2011 until his death. Sometime in 2016, Burniston quit his regular jobs, but S.A. continued to see Burniston with money. She understood Burniston to be in a business relationship with defendant and that he would occasionally meet with defendant, but she did not know the nature of their business. S.A. testified that Burniston had shown her pictures of defendant and would also periodically show her text messages indicating when and where Burniston and defendant intended to meet.

On November 10, 2016, she received a text message from Burniston around 11:30 p.m., stating that he was going to meet with defendant in Corona. When she awoke the next morning, she saw that two additional text messages had been sent from Burniston's phone, stating he did not meet with defendant but, instead, went to have drinks with some friends. She felt uneasy because the messages used phrases and language that was atypical of Burniston. She tried calling Burniston several times, but

the calls went straight to his voicemail each time. Eventually, she went to look for Burniston at his grandparents' home, where she learned that Burniston had been killed.

3. Testimony of Forensic Accountant

A forensic accountant testified he had been retained by the Riverside County District Attorney's Office to conduct an analysis of voluminous financial records related to the case. Based on this analysis, he concluded that Burniston's identity was associated with numerous transactions in an extensive financial network, including a shell account used to distribute money and several large loans. A bank account in Burniston's name was used to facilitate the transfer of more money than any other accounts linked to this financial operation, and Burniston's identity was associated with approximately 40 percent of all transactions related to this operation. The only identity associated with the financial operation that was more prevalent than Burniston's was that of defendant.

4. Testimony of Anaheim Police Sergeant

A sergeant with the Anaheim Police Department testified that in the fall of 2016, he was tasked with investigating a claim of identity theft. The identity theft victim reported that a credit union account had been opened in her name without her permission and further provided a copy of a utility bill, which had been submitted to the credit union for payment. The bill bore the identity theft victim's name but defendant's residential address. Upon investigation, the sergeant learned that the account had been opened online, obtained the IP address[6] used to open the account, and discovered the IP address

---

[6] Internet protocol address.

was also associated with defendant's residence. The sergeant also discovered that numerous accounts and credit cards had been opened using the same IP address, and that defendant and Burniston were associated with many of these accounts. Finally, the sergeant discovered that the credit union had issued a check to the identity theft victim, the check had been mailed to defendant's residence, and the check had been cashed.

On October 27, 2016, the sergeant visited defendant at defendant's residence and conducted a recorded interview. The recorded interview was played for the jury. During the interview, defendant admitted he had some business relationship with the identity theft victim, which involved using her identity for financial transactions. When asked about the cashed check, defendant denied ever receiving such a check and claimed that he would have returned any such check to the victim, even if he had received one. When defendant claimed that he would not have been able to cash a check made out in the victim's name, the sergeant indicated that the check "was made out to a car company as well." Defendant adamantly claimed that any investigation regarding the check would not lead back to him.

The sergeant eventually learned the check had been deposited into a bank account held by Eric Burniston, "Doing Business As . . . Premier Motors." However, by the time the sergeant attempted to locate Burniston for an interview, Burniston had already been killed.

5. Testimony of B.C.

B.C. testified that he first met defendant in September 2016, shortly after B.C. turned 18 years of age, while attending an event for car enthusiasts. Defendant proposed

that B.C. consider becoming a "silent investor" in defendant's business. The precise nature of defendant's business was unclear to B.C., but B.C. understood that this involved defendant's use of B.C.'s personal information in order to obtain loans and, in exchange, B.C. would receive a monthly payment. At the time, B.C. thought it was a worthwhile venture because he had no money and had been evicted from his parents' home.

At some point, B.C. also began acting as a personal assistant to defendant and was paid $1,000 each month in exchange for running errands, picking up food, and driving defendant. B.C. testified that he met Burniston on one occasion after driving defendant to a meeting with Burniston. At the time, B.C. understood that defendant had some type of business relationship with Burniston and was delivering money to Burniston.

B.C. recalled that, in a prior conversation with defendant, defendant stated a female business associate had emptied one of their bank accounts and suggested he would pay $10,000 to have the woman killed. B.C. also recalled that, on a different occasion, defendant expressed a desire to kill Burniston. However, defendant did not disclose his motivation for wanting to kill Burniston, and B.C. did not ask out of fear defendant might become angry. According to B.C., defendant explained that he would contact B.C. to have B.C. drive defendant to kill Burniston. While defendant did not disclose where or how he intended to carry out the killing, B.C. knew defendant kept several firearms.

In the evening of November 10, 2016, defendant sent B.C. a text message, which signaled defendant's desire to carry out the killing that day.[7] In response, B.C. drove to defendant's home to meet defendant. As they left, defendant suggested that they take B.C.'s vehicle. B.C. did not see defendant carrying any weapons at the time they left his home. However, while driving to their destination, defendant pulled out a gun that had been hidden in defendant's clothing, said he was "going to test it to see if it worked," and fired a couple of shots out the window of the vehicle.

Defendant instructed B.C. to drive to a location off of Temescal Canyon Road and eventually instructed B.C. to park along the side of the road. Defendant then exited the vehicle while texting on a mobile phone, reentered the vehicle, and asked B.C. to repark the vehicle farther down the street. After about five minutes, Burniston arrived driving a red vehicle, and parked behind B.C.'s vehicle. Defendant exited B.C.'s vehicle, tapped himself as if to check to ensure he had his firearm, and walked to the rear of Burniston's vehicle. B.C. never exited the vehicle, but he watched through his rearview mirrors as Burniston exited the red vehicle and walked to meet defendant. B.C. recalled seeing Burniston smoke a cigarette while talking with defendant.

After some period of time, B.C. heard two gunshots; defendant quickly returned to B.C.'s vehicle, and B.C. drove away. Defendant was holding a firearm, as well as Burniston's mobile phone when he returned to B.C.'s vehicle. B.C. drove defendant

---

[7] B.C. exchanged a series of text messages with defendant in which they discussed going to a car meet. B.C. clarified that a car meet is an event in which car enthusiasts gather together to view each other's cars, but defendant had previously indicated this would be a signal that defendant intended to kill Burniston that day.

straight to defendant's home where defendant changed his clothing and handed the clothes he had been wearing to B.C. so that B.C. could dispose of them. B.C. testified that he originally intended to keep defendant's clothing as leverage in case B.C. was contacted by the police, but one of his friends eventually burned the clothes when B.C. revealed his involvement in Burniston's killing.

B.C. admitted he was granted immunity in exchange for his testimony against defendant. He admitted failing to disclose his involvement in Burniston's killing when he was initially contacted by the police. B.C. also admitted he did not tell the truth when the police initially conducted an interview with him. Nevertheless, B.C. stated he had confessed to a friend about his involvement in Burniston's killing the night it happened, which is what led the friend to help burn defendant's clothing.

On cross-examination, B.C. admitted that he had access to defendant's vehicles and home as part of his work for defendant. B.C. also admitted that defendant had previously shown him where some of defendant's firearms were stored and further admitted that he had access to these firearms. B.C. again admitted he lied to the police when he was initially contacted about Burniston as well as during a subsequent interview at the police station. B.C. also acknowledged that, despite being granted immunity for testifying at defendant's preliminary hearing, some of the testimony he gave at that time was inconsistent with his trial testimony. He admitted that he never approached the deputy district attorney to clarify inaccuracies in his preliminary hearing testimony prior to trial.

6. Evidence of Mobile Phone Communications

An investigator with the Riverside County District Attorney's Office testified that, following the discovery of Burniston's body, investigators contacted Burniston's family members, obtained Burniston's mobile phone number, and used that information to review call records related to Burniston's communications. Investigators noted the most recent phone numbers that had called Burniston's mobile phone, conducted a search in police databases for those phone numbers, and discovered that one of those numbers was associated with defendant.[8]

The investigator explained that the police also recovered a mobile phone, which was in defendant's possession at the time defendant was detained and subsequently arrested. The police extracted a series of text messages sent from Burniston's phone number to the mobile phone in defendant's possession. The text exchanges were presented to the jury. From September 28 through November 10, 2016, Burniston sent multiple text messages to defendant complaining about the fact that Burniston had not been paid as promised and about the mishandling of various accounts in Burniston's

[8] While the phone number was registered to B.B., defendant had previously filed a police report, representing that the phone number belonged to defendant. As a result, the number was linked to defendant in the police database.

name.[9] On November 10, Burniston sent a series of text messages to defendant's phone suggesting the two had a planned meeting later that evening.[10]

The investigator also testified that police had tracked cellular phone data for Burniston's phone number, the phone number associated with defendant, and a third prepaid mobile phone number. The cellular data showed the following sequence of events on the evening of November 10, into the morning of November 11, 2016: (1) defendant's phone was active at his residence before being turned off; (2) Burniston's phone approached the crime scene; (3) the prepaid mobile phone number was activated near the area of the crime scene; (4) Burniston's phone and the prepaid mobile phone number were active at the same time at the crime scene; (5) the prepaid mobile phone number was shut off; and (6) Burniston's phone traveled from the crime scene in the direction of defendant's residence before being turned off.

---

[9] On September 28, 2016, Burniston sent a text message inquiring why he had received mail stating he owed monthly payments to a lender. On October 6, Burniston sent a text message that expressed concern over the fact he had not been paid as defendant had promised. For the next two weeks, Burniston sent multiple text messages that requested defendant make the promised payment. On October 21, Burniston sent a text message stating that a bank had closed one of Burniston's personal accounts. On October 29, Burniston sent a text message stating he had been contacted by two different lenders claiming he owed money. Finally, on the morning of November 10, Burniston sent a text message stating he had received a call regarding an overdue payment on a cash advance and a second text message stating he had represented to the vendor that payment would be made later that day.

[10] Specifically, at 6:27 p.m., on November 10, 2016, Burniston sent a text message stating: "Everything still on for tonight, Bro?" At 9:15 p.m., Burniston's phone made a call to defendant's phone and, at 9:31 p.m., Burniston's phone sent another text stating: "Let me know, Bro. I haven't heard from you in a while." At 12:06 a.m., on November 11, Burniston's mobile phone again sent a text stating: "Address, Bro."

A second investigator with the Riverside County District Attorney's Office testified that she analyzed records related to the prepaid mobile phone number. The prepaid mobile phone card associated with the number was activated in Burniston's name on November 9, 2016; was not used after November 11; and was used only to contact Burniston's known mobile phone number. She admitted the physical phones corresponding with Burniston's mobile phone and the prepaid mobile phone number were never recovered.

A retail store employee testified that she conducted an investigation into records related to the purchase of a prepaid mobile phone card. The retail store's receipts showed that a mobile phone, prepaid mobile phone card, socks, underwear, gloves, and a shirt had been purchased together on November 7, 2016, using a credit card in the name of B.B.

B.B. testified as a witness and denied purchasing the prepaid mobile phone card on November 7, 2016. When shown a copy of the credit card used for the purchase, B.B. denied ever applying for, possessing, or using the card. However, B.B. acknowledged he had previously given defendant a copy of his social security card and identification card because he wanted defendant to "help [him] build [his] credit." B.B. was not aware that defendant used a phone registered in B.B.'s name.

7. Evidence Found in Defendant's Possession

An investigator with the Riverside County District Attorney's Office testified he inventoried the items in defendant's possession at the time of defendant's detention and subsequent arrest. Within defendant's wallet, investigators located, among other things,

(1) a driver's license with Burniston's identifying information but bearing defendant's picture; (2) three credit cards in the name of B.B.; (3) one credit card in the name of Burniston; and (4) a credit card in the name of B.C.[11] One of the credit cards in B.B.'s name was the same card used to purchase the prepaid phone card and phone from the retailer.

The phone in defendant's possession at the time of his arrest contained, among other images, photographs of Burniston's driver's license, social security card, and a debit card in Burniston's name; photographs of B.C.'s driver's license and social security card; photographs of B.B.'s driver's license and social security card; and a photograph of five firearms lying across the bed in defendant's residence. Additionally, defendant's phone stored a video depicting defendant displaying and discussing the various firearms in his possession, including two different firearms that used nine-millimeter ammunition.

The investigator also testified that while cellular phone tower records indicated defendant's phone had been shut off at the time of Burniston's killing, the data on defendant's phone continued to keep track of its location using the phone's GPS system. The location data indicated that in the early morning of November 11, 2016, defendant's phone had physically been at the crime scene around the same time as Burniston's phone and the prepaid mobile phone.

---

[11] The investigator merely confirmed that the items documented in exhibit 167 were located on defendant's person at the time of his arrest. The specific items documented in exhibit 167 had been previously detailed in another witness's testimony.

Finally, the data records from defendant's phone showed that it was used on multiple occasions on November 11, 2016, to conduct Internet searches regarding the discovery of a body in Corona.[12] Cellular phone tower data also showed that during this time period, the phone traveled from defendant's residence to the location of the crime scene before traveling back toward Riverside.

8. Evidence Recovered from Defendant's Residence

An investigator with the Riverside County District Attorney's Office testified that during the course of their investigation, all of the firearms depicted in the video and the photograph on defendant's phone were recovered, except for the smallest nine-millimeter firearm. Based upon a forensic analysis, the one nine-millimeter firearm that was recovered was not used in connection with Burniston's shooting. While searching defendant's home, investigators also discovered ammunition that matched the brand and color of the shell casings located near Burniston's body.

9. Defendant's Testimony

Defendant elected to testify in his own defense. Defendant acknowledged that he and Burniston had a business relationship, describing Burniston as a "silent investor" who contributed his "creditworthiness" for the purpose of providing credit repair

---

[12] Specifically, at 7:10 a.m., on November 11, 2016, defendant's phone was used to conduct an Internet search of the terms, " 'Corona News' "; was used again at 7:12 a.m. to conduct an Internet search of the terms, " 'Corona, California News, body found' "; and was used again at 7:39 a.m., to conduct an Internet search of the terms, " 'can prepaid phone be traced.' " The phone was used later that afternoon to again search for the terms, " 'Corona, California News body found' " and " 'Corona, California News, body found today.' "

services. Defendant stated all of the credit cards he had in his possession were given to him by the identified owners, and all of the individuals who provided him with their personal identifying information did so with full knowledge of what he intended to do with that information. Defendant also acknowledged that he hired B.C. as a personal assistant.

According to defendant, he was out with a girlfriend, L., on the evening of November 10, 2016, and dropped her off at her home around 5:00 or 6:00 p.m. He intended to go to a car meet later that evening with members of his car club but missed the prearranged meeting time, so he instead decided to visit a different girlfriend's home. Defendant admitted that he briefly returned to his residence that evening to meet B.C., but he stated that the purpose of doing so was to allow B.C. to borrow one of defendant's cars. At some point while he was at home, defendant misplaced his phone, and he returned to S.'s home without it.

According to defendant, he returned to his residence the morning of November 11, 2016, and discovered B.C. in the living room. B.C. then confessed to defendant that he and a friend went to meet Burniston the previous night; the purpose of the meeting was to purchase marijuana; there was some disagreement about the cost; and the friend eventually shot Burniston. Defendant explained that he owned five firearms, including two nine-millimeter pistols; B.C. had a key to defendant's home and knew where the firearms were stored; and B.C. confessed to taking one of defendant's firearms to the meeting with Burniston.

B.C. told defendant he did not see the actual shots and thus did not know if Burniston was killed. As a result, defendant used his phone to conduct Internet searches to see if a murder had been reported in the news. Defendant also admitted purchasing a mobile phone and prepaid mobile phone card sometime during the week prior to Burniston's death, but he claimed that he gave the phone to B.C. the day it was purchased.

Defendant admitted, both on direct examination and during cross-examination, that he did not disclose B.C.'s confession prior to trial.

C. *Verdict and Sentence*

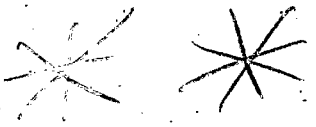
The jury found defendant guilty of murder (§ 187, subd. (a), count 1) and also found true the allegations that defendant was lying in wait and personally discharged a firearm causing death in the commission of the murder. The jury also returned guilty verdicts on the numerous other charges made against defendant.

Defendant was sentenced to life imprisonment without the possibility of parole for the murder conviction in count 1; a consecutive indeterminate term of 25 years to life in state prison for the personal discharge of a firearm; and a consecutive determinate term of 21 years four months for the other charges.

III. DISCUSSION

A. *Defendant's Claim of* Doyle *Error Does Not Warrant Reversal*

On appeal, defendant argues the prosecutor's questioning during cross-examination regarding his failure to disclose B.C.'s purported confession prior to trial was an impermissible use of his silence in violation of his constitutional rights, as set



forth in *Doyle*. We conclude the claim has been forfeited for failure to raise a timely objection in the proceedings below. We further conclude that even in the absence of forfeiture, the prosecutor's cross-examination did not constitute error under *Doyle*. Finally, we conclude that even assuming *Doyle* error occurred, defendant has not established prejudice warranting reversal.

