

APPENDIX A

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GLEN RAY MAXWELL,

Defendant and Appellant.

H041586

(Santa Clara County

Super. Ct. No. C1240718)

Following a bifurcated jury trial, defendant Glen Ray Maxwell was found guilty of violating Health and Safety Code section 11351.5 (possession for sale of cocaine base) and Penal Code section 4573¹ (bringing a controlled substance, cocaine base, into a jail). Subsequently, the jury found an alleged prior robbery conviction to be true, and it also found true that defendant had prior convictions of drug offenses (Health & Saf. Code, §§ 11350, 11351.5, 11352). The trial court sentenced defendant to a total term of eight years under the Three Strikes law (§§ 667, subd. (b)- (i); 1170.12).

On appeal, defendant raises multiple contentions. We find none meritorious and affirm the judgment.

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

Procedural History

On July 30, 2013, a three-count information was filed against defendant. It charged him with committing several drug-related offenses on or about August 17, 2012.

On September 4, 2013, the trial court heard a *Pitchess* motion. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); Evid. Code, §§ 1043, 1045.) On September 5, 2013, the court issued a protective order with respect to any information or documents ordered produced.

The trial court heard defendant's motion to suppress evidence, and on December 6, 2013, the court denied it.

By first amended information filed on January 27, 2014, defendant was charged with three felony offenses occurring on or about August 17, 2012: (1) possession for sale of cocaine base in violation of Health and Safety Code section 11351.5 (count 1); (2) sale of cocaine base in violation of Health and Safety Code section 11352, subdivision (a) (count 2); and (3) bringing a controlled substance or paraphernalia into jail in violation of section 4573 (count 3). The information further alleged as to counts 1 and 2 that (1) defendant had a prior conviction for violating Health and Safety Code section 11351.5 within the meaning of section 1203.07, subdivision (a)(11) (persons convicted of certain drug offenses with prior convictions for certain drug offenses ineligible for probation) and that (2) defendant had three prior convictions of drug offenses (two convictions of violating Health and Safety Code section 11352 and a conviction for violating Health and Safety Code section 11351.5) within the meaning of Health and Safety Code sections 11370.2, subdivision (a) (consecutive three-year enhancement term for each prior felony conviction of certain offenses), and 11370, subdivisions (a) and (c) (persons convicted of certain drug offenses who were previously convicted of certain offenses are ineligible for probation). The first amended information also alleged that defendant had a prior

conviction of a serious or violent felony within the meaning of the Three Strikes law (§§ 667, subd. (b)-(i), 1170.12), specifically robbery (§ 211), and that he had served a prior prison term within the meaning of section 667.5, subdivision (b), for a violation of Health and Safety Code section 11350 (possession of a controlled substance).

Also on January 27, 2014, the jury selection process was completed, and the jurors were sworn and impaneled. On January 29, 2014, defense counsel placed her challenges for cause as to Prospective Jurors Nos. 2, 6, and 25 on the record.

After a bifurcated trial, the jury found defendant guilty of counts 1 and 3. The court declared a mistrial as to count 2 based on the jury's inability to reach a verdict on that count. The jury subsequently found true: (1) the alleged prior conviction for robbery (§ 211) (which was alleged under the Three Strikes law); (2) the alleged prior conviction for violating Health and Safety Code section 11350 (which had been alleged as prior prison term enhancement pursuant to section 667.5, subdivision (b)); and (3) the three prior convictions of drug offenses (which had been alleged under Health and Safety Code sections 11370.2 and 11370). The trial court dismissed count 2 on the prosecutor's motion.

Under the Three Strikes law (§§ 667, subd. (b)-(i); 1170.12), the trial court sentenced defendant to a total term of eight years, consisting of a six-year term on the violation of Health and Safety Code section 11351.5 (count 1) and a consecutive two-year term on the violation of section 4573 (count 3). Pursuant to section 1385, the trial court struck the sentence enhancements under Health and Safety Code section 11370.2, subdivision (a) and section 667.5, subdivision (b).

II

Evidence

On August 17, 2012, Hans Jorgensen and Matthew Blackerby were San Jose police officers assigned to the police department's Downtown Services Unit (DSU), which was primarily focused on narcotics crime. At approximately 10:00 p.m., the

officers were conducting surveillance from a building; they were watching the north side of Santa Clara Street between First and Second Streets for drug transactions. At trial, Officers Jorgensen and Blackerby testified regarding their observations of defendant that night; their testimony was essentially consistent.

That night, Officer Daniel Akery and Officer Miller, who were in plain clothes and working as part of the DSU, were nearby and ready to assist Officers Jorgensen and Blackerby with any arrest. The officers could communicate using their police radios.

Officers Jorgensen and Blackerby first noticed defendant at approximately 10:00 p.m. on August 17, 2012. It was nighttime, but the area was lit. Officer Jorgensen was using Nikon binoculars with four-by-twelve magnification, which meant that he could see between four and twelve times “what the normal eye sees.” Officer Blackerby was also using binoculars, and he could zoom in whenever he wanted a closer look.

Defendant was wearing a gray hooded sweatshirt and gray gym shorts, and he was by himself, sitting or leaning against a blue rail on the sidewalk. Other people came, sat at the bus stop, and got on one of the buses traveling on Santa Clara Street. Other people walked by, socialized, or appeared to be waiting for a bus. The officers focused their attention on defendant because he was near a bus stop, multiple buses came by, but defendant did not get on any of them. There was a mini-market next door, but defendant was not seen going into or out of it.

After the officers had been watching defendant for approximately 10 minutes, they saw a white female adult wearing pink medical scrubs and a black male adult walking together, eastbound on the north side of Santa Clara Street. The female handed money to the male, the male motioned to the female to stay put, and the male approached defendant and handed green paper money to defendant. Defendant accepted the money and placed it in the right pocket of his shorts. Defendant appeared to put his hand underneath his gym shorts toward his buttocks, and defendant pulled out an object that was white or light colored and the size of a golf ball.

Defendant placed the object in the front “kangaroo pouch” pocket of his sweatshirt with his right hand, and he put his left hand into the same pocket. Defendant’s hands appeared to be moving inside the pocket and manipulating something. About 15 to 30 seconds later, defendant withdrew his left hand and placed a “corn kernel”-sized object into the hand of the other man, who put the object in his mouth. The other man then motioned to his female companion, and they walked away westbound on Santa Clara Street.

At trial, Officer Blackerby testified that, at that point he believed he had witnessed a drug transaction. Officer Jorgensen testified, based on his training and experience, that “individuals who often use cocaine base will keep it in their mouth until they are able to use it or smoke it” to “avoid detection by law enforcement.” He stated that, if such drug users are contacted by law enforcement, “they can easily swallow the narcotic and not be arrested.” Officer Jorgensen indicated that the corn kernel size was an amount of cocaine base commonly purchased and ingested by “street level users.”

As the couple were leaving, defendant appeared to manipulate something in his sweatshirt’s front pocket. He pulled his right hand from the pocket and placed the white, golf-ball-sized object underneath his shorts towards his buttocks with his right hand. Officer Jorgensen testified, based on his training and experience, that individuals often store narcotics in between their buttocks.

Within approximately a minute after the couple left, defendant was approached by second male, who was later identified as Thomas White. Officer Jorgensen saw White hand green money to defendant, and defendant placed the money in his right pocket. Officer Jorgensen radioed Officer Miller and instructed Officers Miller and Akery to arrest defendant and White.

Officers Akery and Miller moved in to arrest defendant and White. Officer Blackerby kept his attention focused on defendant to make sure defendant did not try to

discard the object that he had placed underneath his clothes when the officers made contact. Officer Blackerby did not see defendant drop any item before his arrest.

As Officer Miller approached defendant, the officer saw “wadded money falling out of [defendant’s] right shorts pocket” and defendant holding a translucent, light pink, plastic bag of marijuana in his left hand. Officers Miller and Akery took defendant and White to a safer location around the corner on First Street.