1. Relevant Background

During the direct examination of defendant, defendant testified that B.C. made a confession regarding the murder of Burniston that differed substantially from B.C.'s trial testimony. Defendant then acknowledged that when he was first interviewed by the police, he did not disclose B.C.'s confession. However, defendant explained that he did not do so because he believed B.C. was innocent and did not want to implicate B.C. in Burniston's death. Defendant claimed that he would not have made the same decision had he known B.C. would accuse him of killing Burniston; he accused B.C. of lying when providing preliminary hearing and trial testimony; and he further expressed the belief that B.C. had "tricked" defendant into not disclosing the truth earlier. Defendant adamantly claimed that, had he known B.C. would lie, he "would have made the decision . . . [to] just call[] the cops [him]self. . . . [¶] Before [he] even was arrested. This would have been something that [he] would have just made a decision on [his] own . . . ."

On cross-examination, the prosecutor questioned defendant regarding multiple inconsistencies between his trial testimony and the version of events he had provided to the police when he was initially detained and interviewed, including defendant's failure

to disclose B.C.'s purported confession. Defendant did not object to this line of questioning.

Defendant was then asked when he first learned that B.C. had accused defendant of Burniston's murder and why he failed to disclose B.C.'s purported confession to the police or the district attorney's office even after he discovered B.C.'s accusations. Defendant objected to this line of questioning on the ground it would invade attorney-client privilege and, as a result, the trial court admonished the prosecutor to tailor any questions to avoid asking about the substance of any communication between defendant and his attorney. Near the end of the prosecutor's cross-examination, the prosecutor again asked, "And you waited until almost the last week of trial to give your version of [B.C.'s] confession?" In response, defense counsel stated: "Same objection, . . . she's asking the same question. . . . I move for a mistrial." The trial court denied the request for a mistrial and admonished the prosecutor to move onto another area of inquiry; the prosecutor concluded her cross-examination shortly thereafter.

On redirect, defense counsel elicited further testimony regarding defendant's previous failure to disclose B.C.'s confession. Defendant reaffirmed that if he had known B.C. would accuse defendant of Burniston's killing, defendant would have called the police himself "without a doubt." Defendant further stated he would have disclosed B.C.'s confession during his interview with the police "without a doubt."

Defendant's testimony concluded, the defense rested its case, and the jury was released for the day. After a lengthy discussion between counsel and the trial court regarding admission of exhibits, defense counsel stated: "I wanted to add something

briefly to the record. There was some . . . objections that I was making prior to the lunch break, concerning my client's privileged communications with his attorneys. I just wanted to add I believe that's going to be pursuant to the Fifth and Sixth Amendments to the U.S. Constitution as well as just his right to a fair trial as pursuant to the U.S. Constitution. I just wanted to add that for the record."

On the day of sentencing, defendant moved for a new trial on the ground that the prosecutor's cross-examination constituted *Doyle* error in violation of his Fifth Amendment right to remain silent. The motion characterized the entirety of the prosecution's cross-examination regarding defendant's failure to disclose B.C.'s purported confession as error under *Doyle*, without distinguishing between any of the specific questions asked by the prosecutor. The trial court denied the motion, concluding that it was appropriate to question defendant on cross-examination regarding inconsistencies in his prior statements and actions.

2. General Legal Principles and Standard of Review

"In *Doyle*, the United States Supreme Court held the prosecution may not use a defendant's postarrest, post-*Miranda*[13] silence to impeach the defendant's trial testimony. [Citation.] . . . The court concluded such impeachment was fundamentally unfair and a deprivation of due process because *Miranda* warnings carry an implied assurance that silence will carry no penalty. [Citation.] . . . [¶] The California Supreme Court has extended the *Doyle* rule to prohibit the prosecution's use of a defendant's post-

---

13 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Miranda silence as evidence of guilt during the prosecution's case-in-chief." (*People v. Bowman* (2011) 202 Cal.App.4th 353, 363.)

"Doyle error can occur either in questioning of witnesses or jury argument." (*People v. Lewis* (2004) 117 Cal.App.4th 246, 256.) However, "[t]he United States Supreme Court has explained that a *Doyle* violation does not occur unless the prosecutor is *permitted* to use a defendant's postarrest silence against him at trial, and an objection and appropriate instruction to the jury ordinarily ensures that the defendant's silence will not be used for an impermissible purpose." (*People v. Clark* (2011) 52 Cal.4th 856, 959.) Thus, while *Doyle* error may be premised upon a single improper question, there must also be a defense objection to the question that is erroneously overruled in order to constitute error. (*People v. Lewis*, at p. 256.)

Finally, even where *Doyle* error has occurred, such error must be prejudicial under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18 to warrant reversal. (*People v. Thomas* (2012) 54 Cal.4th 908, 936-937.) Under this standard, "reversal is required unless the error was harmless beyond a reasonable doubt" (*People v. Hernandez* (2011) 51 Cal.4th 733, 744-745) or, stated alternatively, it must be "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*People v. Pearson* (2013) 56 Cal.4th 393, 463.)

3. Defendant's Claim Is Forfeited for Failure To Raise a Timely Objection Below

The California Supreme Court has repeatedly recognized that the failure to make a timely objection on *Doyle* grounds and failure to request a curative admonition constitutes forfeiture of any claim of *Doyle* error on appeal. (See *People v. Tate* (2010)

49 Cal.4th 635, 691-692; *People v. Collins* (2010) 49 Cal.4th 175, 202; *People v. Huggins* (2006) 38 Cal.4th 175, 198; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118.)

As the People correctly note, the prosecutor's questions on cross-examination actually addressed two, distinct instances in which defendant failed to disclose B.C.'s purported confession: (1) defendant's failure to disclose during his prearrest interview with police, and (2) defendant's failure to disclose after learning of B.C.'s testimony at defendant's preliminary hearing. The record here shows that defendant did not raise any objections, let alone objections based upon *Doyle*, to the line of questioning involving his prearrest interview with police. Accordingly, any claim of *Doyle* error premised upon these questions has clearly been forfeited.

Further, while defendant did object to the handful of questions regarding his failure to disclose B.C.'s confession after learning of B.C.'s accusations, the only objection made was based upon attorney-client privilege. The California Supreme Court has concluded that an objection based upon attorney-client privilege does not preserve an objection based upon *Doyle* error for purposes of appeal. (*People v. Tate*, *supra*, 49 Cal.4th at pp. 691-692.) Thus, defendant's objection at the time of cross-examination was not sufficient to preserve any claim of *Doyle* error.

Defendant attempts to avoid this conclusion by highlighting the fact that defense counsel clarified his prior objections "before the parties left for the day."[14] However, "[a]n objection to evidence must generally be preserved by specific objection at the time the evidence is introduced; the opponent cannot make a 'placeholder' objection stating general or incorrect grounds . . . and revise the objection later . . . stating specific or different grounds." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 22.) Likewise, a contemporaneous objection and request for jury admonition is required to preserve a claim of prosecutorial misconduct based upon a prosecutor's comments before the jury. (*People v. Gamache* (2010) 48 Cal.4th 347, 371; see *People v. Holt* (1997) 15 Cal.4th 619, 666-667 [The requirement that objections be timely raised applies to *Miranda*-based objections.].)

Here, defense counsel's clarification came only after defense counsel engaged in redirect examination eliciting testimony on the exact same topic, defendant's testimony had concluded, the defense rested its case, the jury was excused for the day, and the trial court conducted a conference on numerous other evidentiary matters. Waiting until this time to raise an objection deprived the trial court of the ability to immediately address any potential prejudice with a curative admonition and further deprived the prosecution of the ability to lay the foundation for potential exceptions to the extent any objection had

---

[14] Defendant also represents that he requested a mistrial during the prosecutor's cross-examination, implying that such request was premised upon *Doyle* error. However, the record shows that the request for a mistrial was made following an objection based upon attorney-client privilege, and there was no mention of alleged constitutional error, let alone any specific mention of *Doyle* error.

merit. Thus, the objection was neither timely nor specific, and any claim of *Doyle* error has been forfeited for purposes of appeal.

4. Even in the Absence of Forfeiture, We Would Find No Error

While we have concluded defendant forfeited his claim, we also believe that, even in the absence of forfeiture, *Doyle* error did not occur in this case.

"The *Doyle* rule . . . is not absolute." (*People v. Bowman, supra*, 202 Cal.App.4th at p. 363.) It does not prohibit the prosecution's use of a defendant's silence in a variety of situations, including the use of a defendant's prearrest silence. (*Id.* at pp. 363-364; *Jenkins v. Anderson* (1980) 447 U.S. 231, 238 ["[T]he Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility."]; *People v. Tom* (2014) 59 Cal.4th 1210, 1223 ["The prosecution may . . . use a defendant's prearrest silence in response to an officer's question as substantive evidence of guilt, provided the defendant has not expressly invoked the privilege."].) Here, the record discloses that defendant submitted to an interview with police and discussed numerous topics related to Burniston's murder prior to defendant's assertion of his right to counsel and prior to his arrest.[15] Thus, as an initial matter, we agree with the People that the prosecution's cross-examination of defendant's failure to disclose B.C.'s purported confession at the time he actively engaged in a prearrest interview with police cannot be the basis of *Doyle* error.

---

[15] For example, defendant claimed that he never spoke with Burniston on the evening of the murder and did not own a second nine-millimeter firearm. After these exchanges, defendant requested an attorney and the police ended the interview.

It is true that later in defendant's interview, he asserted his right to counsel and the police ended the interview in response. However, "the exercise of [a defendant's] *Miranda* rights in the midst of his statement to the police does not erase the statement previously given. A fully voluntary statement to police followed by invocation of the right to remain silent does not render the voluntary statement somehow the less voluntary and thus inadmissible. . . . [A] deliberate omission in a voluntary statement to police is [not] tantamount to an exercise of the right to remain silent. The principle of . . . *Doyle* cannot be strained so far." (*People v. Clem* (1980) 104 Cal.App.3d 337, 344.) Thus, the fact that defendant eventually invoked his right to counsel and remained silent thereafter does not preclude the prosecutor from cross-examining defendant regarding inconsistent statements or selective silence prior to that time, and cross-examination on that subject does not constitute error under *Doyle*.

As the People correctly note, the prosecutor's questions regarding defendant's postarrest failure to disclose present a closer question. However, while the permissible use of postarrest silence is indeed more limited, "a prosecutor may refer to the defendant's postarrest silence in fair response to an exculpatory claim or in fair comment on the evidence without violating the defendant's due process rights." (*People v. Wang* (2020) 46 Cal.App.5th 1055, 1083.) As this court has previously explained: "[A]n assessment of whether the prosecutor made inappropriate use of a defendant's postarrest silence requires consideration of the context of the prosecutor's inquiry or argument," and "[a] violation of due process does not occur where the prosecutor's reference to defendant's postarrest silence constitutes a fair response to defendant's claim or a fair

comment on the evidence. [Citations.] . . . . '*Doyle*'s protection of the right to remain silent is a "shield," not a "sword" that can be used to "cut off the prosecution's 'fair response' to the evidence or argument of the defendant." ' " (*People v. Champion* (2005) 134 Cal.App.4th 1440, 1448.)

Thus, numerous courts, including this court, have found no error under *Doyle* where the prosecutor's questions or comments are a direct response to a theory or argument raised by a defendant. (See *People v. Champion, supra,* 134 Cal.App.4th at p. 1448 [" 'Questions or argument suggesting that the defendant did not have a fair opportunity to explain his innocence can open the door to evidence and comment on his silence.' "]; *People v. Wang, supra,* 46 Cal.App.5th at p. 1083 [no *Doyle* error where prosecutor's cross-examination was not designed to draw independent meaning from defendant's silence, but instead intended to correct the false impression defendant tried to create in direct testimony that he was fully cooperative with police]; *People v. Campbell* (2017) 12 Cal.App.5th 666, 672-673 [prosecutor may fairly question defendant on postarrest silence where a defendant testifies on the stand in an attempt to create an impression he fully cooperated with law enforcement]; *People v. Delgado* (2010) 181 Cal.App.4th 839, 852-854 [same]; *People v. Collins* (2010) 49 Cal.4th 175, 204 [A prosecutor's questions regarding a defendant's failure to come forward earlier with his alibi can be "a legitimate effort to elicit an explanation as to why, if the alibi were true, [the] defendant did not provide it earlier."].)

Here, defendant first raised the issue of his failure to previously disclose B.C.'s purported confession on direct examination, openly acknowledging his silence on the

issue in prior interactions with law enforcement; claiming he had been "tricked"; and further claiming that he would have been inclined to voluntarily report B.C.'s confession to police had he known B.C. would accuse him of Burniston's murder. Indeed, even after the prosecutor's allegedly improper cross-examination, defendant chose to draw attention to the issue again on redirect examination, repeatedly asserting that he would have disclosed B.C.'s confession to police "without a doubt."

Thus, in context, it is apparent that the brief portion of the prosecutor's cross-examination addressing defendant's postarrest silence was not an attempt to draw attention to that silence as substantive evidence of guilt, but a fair response to the assertions made by defendant on direct examination. Defendant himself voluntarily made his failure to disclose known to the jury and voluntarily offered an explanation for his failure to disclose during direct examination. Having done so, defendant cannot claim that the Fifth Amendment precludes the prosecution from cross-examining him on that very subject. Particularly in light of defendant's repeated assertions that he would have independently made the decision to reveal B.C.'s confession had he known of B.C.'s accusations, a question regarding why he failed to do so, even after learning of those accusations, was a logical and fair response. Where defendant himself has opened the door to a specific line of questioning involving his failure to make a disclosure following his arrest, the prosecutor's attempt to cross-examine defendant on that subject does not run afoul of *Doyle*.

5. Any Alleged *Doyle* Error Was Not Prejudicial

Finally, even if the issue had not been forfeited and, even assuming cross-examination regarding defendant's postarrest silence constituted *Doyle* error, we would find no prejudice warranting reversal.

First, *Doyle* error arising from the mention of a defendant's postarrest silence is not prejudicial where other instances of silence or inconsistent statements were also properly admitted for the same impeachment purpose. (*People v. Hinton* (2006) 37 Cal.4th 839, 867-868 [prosecutor's reference to defendant's postarrest silence in response to a police request for an interview was harmless in light of fact that defendant was also impeached with statements given during three other postarrest police interviews in which he waived his *Miranda* rights]; *People v. Earp* (1999) 20 Cal.4th 826, 857-858 [prosecutor's reference to postarrest silence was harmless where defendant was also impeached with inconsistent version of events he gave prior to invocation of his right to remain silent].)

As we have already explained, the prosecution's cross-examination regarding defendant's inconsistent statements and failure to disclose during a prearrest interview did not violate *Doyle* and was clearly admissible for the purpose of impeachment. Thus, defendant's prior failure to disclose was already properly before the jury for the purpose of impeaching his trial testimony. The prosecutor's brief cross-examination on defendant's postarrest silence served the same purpose; was merely cumulative of the more numerous questions regarding his prearrest silence; and, as such, was not prejudicial.

Second, the other evidence of defendant's guilt was overwhelming in this case. B.C. provided direct witness testimony that defendant committed the murder. Defendant's mobile phone contained location data revealing it was present at the location of Burniston's death at the time Burniston was killed, and it also contained Internet search data suggesting defendant had conducted numerous internet searches regarding the discovery of a body the day of Burniston's death. Defendant admitted that he purchased the prepaid mobile phone card that was used to contact Burniston in the hours leading up to Burniston's death. Video and photographic evidence, as well as defendant's own testimony, confirmed that defendant owned a firearm of the same type used to kill Burniston. A search of defendant's home also uncovered ammunition of the same type used to kill Burniston.

An analysis of defendant's financial operation revealed that Burniston was the second most important identity connected with defendant's network of financial accounts; text messages between Burniston and defendant suggested Burniston was becoming impatient with defendant's handling of various accounts bearing Burniston's name; and defendant had recently been made aware of a police investigation focused on a check that had been mailed to defendant and ultimately deposited into one of Burniston's accounts. In light of this overwhelming evidence connecting defendant to Burniston's murder, and the fact that the prosecutor did not even mention defendant's postarrest silence in her closing argument, we conclude that, even if *Doyle* error had occurred, any such error was harmless beyond a reasonable doubt.

B. *Admission of Uncharged Misconduct To Show Motive Was Not Erroneous*

Defendant also claims the trial court erred when it permitted a witness to testify that defendant had previously made a violent threat following a dispute over money. Specifically, defendant argues there was an insufficient nexus or link between the prior threat of violence and the charged offense to render the evidence admissible to establish motive.[16] We find no error warranting reversal on this ground.

1. Relevant Background

At the beginning of trial, defendant requested the trial court determine the relevance and admissibility of testimony by H.G. outside the presence of a jury pursuant to Evidence Code section 402, and the trial court requested an offer of proof from the prosecution. In response, the People argued H.G.'s testimony would be relevant to show identity, a common plan or scheme with respect to the various financial crimes charged, and motive with respect to the murder charge. With respect to motive, the prosecution specifically detailed that H.G. would testify that defendant verbally threatened her with violence when she withdrew money from one of their joint accounts without his permission. The trial court concluded that H.G.'s testimony was relevant to show intent, common scheme, design, or plan with respect to the financial crimes charged. The trial court also ruled the testimony of a prior threat would be admitted for the purpose of showing motive, explaining that "[t]he threat of violence to her in—with respect to a

---

[16] We note that defendant also discussed potential error in the admission of this witness's testimony for purposes of showing intent or a common plan or design, but ultimately concludes that only the testimony of a prior threat was prejudicial.

dispute over money is relevance of intent in the current charges," based upon the representation that the People intended to prove defendant had a financial motive for killing Burniston.

Ultimately, H.G. testified that she first met defendant in the spring of 2016, the two began a dating relationship, and she eventually opened a shared business account with defendant when he offered to financially help her. H.G. had access to this account and observed funds being transferred into and out of the account, but she did not know the source of the funds or the purpose of the transfers. H.G. eventually learned that defendant was in a relationship with another woman and, in response, withdrew all of the money from the account. When defendant discovered what H.G. had done, he called H.G. and threatened her. Defendant stated the amount of money H.G. took was not enough to justify killing her, but it might justify setting fire to her parents' home. H.G. returned the money to the business account that same day.

2. General Legal Principles and Standard of Review

"The admission of evidence of prior conduct is controlled by Evidence Code section 1101. Subdivision (a) of that section provides . . . : 'Evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, *or evidence of specific instances of his or her conduct*) is inadmissible when offered to prove his or her conduct on a specified occasion.' " (*People v. Thompson* (2016) 1 Cal.5th 1043, 1113-1114.) " 'Evidence of [prior uncharged acts] is admissible, however, when relevant for a noncharacter purpose—that is, when it is relevant to prove some fact other than the defendant's criminal disposition, such as 'motive, opportunity,

intent, preparation, plan, knowledge, identity, absence of mistake [of fact] or accident.' " (*People v. Winkler* (2020) 56 Cal.App.5th 1102, 1143.)

Even when relevant for a noncharacter purpose, evidence of a prior uncharged act may be excluded under Evidence Code section 352 if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Winkler*, *supra*, 56 Cal.App.5th at p. 1143.) Thus, when considering whether such evidence is admissible, the trial court must balance three factors: (1) the materiality of the facts to be proved; (2) the probative value, or the tendency of the uncharged crimes to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence such as prejudicial effect or other section 352 concerns. (*Ibid.*) The trial court's evidentiary ruling on this issue is reviewed for abuse of discretion. (*Id.* at p. 1144; *People v. Thompson*, *supra*, 1 Cal.5th at p. 1114.)

3. Application

Here, the trial court held that H.G.'s testimony regarding defendant's prior threat of violence in response to a financial dispute was relevant to the issue of motive. Evidence of prior conduct is admissible for the purpose of establishing motive where the uncharged act and the charged act " '*are explainable as a result of the same motive*.' " (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1381.) Such evidence is admissible so long as "there is 'sufficient evidence for the jury to find defendant committed both sets of acts, and sufficient similarities to demonstrate that in each instance the perpetrator acted

with the same intent or motive.' " (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 827.)

Here, with respect to both the charged conduct and uncharged conduct, defendant was involved in some form of business relationship with the victim, had access to an account in the victim's name, exercised control of the finances within that account, and responded with violence when challenged with respect to his control over management of those finances. These similarities were sufficient for a jury to reasonably infer that defendant had the same motive with respect to making his threat of violence to H.G. and killing Burniston. Moreover, the portion of H.G.'s testimony regarding defendant's threat was brief, and the threat of violence testified to by H.G. was far less egregious than the act of killing Burniston. Thus, other factors that might have justified exclusion of the testimony pursuant to Evidence Code section 352, notwithstanding its relevance to the prosecution's theory of the case, were simply not present.

Defendant claims there was an insufficient similarity to justify admission of H.G.'s testimony under Evidence Code section 1101, subdivision (b). However, the least degree of similarity between the uncharged act and the charged offense is required in order to prove motive and intent. (*People v. Daveggio and Michaud, supra*, 4 Cal.5th at p. 827.) In such a case, the similarities need only "provide[] a sufficient basis for the jury to conclude that defendant[] acted with the same criminal intent or motive, rather than by ' "accident or inadvertence or self-defense or good faith or other innocent mental state." ' " (*Ibid.*; see *People v. Pertsoni* (1985) 172 Cal.App.3d 369, 374 [lack of similarity may be irrelevant where "the mere *fact* of the prior offense gives rise to an

inference of motive"].) As we have already explained, the prior threat and the charged offense in this case bore at least some similarity with respect to the characteristics of the victim in relation to defendant. At the very least, the similarities were sufficient to permit the jury to reasonably infer defendant did not act with an "innocent mental state," which is all that is necessary to support admission for the purpose of showing intent or motive.

4. Even if Erroneous Admission of H.G.'s Testimony Was Not Prejudicial

Finally, even assuming the brief testimony regarding defendant's prior threat of violence to H.G. was erroneously admitted, any such error was harmless. "[W]here . . . independent and competent evidence to substantially the same effect from other witnesses is placed before the jury[,] the erroneous admission of such cumulative evidence is ordinarily not prejudicial." (*Kalfus v. Fraze* (1955) 136 Cal.App.2d 415, 423; see *People v. Smithey* (1999) 20 Cal.4th 936, 972-973 [admission of testimony over defendant's objection harmless where such testimony cumulative of other testimony already in record]; *People v. Houston* (2005) 130 Cal.App.4th 279, 300 [no prejudice where objectionable testimony cumulative of other evidence unchallenged by appellant].)

Here, B.C. offered testimony to substantially the same effect as H.G.'s testimony regarding defendant's threat of violence in response to a financial dispute. Specifically, B.C. testified of a conversation in which defendant expressed interest in hiring someone to kill a woman who shared a joint account with defendant because the woman had taken money from the joint account. Defendant did not object to the admission of this testimony and does not claim admission of this testimony was erroneous on appeal. Because essentially the same testimony was presented to the jury by a different witness,

we cannot conclude that H.G.'s testimony accusing defendant of making a violent threat in response to a nearly identical set of actions was prejudicial, even if erroneously admitted.

C. *Exclusion of Third Party Culpability Evidence*

Defendant also broadly argues that the trial court erroneously excluded evidence of third party culpability. We conclude this claim of error has been forfeited for failure to preserve an adequate record for appellate review and further conclude that, even in the absence of forfeiture, the trial court did not abuse its discretion.

1. Relevant Background

Early in the trial, during the cross-examination of a witness, defense counsel disclosed defendant's intent to potentially pursue a theory of defense based upon third party culpability. Over the prosecutor's objections, the trial court permitted defense counsel to complete his intended questions with respect to cross-examination of that witness. However, at the conclusion of witness testimony for the day, the trial court informed defense counsel that the admissibility of any evidence of third party culpability should be addressed in limine outside the presence of the jury. In response, defense counsel disclosed that he was considering pursuing a theory that "either [B.C.] and one or more of his cohorts is responsible for this."

The trial court ordered briefing on the issue, indicated its intent to set a hearing pursuant to Evidence Code section 402 to consider the admissibility of any such evidence, and instructed defense counsel not to inquire about third party culpability until after the trial court could rule on the admissibility of any specific evidence at such a

hearing. Specifically, the trial court advised defense counsel that: "I'm going to expect that you'll provide an offer of proof, offers of proof and specify specific examples of evidence that you anticipate you'll be presenting in support of your third party culpability argument that's going to be important because without that, I'll be left with merely argument, and so I need to know with some precision, [what] you believe the evidence is that supports such an argument."

After reviewing the briefs submitted by both parties on the issue of third party culpability,[17] the trial court expressed that it was not inclined to rule on the issue solely based upon representations in the briefing and advised that it would set the matter for a full evidentiary hearing with witness testimony under oath pursuant to Evidence Code section 402. The trial court indicated it was important for it to hear the actual evidence being proposed in order to make preliminary determinations on admissibility. Defense counsel acknowledged that he was not objecting to the trial court's desire to conduct such an inquiry.

When the trial court called the matter for the anticipated evidentiary hearing, defense counsel represented he would not be calling any witnesses. In response, the trial court offered to reschedule the hearing to permit more time to arrange for appearances. Defense counsel declined this offer and indicated that most of his anticipated evidence of third party culpability would be presented during the cross-examination of B.C. However, the trial court cautioned that even if defendant intended to utilize witnesses that

---

17 Both parties submitted briefs on the admissibility of third party culpability evidence. However, neither brief has been made part of the record on appeal.

were already identified, the trial court still needed to hear the potential testimony outside the presence of the jury to make an initial determination of its admissibility.

The trial court repeatedly represented that it would permit defense counsel as much time as needed to arrange for any necessary witness to appear and testify in a hearing pursuant to Evidence Code section 402. The trial court also indicated that, to the extent defense counsel was concerned about divulging any of defendant's own testimony in advance, the trial court would be amenable to holding an evidentiary hearing after defendant's testimony and permitting the defense to recall any witness to testify on the issue of third party culpability, should such evidence be deemed admissible following the hearing.

Specifically, with respect to B.C.'s testimony, the trial court indicated it would schedule a hearing for B.C. to testify under oath regarding any inquiry potentially related to third party culpability. However, when defense counsel was subsequently asked when he would like to conduct that hearing, counsel represented that a hearing would no longer be necessary.

Several days later, the trial court asked defense counsel to confirm that defendant was declining the opportunity to conduct an Evidence Code section 402 hearing on the admissibility of third party culpability evidence. In response, defense counsel indicated that a hearing might be required, but that he was still investigating some information related to the matter and asked that a hearing be put off until such time as the defense completed its investigation. The trial court indicated it would be open to conducting a

hearing as soon as defense counsel believed he was ready, but that until such time, no evidence of third party culpability would be permitted.

During the cross-examination of B.C., the trial court was asked to resolve various objections to questions that potentially implicated third party culpability in violation of the trial court's prior order. In response, the trial court inquired why defense counsel had still not accepted the invitation to first present any anticipated testimony on the issue in an Evidence Code section 402 hearing, and defense counsel indicated his decision was based upon "strategic reasons." The trial court again advised that defense counsel should refrain from pursuing any questioning regarding third party culpability absent a hearing, but noted that B.C. could be subject to recall to testify on that subject after defendant had testified. However, following defendant's testimony, the defense rested its case and declined to recall any witnesses.

2. General Legal Principles and Standard of Review

"Like all other evidence, third party culpability evidence may be admitted if it is relevant and its probative value is not substantially outweighed by the risk of undue delay, prejudice, or confusion, or otherwise made inadmissible by the rules of evidence. [Citations.] 'To be admissible, the third party evidence need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability.' " (*People v. Turner* (2020) 10 Cal.5th 786, 816.) " '[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not

suffice to raise a reasonable doubt about a defendant's guilt . . . .' [Citation.] Moreover, admissible evidence of this nature points to the culpability of a *specific* third party, not the possibility that some unidentified third party could have committed the crime. [Citations.] For the evidence to be relevant and admissible, 'there must be *direct or circumstantial evidence linking the third person to the actual perpetration of the crime.*' [Citation.] As with all evidentiary rulings, the exclusion of third party evidence is reviewed for abuse of discretion." (*Id.* at pp. 816-817.)

3. Defendant's Refusal to Participate in an Evidence Code Section 402 Hearing Renders the Record Inadequate To Review His Claim of Error

The People contend that defendant's claim of error has been forfeited because defendant "withdrew" his request to present such evidence. Defendant disagrees, arguing that his counsel did not withdraw his request to present evidence of third party culpability but merely refused to participate in an evidentiary hearing pursuant to Evidence Code section 402 when offered the opportunity to do so by the trial court. Regardless of whether defendant's actions can properly be characterized as a "withdrawal" of a request to present third party culpability evidence, the fact that defendant declined to participate in a hearing pursuant to Evidence Code section 402 renders the record inadequate for review of his claim of error on appeal.

A judgment may not be reversed based upon the erroneous exclusion of evidence unless "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (Evid. Code, § 354, subd. (a).) Thus, "[w]hen a trial court denies a defendant's request to

produce evidence, the defendant must make an offer of proof in order to preserve the issue for consideration on appeal." (*People v. Foss* (2007) 155 Cal.App.4th 113, 126.) " ' " ' Before an appellate court can knowledgeably rule upon an evidentiary issue presented, it must have an adequate record before it to determine if an error was made.' [Citation.]" "The offer of proof exists for the benefit of the appellate court . . . [and] serves to inform the appellate court of the nature of the evidence that the trial court refused to receive in evidence. . . . The function of an offer of proof is to lay an adequate record for appellate review. . . ." ' " (*Id.* at p. 127.)

Here, the record shows that defendant repeatedly declined the trial court's invitation to participate in a hearing pursuant to Evidence Code section 402. As a result, the record on appeal does not contain any indication of what evidence or testimony defendant believed constituted admissible evidence of third party culpability. Notably, other than broadly stating that the trial court excluded evidence of third party culpability, defendant's briefs on appeal fail to identify the specific testimony or other evidence that would have been introduced but for the trial court's purported exclusion. Absent any indication of what evidence, if any, was actually excluded, the record is inadequate for this court to determine the merits of defendant's claim on appeal, and the issue must be resolved against defendant.

Defendant appears to suggest this court can determine the admissibility of third party culpability evidence based upon inferences drawn from the testimony that was permitted or the questions defendant was not permitted to ask on cross-examination. However, "[e]ven if a question . . . is posed on cross-examination and the trial court

prevents the defense from delving into the issue, the defendant must still make an offer of proof to preserve the issue for consideration on appeal, unless the issue was within the scope of the direct examination. . . . If the evidence the defendant seeks to elicit on cross-examination is not within the scope of the direct examination, an offer of proof is required to preserve the issue." (*People v. Foss, supra*, 155 Cal.App.4th at p. 127.) Absent any indication of a witness's answer that may have been to any specific question, this court cannot simply speculate what evidence might have been adduced. Thus, we conclude this claim of error has been forfeited for failure to present an adequate record for review.

4. Even in the Absence of Forfeiture, We Would Find No Abuse of Discretion

Even in the absence of forfeiture, the record actually before us does not disclose an abuse of discretion. Here, the trial court did not exclude any third party culpability evidence based upon a substantive analysis of its relevance or potential prejudice. Instead, the trial court conditioned the introduction of any such evidence upon its presentation in a hearing pursuant to Evidence Code section 402 for the purpose of permitting the trial court to make a preliminary determination of its admissibility.

"In determining the admissibility of evidence, the trial court has broad discretion," and "it is within the court's discretion whether or not to decide admissibility questions under [Evidence Code section 402, subdivision (b),] within the jury's presence." (*People v. Williams* (1997) 16 Cal.4th 153, 196.) The trial court's selection of a statutorily authorized procedure in order to make a preliminary determination of the admissibility of evidence is not arbitrary, capricious, or outside the bounds of reason. Defendant has

cited no authority for the proposition that the circumstances of this case restrained or otherwise limited the trial court's discretion in selecting such a procedure to resolve preliminary questions of admissibility. The trial court's decision here did nothing more than apply ordinary rules of procedure and evidence, and it was clearly within its broad discretion.

We disagree with defendant's contention that the trial court's decision to require a hearing pursuant to Evidence Code section 402 prior to the introduction of any evidence of third party culpability violated his constitutional rights. While "[a]ll defendants have the constitutional right to present a defense. [Citation.] That right does not encompass the ability to present evidence unfettered by evidentiary rules. [Citation.] Indeed, application of the ordinary rules of evidence does not impermissibly infringe on a defendant's right to present a defense." (*People v. Thomas* (2021) 63 Cal.App.5th 612, 627; see *People v. Mincey* (1992) 2 Cal.4th 408, 440.)

Moreover, the record in this case clearly shows the trial court afforded defendant every opportunity to lay the foundation for the admission of any third party culpability evidence, offering to conduct a hearing at anytime during the lengthy trial, offering to accommodate the schedule of any necessary witness, and offering to permit defendant to recall any witness who had already testified, should evidence of third party culpability be deemed admissible. Indeed, the trial court even offered to wait until after defendant's testimony to conduct the hearing to avoid giving the prosecution any unfair advantage. Having failed to avail himself of these opportunities, defendant's claim that his trial was

fundamentally unfair because he was prevented from presenting evidence of third party culpability is without merit.

D. *The Cumulative Error Doctrine Does Not Apply*

Defendant also claims the cumulative impact of errors identified on appeal requires reversal even if any individual error was not sufficiently prejudicial to independently warrant reversal. Under the cumulative error doctrine, "the cumulative effect of several trial errors may be prejudicial even if they would not be prejudicial when considered individually." (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1019.) However, since we have rejected each of defendant's individual claims of error, there are no errors to cumulate, and the cumulative error doctrine is not applicable.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
J.

We concur:

McKINSTER
Acting P. J.

MENETREZ
J.

APPENDIX B

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANTE DANIL CARTER, Defendant and Appellant.	E072834 (Super.Ct.No. RIF1880136) TENTATIVE OPINION

APPEAL from the Superior Court of Riverside County. Steven G. Counelis, Judge. Affirmed.