Officer Jorgensen continued watching as Officers Miller and Akery arrested defendant and White and the officers started to move them around the corner to conduct searches incident to arrest. Officer Jorgensen then joined Officers Miller and Akery.

When Officer Miller searched defendant incident to arrest, the officer found cash in various locations on defendant. The officer located \$28 in the right pocket of defendant’s gym shorts, \$430 in his sock, and bills in a lanyard worn around his neck and in his backpack. Officer Miller handed the money to Officer Jorgensen, who counted the money, a total of \$513. Officer Jorgensen did not see any symptoms indicating that defendant was under the influence. At trial, defendant admitted that the officers found \$513 when he was searched.

Officer Akery searched White incident to arrest. Officer Akery found a cigarette pack, containing a glass pipe, on White. The pipe had burn marks and contained a Brillo pad, which the officer believed was used as a filter when smoking. To Officer Akery, the pipe looked like one used to smoke narcotics, most likely “crack.”

Officer Blackerby joined the other officers after the arrests of defendant and White, both of whom were in handcuffs. After completing the search incident to arrest, Officer Miller turned defendant over to Officer Jorgensen. White was cited and released.

Defendant was placed in the front seat of an unmarked police vehicle, and Officer Jorgensen drove the vehicle to the police department’s preprocessing center, a place where officers can fingerprint, photograph, interview, document evidence, and conduct strip searches. Officer Blackerby, who was a passenger in the “middle row” of the

vehicle, assisted with the transportation. Defendant had been continuously handcuffed, with his hands behind his back, from the time Officer Miller had put him in handcuffs. During the drive, Officer Jorgensen noticed that that defendant's hands were "moving around more than they should" in "the area of his buttocks."

When they arrived at the preprocessing center, Officer Jorgensen showed defendant a sign explaining the Penal Code makes it illegal to bring substances into a controlled facility, and the officer told defendant to not bring any drugs into the center. The officer asked defendant whether he had any drugs and then he was placed in a holding cell while the officer began filling out some paperwork for defendant's admittance into the preprocessing center. The officer was keeping a general eye on defendant through a live video surveilling the holding cell and periodically looking to see what defendant was doing. Officer Jorgensen saw that defendant's hands were still moving around in his buttocks area. When Officer Jorgensen finished the paperwork, he went to the holding cell with Officer Akery, and Officer Jorgensen told defendant that the center was a controlled facility, that defendant needed to let them know whether there was anything on him, and that, once defendant went through the metal detector, he had brought anything on him into a controlled facility.

Before defendant was taken through a metal detector, Officer Akery performed another search of him and went through defendant's pockets and sweatshirt, but the officer found nothing. After defendant went through the metal detector, defendant's handcuffs were removed and he was placed in holding cell No. 1 to conduct a strip search. Officer Jorgesen closed the blinds on the cell's window and door, and put a magnetic sign, which stated "strip search in progress," on the door. During the search of defendant, Officers Jorgensen and Blackerby were present. Officer Jorgensen explained what was going to happen.

Officer Jorgensen sequentially instructed defendant to remove items of clothing and hand them to him; the officer inspected each item. Defendant handed the officer his

socks, one at a time, his sweatshirt, his T-shirt, his gym shorts, and his boxer briefs. Officer Jorgensen instructed defendant to “lift up his scrotum” so the officer could make sure nothing was hidden underneath. Officer Jorgensen then directed defendant to turn around, “to spread his butt cheeks,” and to “bend over at the waist” so that the officer could see defendant’s anus. Although defendant had been cooperative in removing his clothing and lifting his scrotum, defendant failed to spread his buttocks cheeks and bend over at the waist as directed. Officer Jorgensen told defendant that he needed to see defendant’s anus, but defendant did not comply and merely did something “like a squat.” The officers were unable to complete the strip search because defendant failed to follow instructions. Officer Jorgensen told defendant to put on his clothes.

Defendant was returned to the first holding cell, where there was a stool and a table. Each hand was separately handcuffed so that defendant could not “use his hands to manipulate or possibly destroy” the evidence that Officer Jorgensen believed defendant had.

Subsequently, defendant’s hands were uncuffed and then re-handcuffed behind his back, and he was transported to the Santa Clara County main jail, “lower booking.” Prior to entering the main jail, Officer Jorgensen showed defendant a sign referencing section 4573, which makes it a crime to bring controlled substances into the jail, and the officer again instructed defendant not to bring any controlled substances into the jail facility.

After entering the main jail with defendant, Officer Jorgensen contacted Sergeant Roggia, the sergeant in charge of intake, and explained the situation and the need for assistance in conducting a strip search of defendant. Officer Jorgensen again explained to defendant what was going to happen. With the assistance of deputies, another strip search was conducted in the presence of Officers Jorgensen, Blackerby, and Akery. The same process took place: defendant removed his clothing as instructed by Officer Jorgensen, and this time defendant complied with the instruction to bend over and spread

his “butt cheeks.” Using a flashlight to illuminate defendant’s anal area, Officer Jorgensen saw a white, golf-ball-sized object. Defendant removed the object from his buttocks.

The strip search was recorded by Sergeant Roggia. The recording was played for the jury. It clearly shows defendant removing a white, golf-ball-sized object from between his buttocks cheeks at the prompting of the officers and tossing it onto the floor of the cell.

That object consisted of “a clear plastic bag with a rubber band wrapped around the exterior,” which contained two plastic bags. The larger bag held a white, chunky substance. It appeared to Officer Blackerby to be what defendant had removed from, and then returned to, his buttocks area. The second plastic bag, which was an individual bundle, contained what appeared to be the same material and was twisted and burned at one end.

Officer Jorgensen acknowledged that not every arrestee taken to the preprocessing center is subjected to a strip search. He had performed approximately 20 strip searches during his career. Officer Jorgensen indicated that he normally performs a strip search only when he has a belief that narcotics are hidden on someone and has made observations that support that belief. The officer affirmed that he had not made fun of defendant or taunted him in any way. The recording of the strip search does not disclose that the officers treated defendant in a degrading or disrespectful way.

Trevor Gillis, a criminalist with the Santa Clara County Crime Laboratory, testified as an expert in the recognition and identification of controlled substances, specifically cocaine base. He examined the contents of a sealed evidence envelope, specifically a Ziploc bag in which there was a sandwich baggie and a “twist,” both containing “off-white, chunky material.” He determined through various tests that the substance in the baggie was cocaine base, which weighed 6.58 grams. The smaller twist appeared to contain the same substance; it had a gross weight of 0.65 grams.

Officer Bret Moiseff testified as an expert regarding recognition of cocaine base, recognition of a usable amount of cocaine base, and possession for sale of cocaine base. Officer Moiseff indicated that “roughly a quarter of a gram” was the amount of cocaine base sold on the street to a buyer for \$20. A \$20 amount of cocaine base was generally good for two to three doses or uses.

In Officer Moiseff’s experience, the seller’s larger stash of cocaine was often wrapped in plastic or plastic bags. He indicated that there was a lot of drug activity in certain parts of downtown San Jose, including near First and Santa Clara Streets. The officer stated that, if sold in increments of \$20 for a quarter of a gram, 6.58 grams of cocaine base would bring in “just over \$500.”

Based upon a hypothetical scenario reflecting the evidence at trial, including officers’ observations of defendant, the time and place of the hand-to-hand transactions, the discovery of cocaine base found secreted between defendant’s buttocks, and the quantity of that cocaine base found in defendant’s possession, Officer Moiseff opined that the cocaine base found on the hypothetical seller was possessed for sale. He stated that the scenario described was “very consistent with how a drug deal works,” with a buyer approaching a seller, the seller accepting money, the seller removing a stash of drugs concealed on his body, and breaking a smaller piece off from a larger quantity of drugs. He explained that it is very common for a drug dealer, based on his experience, to “eyeball” the appropriate amount to sell in exchange for the money paid and to break it off from the stash. Officer Moiseff also testified that it was common for sellers to hide drugs in their pants, underwear, and genitals to prevent law enforcement from finding them. The cash found was consistent with a seller’s receiving money in return for drugs. It was not uncommon for a buyer to stash his drugs in an unusual location; it was “not unusual for drug persons” to stash drugs in their mouths.

Officer Moiseff agreed that concealing a controlled substance in one’s buttocks was not sufficient in and of itself to show that the drug was possessed for sale rather than

for personal use. But under the totality of circumstances, his opinion was that defendant possessed the 6.58 grams of crack cocaine for sale, not personal use.

III

Discussion

A. Pitchess Motion

1. Background

On August 9, 2013, defendant filed a *Pitchess* motion (see Evid. Code, §§ 1043, 1045) seeking to compel disclosure and discovery of any complaints, investigations, or allegations of excessive force, aggressive conduct, unnecessary force or violence, false arrest, false statements made in police reports, false claims of probable cause, false testimony, or any other evidence or complaints of dishonesty against Officers Jorgensen, Blackerby, Miller, and Akery.

On September 4, 2013, the trial court held a hearing on the motion. The trial determined that defendant had made an inadequate showing to justify a review of records pertaining to Officers Miller and Akery but that defendant's showing as to Officers Jorgensen and Officer Blackerby had been sufficient. The court conducted an in camera hearing. It ordered a "disclosure" to defendant.

On appeal, this court, by order dated August 24, 2016, granted in part defendant's motion for settled statements. We directed the superior court to undertake preparation of two settled statements, one of which pertained to "the confidential personnel files and any other materials reviewed by the court during the *Pitchess* motion [heard] on September 4, 2013."² But we denied as moot defendant's request for a settled statement regarding the September 4, 2013 hearing on defendant's *Pitchess* motion because the record on appeal

² We also directed the superior court to prepare a settled statement regarding supposed written juror questionnaires, which related to another appellate claim that we deal with below.

had been augmented with the reporter's transcript of the hearing, including the sealed, in camera portion.

2. Analysis

Defendant asks this court to review the appellate record of the in camera hearing on his *Pitchess* motion to determine whether the trial court preserved an adequate record for appeal. The prosecution agrees that we should review the record to determine whether the trial court abused its discretion.

In *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*), the Supreme Court directed trial courts to preserve some record of the documents examined by the trial court in camera to facilitate appellate review of the denial of a *Pitchess* motion: "The trial court should . . . make a record of what documents it examined before ruling on the *Pitchess* motion. . . . If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined." (*Id.* at p. 1229; see *People v. Myles* (2012) 53 Cal.4th 1181, 1209 (*Myles*).)

In *People v. Townsel* (2016) 63 Cal.4th 25, the record on appeal was "devoid of any of the materials reviewed by the trial court" in camera when it ruled on a penalty-phase *Pitchess* motion. (*Id.* at pp. 67-68.) Those materials were lost and could not be reconstructed. (*Id.* at p. 68.) Since the appellate record lacked "specification of either the materials the trial court reviewed in ruling on the *Pitchess* motion or any particularized description of them," the Supreme Court found it was "inadequate to permit meaningful appellate review." (*Id.* at p. 69; *id.* at pp. 70-71 [but the court determined that any error was harmless as to the penalty phase verdict of the capital trial].)

The superior court did not respond to the portion of our request for a settled statement as to the materials reviewed by the trial court in ruling on defendant's *Pitchess* motion. Since the record on appeal contains the reporter's transcript of the in camera

Pitchess hearing conducted on September 4, 2013, we now vacate the order with respect to “the confidential personnel files and any other materials reviewed by the court during the *Pitchess* motion held on September 4, 2013” as improvidently granted.³

We have reviewed the record for any abuse of discretion (see *People v. Winbush* (2017) 2 Cal.5th 402, 424), including any failure to preserve an adequate record on appeal. The appellate record in this case is not completely devoid of any record of the materials reviewed by the trial court. The reporter’s transcript reflects that the trial court satisfied the requirements of *Mooc*. (See *Mooc, supra*, 26 Cal.4th at p. 1229; see *Myles, supra*, 53 Cal.4th at p. 1209.) The trial court did not abuse its discretion in ruling upon the *Pitchess* motion.

B. *Motion to Suppress*

1. *Motion and Ruling*

Pursuant to section 1538.5, defendant moved to suppress all the observations and evidence derived from the warrantless search and seizure of him on August 17, 2012. In response to the People’s opposition, defendant filed a supplemental memorandum in which he asserted that he was arrested without probable cause and that he was strip searched in violation of the Fourth Amendment to the United States Constitution, and that therefore all “fruits,” including the narcotics located on his person and all currency located in his clothing, had to be suppressed under the exclusionary rule.

The prosecutor argued that there was probable cause to arrest defendant for a violation of Health and Safety Code section 11532. The prosecutor further contended that the strip searches of defendant were justified based upon a reasonable cause to believe that defendant had secreted a controlled substance in his buttocks area.

³ The California Rules of Court “refer to preparation of a settled statement when ‘oral proceedings cannot be transcribed.’ (Cal. Rules of Court, rule 8.346(a).)” (*People v. Virgil* (2011) 51 Cal.4th 1210, 1266, fn. 14.) The California Supreme Court has assumed but has not held “that the settled statement procedures can be used in the case of demonstrative evidence.” (*Ibid.*)

Defendant contended that he was arrested without probable cause. He also argued that there was no objective basis to warrant either strip search, and that they were conducted in an unreasonable manner.

The trial court denied defendant's motion to suppress. It found that there was ample probable cause to arrest defendant for a violation of Health and Safety Code section 11532, subdivision (a) (loitering with the intent to engage in specified offenses involving controlled substances). The court further determined that the initial strip search was reasonable and that it was conducted in a professional manner without excessive force. It explained that it was "totally appropriate to do a strip search when you've observed what appears to be a narcotics transaction and you haven't found the narcotics in the area that the person's hands were seen during that transaction . . . his buttocks area. [¶] [During] the first strip search the defendant did not reveal his anus to the officer. So that necessitated the second one, which appeared to be handled reasonably, without excessive force."

2. Standard of Review

"A defendant may move to suppress evidence on the ground that '[t]he search or seizure without a warrant was unreasonable.' (§ 1538.5, subd. (a)(1)(A).) A warrantless search is presumed to be unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search. [Citation.] 'The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.

[Citations.]’ [Citations.]”⁴ (*People v. Redd* (2010) 48 Cal.4th 691, 719, fn. omitted; see *Ornelas v. United States* (1996) 517 U.S. 690, 691, 699 (*Ornelas*).)

3. *Probable Cause to Arrest Defendant*

a. *Evidence Presented on Motion*

At approximately 10:00 p.m. on August 17, 2012, San Jose Police Officers Blackerby and Jorgensen, both members of the police department’s DSU, were surveilling an area of Santa Clara Street between North First and North Second Streets for narcotics activity. The targeted area was known for “high-narcotics activity.” The surveillance was being conducted from inside a building, and the officers were using binoculars.

The officers first observed defendant leaning or sitting on a horizontal rail on Santa Clara Street, between North First and North Second Street and near a VTA bus stop. Buses stopped and then left without defendant’s getting on any of them.