Matthew Barhoma for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

In the early morning of November 11, 2016, the body of Eric Burniston (Burniston) was found on a remote street in the City of Corona with two gunshot wounds to the head.{3RT 412-414, 416, 424, 436} Investigators determined that Burniston's identity was linked to an extensive operation that used the personal identifying information of numerous individuals to obtain fraudulent loans from various financial institutions.{4RT 777-781, 810-811} While the operation involved the use of many names and identities, the only identity referenced more prevalently than Burniston's was that of defendant and appellant Dante Danil Carter.{*Ibid.*}

Ultimately, defendant was convicted by a jury of first degree murder in connection with Burniston's death (Pen. Code,[1] § 187, subd. (a), count 1), as well as numerous other offenses involving the possession of firearms, identity theft, and financial crimes.[2] Additionally, the jury found that defendant intentionally killed Burniston by means of lying in wait (§ 190.2, subd. (a)(15)) and discharged a firearm causing death in the commission of the murder (§ 12022.53, subd. (d)).{2CT 304-305} Defendant was

---

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

[2] Specifically, in addition to murder, defendant was convicted of three counts of the unauthorized possession of a firearm (§ 29800, subd. (a)(1), counts 2-4); one count of the unauthorized possession of ammunition (§ 30305, subd. (a), count 5); four counts of grand theft from a financial institution (§ 487, subd. (a), counts 6-9); three counts of false personation (§ 530, counts 10-12); five counts of identity theft (§ 530.5, subd. (a), counts 13-17); two counts of possessing a falsified driver's license for the purpose of forgery (§ 470b, counts 18 & 19); and 10 counts of money laundering (§ 186.10, subd. (a), counts 20-29).{2CT 304-313} The jury also found that defendant committed two or more theft-related felonies that involved taking more than $500,000. (§ 186.11, subd. (a)(2).){2CT 313}

sentenced to life imprisonment without the possibility of parole for the murder conviction and a consecutive indeterminate term of 25 years to life in state prison for the personal discharge of a firearm.[3] {3CT 877, 879-880, 883}

On appeal, defendant raises claims of error related only to his murder conviction. Specifically, defendant claims (1) the prosecutor committed misconduct warranting reversal under *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*) in questioning defendant during cross-examination; (2) the trial court erred in admitting evidence of prior, uncharged misconduct; (3) the trial court erred in excluding evidence of third party culpability; and (4) the cumulative impact of these errors requires reversal even if any individual error was not sufficiently prejudicial to independently warrant reversal. {AOB 7-8} We find no merit in defendant's arguments and affirm the judgment.

II. FACTS AND PROCEDURAL HISTORY

A. *Background, Facts, and Charges*

Defendant was involved in an extensive operation that involved obtaining the personal identifying information of numerous individuals; using that information to create false documents; and using those false documents to open bank accounts, obtain loans, and open lines of credit with various financial institutions. {2RT 263-264, 270-279, 332-340; 3RT 527-528; 4RT 678, 784; 6RT 1035} The money obtained from these financial institutions would then be diverted to defendant through various accounts designed to mimic legitimate businesses, as well as various shell companies. {2RT 315-

[3] Defendant was also sentenced to a consecutive determinate term of 21 years four months for the other charges. {3CT 877, 879-880, 883}

318; 3RT 402-404, 409-411, 509-511; 4RT 575-577, 772-774; 7RT 1340-1341; 2CT 372-389, 405-408}

One of the ways defendant would obtain personal identifying information for use in his operation was to befriend young adults and offer them an opportunity to go into business with him.{3RT 518-523; 4ART 621-625; 6RT 1012-1023}. He would provide these individuals with small payments, while using their identities to obtain much larger sums of money.{1RT 138; 3RT 523-525; 4RT 625-626} Burniston, along with two other young men, B.B. and B.C., were among the individuals who provided their personal identifying information to defendant.{3RT 514-515; 4RT 662-663; 4ART 598-599, 602, 618-619, 628; 6RT 1013-1014}

In the early morning of November 11, 2016, Burniston's body was discovered on a street in the City of Corona.{3RT 412-414} His body was discovered on the ground behind his parked vehicle with two gunshot wounds to the head.{3RT 412-414, 424, 436} Ultimately, defendant was charged with first degree murder in connection with Burniston's death (§ 187, subd. (a), count 1), as well as numerous other charges related to the possession of firearms, identity theft, and various financial crimes.{2CT 304-313}

B. *Relevant Evidence at Trial*[4]

1. Crime Scene Evidence

An investigator with the Riverside County Sheriff's Department testified that he was dispatched to the scene of a suspected murder in the early morning of November 11, 2016.{3RT 412-414} He arrived at a location off of Temescal Canyon Road near the border of the City of Corona, which he described as rural and surrounded by open fields but located on the outskirts of a nearby residential community.{3RT 416, 421} At the scene, the investigator observed a body on the ground lying near the rear end of a parked, red vehicle.{3RT 424} The body appeared to have two gunshot wounds to the head.{3RT 436} Investigators located two nine-millimeter shell casings near the body{3RT 426-430} and later identified the body as that of Burniston.{3RT 414}

Two residents who lived in the residential community near the crime scene also testified at trial.{1RT 176, 220} The first resident testified that, on November 11, 2016, between the hours of 12:00 and 2:00 a.m., she left her home to pick up her son, following his return from a school field trip.{1RT 179} As she left her residential community, she observed two vehicles parked in tandem on the side of the road, and she observed two men walking toward the rear of the second vehicle.{1RT 180-183} She described the first vehicle as black or dark-colored and the second as red.{1RT 183} After picking up her son, she took the same route home and, this time, she observed a body lying behind

[4] As already noted, defendant was charged and convicted of numerous offenses related to firearm possession, identity theft, and financial crimes. However, because defendant has not alleged error with respect to these convictions on appeal, we summarize only the evidence relevant to the murder conviction.

the red vehicle, a new vehicle that had stopped along the road, and the driver of that new vehicle attempting to render assistance.{1RT 188-189} The dark vehicle she previously had observed was no longer present.{*Ibid.*}

The second resident testified that on November 11, 2016, he was driving home from work when he noticed a red vehicle parked on the side of the road.{1RT 220-223} After he drove past the vehicle, he observed a body lying on the ground behind the vehicle.{1RT 226-227} The resident stopped his vehicle, exited, and walked over to see if any assistance was needed.{1RT 227} When the individual did not seem to respond, the resident called 911.{1RT 229} A few minutes later, the first resident who testified drove up and also stopped to render assistance.{1RT 232}

2. Testimony of S.A.

S.A. testified she had been in a dating relationship with Burniston from 2011 until his death.{1RT 133-134} Sometime in 2016, Burniston quit his regular jobs, but S.A. continued to see Burniston with money.{1RT 137-138} She understood Burniston to be in a business relationship with defendant and that he would occasionally meet with defendant, but she did not know the nature of their business.{1RT 140-141} S.A. testified that Burniston had shown her pictures of defendant and would also periodically show her text messages indicating when and where Burniston and defendant intended to meet.{1RT 140, 142}

On November 10, 2016, she received a text message from Burniston around 11:30 p.m., stating that he was going to meet with defendant in Corona.{1RT 143} When she awoke the next morning, she saw that two additional text messages had been

sent from Burniston's phone, stating he did not meet with defendant but, instead, went to have drinks with some friends.{1RT 145-146} She felt uneasy because the messages used phrases and language that was atypical of Burniston.{1RT 146} She tried calling Burniston several times, but the calls went straight to his voicemail each time.{1RT 147} Eventually, she went to look for Burniston at his grandparents' home, where she learned that Burniston had been killed.{1RT 148-149}

3. Testimony of Forensic Accountant

A forensic accountant testified he had been retained by the Riverside County District Attorney's Office to conduct an analysis of voluminous financial records related to the case.{4RT 766, 769-773} Based on this analysis, he concluded that Burniston's identity was associated with numerous transactions in an extensive financial network, including a shell account used to distribute money and several large loans.{4RT 777-781, 810-811} A bank account in Burniston's name was used to facilitate the transfer of more money than any other accounts linked to this financial operation, and Burniston's identity was associated with approximately 40 percent of all transactions related to this operation.{4RT 777, 811} The only identity associated with the financial operation that was more prevalent than Burniston's was that of defendant.{4RT 811}

4. Testimony of Anaheim Police Sergeant

A sergeant with the Anaheim Police Department testified that in the fall of 2016, he was tasked with investigating a claim of identity theft.{4RT 689} The identity theft victim reported that a credit union account had been opened in her name without her permission and further provided a copy of a utility bill, which had been submitted to the

credit union for payment.{4RT 690-691} The bill bore the identity theft victim's name but defendant's residential address.{*Ibid.*} Upon investigation, the sergeant learned that the account had been opened online, obtained the IP address[5] used to open the account, and discovered the IP address was also associated with defendant's residence.{4RT 691-693} The sergeant also discovered that numerous accounts and credit cards had been opened using the same IP address, and that defendant and Burniston were associated with many of these accounts.{4RT 693-694} Finally, the sergeant discovered that the credit union had issued a check to the identity theft victim, the check had been mailed to defendant's residence, and the check had been cashed.{4RT 694}

On October 27, 2016, the sergeant visited defendant at defendant's residence and conducted a recorded interview.{4RT 695} The recorded interview was played for the jury.{4RT 697} During the interview, defendant admitted he had some business relationship with the identity theft victim, which involved using her identity for financial transactions.{2CT 412-413} When asked about the cashed check, defendant denied ever receiving such a check and claimed that he would have returned any such check to the victim, even if he had received one.{2CT 413, 416-418} When defendant claimed that he would not have been able to cash a check made out in the victim's name, the sergeant indicated that the check "was made out to a car company as well."{2CT 418} Defendant adamantly claimed that any investigation regarding the check would not lead back to him.{2CT 465, 470}

---

[5] Internet protocol address.

The sergeant eventually learned the check had been deposited into a bank account held by Eric Burniston, "Doing Business As . . . Premier Motors."{4RT 698} However, by the time the sergeant attempted to locate Burniston for an interview, Burniston had already been killed.{*Ibid.*}

5. Testimony of B.C.

B.C. testified that he first met defendant in September 2016, shortly after B.C. turned 18 years of age, while attending an event for car enthusiasts.{6RT 1013-1015, 1025} Defendant proposed that B.C. consider becoming a "silent investor" in defendant's business.{6RT 1016} The precise nature of defendant's business was unclear to B.C., but B.C. understood that this involved defendant's use of B.C.'s personal information in order to obtain loans and, in exchange, B.C. would receive a monthly payment.{6RT 1016-1018, 1022} At the time, B.C. thought it was a worthwhile venture because he had no money and had been evicted from his parents' home.{6RT 1022-1023}

At some point, B.C. also began acting as a personal assistant to defendant and was paid $1,000 each month in exchange for running errands, picking up food, and driving defendant.{6RT 1029-1031} B.C. testified that he met Burniston on one occasion after driving defendant to a meeting with Burniston.{6RT 1057} At the time, B.C. understood that defendant had some type of business relationship with Burniston and was delivering money to Burniston.{6RT 1057-1058}

B.C. recalled that, in a prior conversation with defendant, defendant stated a female business associate had emptied one of their bank accounts and suggested he

would pay $10,000 to have the woman killed.{6RT 1038-1039} B.C. also recalled that, on a different occasion, defendant expressed a desire to kill Burniston.{6RT 1061-1063} However, defendant did not disclose his motivation for wanting to kill Burniston, and B.C. did not ask out of fear defendant might become angry.{*Ibid.*} According to B.C., defendant explained that he would contact B.C. to have B.C. drive defendant to kill Burniston.{6RT 1071-1072} While defendant did not disclose where or how he intended to carry out the killing, B.C. knew defendant kept several firearms.{*Ibid.*}

In the evening of November 10, 2016, defendant sent B.C. a text message, which signaled defendant's desire to carry out the killing that day.[6]{6RT 1083-1084} In response, B.C. drove to defendant's home to meet defendant.{6RT 1084-1091} As they left, defendant suggested that they take B.C.'s vehicle.{6RT 1090-1091} B.C. did not see defendant carrying any weapons at the time they left his home.{6RT 1091} However, while driving to their destination, defendant pulled out a gun that had been hidden in defendant's clothing, said he was "going to test it to see if it worked," and fired a couple of shots out the window of the vehicle.{6RT 1093-1094}

Defendant instructed B.C. to drive to a location off of Temescal Canyon Road and eventually instructed B.C. to park along the side of the road.{6RT 1092, 1099} Defendant then exited the vehicle while texting on a mobile phone, reentered the vehicle,

---

[6] B.C. exchanged a series of text messages with defendant in which they discussed going to a car meet.{6RT 1074-1078} B.C. clarified that a car meet is an event in which car enthusiasts gather together to view each other's cars,{6RT 1077} but defendant had previously indicated this would be a signal that defendant intended to kill Burniston that day.{6RT 1083-1084}

and asked B.C. to repark the vehicle farther down the street.{6RT 1100-1103} After about five minutes, Burniston arrived driving a red vehicle, and parked behind B.C.'s vehicle.{6RT 1104, 1108} Defendant exited B.C.'s vehicle, tapped himself as if to check to ensure he had his firearm, and walked to the rear of Burniston's vehicle.{6RT 1110} B.C. never exited the vehicle, but he watched through his rearview mirrors as Burniston exited the red vehicle and walked to meet defendant.{6RT 1109-1110, 1175} B.C. recalled seeing Burniston smoke a cigarette while talking with defendant.{6RT 1115-1116} KEY POINT HERE

After some period of time, B.C. heard two gunshots; defendant quickly returned to B.C.'s vehicle, and B.C. drove away.{6RT 1116-1117} Defendant was holding a firearm, as well as Burniston's mobile phone when he returned to B.C.'s vehicle.{6RT 1117-1118} B.C. drove defendant straight to defendant's home where defendant changed his clothing and handed the clothes he had been wearing to B.C. so that B.C. could dispose of them.{6RT 1120, 1123-1124} B.C. testified that he originally intended to keep defendant's clothing as leverage in case B.C. was contacted by the police, but one of his friends eventually burned the clothes when B.C. revealed his involvement in Burniston's killing.{6RT 1129-1130}

B.C. admitted he was granted immunity in exchange for his testimony against defendant.{6RT 1132} He admitted failing to disclose his involvement in Burniston's killing when he was initially contacted by the police.{6RT 1147-1148} B.C. also admitted he did not tell the truth when the police initially conducted an interview with him.{6RT 1151-1152} Nevertheless, B.C. stated he had confessed to a friend about his

involvement in Burniston's killing the night it happened, which is what led the friend to help burn defendant's clothing.{6RT 1135-1136}

On cross-examination, B.C. admitted that he had access to defendant's vehicles and home as part of his work for defendant.{6RT 1161-1164} B.C. also admitted that defendant had previously shown him where some of defendant's firearms were stored and further admitted that he had access to these firearms.{6RT 1164; 7RT 1279} B.C. again admitted he lied to the police when he was initially contacted about Burniston as well as during a subsequent interview at the police station.{6RT 1180, 1184-1187, 1191; 7RT 1220, 1222, 1275} B.C. also acknowledged that, despite being granted immunity for testifying at defendant's preliminary hearing, some of the testimony he gave at that time was inconsistent with his trial testimony.{7RT 1228-1229} He admitted that he never approached the deputy district attorney to clarify inaccuracies in his preliminary hearing testimony prior to trial.{7RT 1232-1233}

6. Evidence of Mobile Phone Communications

An investigator with the Riverside County District Attorney's Office testified that, following the discovery of Burniston's body, investigators contacted Burniston's family members, obtained Burniston's mobile phone number, and used that information to review call records related to Burniston's communications.{2RT 299-300; 5RT 947-948} Investigators noted the most recent phone numbers that had called Burniston's mobile

phone, conducted a search in police databases for those phone numbers, and discovered that one of those numbers was associated with defendant.[7]{5RT 947-948}

The investigator explained that the police also recovered a mobile phone, which was in defendant's possession at the time defendant was detained and subsequently arrested.{5RT 947-948} The police extracted a series of text messages sent from Burniston's phone number to the mobile phone in defendant's possession.{7RT 1391} The text exchanges were presented to the jury.{7RT 1392-1410} From September 28 through November 10, 2016, Burniston sent multiple text messages to defendant complaining about the fact that Burniston had not been paid as promised and about the mishandling of various accounts in Burniston's name.[8]{7RT 1404-1410} On November

---

[7] While the phone number was registered to B.B., defendant had previously filed a police report, representing that the phone number belonged to defendant. As a result, the number was linked to defendant in the police database.{5RT 947-948}

[8] On September 28, 2016, Burniston sent a text message inquiring why he had received mail stating he owed monthly payments to a lender.{7RT 1404-1405} On October 6, Burniston sent a text message that expressed concern over the fact he had not been paid as defendant had promised.{7RT 1405-1406} For the next two weeks, Burniston sent multiple text messages that requested defendant make the promised payment.{7RT 1407-1409} On October 21, Burniston sent a text message stating that a bank had closed one of Burniston's personal accounts.{7RT 1409} On October 29, Burniston sent a text message stating he had been contacted by two different lenders claiming he owed money.{7RT 1409} Finally, on the morning of November 10, Burniston sent a text message stating he had received a call regarding an overdue payment on a cash advance and a second text message stating he had represented to the vendor that payment would be made later that day.{7RT 1409-1410}