After watching defendant for approximately 10 minutes, Officer Blackerby saw a black man, who was with a woman, approach defendant. The man gestured to the woman to wait, and she “stopped about 10 feet” away from defendant. The man took money from the woman and went up to defendant. A “transaction of money” took place

⁴ “[W]hen the basis of a motion to suppress is a warrantless search or seizure, the requisite specificity is generally satisfied, *in the first instance*, if defendants simply assert the absence of a warrant and make a prima facie showing to support that assertion. Of course, if defendants have a specific argument *other than the lack of a warrant* as to why a warrantless search or seizure was unreasonable, they must specify that argument as part of their motion to suppress and give the prosecution an opportunity to offer evidence on the point. [Citation.]” (*People v. Williams* (1999) 20 Cal.4th 119, 130.) “[O]nce the prosecution has offered a justification for a warrantless search or seizure, defendants must present any arguments as to why that justification is inadequate. [Citation.] . . . The prosecution retains the burden of proving that the warrantless search or seizure was reasonable under the circumstances. [Citation.] But, if defendants detect a critical gap in the prosecution’s proof or a flaw in its legal analysis, they must object on that basis to admission of the evidence or risk forfeiting the issue on appeal.” (*Ibid.*)

in which the man handed either folded or crumpled bills to defendant. Defendant took the money and put it in the right pocket of the gray gym shorts he was wearing. Defendant then retrieved a light-colored, plastic-wrapped, golf-ball-sized object from his buttocks area underneath his clothes. He placed the object in the front pocket of the hooded gray sweatshirt he was wearing.

Both of defendant's "hands [were] moving" inside the pocket. Defendant then removed his left hand from the pocket and dropped a small object, which was about the size of a pencil eraser, into the man's hand. The man put the small object into his mouth, and he then walked westbound on Santa Clara Street with his female companion. Defendant took the plastic-wrapped, golf-ball-sized object from his front sweatshirt pocket and returned it to his buttocks area underneath his clothes.

Approximately a minute after the couple left, another man, later identified as White, approached defendant. White handed money to defendant. At that point, Officer Jorgensen relayed directions to arrest defendant and White to other officers, Officers Miller and Akery, who arrested defendant and White for loitering for narcotics activity, which is a misdemeanor (Health & Saf. Code, §§ 11532, 11536).

Officer Jorgensen believed that the golf-ball-sized object that he had seen defendant take from his buttocks area, hold, manipulate, and put back in his buttocks area was illegal drugs. Officer Blackerby believed, based on his training and experience, that he had been viewing a drug transaction because drug dealers often conceal narcotics in their buttocks area and that the golf-ball-sized object was "consistent with some type of narcotic or controlled substance." He believed it to be crack cocaine based on the object's size and the "the way that it was singly packaged." From his training and experience, Officer Blackerby knew that a golf-ball-sized amount of narcotics was "more than a personal use amount." He also knew that street drug dealers sometimes hide or "stash their contraband" in their buttocks area to avoid detection. Officer Blackerby had

previously “seen hand-to-hand sales” in which the seller took a small amount of narcotics from a larger quantity and gave it to a buyer.

Officer Blackerby’s observation of the man putting the object in his mouth “reaffirmed” his conclusion that he was viewing a narcotics transaction. The officer explained, based on his training and experience, that buyers put narcotics in their mouths for two reasons: (1) a search of their persons will not uncover the narcotics and (2) the buyers can swallow the narcotics if it appears they are going to be arrested.

b. *Analysis*

Defendant contends that police lacked probable cause to arrest him for loitering with the intent to commit an offense involving a controlled substance, and therefore, any evidence derived from that arrest should have been suppressed. He argues that “[w]hile [his conduct was] suspicious, and probably enough to justify [his] temporary detention . . . for further investigation . . . , the observations made by the police . . . [did] not support [his] full blown arrest”

Defendant asserts that “the observations made by police in this case [were] not materially distinguishable from [the observations]” of the officers in *Cunha v. Superior Court* (1970) 2 Cal.3d 352 (*Cunha*) and *Remers v. Superior Court* (1970) 2 Cal.3d 659 (*Remers*), in which the Supreme Court found that the circumstances were insufficient to establish probable cause to arrest a person for a drug offense. In those cases, the same two Berkeley police officers conducted the surveillance and arrests, which took place a day apart in the Telegraph Avenue area of Berkeley. (*Remers, supra*, at p. 665.)

In *Cunha*, the petitioner and a companion were each seen reaching in his pants pocket. (*Cunha, supra*, 2 Cal.3d at p. 355.) “The companion appeared to extract an object—although [the surveilling officer] could not actually see an object—while [the] petitioner extracted what appeared to be money. The two placed their hands together in an apparent exchange.” (*Ibid.*) The officer believed that a drug deal had occurred and petitioner and his companion were placed under arrest “ ‘to determine whether or not a

narcotic transaction had been made.’ ” (*Ibid.*, see *id.* at p. 358.) The arrest was “predicated solely upon the officers’ observations that petitioner and his companion looked around as they walked on a public sidewalk in broad daylight, and apparently engaged in some sort of transaction in an area known for frequent narcotics traffic.” (*Id.* at p. 357.) The California Supreme Court determined that “an area known to be the site of frequent narcotics traffic should not be deemed to convert circumstances as innocent as an apparent transaction by pedestrians who seem generally concerned with their surroundings into sufficient cause to arrest those pedestrians.” (*Ibid.*, fn. omitted.) It concluded that “the circumstances fell far short of specific and articulable facts constituting probable cause, and the arrest was unlawful.” (*Id.* at p. 358.)

The California Supreme Court concluded that *Cunha* was the controlling authority in *Remers*. (*Remers*, *supra*, 2 Cal.3d at p. 662.) In *Remers*, the Supreme Court explained: “In *Cunha* . . . , we held that no implication of guilt can be drawn from the fact that a suspect indicates an apparent concern with privacy by looking around to see whether anyone is observing him [citation], and that a showing that an area is known to be the site of frequent narcotics traffic cannot convert into sufficient cause to arrest circumstances that are as consistent with innocence as with criminality [citation].” (*Remers*, *supra*, at pp. 664-665.) It found that the circumstances in *Remers* provided even less justification for an arrest than did the circumstances in *Cunha*. (*Id.* at p. 665.)

In *Remers*, the petitioner and a male were standing in front of a pizza parlor, she “looked around ‘over either shoulder,’ ” she “removed a tinfoil package from her purse,” and then she indicated with a nod that they should enter the pizza parlor. (*Remers*, *supra*, 2 Cal.3d at p. 662.) In the Supreme Court’s view, the petitioner’s “apparent concern [with her surroundings] was consistent with innocent activity—such as keeping an eye out for acquaintances.” (*Id.* at p. 665.) As to the tinfoil package, the officers could not see what was in it, and one of them later conceded that the package could have contained cookies. (*Id.* at pp. 662-663, 665.) The Supreme Court found that “a tinfoil package is so

commonly used for legitimate purposes that it is not a suspicious circumstance.” (*Id.* at p. 666.) It stated: “[E]ven if dangerous drugs are often packaged in tinfoil, so many other, legitimate items—such as foods or tobacco—are packaged in tinfoil that a tinfoil package is not a suspicious circumstance, and a man of reasonable caution who possesses the knowledge that dangerous drugs are often packaged in tinfoil would not be justified in assuming, upon seeing a tinfoil package, that it is likely to contain drugs.” (*Ibid.*)

Although one of the arresting officers in *Remers* had heard from other officers that the “petitioner sold dangerous drugs” (*Remers, supra*, 2 Cal.3d at p. 667), the prosecution had been unable to establish the source or validity of that information. (*Id.* at pp. 667-668.) The other arresting officer was aware that the petitioner had been arrested, but he was unaware that the charges had been dismissed as unfounded. (*Id.* at p. 668.) The Supreme Court concluded that, under those circumstances, “the officer’s knowledge of that arrest should be given no weight” in evaluating whether the arresting officers had probable cause to arrest. (*Ibid.*)

The present case is readily distinguishable from both *Cunha* and *Remers*, each of which involved insufficient evidence to provide probable cause to arrest for a drug offense. The evidence adduced at the suppression hearing in this case showed more than the evidence in either *Cunha* or *Remers*. In contrast to the arresting officers in *Cunha* and *Remers* who were unable to see the object that was inferably handed to another person or the contents of a tinfoil-wrapped package in someone’s purse, the surveilling officers clearly saw defendant retrieve from, and return to, his buttocks area a light colored, plastic wrapped, golf-ball-sized object. Based on his training and experience, Officer Blackerby believed that the golf-ball-sized object was a controlled substance, likely crack cocaine. Further, a person’s buttocks area is not a place where something innocuous, such as cookies or tobacco, might be stored. The officers’ testimony, which was impliedly believed by the court, supported more than mere speculation that

defendant was stashing a controlled substance in his buttocks area and loitering at that spot with the intent of committing an offense involving a controlled substance.