10, Burniston sent a series of text messages to defendant's phone suggesting the two had a planned meeting later that evening.[9] {7RT 1410}

The investigator also testified that police had tracked cellular phone data for Burniston's phone number, the phone number associated with defendant, and a third prepaid mobile phone number. {5RT 955} The cellular data showed the following sequence of events on the evening of November 10, into the morning of November 11, 2016: (1) defendant's phone was active at his residence before being turned off; (2) Burniston's phone approached the crime scene; (3) the prepaid mobile phone number was activated near the area of the crime scene; (4) Burniston's phone and the prepaid mobile phone number were active at the same time at the crime scene; (5) the prepaid mobile phone number was shut off; and (6) Burniston's phone traveled from the crime scene in the direction of defendant's residence before being turned off. {5RT 955-957}

A second investigator with the Riverside County District Attorney's Office testified that she analyzed records related to the prepaid mobile phone number. {4RT 755-758} The prepaid mobile phone card associated with the number was activated in Burniston's name on November 9, 2016; was not used after November 11; and was used only to contact Burniston's known mobile phone number. {4RT 761, 763} She admitted

---

[9] Specifically, at 6:27 p.m., on November 10, 2016, Burniston sent a text message stating: "Everything still on for tonight, Bro?" {7RT 1410} At 9:15 p.m., Burniston's phone made a call to defendant's phone and, at 9:31 p.m., Burniston's phone sent another text stating: "Let me know, Bro. I haven't heard from you in a while." {*Ibid.*} At 12:06 a.m., on November 11, Burniston's mobile phone again sent a text stating: "Address, Bro." {*Ibid.*}

the physical phones corresponding with Burniston's mobile phone and the prepaid mobile phone number were never recovered.{4RT 764}

A retail store employee testified that she conducted an investigation into records related to the purchase of a prepaid mobile phone card.{4RT 725-726} The retail store's receipts showed that a mobile phone, prepaid mobile phone card, socks, underwear, gloves, and a shirt had been purchased together on November 7, 2016, using a credit card in the name of B.B.{1RT 726-729}

B.B. testified as a witness and denied purchasing the prepaid mobile phone card on November 7, 2016.{4ART 631} When shown a copy of the credit card used for the purchase, B.B. denied ever applying for, possessing, or using the card.{4ART 630-631} However, B.B. acknowledged he had previously given defendant a copy of his social security card and identification card because he wanted defendant to "help [him] build [his] credit."{4ART 621-624, 628} B.B. was not aware that defendant used a phone registered in B.B.'s name.{4ART 634-635}

7. Evidence Found in Defendant's Possession

An investigator with the Riverside County District Attorney's Office testified he inventoried the items in defendant's possession at the time of defendant's detention and subsequent arrest.{7RT 1350} Within defendant's wallet, investigators located, among other things, (1) a driver's license with Burniston's identifying information but bearing defendant's picture; (2) three credit cards in the name of B.B.; (3) one credit card in the

name of Burniston; and (4) a credit card in the name of B.C.[10] {4RT 783-785; 7RT 1351-1352} One of the credit cards in B.B.'s name was the same card used to purchase the prepaid phone card and phone from the retailer. {4RT 756-761}

The phone in defendant's possession at the time of his arrest contained, among other images, photographs of Burniston's driver's license, social security card, and a debit card in Burniston's name; photographs of B.C.'s driver's license and social security card; photographs of B.B.'s driver's license and social security card; and a photograph of five firearms lying across the bed in defendant's residence. {7RT 1359-1362} Additionally, defendant's phone stored a video depicting defendant displaying and discussing the various firearms in his possession, including two different firearms that used nine-millimeter ammunition. {4ART 536-538; 7RT 1381-1382; 2CT 410}

The investigator also testified that while cellular phone tower records indicated defendant's phone had been shut off at the time of Burniston's killing, the data on defendant's phone continued to keep track of its location using the phone's GPS system. {5RT 949} The location data indicated that in the early morning of November 11, 2016, defendant's phone had physically been at the crime scene around the same time as Burniston's phone and the prepaid mobile phone. {5RT 952}

Finally, the data records from defendant's phone showed that it was used on multiple occasions on November 11, 2016, to conduct Internet searches regarding the

---

[10] The investigator merely confirmed that the items documented in exhibit 167 were located on defendant's person at the time of his arrest. {7RT 1350-1352} The specific items documented in exhibit 167 had been previously detailed in another witness's testimony. {4RT 783-785}

discovery of a body in Corona.[11] {7RT 1376-1377, 1379-1380} Cellular phone tower data also showed that during this time period, the phone traveled from defendant's residence to the location of the crime scene before traveling back toward Riverside. {5RT 958-959}

8. Evidence Recovered from Defendant's Residence

An investigator with the Riverside County District Attorney's Office testified that during the course of their investigation, all of the firearms depicted in the video and the photograph on defendant's phone were recovered, except for the smallest nine-millimeter firearm. {7RT 1362} Based upon a forensic analysis, the one nine-millimeter firearm that was recovered was not used in connection with Burniston's shooting. {7RT 1365-1366} While searching defendant's home, investigators also discovered ammunition that matched the brand and color of the shell casings located near Burniston's body. {7RT 1328; 3RT 428-430}

9. Defendant's Testimony

Defendant elected to testify in his own defense. {8RT 1587} Defendant acknowledged that he and Burniston had a business relationship, describing Burniston as a "silent investor" who contributed his "creditworthiness" for the purpose of providing

---

[11] Specifically, at 7:10 a.m., on November 11, 2016, defendant's phone was used to conduct an Internet search of the terms, " 'Corona News' "; was used again at 7:12 a.m. to conduct an Internet search of the terms, " 'Corona, California News, body found' "; and was used again at 7:39 a.m., to conduct an Internet search of the terms, " 'can prepaid phone be traced.' " {7RT 1376-1377} The phone was used later that afternoon to again search for the terms, " 'Corona, California News body found' " and " 'Corona, California News, body found today.' " {7RT 1377, 1379-1380}

credit repair services.{8RT 1584-1585} Defendant stated all of the credit cards he had in his possession were given to him by the identified owners, and all of the individuals who provided him with their personal identifying information did so with full knowledge of what he intended to do with that information.{8RT 1592, 1598} Defendant also acknowledged that he hired B.C. as a personal assistant.{8RT 1605}

According to defendant, he was out with a girlfriend, L., on the evening of November 10, 2016, and dropped her off at her home around 5:00 or 6:00 p.m.{8RT 1608-1609} He intended to go to a car meet later that evening with members of his car club but missed the prearranged meeting time, so he instead decided to visit a different girlfriend's home.{8RT 1631-1632, 1637-1638} Defendant admitted that he briefly returned to his residence that evening to meet B.C., but he stated that the purpose of doing so was to allow B.C. to borrow one of defendant's cars.{8RT 1641-1642} At some point while he was at home, defendant misplaced his phone, and he returned to S.'s home without it.{8RT 1643, 1645}

According to defendant, he returned to his residence the morning of November 11, 2016, and discovered B.C. in the living room.{8RT 1647} B.C. then confessed to defendant that he and a friend went to meet Burniston the previous night; the purpose of the meeting was to purchase marijuana; there was some disagreement about the cost; and the friend eventually shot Burniston.{8RT 1651-1652, 1655-1656} Defendant explained that he owned five firearms, including two nine-millimeter pistols; B.C. had a key to defendant's home and knew where the firearms were stored; and B.C.

confessed to taking one of defendant's firearms to the meeting with Burniston.{8RT 1636-1637, 1663-1664}

B.C. told defendant he did not see the actual shots and thus did not know if Burniston was killed.{8RT 1658-1659} As a result, defendant used his phone to conduct Internet searches to see if a murder had been reported in the news.{8RT 1660-1661} Defendant also admitted purchasing a mobile phone and prepaid mobile phone card sometime during the week prior to Burniston's death, but he claimed that he gave the phone to B.C. the day it was purchased.{8RT 1672-1673}

Defendant admitted, both on direct examination and during cross-examination, that he did not disclose B.C.'s confession prior to trial.{8RT 1676; 9RT 1752-1753,1790-1791}

C. *Verdict and Sentence*

The jury found defendant guilty of murder (§ 187, subd. (a), count 1) and also found true the allegations that defendant was lying in wait and personally discharged a firearm causing death in the commission of the murder.{3CT 656-658} The jury also returned guilty verdicts on the numerous other charges made against defendant.{*Ibid.*}

Defendant was sentenced to life imprisonment without the possibility of parole for the murder conviction in count 1; a consecutive indeterminate term of 25 years to life in state prison for the personal discharge of a firearm; and a consecutive determinate term of 21 years four months for the other charges.{3CT 877, 879-880, 883}

III. DISCUSSION

A. *Defendant's Claim of Doyle Error Does Not Warrant Reversal*

On appeal, defendant argues the prosecutor's questioning during cross-examination regarding his failure to disclose B.C.'s purported confession prior to trial was an impermissible use of his silence in violation of his constitutional rights, as set forth in *Doyle*.{AOB 7-8} We conclude the claim has been forfeited for failure to raise a timely objection in the proceedings below. We further conclude that even in the absence of forfeiture, the prosecutor's cross-examination did not constitute error under *Doyle*. Finally, we conclude that even assuming *Doyle* error occurred, defendant has not established prejudice warranting reversal.

1. Relevant Background

During the direct examination of defendant, defendant testified that B.C. made a confession regarding the murder of Burniston that differed substantially from B.C.'s trial testimony.{8RT 1647-1676} Defendant then acknowledged that when he was first interviewed by the police, he did not disclose B.C.'s confession.{8RT 1676} However, defendant explained that he did not do so because he believed B.C. was innocent and did not want to implicate B.C. in Burniston's death.{8RT 1676} Defendant claimed that he would not have made the same decision had he known B.C. would accuse him of killing Burniston;{8RT 1676-1677} he accused B.C. of lying when providing preliminary hearing and trial testimony; and he further expressed the belief that B.C. had "tricked" defendant into not disclosing the truth earlier.{8RT 1677} Defendant adamantly claimed that, had he known B.C. would lie, he "would have made the decision . . . [to] just call[]

the cops [him]self. . . . [¶] Before [he] even was arrested. This would have been something that [he] would have just made a decision on [his] own . . . ."{8RT 1677}

On cross-examination, the prosecutor questioned defendant regarding multiple inconsistencies between his trial testimony and the version of events he had provided to the police when he was initially detained and interviewed, including defendant's failure to disclose B.C.'s purported confession.{9RT 1752-1761} Defendant did not object to this line of questioning.{*Ibid.*}

Defendant was then asked when he first learned that B.C. had accused defendant of Burniston's murder and why he failed to disclose B.C.'s purported confession to the police or the district attorney's office even after he discovered B.C.'s accusations.{9RT 1768-1771} Defendant objected to this line of questioning on the ground it would invade attorney-client privilege and, as a result, the trial court admonished the prosecutor to tailor any questions to avoid asking about the substance of any communication between defendant and his attorney.{*Ibid.*} Near the end of the prosecutor's cross-examination, the prosecutor again asked, "And you waited until almost the last week of trial to give your version of [B.C.'s] confession?"{9RT 1773} In response, defense counsel stated: "Same objection, . . . she's asking the same question. . . . I move for a mistrial."{*Ibid.*} The trial court denied the request for a mistrial and admonished the prosecutor to move onto another area of inquiry; the prosecutor concluded her cross-examination shortly thereafter.{*Ibid.*}

On redirect, defense counsel elicited further testimony regarding defendant's previous failure to disclose B.C.'s confession.{9RT 1790-1791} Defendant reaffirmed

that if he had known B.C. would accuse defendant of Burniston's killing, defendant would have called the police himself "without a doubt." {9RT 1791} Defendant further stated he would have disclosed B.C.'s confession during his interview with the police "without a doubt."{9RT 1791-1792}

Defendant's testimony concluded, the defense rested its case, and the jury was released for the day.{9RT 1805-1806} After a lengthy discussion between counsel and the trial court regarding admission of exhibits, defense counsel stated: "I wanted to add something briefly to the record. There was some . . . objections that I was making prior to the lunch break, concerning my client's privileged communications with his attorneys. I just wanted to add I believe that's going to be pursuant to the Fifth and Sixth Amendments to the U.S. Constitution as well as just his right to a fair trial as pursuant to the U.S. Constitution. I just wanted to add that for the record."{9RT 1815}

On the day of sentencing, defendant moved for a new trial on the ground that the prosecutor's cross-examination constituted *Doyle* error in violation of his Fifth Amendment right to remain silent.{3CT 831-841} The motion characterized the entirety of the prosecution's cross-examination regarding defendant's failure to disclose B.C.'s purported confession as error under *Doyle*, without distinguishing between any of the specific questions asked by the prosecutor.{3CT 836, 841} The trial court denied the motion, concluding that it was appropriate to question defendant on cross-examination regarding inconsistencies in his prior statements and actions.{11RT 2136}

2. General Legal Principles and Standard of Review

"In *Doyle*, the United States Supreme Court held the prosecution may not use a defendant's postarrest, post-*Miranda*[12] silence to impeach the defendant's trial testimony. [Citation.] . . . The court concluded such impeachment was fundamentally unfair and a deprivation of due process because *Miranda* warnings carry an implied assurance that silence will carry no penalty. [Citation.] . . . [¶] The California Supreme Court has extended the *Doyle* rule to prohibit the prosecution's use of a defendant's post-*Miranda* silence as evidence of guilt during the prosecution's case-in-chief." (*People v. Bowman* (2011) 202 Cal.App.4th 353, 363.)

"Doyle error can occur either in questioning of witnesses or jury argument." (*People v. Lewis* (2004) 117 Cal.App.4th 246, 256.) However, "[t]he United States Supreme Court has explained that a *Doyle* violation does not occur unless the prosecutor is *permitted* to use a defendant's postarrest silence against him at trial, and an objection and appropriate instruction to the jury ordinarily ensures that the defendant's silence will not be used for an impermissible purpose." (*People v. Clark* (2011) 52 Cal.4th 856, 959.) Thus, while *Doyle* error may be premised upon a single improper question, there must also be a defense objection to the question that is erroneously overruled in order to constitute error. (*People v. Lewis*, at p. 256.)

Finally, even where *Doyle* error has occurred, such error must be prejudicial under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18 to warrant reversal.

---

[12] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

(*People v. Thomas* (2012) 54 Cal.4th 908, 936-937.) Under this standard, "reversal is required unless the error was harmless beyond a reasonable doubt" (*People v. Hernandez* (2011) 51 Cal.4th 733, 744-745) or, stated alternatively, it must be "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*People v. Pearson* (2013) 56 Cal.4th 393, 463.)

3. Defendant's Claim Is Forfeited for Failure To Raise a Timely Objection Below

The California Supreme Court has repeatedly recognized that the failure to make a timely objection on *Doyle* grounds and failure to request a curative admonition constitutes forfeiture of any claim of *Doyle* error on appeal. (See *People v. Tate* (2010) 49 Cal.4th 635, 691-692; *People v. Collins* (2010) 49 Cal.4th 175, 202; *People v. Huggins* (2006) 38 Cal.4th 175, 198; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118.)

As the People correctly note, the prosecutor's questions on cross-examination actually addressed two, distinct instances in which defendant failed to disclose B.C.'s purported confession: (1) defendant's failure to disclose during his prearrest interview with police, and (2) defendant's failure to disclose after learning of B.C.'s testimony at defendant's preliminary hearing. (RB 56-58) The record here shows that defendant did not raise any objections, let alone objections based upon *Doyle*, to the line of questioning involving his prearrest interview with police. Accordingly, any claim of *Doyle* error premised upon these questions has clearly been forfeited.

Further, while defendant did object to the handful of questions regarding his failure to disclose B.C.'s confession after learning of B.C.'s accusations, the only

objection made was based upon attorney-client privilege.{9RT 1768-1771} The California Supreme Court has concluded that an objection based upon attorney-client privilege does not preserve an objection based upon *Doyle* error for purposes of appeal. (*People v. Tate*, *supra*, 49 Cal.4th at pp. 691-692.) Thus, defendant's objection at the time of cross-examination was not sufficient to preserve any claim of *Doyle* error.

Defendant attempts to avoid this conclusion by highlighting the fact that defense counsel clarified his prior objections "before the parties left for the day."[13]{AOB 17-18} However, "[a]n objection to evidence must generally be preserved by specific objection at the time the evidence is introduced; the opponent cannot make a 'placeholder' objection stating general or incorrect grounds . . . and revise the objection later . . . stating specific or different grounds." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 22.) Likewise, a contemporaneous objection and request for jury admonition is required to preserve a claim of prosecutorial misconduct based upon a prosecutor's comments before the jury. (*People v. Gamache* (2010) 48 Cal.4th 347, 371; see *People v. Holt* (1997) 15 Cal.4th 619, 666-667 [The requirement that objections be timely raised applies to *Miranda*-based objections.].)