“[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed. See *United States v. Watson*, 423 U.S. 411, 417-424 (1976); *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949). Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).” (*Devenpeck v. Alford* (2004) 543 U.S. 146, 152.)

“[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists. [Citation.]” (*Ornelas, supra*, 517 U.S. at p. 700.) A trained officer may draw “inferences and deductions that might well elude an untrained person.” (*United States v. Cortez* (1981) 449 U.S. 411, 418.) “In making a determination of probable cause the relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of non-criminal acts.” (*Illinois v. Gates* (1983) 462 U.S. 213, 243, fn. 13.) “When . . . the facts known to an officer are sufficient to constitute probable cause to arrest, the possibility of an innocent explanation does not vitiate probable cause and does not render an arrest unlawful. [Citation.]” (*Johnson v. Lewis* (2004) 120 Cal.App.4th 443, 453.)

“[W]hen an officer has probable cause to believe a person committed even a minor crime in his presence,” “[t]he arrest is constitutionally reasonable. [Citations.]” (*Virginia v. Moore* (2008) 553 U.S. 164, 171 (*Moore*).) “[W]hile States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment’s protections.” (*Id.* at p. 176.) “[T]he standard of probable cause ‘applie[s] to all arrests, without the need to ‘balance’ the interests and circumstances involved in particular situations.’ [Citation.]” (*Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 354.)

“An officer may arrest or detain a suspect ‘based on information received through ‘official channels.’” ’ (*People v. Madden* (1970) 2 Cal.3d 1017, 1021; see *United States v. Hensley* (1985) 469 U.S. 221, 230-233 (*Hensley*).)” (*People v. Brown* (2015) 61 Cal.4th 968, 983.) But “an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.” (*Whiteley v. Warden* (1971) 401 U.S. 560, 568, abrogated on another ground in *Arizona v. Evans* (1995) 514 U.S. 1, 13-14; see *Remers, supra*, 2 Cal.3d at pp. 666-667.)

In this case, there were sufficient specific and articulable facts, which, together with rational inferences from those facts, provided probable cause to arrest defendant for a violation of Health and Safety Code section 11532. The arrest of defendant was lawful.

4. *Strip Search and Visual Inspection of Anal Area*

a. *Evidence Presented*

The evidence adduced on the motion to suppress showed that, when Officer Miller contacted defendant to arrest him for “loitering for narcotics activity,” defendant was holding, in his left hand, a small Ziploc bag containing a green leafy substance, which the officer believed was marijuana. Officer Miller also observed that “wadded money . . . was partially falling out of [defendant’s] pocket.” The marijuana was impliedly seized and later turned over to Officer Jorgensen. During the search of defendant incident to arrest conducted in the field, money was found in various locations, including defendant’s right pocket (\$28), his sock, his lanyard necklace’s little pocket, and his backpack. But that search did not uncover the golf-ball-sized object that the officers had observed defendant place in his buttocks area.

Officer Jorgensen drove defendant to the preprocessing center in an “undercover vehicle,” not a marked patrol car. Defendant sat directly to the officer’s right in the front passenger’s seat. Officer Jorgensen observed that defendant’s hands, which were handcuffed behind his back, were continually moving during the drive. Officer Blackerby was also in the car.

At the preprocessing center, Officer Jorgensen initially placed defendant, who was still handcuffed, in a holding cell for approximately 10 minutes. Officer Jorgensen then took defendant to another holding cell with a window, where a strip search of defendant was conducted. Officer Blackerby was present. Defendant was released from the handcuffs, and he was not restrained during the strip search. Neither officer was making any jokes during the strip search. A sergeant was present in the preprocessing center, but the blinds on the cell's windows and door were closed during the strip search.

Officer Jorgensen confirmed that there were no departmental policies and procedures governing conduct of a strip search. But Officer Jorgensen had been trained on how to perform a strip search, and the officer had performed a strip search approximately 20 times.

Defendant followed Officer Jorgensen's instructions as he was told to remove his clothing, item by item. The officer then directed defendant to lift his scrotum, turn around, spread his buttocks, and bend over at the waist. But defendant squatted instead of bending over as instructed; he did not spread his "butt cheeks." The officer was unable to see defendant's anus, and he directed defendant to bend over more, but defendant did not comply. The search was discontinued. Nothing was recovered from defendant at that time.

At the preprocessing center, defendant was temporarily secured with each arm separately handcuffed to a wall of a cell. Officer Jorgensen was not sure how long defendant was left that way, but he was watching a video feed of him to ensure that defendant was not in any distress. The cell was close enough that if someone inside were yelling or screaming, Officer Jorgensen could hear.

Officer Jorgensen then drove defendant to the Santa Clara County jail; Officer Blackerby went with them. Defendant was informed that a second strip search would be conducted, and defendant asked for a sergeant. The second strip search took place in a room with a window and a door, which was open throughout the search. It was

videotaped by a sheriff's sergeant. More than five officers, including Officer Jorgensen, were present during the search. The sheriff's sergeant was supervising, Officer Jorgensen was giving instructions, Officer Blackerby was present, and other correctional officers were present. Officer Jorgensen was concerned that defendant might become combative because the officer expected narcotics to be found on defendant, and this concern was the reason for the presence of additional officers during the second search.

When defendant spread his buttocks during the strip search at the jail, Officer Jorgensen observed "a golf-ball-sized white object" "between the defendant's butt cheeks, or buttocks." Officer Jorgensen illuminated the area with his flashlight and advised other officers of his observation. The object was consistent with the object that the officer had previously seen defendant manipulating. Officer Jorgensen grabbed defendant's hands. The sheriff's sergeant asked defendant whether he would remove it. Defendant said, "Let go of my hand." Officer Jorgensen released his right hand, and defendant reached between his buttocks, pulled out the object, and threw it on the floor. Officer Jorgensen retrieved it, and it appeared to be cocaine. It was consistent with the object that he had previously seen defendant "retrieve from his back area."

During the second strip search, Officer Jorgensen did not at any time touch the inner cavities of defendant's body. Somebody said something like, "Come on, man. We're going to find it." Somebody said, "This isn't our first rodeo." At the suppression hearing, the officer did not know whether anybody had said, "Don't make the man touch your butt."

b. Argument and Ruling Below

In support of the suppression motion, it was argued that there was "no objective basis" to warrant either strip search on August 17, 2012. At the motion hearing, defense counsel argued that there was no justification for the strip searches in that the officers lacked "particularized suspicion for a strip search," that defendant's behavior during the first strip search did not justify describing him as uncooperative, that defendant was

handcuffed in a “spread eagle position” for an indeterminate period of time after that search, that a window or a door was open during one of the searches, and that the second strip search was conducted in the presence of multiple officers who were engaging in “commentary” that could be perceived as “threatening and harassing.”