Here, defense counsel's clarification came only after defense counsel engaged in redirect examination eliciting testimony on the exact same topic, defendant's testimony

---

[13] Defendant also represents that he requested a mistrial during the prosecutor's cross-examination, implying that such request was premised upon *Doyle* error.{AOB 18} However, the record shows that the request for a mistrial was made following an objection based upon attorney-client privilege, and there was no mention of alleged constitutional error, let alone any specific mention of *Doyle* error.{9RT 1773}

had concluded, the defense rested its case, the jury was excused for the day, and the trial court conducted a conference on numerous other evidentiary matters.{9RT 1815} Waiting until this time to raise an objection deprived the trial court of the ability to immediately address any potential prejudice with a curative admonition and further deprived the prosecution of the ability to lay the foundation for potential exceptions to the extent any objection had merit. Thus, the objection was neither timely nor specific, and any claim of *Doyle* error has been forfeited for purposes of appeal.

4. Even in the Absence of Forfeiture, We Would Find No Error

While we have concluded defendant forfeited his claim, we also believe that, even in the absence of forfeiture, *Doyle* error did not occur in this case.

"The *Doyle* rule . . . is not absolute." (*People v. Bowman, supra*, 202 Cal.App.4th at p. 363.) It does not prohibit the prosecution's use of a defendant's silence in a variety of situations, including the use of a defendant's prearrest silence. (*Id.* at pp. 363-364; *Jenkins v. Anderson* (1980) 447 U.S. 231, 238 ["[T]he Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility."]; *People v. Tom* (2014) 59 Cal.4th 1210, 1223 ["The prosecution may . . . use a defendant's prearrest silence in response to an officer's question as substantive evidence of guilt, provided the defendant has not expressly invoked the privilege."].) Here, the record discloses that defendant submitted to an interview with police and discussed numerous topics related to Burniston's murder prior to defendant's assertion of his right to counsel and prior to his

arrest.[14]{9RT 1761} Thus, as an initial matter, we agree with the People that the prosecution's cross-examination of defendant's failure to disclose B.C.'s purported confession at the time he actively engaged in a prearrest interview with police cannot be the basis of *Doyle* error.

It is true that later in defendant's interview, he asserted his right to counsel and the police ended the interview in response.{3CT 637-638; 9RT 1761} However, "the exercise of [a defendant's] *Miranda* rights in the midst of his statement to the police does not erase the statement previously given. A fully voluntary statement to police followed by invocation of the right to remain silent does not render the voluntary statement somehow the less voluntary and thus inadmissible. . . . [A] deliberate omission in a voluntary statement to police is [not] tantamount to an exercise of the right to remain silent. The principle of . . . *Doyle* cannot be strained so far." (*People v. Clem* (1980) 104 Cal.App.3d 337, 344.) Thus, the fact that defendant eventually invoked his right to counsel and remained silent thereafter does not preclude the prosecutor from cross-examining defendant regarding inconsistent statements or selective silence prior to that time, and cross-examination on that subject does not constitute error under *Doyle*.

As the People correctly note, the prosecutor's questions regarding defendant's postarrest failure to disclose present a closer question. However, while the permissible use of postarrest silence is indeed more limited, "a prosecutor may refer to the

---

[14] For example, defendant claimed that he never spoke with Burniston on the evening of the murder{3CT 631} and did not own a second nine-millimeter firearm.{3CT 631-637} After these exchanges, defendant requested an attorney and the police ended the interview.{*Ibid.*}

defendant's postarrest silence in fair response to an exculpatory claim or in fair comment on the evidence without violating the defendant's due process rights." (*People v. Wang* (2020) 46 Cal.App.5th 1055, 1083.) As this court has previously explained: "[A]n assessment of whether the prosecutor made inappropriate use of a defendant's postarrest silence requires consideration of the context of the prosecutor's inquiry or argument," and "[a] violation of due process does not occur where the prosecutor's reference to defendant's postarrest silence constitutes a fair response to defendant's claim or a fair comment on the evidence. [Citations.] . . . . '*Doyle*'s protection of the right to remain silent is a "shield," not a "sword" that can be used to "cut off the prosecution's 'fair response' to the evidence or argument of the defendant." ' " (*People v. Champion* (2005) 134 Cal.App.4th 1440, 1448{Fourth Dist., Div. Two}.)

Thus, numerous courts, including this court, have found no error under *Doyle* where the prosecutor's questions or comments are a direct response to a theory or argument raised by a defendant. (See *People v. Champion*, *supra*, 134 Cal.App.4th at p. 1448 [" 'Questions or argument suggesting that the defendant did not have a fair opportunity to explain his innocence can open the door to evidence and comment on his silence.' "]; *People v. Wang*, *supra*, 46 Cal.App.5th at p. 1083 [no *Doyle* error where prosecutor's cross-examination was not designed to draw independent meaning from defendant's silence, but instead intended to correct the false impression defendant tried to create in direct testimony that he was fully cooperative with police]; *People v. Campbell* (2017) 12 Cal.App.5th 666, 672-673 [prosecutor may fairly question defendant on postarrest silence where a defendant testifies on the stand in an attempt to create an

impression he fully cooperated with law enforcement]; *People v. Delgado* (2010) 181 Cal.App.4th 839, 852-854 [same]; *People v. Collins* (2010) 49 Cal.4th 175, 204 [A prosecutor's questions regarding a defendant's failure to come forward earlier with his alibi can be "a legitimate effort to elicit an explanation as to why, if the alibi were true, [the] defendant did not provide it earlier."].)

Here, defendant first raised the issue of his failure to previously disclose B.C.'s purported confession on direct examination, openly acknowledging his silence on the issue in prior interactions with law enforcement; claiming he had been "tricked"; and further claiming that he would have been inclined to voluntarily report B.C.'s confession to police had he known B.C. would accuse him of Burniston's murder.{8RT 1677} Indeed, even after the prosecutor's allegedly improper cross-examination, defendant chose to draw attention to the issue again on redirect examination, repeatedly asserting that he would have disclosed B.C.'s confession to police "without a doubt."{9RT 1791-1792}

Thus, in context, it is apparent that the brief portion of the prosecutor's cross-examination addressing defendant's postarrest silence was not an attempt to draw attention to that silence as substantive evidence of guilt, but a fair response to the assertions made by defendant on direct examination. Defendant himself voluntarily made his failure to disclose known to the jury and voluntarily offered an explanation for his failure to disclose during direct examination. Having done so, defendant cannot claim that the Fifth Amendment precludes the prosecution from cross-examining him on that very subject. Particularly in light of defendant's repeated assertions that he would have

independently made the decision to reveal B.C.'s confession had he known of B.C.'s accusations, a question regarding why he failed to do so, even after learning of those accusations, was a logical and fair response. Where defendant himself has opened the door to a specific line of questioning involving his failure to make a disclosure following his arrest, the prosecutor's attempt to cross-examine defendant on that subject does not run afoul of *Doyle*.

5. Any Alleged *Doyle* Error Was Not Prejudicial

Finally, even if the issue had not been forfeited and, even assuming cross-examination regarding defendant's postarrest silence constituted *Doyle* error, we would find no prejudice warranting reversal.

First, *Doyle* error arising from the mention of a defendant's postarrest silence is not prejudicial where other instances of silence or inconsistent statements were also properly admitted for the same impeachment purpose. (*People v. Hinton* (2006) 37 Cal.4th 839, 867-868 [prosecutor's reference to defendant's postarrest silence in response to a police request for an interview was harmless in light of fact that defendant was also impeached with statements given during three other postarrest police interviews in which he waived his *Miranda* rights]; *People v. Earp* (1999) 20 Cal.4th 826, 857-858 [prosecutor's reference to postarrest silence was harmless where defendant was also impeached with inconsistent version of events he gave prior to invocation of his right to remain silent].)

As we have already explained, the prosecution's cross-examination regarding defendant's inconsistent statements and failure to disclose during a prearrest interview

did not violate *Doyle* and was clearly admissible for the purpose of impeachment. Thus, defendant's prior failure to disclose was already properly before the jury for the purpose of impeaching his trial testimony. The prosecutor's brief cross-examination on defendant's postarrest silence served the same purpose; was merely cumulative of the more numerous questions regarding his prearrest silence; and, as such, was not prejudicial.

Second, the other evidence of defendant's guilt was overwhelming in this case. B.C. provided direct witness testimony that defendant committed the murder.{6RT 1083-1120} Defendant's mobile phone contained location data revealing it was present at the location of Burniston's death at the time Burniston was killed,{5RT 949-952} and it also contained Internet search data suggesting defendant had conducted numerous internet searches regarding the discovery of a body the day of Burniston's death.{7RT 1376-1380} Defendant admitted that he purchased the prepaid mobile phone card that was used to contact Burniston in the hours leading up to Burniston's death.{8RT 1672-1673} Video and photographic evidence, as well as defendant's own testimony, confirmed that defendant owned a firearm of the same type used to kill Burniston.{7RT 1359-1362; 4ART 536-538; 8RT 1636-1637, 1663-1664} A search of defendant's home also uncovered ammunition of the same type used to kill Burniston.{3RT 428-430; 7RT 1328}

An analysis of defendant's financial operation revealed that Burniston was the second most important identity connected with defendant's network of financial accounts {4RT 811}; text messages between Burniston and defendant suggested Burniston was

becoming impatient with defendant's handling of various accounts bearing Burniston's name;{7RT 1391-1410} and defendant had recently been made aware of a police investigation focused on a check that had been mailed to defendant and ultimately deposited into one of Burniston's accounts.{4RT 695-698; 2CT 412-470} In light of this overwhelming evidence connecting defendant to Burniston's murder, and the fact that the prosecutor did not even mention defendant's postarrest silence in her closing argument, we conclude that, even if *Doyle* error had occurred, any such error was harmless beyond a reasonable doubt.

B. *Admission of Uncharged Misconduct To Show Motive Was Not Erroneous*

Defendant also claims the trial court erred when it permitted a witness to testify that defendant had previously made a violent threat following a dispute over money.{AOB 38-41} Specifically, defendant argues there was an insufficient nexus or link between the prior threat of violence and the charged offense to render the evidence admissible to establish motive.[15]{*Ibid.*} We find no error warranting reversal on this ground.

1. Relevant Background

At the beginning of trial, defendant requested the trial court determine the relevance and admissibility of testimony by H.G. outside the presence of a jury pursuant to Evidence Code section 402, and the trial court requested an offer of proof from the

---

[15] We note that defendant also discussed potential error in the admission of this witness's testimony for purposes of showing intent or a common plan or design, but ultimately concludes that only the testimony of a prior threat was prejudicial.{AOB 41-43}

prosecution.{1RT 99} In response, the People argued H.G.'s testimony would be relevant to show identity, a common plan or scheme with respect to the various financial crimes charged, and motive with respect to the murder charge.{1RT 105-106} With respect to motive, the prosecution specifically detailed that H.G. would testify that defendant verbally threatened her with violence when she withdrew money from one of their joint accounts without his permission.{1RT 107-108} The trial court concluded that H.G.'s testimony was relevant to show intent, common scheme, design, or plan with respect to the financial crimes charged.{1RT 110-112} The trial court also ruled the testimony of a prior threat would be admitted for the purpose of showing motive, explaining that "[t]he threat of violence to her in—with respect to a dispute over money is relevance of intent in the current charges," based upon the representation that the People intended to prove defendant had a financial motive for killing Burniston.{1RT 113, 115}

Ultimately, H.G. testified that she first met defendant in the spring of 2016, the two began a dating relationship, and she eventually opened a shared business account with defendant when he offered to financially help her.{4RT 614-615, 625-629} H.G. had access to this account and observed funds being transferred into and out of the account, but she did not know the source of the funds or the purpose of the transfers.{4RT 635-637} H.G. eventually learned that defendant was in a relationship with another woman and, in response, withdrew all of the money from the account.{4RT 632-637} When defendant discovered what H.G. had done, he called H.G. and threatened her.{4RT 637} Defendant stated the amount of money H.G. took was not

enough to justify killing her, but it might justify setting fire to her parents' home.{*Ibid.*} H.G. returned the money to the business account that same day.{4RT 637-638}

2. General Legal Principles and Standard of Review

"The admission of evidence of prior conduct is controlled by Evidence Code section 1101. Subdivision (a) of that section provides . . . : 'Evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, *or evidence of specific instances of his or her conduct*) is inadmissible when offered to prove his or her conduct on a specified occasion.' " (*People v. Thompson* (2016) 1 Cal.5th 1043, 1113-1114.) " 'Evidence of [prior uncharged acts] is admissible, however, when relevant for a noncharacter purpose—that is, when it is relevant to prove some fact other than the defendant's criminal disposition, such as 'motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake [of fact] or accident.' " (*People v. Winkler* (2020) 56 Cal.App.5th 1102, 1143.)

Even when relevant for a noncharacter purpose, evidence of a prior uncharged act may be excluded under Evidence Code section 352 if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Winkler*, *supra*, 56 Cal.App.5th at p. 1143.) Thus, when considering whether such evidence is admissible, the trial court must balance three factors: (1) the materiality of the facts to be proved; (2) the probative value, or the tendency of the uncharged crimes to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence such as prejudicial effect or other section 352 concerns.

(*Ibid.*) The trial court's evidentiary ruling on this issue is reviewed for abuse of discretion. (*Id.* at p. 1144; *People v. Thompson, supra,* 1 Cal.5th at p. 1114.)

3. Application

Here, the trial court held that H.G.'s testimony regarding defendant's prior threat of violence in response to a financial dispute was relevant to the issue of motive. Evidence of prior conduct is admissible for the purpose of establishing motive where the uncharged act and the charged act " '*are explainable as a result of the same motive*;' " (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1381.) Such evidence is admissible so long as "there is 'sufficient evidence for the jury to find defendant committed both sets of acts, and sufficient similarities to demonstrate that in each instance the perpetrator acted with the same intent or motive.' " (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 827.)

Here, with respect to both the charged conduct and uncharged conduct, defendant was involved in some form of business relationship with the victim, had access to an account in the victim's name, exercised control of the finances within that account, and responded with violence when challenged with respect to his control over management of those finances. These similarities were sufficient for a jury to reasonably infer that defendant had the same motive with respect to making his threat of violence to H.G. and killing Burniston. Moreover, the portion of H.G.'s testimony regarding defendant's threat was brief, and the threat of violence testified to by H.G. was far less egregious than the act of killing Burniston. Thus, other factors that might have justified exclusion of the

testimony pursuant to Evidence Code section 352, notwithstanding its relevance to the prosecution's theory of the case, were simply not present.

Defendant claims there was an insufficient similarity to justify admission of H.G.'s testimony under Evidence Code section 1101, subdivision (b). {AOB 39-40} However, the least degree of similarity between the uncharged act and the charged offense is required in order to prove motive and intent. (*People v. Daveggio and Michaud, supra*, 4 Cal.5th at p. 827.) In such a case, the similarities need only "provide[] a sufficient basis for the jury to conclude that defendant[] acted with the same criminal intent or motive, rather than by ' "accident or inadvertence or self-defense or good faith or other innocent mental state." ' " (*Ibid.*; see *People v. Pertsoni* (1985) 172 Cal.App.3d 369, 374 [lack of similarity may be irrelevant where "the mere *fact* of the prior offense gives rise to an inference of motive"].) As we have already explained, the prior threat and the charged offense in this case bore at least some similarity with respect to the characteristics of the victim in relation to defendant. At the very least, the similarities were sufficient to permit the jury to reasonably infer defendant did not act with an "innocent mental state," which is all that is necessary to support admission for the purpose of showing intent or motive.

4. Even if Erroneous Admission of H.G.'s Testimony Was Not Prejudicial

Finally, even assuming the brief testimony regarding defendant's prior threat of violence to H.G. was erroneously admitted, any such error was harmless. "[W]here . . . independent and competent evidence to substantially the same effect from other witnesses is placed before the jury[,] the erroneous admission of such cumulative

evidence is ordinarily not prejudicial." (*Kalfus v. Fraze* (1955) 136 Cal.App.2d 415, 423; see *People v. Smithey* (1999) 20 Cal.4th 936, 972-973 [admission of testimony over defendant's objection harmless where such testimony cumulative of other testimony already in record]; *People v. Houston* (2005) 130 Cal.App.4th 279, 300 [no prejudice where objectionable testimony cumulative of other evidence unchallenged by appellant].)

Here, B.C. offered testimony to substantially the same effect as H.G.'s testimony regarding defendant's threat of violence in response to a financial dispute. Specifically, B.C. testified of a conversation in which defendant expressed interest in hiring someone to kill a woman who shared a joint account with defendant because the woman had taken money from the joint account.{6RT 1037-1039} Defendant did not object to the admission of this testimony and does not claim admission of this testimony was erroneous on appeal. Because essentially the same testimony was presented to the jury by a different witness, we cannot conclude that H.G.'s testimony accusing defendant of making a violent threat in response to a nearly identical set of actions was prejudicial, even if erroneously admitted.

C. *Exclusion of Third Party Culpability Evidence*

Defendant also broadly argues that the trial court erroneously excluded evidence of third party culpability.{AOB 50-54} We conclude this claim of error has been forfeited for failure to preserve an adequate record for appellate review and further conclude that, even in the absence of forfeiture, the trial court did not abuse its discretion.

1. Relevant Background

Early in the trial, during the cross-examination of a witness, defense counsel disclosed defendant's intent to potentially pursue a theory of defense based upon third party culpability.{1RT 208-214} Over the prosecutor's objections, the trial court permitted defense counsel to complete his intended questions with respect to cross-examination of that witness.{*Ibid.*} However, at the conclusion of witness testimony for the day, the trial court informed defense counsel that the admissibility of any evidence of third party culpability should be addressed in limine outside the presence of the jury.{1RT 243-244} In response, defense counsel disclosed that he was considering pursuing a theory that "either [B.C.] and one or more of his cohorts is responsible for this."{1RT 244}

The trial court ordered briefing on the issue, indicated its intent to set a hearing pursuant to Evidence Code section 402 to consider the admissibility of any such evidence, and instructed defense counsel not to inquire about third party culpability until after the trial court could rule on the admissibility of any specific evidence at such a hearing.{1RT 244} Specifically, the trial court advised defense counsel that: "I'm going to expect that you'll provide an offer of proof, offers of proof and specify specific examples of evidence that you anticipate you'll be presenting in support of your third party culpability argument that's going to be important because without that, I'll be left with merely argument, and so I need to know with some precision, [what] you believe the evidence is that supports such an argument."{1RT 246}

After reviewing the briefs submitted by both parties on the issue of third party culpability,[16] the trial court expressed that it was not inclined to rule on the issue solely based upon representations in the briefing and advised that it would set the matter for a full evidentiary hearing with witness testimony under oath pursuant to Evidence Code section 402.{3RT 391-392} The trial court indicated it was important for it to hear the actual evidence being proposed in order to make preliminary determinations on admissibility.{*Ibid.*} Defense counsel acknowledged that he was not objecting to the trial court's desire to conduct such an inquiry.{3RT 397}

When the trial court called the matter for the anticipated evidentiary hearing, defense counsel represented he would not be calling any witnesses.{3RT 472-473} In response, the trial court offered to reschedule the hearing to permit more time to arrange for appearances.{*Ibid.*} Defense counsel declined this offer and indicated that most of his anticipated evidence of third party culpability would be presented during the cross-examination of B.C.{3RT 473} However, the trial court cautioned that even if defendant intended to utilize witnesses that were already identified, the trial court still needed to hear the potential testimony outside the presence of the jury to make an initial determination of its admissibility.{3RT 473-474}

The trial court repeatedly represented that it would permit defense counsel as much time as needed to arrange for any necessary witness to appear and testify in a hearing pursuant to Evidence Code section 402.{3RT 477, 491} The trial court also

---

[16] Both parties submitted briefs on the admissibility of third party culpability evidence.{3RT 390} However, neither brief has been made part of the record on appeal.

indicated that, to the extent defense counsel was concerned about divulging any of defendant's own testimony in advance, the trial court would be amenable to holding an evidentiary hearing after defendant's testimony and permitting the defense to recall any witness to testify on the issue of third party culpability, should such evidence be deemed admissible following the hearing.{3RT 491-492}

Specifically, with respect to B.C.'s testimony, the trial court indicated it would schedule a hearing for B.C. to testify under oath regarding any inquiry potentially related to third party culpability.{3RT 501-502} However, when defense counsel was subsequently asked when he would like to conduct that hearing, counsel represented that a hearing would no longer be necessary.{4RT 816}

Several days later, the trial court asked defense counsel to confirm that defendant was declining the opportunity to conduct an Evidence Code section 402 hearing on the admissibility of third party culpability evidence.{5RT 828} In response, defense counsel indicated that a hearing might be required, but that he was still investigating some information related to the matter and asked that a hearing be put off until such time as the defense completed its investigation.{5RT 823} The trial court indicated it would be open to conducting a hearing as soon as defense counsel believed he was ready, but that until such time, no evidence of third party culpability would be permitted.{5RT 829}

During the cross-examination of B.C., the trial court was asked to resolve various objections to questions that potentially implicated third party culpability in violation of the trial court's prior order.{7RT 1202-1210} In response, the trial court inquired why defense counsel had still not accepted the invitation to first present any anticipated

testimony on the issue in an Evidence Code section 402 hearing, and defense counsel indicated his decision was based upon "strategic reasons."{7RT 1211-1212} The trial court again advised that defense counsel should refrain from pursuing any questioning regarding third party culpability absent a hearing, but noted that B.C. could be subject to recall to testify on that subject after defendant had testified.{7RT 1212} However, following defendant's testimony, the defense rested its case and declined to recall any witnesses.{9RT 1805-1806}

2. General Legal Principles and Standard of Review

"Like all other evidence, third party culpability evidence may be admitted if it is relevant and its probative value is not substantially outweighed by the risk of undue delay, prejudice, or confusion, or otherwise made inadmissible by the rules of evidence. [Citations.] 'To be admissible, the third party evidence need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability.' " (*People v. Turner* (2020) 10 Cal.5th 786, 816.) " '[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt . . . .' [Citation.] Moreover, admissible evidence of this nature points to the culpability of a *specific* third party, not the possibility that some unidentified third party could have committed the crime. [Citations.] For the evidence to be relevant and admissible, 'there must be *direct or circumstantial evidence linking the third person to the actual perpetration of the crime.*'

[Citation.] As with all evidentiary rulings, the exclusion of third party evidence is reviewed for abuse of discretion." (*Id.* at pp. 816-817.)

3. Defendant's Refusal to Participate in an Evidence Code Section 402 Hearing Renders the Record Inadequate To Review His Claim of Error

The People contend that defendant's claim of error has been forfeited because defendant "withdrew" his request to present such evidence.{RB 81-88, 90} Defendant disagrees, arguing that his counsel did not withdraw his request to present evidence of third party culpability but merely refused to participate in an evidentiary hearing pursuant to Evidence Code section 402 when offered the opportunity to do so by the trial court.{ARB 26-27} Regardless of whether defendant's actions can properly be characterized as a "withdrawal" of a request to present third party culpability evidence, the fact that defendant declined to participate in a hearing pursuant to Evidence Code section 402 renders the record inadequate for review of his claim of error on appeal.

A judgment may not be reversed based upon the erroneous exclusion of evidence unless "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (Evid. Code, § 354, subd. (a).) Thus, "[w]hen a trial court denies a defendant's request to produce evidence, the defendant must make an offer of proof in order to preserve the issue for consideration on appeal." (*People v. Foss* (2007) 155 Cal.App.4th 113, 126.) " ' " ' Before an appellate court can knowledgeably rule upon an evidentiary issue presented, it must have an adequate record before it to determine if an error was made.' [Citation.]" "The offer of proof exists for the benefit of the appellate court . . . [and]

serves to inform the appellate court of the nature of the evidence that the trial court refused to receive in evidence. . . . The function of an offer of proof is to lay an adequate record for appellate review. . . .' " (*Id.* at p. 127.)

Here, the record shows that defendant repeatedly declined the trial court's invitation to participate in a hearing pursuant to Evidence Code section 402. As a result, the record on appeal does not contain any indication of what evidence or testimony defendant believed constituted admissible evidence of third party culpability. Notably, other than broadly stating that the trial court excluded evidence of third party culpability, defendant's briefs on appeal fail to identify the specific testimony or other evidence that would have been introduced but for the trial court's purported exclusion. Absent any indication of what evidence, if any, was actually excluded, the record is inadequate for this court to determine the merits of defendant's claim on appeal, and the issue must be resolved against defendant.

Defendant appears to suggest this court can determine the admissibility of third party culpability evidence based upon inferences drawn from the testimony that was permitted or the questions defendant was not permitted to ask on cross-examination. {AOB 50-51; ARB 28-30} However, "[e]ven if a question . . . is posed on cross-examination and the trial court prevents the defense from delving into the issue, the defendant must still make an offer of proof to preserve the issue for consideration on appeal, unless the issue was within the scope of the direct examination. . . . If the evidence the defendant seeks to elicit on cross-examination is not within the scope of the direct examination, an offer of proof is required to preserve the issue." (*People v. Foss*,

supra, 155 Cal.App.4th at p. 127.) Absent any indication of a witness's answer that may have been to any specific question, this court cannot simply speculate what evidence might have been adduced. Thus, we conclude this claim of error has been forfeited for failure to present an adequate record for review.

4. Even in the Absence of Forfeiture, We Would Find No Abuse of Discretion

Even in the absence of forfeiture, the record actually before us does not disclose an abuse of discretion. Here, the trial court did not exclude any third party culpability evidence based upon a substantive analysis of its relevance or potential prejudice. Instead, the trial court conditioned the introduction of any such evidence upon its presentation in a hearing pursuant to Evidence Code section 402 for the purpose of permitting the trial court to make a preliminary determination of its admissibility.

"In determining the admissibility of evidence, the trial court has broad discretion," and "it is within the court's discretion whether or not to decide admissibility questions under [Evidence Code section 402, subdivision (b),] within the jury's presence." (*People v. Williams* (1997) 16 Cal.4th 153, 196.) The trial court's selection of a statutorily authorized procedure in order to make a preliminary determination of the admissibility of evidence is not arbitrary, capricious, or outside the bounds of reason. Defendant has cited no authority for the proposition that the circumstances of this case restrained or otherwise limited the trial court's discretion in selecting such a procedure to resolve preliminary questions of admissibility. The trial court's decision here did nothing more than apply ordinary rules of procedure and evidence, and it was clearly within its broad discretion.

We disagree with defendant's contention that the trial court's decision to require a hearing pursuant to Evidence Code section 402 prior to the introduction of any evidence of third party culpability violated his constitutional rights.{AOB 54} While "[a]ll defendants have the constitutional right to present a defense. [Citation.] That right does not encompass the ability to present evidence unfettered by evidentiary rules. [Citation.] Indeed, application of the ordinary rules of evidence does not impermissibly infringe on a defendant's right to present a defense." (*People v. Thomas* (2021) 63 Cal.App.5th 612, 627; see *People v. Mincey* (1992) 2 Cal.4th 408, 440.)

Moreover, the record in this case clearly shows the trial court afforded defendant every opportunity to lay the foundation for the admission of any third party culpability evidence, offering to conduct a hearing at anytime during the lengthy trial, offering to accommodate the schedule of any necessary witness, and offering to permit defendant to recall any witness who had already testified, should evidence of third party culpability be deemed admissible. Indeed, the trial court even offered to wait until after defendant's testimony to conduct the hearing to avoid giving the prosecution any unfair advantage. Having failed to avail himself of these opportunities, defendant's claim that his trial was fundamentally unfair because he was prevented from presenting evidence of third party culpability is without merit.

D. *The Cumulative Error Doctrine Does Not Apply*

Defendant also claims the cumulative impact of errors identified on appeal requires reversal even if any individual error was not sufficiently prejudicial to independently warrant reversal.{AOB 56-58} Under the cumulative error doctrine, "the

cumulative effect of several trial errors may be prejudicial even if they would not be prejudicial when considered individually." (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1019{Fourth Dist., Div. Two}.) However, since we have rejected each of defendant's individual claims of error, there are no errors to cumulate, and the cumulative error doctrine is not applicable.

IV. DISPOSITION

The judgment is affirmed. Jan 7, 2022

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

APPENDIX C

Court of Appeal, Fourth Appellate District, Division Two - No. E072834

S273101

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DANTE DANIL CARTER, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX D

INCIDENT REPORT

DATE PREPARED: 01/30/17 — RIVERSIDE COUNTY SHERIFF CA0330000 — ☐ INITIAL ☒ SUPPLEMENTAL

1. FILE NUMBER	2. DATE/TIME REPORTED	3. DATE/TIME ASSIGNED	4. DATE/TIME INV. START	5. DATE/TIME INV. TERM	6. ADULT ARR	7. JUV ARR
F-163160005					01	-

8. OFFENSES- CODE SECTION	CRIME	COUNTS	9. EDP CODE
	No Change		
10. OFFENSES- CODE SECTION (Add or Change to)	CRIME	COUNTS	11. EDP CODE
12. OFFENSES – CODE SECTION (Add or Change to)	CRIME	COUNTS	13. EDP CODE

14. LOCATION OF OCCURRENCE	15. REP. DIST.	16. OCCURRED ON-	DATE/TIME	17. OR BETWEEN	DATE/TIME
Squaw Mountain and Mojeska Summit Rd, Glen Ivy		11-11-16	0200	11-11-16	0224

18. BUSINESS NAME	19. BUSINESS PHONE	20. CASE STATUS/ CLEARANCE
		EXC

VICTIM – REPORTING PARTY – WITNESS – OTHERS: ☐ SEE ADDITIONAL PERSONS REPORT

21. INVL	22. NAME (Last, First, Middle)	23. SEX	24. RACE	25. DOB	26. AGE	27. HT	28. WT	29. HAIR	30. EYES	31. SKIN
VIC	Burniston, Eric (Prev Blocked)									

32. RESIDENCE ADDRESS	CITY	ZIP	33. RES. PHONE
34. BUSINESS ADDRESS	CITY	ZIP	35. BUS. PHONE

36. INVL	37. NAME (Last, First, Middle)	38. SEX	39. RACE	40. DOB	41. AGE	42. HT	43. WT	44. HAIR	45. EYES	46. SKIN

47. RESIDENCE ADDRESS	CITY	ZIP	48. RES. PHONE
49. BUSINESS ADDRESS	CITY	ZIP	50. BUS. PHONE

SUSPECT: ☒ ADULT ☐ JUVENILE ☐ PAROLE ☐ PROBATION ☐ SEE ADDITIONAL PERSONS REPORT ☒ ARRESTED

51.	52. NAME (Last, First, Middle)	53. SEX	54. RACE	55. DOB	56. AGE	57. HT	58. WT	59. HAIR	60. EYES	61. SKIN
SUS	Carter, Dante (Prev Blocked)									

62. DRIVER'S LICENSE NUMBER / ID NUMBER	IN POSSESSION	63. STATE	64. SOCIAL SECURITY NUMBER	65. MNI NUMBER	66. CII NUMBER
	YES ☐ NO ☐				
67. RESIDENCE ADDRESS	CITY	ZIP			68. RES. PHONE
69. BUSINESS ADDRESS	CITY	ZIP			70. BUS. PHONE

71. JUVENILE DISPOSITION ☐ OTHER JURIS. ☐ JUV. CRT. PROB. ☐ WITHIN DEPT. ☐ DETAINED ☐ NOT DETAINED

72. **GANG DATA**

GANG NAME(S):

☐ Member ☐ Associate ☐ Self-Admit ☐ Prior Knowledge

TATTOOS / SCARS / MARKS

☐ Face ☐ Neck ☐ R. Arm ☐ L. Arm ☐ Hands ☐ Torso ☐ Back ☐ Legs

73. TATTOOS/SCARS/MARKS/CLOTHING DESCRIPTION

Interview - Dante Carter 11-12-16 @ 1258 RVPD

#3190 SDB

VEHICLE: ☐ REFER TO CHP 180 FORM FOR STOLEN, RECOVERED, TOWED OR IMPOUNDED

74. INVL	75. LICENSE	76. STATE	77. YEAR	78. MAKE	79. MODEL	80. BODY STYLE	81. TYP/ DOC	AUTO VALUE $	85. DISPOSITION OF VEHICLE
82. COLOR/COLOR	83. VIN #				84. OTHER IDENTIFIERS				
86. REGISTERED OWNER	87. ADDRESS	CITY	STATE	ZIP					88. PHONE

☐ PROPERTY REPORT ATTACHED FOR STOLEN, RECOVERED OR DAMAGED PROPERTY — 89. DAMAGED PROPERTY VALUE $

REPORTING OFFICER	OFFICER I.D.	REVIEWED BY/DATE	ENTERED BY/DATE	ENTERED BY/DATE
[redacted]er Inv Button	3190	Bury • 2253 1-31-17		

COPIES TO:	APR SENT:	APR CANCELLED:	DOJ-NCIC ENTERED:	DOJ-NCIC CANCELLED:
CHU-E				

DETAILS:

This is a supplemental report to a murder that occurred in the unincorporated area of Glen Ivy. On November 12, 2016 at 1758 hours, Investigator Paixao and I interviewed Dante Carter at the Moreno Valley Police Station. My interview with him was recorded and the following is a summary of what he told me.

Carter had been handcuffed and was sitting in a holding cell at the Moreno Valley Station. I had a deputy un-cuff Carter and escorted him to an interview room. I told Carter I wanted to talk to him about an issue with the car he was driving. I asked him if he had been arrested before and he said he had. I advised Carter of his rights per Miranda. He told me he understood each of his rights and I began talking to him by saying the car had been embezzled.