In opposition to the suppression motion, the People asserted that the warrantless strip searches of defendant and visual inspection of his anal area were reasonable because the police had probable cause to arrest defendant and search him incident to arrest and “there was probable cause to believe [that defendant] had secreted [a] controlled substance in his buttocks area.” They argued that, under subdivision (f) of section 4030, which statutorily limits strip and body cavity searches, a strip search is warranted whenever a custodial arrest involves controlled substances.⁵ At the motion hearing, the

⁵ The Legislature’s intent in enacting section 4030 was “to protect the state and federal constitutional rights of the people of California by establishing a statewide policy strictly limiting strip and body cavity searches.” (§ 4030, subd. (a)(2).) As to adults, the provisions of section 4030 “apply only to prearrest detainees arrested for infraction or misdemeanor offenses.” (§ 4030, subd. (b).) Section 4030, subdivision (e), provides in pertinent part: “A person arrested and held in custody on a misdemeanor or infraction offense, except those involving weapons, controlled substances, or violence, . . . shall not be subjected to a strip search or visual body cavity search prior to placement in the general jail population, unless a peace officer has determined there is reasonable suspicion, based on specific and articulable facts, to believe that person is concealing a weapon or contraband, and a strip search will result in the discovery of the weapon or contraband.” Section 4030 further states: “A strip search or visual body cavity search, or both, shall not be conducted without the prior written authorization of the supervising officer on duty. The authorization shall include the specific and articulable facts and circumstances upon which the reasonable suspicion determination was made by the supervisor.” (§ 4030, subd. (e).) Section 4030, subdivision (f)(1), generally provides that “a person arrested and held in custody on a misdemeanor or infraction offense not involving weapons, controlled substances, or violence, shall not be confined in the general jail population” unless “[t]he person is not cited and released,” “[t]he person is not released on his or her own recognizance,” and “[t]he person is not able to post bail within a reasonable time, not less than three hours.” Such a person may be housed in the general jail population prior to release only if “a documented emergency exists and there is no reasonable alternative to that placement” and the statutory procedure of documentation is followed. (§ 4030, subd. (f)(2).) A “strip search” is defined as “a

prosecutor argued that there was probable cause to arrest defendant for a violation of Health and Safety Code section 11532 and probable cause to believe that a controlled substance was stashed in defendant's buttocks based on the officers' observations, the officers' failure to recover it at the scene, and defendant's movement in the police car on the way to jail.

As indicated, the trial court determined that it was reasonable to strip search defendant after arresting him for a narcotics offense and not finding the narcotics that the officers had reason to believe were in defendant's buttocks area during the initial search incident to arrest. It also found that the strip searches were conducted in a professional and reasonable manner and without excessive force. The court concluded that the second strip search was required because defendant did not reveal his anus to the officer during the first strip search.

c. *Analysis*

On appeal, defendant argues that the record discloses that the strip searches involving visual inspection of his anal area were conducted incident to his arrest, and not pursuant to section 4030 or any jail policy. (See *ante*, fn. 5.) He argues that the strip searches were not permissible as a search incident to arrest because exigent circumstances must exist and the police must obtain a search warrant to conduct a "visual body cavity" inspection, citing *Fuller v. M.G. Jewelry* (9th Cir. 1991) 950 F.2d 1437 (*Fuller*). Defendant also asserts that the August 17, 2012 strip searches were "unconstitutional because of the humiliating and unprofessional manner in which they were conducted." He also maintains that the strip searches and visual body cavity search of him were unreasonable because they were "conducted without the prior written

search which requires a person to remove or arrange some or all of his or her clothing so as to permit a visual inspection of the underclothing, breasts, buttocks, or genitalia of such person." (§ 4030, subd. (c)(3).) A "visual body cavity search" "means visual inspection of a body cavity." (§ 4030, subd. (c)(4).) The definition of a "body cavity" includes "rectal cavity." (§ 4030, subd. (c)(1).)

authorization of the supervising officer on duty” (§ 4030, subd. (e)) and the strip search in the jail was not “conducted in an area of privacy” in the presence of only persons whose “official duties relative to search procedure require them to be present.” (§ 4030, subd. (l).) Defendant claims that “[t]he very fact that [he] was unnecessarily subjected to two visual body cavity searches was unreasonable.”

Fuller, was a civil rights suit under section 1983 of title 42 of the United States Code. (*Fuller, supra*, 950 F.2d at p. 1439.) In *Fuller*, two female arrestees, who were arrested for grand theft of a ring from a jewelry store, each were subjected to a strip and visual body cavity search, which included a visual inspection of her vagina and rectum, at the police station. (*Id.* at pp. 1439-1440.) After the women were booked into the county jail, they were subjected to a second strip search. (*Ibid.*) The United States Court of Appeals, Ninth Circuit, concluded that the “full search” incident to arrest authorized by *United States v. Robinson* (1983) 414 U.S. 218, 235 (*Robinson*), is “limited to a pat-down and an examination of the arrestee’s pockets” and does not “extend to ‘a strip search or bodily intrusion.’ [Citation.]” (*Fuller, supra*, at p. 1446.) It determined that a “visual body cavity inspection was not justified as a search incident to arrest” for theft of a ring. (*Ibid.*) The Ninth Circuit further concluded that “the police were also required to obtain a warrant before conducting the body cavity searches.” (*Id.* at p. 1449.)

The People rely upon on a different case, *People v. Wade* (1989) 208 Cal.App.3d 304 (*Wade*). They now argue that the visual body cavity search at the jail was permissible incident to arrest.⁶ The People suggest that, even if the searches violated section 4030, there is no suppression remedy for mere state law violations.

⁶ The People make no attempt to justify the strip searches as a legitimate booking procedure (see *Maryland v. King* (2013) 569 U.S. ___ [133 S.Ct. 1958, 1980 (*King*)] [“When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee’s DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment”] or as a procedure authorized by a legitimate jail policy. (See *Florence v. Board of Chosen*

Wade concluded that two warrantless visual body cavity searches of an arrestee were permissible incident to an arrest for being under the influence of an opiate. (See *Wade, supra*, 208 Cal.App.3d at p. 307.) The defendant in *Wade* was a passenger in a car that was stopped for expired registration stickers. (*Id.* at p. 306.) Before stopping the car, officers saw defendant “rise in his seat several times” and touch the vehicle’s “headliner” and saw his right shoulder dip “as though he were trying to adjust something below his waist.” (*Ibid.*) After stopping the car, the defendant was ordered out of the vehicle and pat-searched. (*Ibid.*) His “movements were slow and deliberate.” (*Id.* at p. 307.) The defendant had “scratch marks on [his] face” and “a dry mouth, droopy eyelids, and constricted pupils.” (*Ibid.*) Based on training and experience, an officer arrested the defendant for being under the influence of an opiate. (*Ibid.*) A visual body cavity search of defendant was conducted at the police station. (*Ibid.*) After the defendant pulled down his pants and underwear, bent over, and spread his buttocks as directed, an officer “saw a small plastic object protruding from [the defendant’s] anus.” (*Ibid.*) The officer “believed the object was a bindle of tar heroin.” (*Ibid.*) A police investigator, who was summoned to assist the officers, “spread [the defendant’s] buttocks” while wearing rubber gloves. (*Ibid.*) “[T]he bindle fell to the floor without any further physical invasion into the rectal cavity.” (*Ibid.*)

The appellate court in *Wade* determined that “[t]here was probable cause to conduct the first search” because the defendant’s “appearance and suspicious behavior in the car gave the officers good reason to believe narcotics were hidden on his person.” (*Wade, supra*, 208 Cal.App.3d at p. 307.) The court then concluded that “the observation

Freeholders of County of Burlington (2012) 566 U.S. 318, 322-323 (*Florence*) [with respect to a constitutional claim against a jail policy providing that “every detainee who will be admitted to the general population may be required to undergo a close visual inspection while undressed” even without reasonable suspicion, courts “must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security” and no such showing was made in that case].)

of the object in [the defendant's] anus obviously eliminated any question concerning probable cause to conduct the second rectal examination.” (*Ibid.*)

Wade provides little reasoning and analysis. Some authorities it cites do not support its holding.⁷