Carter told me he gets car through a broker named Richard Caigle. He told me Caigle gets the cars through investors then charges a large down payment. He told me he paid Caigle $13,000 down and $1800 a month for the BMW i8 he was stopped in. He told me he has only had the car for about a week. Carter told me Caigle works in Newport Beach and he has gotten several other car through him. Carter said he had Caigle's phone number in his own phone and would provide it to us.

I continued to speak to Carter under the ruse that his vehicle was embezzled. He ultimately provided his phone number as 818-919-6114, the same number witnesses had given for "Anthony". I had Investigator Paixao retrieve Carter's phone so he could look up Caigle's number.

When Carter opened up his phone he told us that his girlfriend sent a message that she should go to the police. He told us that he got into an argument with his girlfriend and she punched him in the lip. He said he pushed her away and she was "bruised up". He said she texted him that since he was not answering her she was going to call the police. Carter then provided Caigle's phone number. We left the room and I attempted to call the number several times with no answer and no voicemail to leave a message.

I told Carter that I had found out more information. I told him someone was claiming their credit was being used for a car they did not own. I asked him if he knew what that was about and he told me he didn't.

I asked him if he knew Eric Burniston and he told me Burniston was one of his investors. Carter told me he gives Burniston $1200 to use Burniston's credit to get credit cards. Carter told me he then uses the money he obtains from these credit cards to "invest in people." He told us that he finds kids ages 18-23 who generally have no credit, and convinces them to provide their information so he can open credit accounts through Superior Tradelines. He told me he has a power of attorney and contract with Burniston. He went on to explain how he earns his money and uses other people's credit.

He told me he met Burniston about a year ago. He said he paid Burniston every month with the last payment being last month. His last payment to Burniston was $1200. I asked him when he last spoke to Burniston and he told me it had been three or four days. He told me he was supposed to meet with Burniston, then trailed off before saying he was going to Atlanta for business. He told me for various reasons he was unable to meet with Burniston.

Carter told me he tried to call Burniston yesterday but Burniston's phone was off. He said Burniston sent him a message on Instagram. Carter said he answered it by saying he had a lot going on, but Burniston never responded again. He told me he generally meets with Burniston in Orange County. I asked him if he had Burniston's phone number and he provided 562-477-1391 from his cell phone contacts.

I again asked him if he had power of attorney and asked if that paperwork along with the contract he had with Burniston were in his office. He told me he did then said he "even has text messages" from Burniston. He said, "I met up with him. I pay him. You know? Like he gives me the bills, every month. He will give me the bill or he don't even give me the bill, he'll just, tell me like the other day. He said, 'Hey bro, um, what did he say?" Carter whispered to himself that he might be able to find it as he was looking at his phone. He read us a text message he said he received from Burniston. "Good morning bro. I got a voicemail about the Cabella's Club saying there might be a fraud". He told me it was because he (Carter) used the card.

He read again, "I got a voicemail about the Cabella's Club saying there might me fraud. Just wanted to let you know. Let me know if I can do anything for you." He told me he responded with, "Good morning I'm going to call them."

He told us Burniston then sent, "Ok. Let me know if I can help." Carter then said Burniston sent him another message saying, "I'm getting a letter from PenFed saying there is no proof of coverage. Cabella's is showing $3000 in cash advances."

Carter started to say, "Basically saying..." then went on to tell me his reply of, "I don't take cash advances bro. You see a $3000 balance it from me using the card. I'm sure your just not comprehending the bill. Aside from that, I'm paying for it. Your only concern is the money you are getting monthly. Paying the loan credit cards."

Carter explained that Burniston replied with, "Ok bro. Are you thinking tonight for sure?" He told me that he thought Burniston was trying to meet up with him to get money and told me he was too busy to meet up with Burniston. He continued to tell me about the Cabella's card payment and I told him I would go and try to call Burniston.

I went back into the interview room with Carter and told him Burniston was not answering and I had a pretty good idea why. I also told him I believed he was pretty sure of why Burniston was not answering the phone as well. He told me he did not know why and I asked him when he last spoke to Burniston. He again told me it was three to four days ago and I asked him when he last sent a text to Burniston. He told me it had been a

few days. I asked when he last physically saw Burniston in person and he said, "The last time I paid him." I sked when that was and he told me it was last month. He told me he did not remember the exact date, but they met at the In and Out In Yorba Linda or Anaheim Hill and he paid Burniston $1200. He told me there was a black male with Burniston when he last saw him.

I asked him where he was Thursday night. He told me was in Riverside with the mother of one of his children, and that he never left Riverside. I asked him if he went into Corona and he said, "No." I asked him, "Not once?", and he said, "Not once." I asked him, "Not late Thursday night, early Friday morning?", and he again said, "No."

I told him Burniston was dead and introduced myself as a homicide detective. Upon hearing this Carter said, "Oh fuck."

I told him I was giving him the opportunity to give a detailed list of where he was on Thursday so I could verify his whereabouts. I told him the last we knew was Burniston sent a text to his girlfriend saying he was meeting with Carter in Corona.

He told me he was with Sharon Guzman. He arrived at her house at about 2100 hours. Before going to her house he went to a yogurt store which is near Guzman's house. He said he stayed the night at her house and did not leave until 0800 hours the next morning.

He said he was with Lydia the whole day prior to going to Guzman's. He told me he got into an argument with Lydia over a text message with another girl. He told me she saw the text and started going "crazy". He pushed Lydia off of him and she "hurt herself." He said he took Lydia to the hospital and was there until about 2000 hours. From the hospital he went to the yogurt store and then to Guzman's. Once he arrived at Guzman's he ate, had sex with Guzman, and went to sleep. He told me Guzman would verify he was there all night.

The next morning Carter went to his office then met up with another woman he has a child with named Annette Gonzalez. He met with Gonzalez because her sister was buying a car. Carter said he made a fake paystub to verify employment to assist with the purchase of the vehicle. He then told me he did not remember exactly what he did on Friday.

I asked him if he has any firearms at his house. Carter said he had an AR-15 rifle and a 9mm pistol that he has never used. He told me he did not have any firearms at his office and again said he only had the two weapons that have never been fired. He told me he bought the guns from a man that gets the guns from Las Vegas, and that he has had them for a few months.

I confirmed with him that Thursday night going into Friday morning he was at Guzman's house all night and he never left until the next morning.

I asked him if he has ever been to Corona and eh said he has been in the area of a lot of places including Corona, Lake Elsinore and Temecula. I asked him if he has ever been to Tom's Farm, and he told me he had never heard of the place. I asked him if he was familiar with businesses having cameras and he agreed that it was common for businesses to have cameras now. I asked him if we would find him driving a car outside of Riverside that night and he said, "No."

I told him there was a witness that saw Burniston and his car with another person who was driving a dark car where Burniston's body was found. I asked him if that witness would be able to identify him as the other person and Carter told me he was not there.

I told Carter we were going to get search warrants for his home, office, cars and phone. I asked him if there would be anything on his phone instructing Burniston to meet him Thursday night. Carter said, "No." I asked him if we would find the phone he purchased in Burniston's name and he told me he never purchased a name in Burniston's name.

I asked him again if he fired the 9mm, and he said, "No." I asked him if that 9mm would match any evidence found at the crime scene, and he said, "No." He again said he never shot the guns. He also told me there was nothing he should be worried about on his cell phone. I asked him again if Guzman would verify he was at her house all night, and he said, "I don't see why she wouldn't."

I asked if there would be any evidence in Guzman's car, including blood and he said there would not be. He had informed us that Guzman has a black Prius which could be similar to what was described at the scene by a witness.

Investigator Paixao asked Carter where his guns where, and after telling us Carter said he had a question. Carter said he didn't do anything to Burniston because they were friends and they made money together. He then asked if he was going to be charged with the unregistered guns and I told him that was still undetermined.

He again said he would not do anything to Burniston and said perhaps Burniston's girlfriend's father did something to him. He said the father had a restraining order against Burniston, and Burniston had told Carter that he had been in more than one fight with the father. Carter said he (Carter) had never even had a disagreement with Burniston.

I asked him why he had the fake identification cards in his wallet. He said he used the credit cards in Burniston's name and the name of another person so he had the identification cards to match.

I told him I was going to check the GPS on Burniston's phone to see if it went near Carter's house. I again told him we were going to get search warrants for his home, cars, Guzman's house and, Lydia's (Lydia Cerna) house to look for evidence related to this murder.

He asked me if he was being charged, and I told him he was being investigated. He asked if he was going to have a bail and I told him he had not been arrested yet. I told him we were going to search for a few things and let him know in a little while.

We went back into the interview room with Carter. He told us he did not want to look like a bad business man and said his office was really in Temecula off of Winchester. He could not provide the address and said he rented the office from an online company.

I asked him why Burniston's phone showed it was last near his (Carter's) house. He said Burniston had never been to his house, and that Burniston's phone was not at his house. I told him when he (Carter) turned his (Carter's) cell phone off Thursday night the phone showed it was at his house. I also told him when he turned his phone back on the next morning it was again at his house. He said that was weird because he was at Guzman's. I told him someone was on the way to her house and he said he did not know if she would be home. He told me he would provide her cell number and I let him know we would just download his phone to get the number once our search warrant was signed. I asked him of there was anything on his phone he should be worried about and Carter said, "No. Not with anything like with him."

I asked him if he had search anything online about murders. We had already received a signed warrant back and saw the open screen on his phone was a google search of murders in Corona. When I asked him about the online search, Carter told me he looks at news all the time. I told him to tell me more about his news searches. He said he looked at Temecula and the entire Inland Empire. He said he looked at everything saying he was a "news guy". I asked him what kind of news he was searching and he sighed and said, "I looked at murders. I looked at credit fraud. I looked at..." and paused saying, "I looked at a lot of shit." He went on to say that he helps people that are victims of identity theft and credit fraud.

During the search warrant service on his phone there is no record of him searching for any other news items related to credit card fraud. It does show that on November 6 he searches what police agency covers Menifee. On November 9th he searches Boost pre-paid phones and on November 11th he searches freeway exits in the Lake Elsinore area. He also searches, on November 11th, whether pre-paid pones can be traced, about bodies being found, and about murders in Corona. He also search for the Riverside County Sheriff's press releases.

I told him that many people sat in a chair and claimed to have not committed a crime. I told him there were people that drove by and saw the suspect with Burniston. He said the person did not see him. He asked what cars were seen and I told him it was Burniston's car and a dark sedan. He paused, said, "Hmmm." I told him the car could be similar to a black Prius and he told me there was no way because he did not drive that car.

I asked him if his DNA would be inside Burniston's car or if his fingerprints would be on the outside. He answered no to both question, and when I asked him if he ever touched

I asked if he called Burniston Thursday night. He said he did not call him, but Burniston texted him and Burniston tried to call his phone. He told me he had a missed call as I asked him what the text said. He said Burniston asked him for an address to meet him.

Carter told me he did not give Burniston an address and did not answer Burniston at all. Carter said he believed he was having sex with Guzman when Burniston reached out to him. He said he puts his phone on silent around his family and said he later saw the missed call. I asked him what time he thought it was when all this happened and he told me he could not remember. He said he knew Burniston had been trying to meet with him to get the money for a few days, but he hasn't had time to meet with Burniston.

Carter said he was going to pay Burniston early because he (Carter) was going to go to Atlanta. He said he had planned leaving a few days ago, but for whatever reason it didn't work out because "shit came up." He then said, "Shit happens." I asked him why he was going to Atlanta, and he told me he was going to inquire about property in the area. I asked him if he had any property, house or vehicles in his name and he said he did not.

I asked Carter about vehicles at his house, including a Lexus. I asked if that was the same Lexus Burniston got a loan for. He told me it was not the same car. He said Burniston got the loan and cashed the check. He said typically within 90-120 days the companies would turn the car loans into personal loans. He said Burniston cashed the bank check and provided him (Carter) with some of the money.

He then told me about house he went about helping people, which I told him was a fraud. He told me he did not think it was, but could see how I would call it fraud (for further information refer to the digital recording).

Carter asked if he was going to be at the station all weekend. I explained to him we were still investigating and getting search warrants. I explained to him what we were going to do, including sending his gun to the Department of Justice for testing to see if they matched any evidence found at the crime scene. Carter became visibly concerned and asked how shell casings could match to a gun. I explained to him how a gun works and what evidence a firearm could leave on a casing or projectile.

While I was explaining this to him, Carter would nervously drink water and said, "Uh huh", or "Ok". After finishing my explanation he said, "Alright" in a much lower voice. I asked him if the casings would match his gun and in a low voice he said, "No." When I told him he didn't sound so sure he said in an authoritative voice that he was positive, and that he never fired the guns.

I told him for all I knew he destroyed the gun. He could have thrown a phone out the window after he was done sending text messages between two phones registered to the same person. He could have thrown the phones out near his own home, after Burniston was already dead. After saying this Carter sighed and did not deny anything I was saying. I told him there could be blood on his gun, or his clothing and he told me that he

Burniston's car he answered, "Eric drives a Saleen. A blue Mustang Saleen." He then told me he has seen Burniston in a Mercedes and possibly a yellow sedan that belongs to his (Burniston's) grandfather. I asked him if he has ever seen the red Honda that other people have been in when Burniston met with Carter, and he told me he did not know Burniston had a red Honda. I said, "So you fingerprints shouldn't be on the outside of a red Honda that is registered to his name?" He said, "No." I asked him for an explanation if his prints were on it, and he laughed saying, "There is no explanation, because (pause) I didn't even know he had a red Honda. Nor has he ever even told me he has a red Honda."

I asked him again about his DNA being on the steering wheel of the Prius and he emphatically said it would not be. I later found this would have been true because it was not the Prius that was at the location.

Carter told me he has only seen Burniston in the Mustang or Mercedes and the last time he saw Burniston he was driving the Mustang. I asked him where and he said it was at the In and Out in Yorba Linda. I asked him again what day he saw him and he said I had already asked him that. I told him it was pretty important for him to remember and he told me he could not remember the day.

I told Carter that Burniston's family told me the Mustang had been parked for a long time. They told me Burniston didn't drive the car anymore because of the price of gas. I told him the car had spider webs on it. Carter said, "He drives it. Maybe they don't know he drives it. He drive that..."

I stopped Carter and told him I saw the car with spider webs, and he said, "The blue Saleen?" When I confirmed I saw it he said, "Hmm. (Took a drink of water) that's hot cause I know he drives that car." He told me the car hadn't been parked that long and it was the last car he saw Burniston in. He said "Maurice" was with Burniston when Carter last saw him. I told him I spoke to Maurice who said he did not know Carter. He told me he could prove Maurice knew him and that he did credit repair for Maurice. He told me it could have been someone else with Burniston, but he thought it was Maurice.

I told Carter I was still trying to find a good explanation for Burniston's phone being near his (Carter's) house **after** Burniston was already dead. Carter said, "I don't know, and Eric ain't never been to my house."

I asked him how he would explain Burniston's phone being near his house after he was dead and Carter said, "His phone wasn't (scoffed)...Eric has never been to my house, and I sure as fuck to have Eric's fuckin' phone. And I never had his phone. The last time I saw Eric I gave him $1200 at In and Out. We were supposed to meet up. We didn't meet up. I was with Sharon. You know, I mean to make, really? I'm supposed to me up with a lot of people, man."

was still wearing the same clothes he had on Thursday, again not denying anything else I said.

During the initial stages of this investigation we requested Burniston's phone records with a search warrant. While checking the last calls before the murder I saw there was a phone number 310-709-4601 had made only three calls to Burniston's cell phone. A search warrant for that number shows that phone was listed in Burniston's name with Sprint. It should be noted that in the United States Boost Mobile is a subsidiary of Sprint.

After I told him what I believed he could have done, Carter began talking about what was going to happen, including the possibility of him being in custody for months without being charged. He did not say anything about being in custody for something he did not do.

After taking a break we began talking to Carter again. I asked him who Brian was (Brian Coulter) and he told me Brian worked for him, but didn't know where Brian lived. He said he last saw Brian a couple days ago. I then confronted Carter about his Spoofcard phone app that contacted Burniston. He still claimed he never spoke to Burniston the day of the murder.

During a search of Carter phone we saw a phone app named Spoofcard, with a phone number of 323-737-2986 assigned to it. According to Burniston's phone records that same phone number contacted Burniston the night of the murder at 2335 hours. When I went to the Spoofcard website I found it says, "Easily disguise your caller ID. Display a different number to protect yourself or pull a prank. It's easy to use and works on any phone."

When Investigator Paixao showed Carter photographs of guns from his (Carter's) phone, Carter said the guns were not his and belonged to a gun dealer. Investigator Paixao confronted Carter with a video on the phone where Carter is talking about the guns, and Carter acknowledged it was him but said he didn't buy all of the guns. Carter said he only had a 40 caliber, a 9mm and an AR-15 at his house. This was the first time, after already being asked, that Carter mentioned another weapon other than the 9mm and AR-15. He said the handguns were in his master bedroom closet in a drawer and the rifle was under his bed.

For further information regarding this interview refer to the digital recording. This case has been referred to the Riverside District Attorney's Office and is now closed exceptional.

CASE STATUS: EXC