Salinas v. Breier (7th Cir. 1982) 695 F.2d 1073 (*Breier*), one of the cases cited in *Wade*, was a civil rights suit under section 1983 of title 42 of the United States Code brought against a city police chief for the allegedly unconstitutional body searches of a woman and her four children, including a three-year-old child and a baby. (*Breier, supra*, at p. 1075.) Police officers and agents from the federal Drug Enforcement Administration stopped the car in which the family was traveling with the husband and father for whom they had an arrest warrant. (*Ibid.*) “They were also acting on a tip that he was transporting heroin” (*Ibid.*) Since the plaintiffs were not challenging the

⁷ For example, in *People v. Scott* (1978) 21 Cal.3d 284, an incest case, the California Supreme Court concluded that a court-ordered test of the defendant for trichomoniasis (*id.* at p. 289) was unconstitutional because the intrusion was “a very significant invasion of both dignity and privacy.” (*Id.* at p. 294.) “The intrusion contemplated was very substantial, consisting essentially of a prolonged massage of the prostate gland, through the rectum, to induce involuntary ejaculation.” (*Ibid.*) In *United States v. Cameron* (9th Cir. 1976) 538 F.2d 254, another case cited in *Wade*, the defendant who was entering the United States was “subjected to two forced digital probes [of his rectal cavity], two enemas, and forced to drink a liquid laxative.” (*Id.* at p. 258.) The Ninth Circuit concluded that the procedures utilized violated the Fourth Amendment since they were not “conducted with regard for the subject’s privacy and . . . designed to minimize emotional and physical trauma.” (*Cameron, supra*, at p. 258.) The United States Supreme Court has recognized that “[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant.” (*United States v. Montoya de Hernandez* (1985) 473 U.S. 531, 538, fn. omitted.) But to date the Supreme Court has offered “no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body cavity, or involuntary x-ray searches.” (*Id.* at p. 541, fn. 4.) In any case, “it is axiomatic that cases are not authority for propositions not considered. [Citations.]” (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.) “ ‘An appellate decision is not authority for everything said in the court’s opinion but only “for the points actually involved and actually decided.” ’ [Citation.]” (*People v. Knoller* (2007) 41 Cal.4th 139, 155.)

arrests and confinement of the woman and her four children, they were assumed to be lawful on appeal. (*Id.* at pp. 1083-1084.) The United States Court of Appeals, Seventh Circuit, held that a warrantless body search limited to requiring a “person, without the use of force, to bend forward deeply at the waist so as to expose her rectum and vagina to visual inspection,” was “constitutionally permissible when the person searched is in custody following a lawful arrest and when there is probable cause to believe that a controlled substance is hidden on or within the person’s body.” (*Id.* at p. 1085.) The court cited *Robinson* in support of its holding, but it did not discuss the scope of the categorical exception for searches incident to arrest. (*Ibid.*)

“It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment.” (*Robinson, supra*, 414 U.S. at p. 224.) “*Chimel* [*v. California* (1969) 395 U.S. 752, (*Chimel*)] endorsed a general rule that arresting officers, in order to prevent the arrestee from obtaining a weapon or destroying evidence, could search both ‘the person arrested’ and ‘the area ‘within his immediate control.’ ” [Citation.]” (*Birchfield v. North Dakota* (2016) 579 U.S. __ [136 S.Ct. 2160, 2175] (*Birchfield*).) *Robinson* established “a ‘bright-line rule,’ which was based on the concern for officer safety and destruction or loss of evidence, but which did not depend in every case upon the existence of either concern.” (*Knowles v. Iowa* (1998) 525 U.S. 113, 118.) Thus, “[t]he permissibility of [incident-to-arrest] searches. . . does not depend on whether a search of a particular arrestee is likely to protect officer safety or evidence.” (*Birchfield, supra*, at p. __ [136 S.Ct. at p. 2176].)

Under *Robinson*, “[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.” (*Robinson, supra*, 414 U.S. at p. 235) “[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.” (*Ibid.*)

In *Robinson*, the authority to conduct a search incident to arrest “meant that police had acted permissibly in searching inside a package of cigarettes found on the man they arrested. [Citation.]” (*Birchfield, supra*, 579 U.S. ____ at p. ____ [136 S.Ct. at p. 2176].) *Robinson* indicated that a search incident to arrest can “ ‘involve a relatively extensive exploration of the person.’ ” (*Robinson, supra*, 414 U.S. at p. 227.) But it also warned that even a search incident to arrest could violate the Fourth Amendment if “extreme or patently abusive.” (*Id.* at p. 236.)

The United States Supreme Court has not yet addressed whether warrantless strip searches or visual body cavity inspections of arrestees may in certain circumstances be justified as searches incident to arrest. While the United States Supreme Court has given no indication that “a full search incident” to arrest may routinely encompass strip searches or close visual body inspections, neither has it held that a search incident to arrest may never include a strip search or close visual body inspection of an arrestee regardless of the circumstances. The decisions of lower courts are all over the map. (See e.g. *State v. Williams* (2011) 149 N.M. 729, 734 [“a search incident to arrest that involves an officer removing or looking under any part of an arrestee’s clothing requires, at a minimum, particularized reasonable suspicion that the arrestee is concealing a weapon or evidence that is susceptible to destruction before arriving at the police station”]; *People v. Hall* (2008) 10 N.Y.3d 303, 310-311 [“visual cavity inspections and manual body cavity searches cannot be routinely undertaken as incident to all drug arrests”; “a strip search must be founded on a reasonable suspicion that the arrestee is concealing evidence underneath clothing and the search must be conducted in a reasonable manner”; to conduct “a visual cavity inspection, the police must have a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity and the visual inspection must be conducted reasonably”; “removal of an object protruding from a body cavity regardless of whether any insertion into the body cavity is necessary . . . cannot be accomplished without a warrant unless exigent

circumstances reasonably prevent the police from seeking prior judicial authorization”]); *Evans v. Stephens* (11th Cir. 2005) 407 F.3d 1272, 1279-1280, fn. omitted (en banc) [“an officer must have at least a reasonable suspicion that the strip search [, conducted incident to arrest for nondrug crimes,] is necessary for evidentiary reasons,” and the standard may be higher where “the search includes touching genitalia and penetrating anuses”]; *State v. Nieves* (2004) 383 Md. 573, 596 [“the reasonable, articulable suspicion standard applies in the strip search incident to arrest context”]; *Fuller, supra*, 950 F.2d at pp. 1446 [a visual body cavity inspection cannot be justified as a search incident to arrest], 1449-1450 [a body cavity search of an arrestee outside the jail context must be based on probable cause and, absent exigent circumstances, be conducted pursuant to a warrant]; *Mary Beth G. v. City of Chicago* (7th Cir. 1983) 723 F.2d 1263, 1271 [Robinson “simply did not contemplate the significantly greater intrusions” of strip searches and visual body cavity inspections].)

Under the Fourth Amendment to the United States Constitution, “all searches and seizures must be reasonable.” (*Kentucky v. King* (2011) 563 U.S. 452, 459.) “ ‘As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is “reasonableness.” ’ [Citation.]” (*King, supra*, 569 U.S. at p. __ [133 S.Ct. at p. 1969].) “The reasonableness of any search must be considered in the context of the person’s legitimate expectations of privacy.”⁸ (*Id.* at p. __ [133 S.Ct. at

⁸ In *King*, the Supreme Court balanced the privacy interests of an arrestee against governmental interests to decide the constitutionality of using a cheek swab to take a DNA sample: “In light of the context of a valid arrest supported by probable cause respondent’s expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search [under the Fourth Amendment] that can be considered part of a routine booking procedure.” (*King, supra*, 569 U.S. __ [133 S.Ct. at p. 1980].)

p. 1978].) “[A]pplication of ‘traditional standards of reasonableness’ requires a court to weigh ‘the promotion of legitimate governmental interests’ against ‘the degree to which [the search] intrudes upon an individual’s privacy.’ *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).” (*Id.* at p. __ [133 S.Ct. at p. 1970].) “The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.”⁹ (*Bell, supra*, 441 U.S. at p. 559)

In the relatively recent case of *Birchfield*, the United States Supreme Court considered the constitutional validity of blood and breath tests administered incident to arrests for drunk driving. The question was whether states’ implied consent laws that “make it a crime for a motorist to refuse to be tested [for his or her blood alcohol content (BAC)] after being lawfully arrested for driving while impaired” “violate the Fourth Amendment’s prohibition against unreasonable searches.” (*Birchfield, supra*, 579 U.S. at p. __ [136 S.Ct. at pp. 2166-2167].) The court “consider[ed] how the search-incident-to-arrest doctrine applies to breath and blood tests incident to such arrests.” (*Id.* at p. __ [136 S.Ct. at p. 2174].)

In *Birchfield*, the Supreme Court recognized that the Fourth Amendment prohibits “unreasonable searches” and that the reasonableness of the warrantless searches at issue was the key question. (*Birchfield, supra*, 579 U.S. at p. __ [136 S.Ct. at p. 2173].) The court understood that “reasonableness is always the touchstone of Fourth Amendment analysis [citation].” (*Id.* at p. __ [136 S.Ct. at p. 2186].) Since “the founding era” did not “provide any definitive guidance as to whether [blood and breath tests to measure BAC] should be allowed incident to arrest” (*id.* at p. __ [136 S.Ct. at p. 2176]), the Supreme

⁹ In *Bell v. Wolfish* (1979) 441 U.S. 520 (*Bell*), the United States Supreme Court upheld as constitutionally reasonable the general practice of requiring inmates to submit to a strip search and visual body cavity inspection after every contact visit with a person from outside the institution. (*Id.* at pp. 558-560.)

Court in *Birchfield* examined the degree to which such tests intruded upon an individual's privacy and the degree to which such tests were necessary to promote legitimate governmental interests. (*Ibid.*; see *id.* at p. ___, fn. 8 [136 S.Ct. at p. 2185, fn. 8] [observing that *Riley v. California* (2014) 573 U.S. ___ [134 S.Ct. 2473] (*Riley*) “call[ed] for a balancing of individual privacy interests and legitimate state interests to determine the reasonableness of the category of warrantless search that is at issue”].) The Supreme Court noted that “once placed under arrest, the individual’s expectation of privacy is necessarily diminished. *Maryland v. King*, *supra*, at [p.] ___ [133 S.Ct. at pp. 1977-1979].” (*Birchfield*, *supra*, 579 U.S. at p. ___ [136 S.Ct. at p. 2177].) But the court also observed that “[t]he States and the Federal Government have a ‘paramount interest . . . in preserving the safety of . . . public highways.’ [Citation.]” (*Id.* at p. ___ [136 S.Ct. at p. 2178].)

The Supreme Court concluded that “the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving” because “[t]he impact of breath tests on privacy is slight, and the need for BAC testing is great.” (*Birchfield*, *supra*, 579 U.S. at p. ___ [136 S.Ct. at p. 2184].) It reached the contrary conclusion with respect to warrantless blood draws incident to arrests for drunk driving because “[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test.” (*Ibid.*) *Birchfield* held that “[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving” without a warrant. (*Id.* at p. ___ [136 S.Ct. at p. 2185].)

A primary justification for warrantless searches incident to arrest is the government’s legitimate interest in preventing the loss or destruction of easily concealed or destructible evidence. (See *Robinson*, *supra*, 414 U.S. at p. 235; *Chimel*, *supra*, 395 U.S. at pp. 762-763.) As the Supreme Court observed in *Birchfield*, “many of [the

Supreme] Court’s post-*Chimel* cases have recognized the State’s concern, not just in avoiding an arrestee’s intentional destruction of evidence, but in ‘evidence preservation’ or avoiding ‘the loss of evidence’ more generally. *Riley*, 573 U.S., at ___, 134 S.Ct., at 2484; see also *Robinson*, 414 U.S., at 234 (‘the need to preserve evidence on his person’); *Knowles v. Iowa*, 525 U.S. 113, 118-119 (1998) (‘the need to discover and preserve evidence;’ ‘the concern for destruction or loss of evidence’ (emphasis added)); *Virginia v. Moore*, 553 U.S. 164, 176 (2008) (the need to ‘safeguard evidence’).¹⁰ (*Birchfield*, *supra*, 579 U.S. at p. ___ [136 S.Ct. at p. 2182].)

As indicated, an arrestee taken into valid police custody for an offense supported by probable cause has diminished expectations of privacy. (See *Birchfield*, *supra*, 579 U.S. at p. ___ [136 S.Ct. at p. 2177]; *Riley*, *supra*, 573 U.S. at p. ___ [134 S.Ct. at p. 2488]; *King*, *supra*, 569 U.S. at p. ___ [133 S.Ct. at p. 1978].) But “when ‘privacy-related concerns are weighty enough’ a ‘search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.’ [Citation.]” (*Riley*, *supra*, 573 at p. ___ [134 S.Ct. at p. 2488].)

The extent of a bodily intrusion is “of central relevance to determining reasonableness.” (*King*, *supra*, 569 U.S. at p. ___ [133 S.Ct. at p. 1969].) A strip search and visual inspection of a person’s anus is a serious intrusion. In his concurring opinion

¹⁰ In *Arizona v. Gant* (2009) 556 U.S. 332 (*Gant*), the Supreme Court held that “the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” (*Id.* at p. 343, fn. omitted.) “Although it [did] not follow from *Chimel*, [the court] also conclude[d] that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’ [Citation.]” (*Ibid.*; see *id.* at p. 335.) Thus, under *Gant*, police may conduct a warrantless search of a vehicle’s passenger compartment and any containers therein “incident to a recent occupant’s arrest” if “it is reasonable to believe the vehicle contains evidence of the offense of arrest.” (*Id.* at p. 351; see 344.) This extension of a search incident to arrest seems to recognize the governmental interest in preservation of evidence of the offense in light of the potential for loss or destruction.

in *Florence* (see fn. 6, *ante*), Justice Alito acknowledged that being subjected to a strip search and visual inspection “is undoubtedly humiliating and deeply offensive to many.” (*Florence, supra*, 566 U.S. at p. 341.) In his dissenting opinion in *Florence*, Justice Breyer stated: “A strip search that involves a stranger peering without consent at a naked individual, and in particular at the most private portions of that person’s body, is a serious invasion of privacy.” (*Id.* at pp. 344-345.) In this case, there were two strip searches and visual inspections, but there was no physical intrusion into any body cavity and no touching of defendant’s genitalia, buttocks, or anus by officers.

Against that invasion of defendant’s dignity and privacy, we balance the law enforcement’s strong interest in the preservation of evidence of the offense. The government has a weighty interest in preserving the evidence of an offense where it is reasonable to believe that the arrestee has secreted such evidence on his body and there is a real risk that the arrestee will seek to dispose of or destroy the evidence. This could occur if an arrestee were cited and released despite the arresting officer’s reasonable belief that evidence of a drug offense was being concealed on the arrestee’s body. Defendant suggests that at the time he was searched he had been arrested for a misdemeanor drug offense and “likely would have been released on a citation (or not charged at all) but for the drugs recovered”

Even if a warrant is not required for a search under the Fourth Amendment, “it must be reasonable in its scope and manner of execution.” (*King, supra*, 569 U.S. at p. __ [133 S.Ct. at p. 1970].) “Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. [Citations.]” (*Bell, supra*, 441 U.S. at p. 559; see *Schmerber v. California* (1966) 384 U.S. 757, 768 [“Fourth Amendment’s proper function is to constrain, not against all intrusions [into the human body] as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner”].)

In this case, the evidence and reasonable inferences therefrom indicate that the strip searches and visual inspections of defendant involved relatively brief intrusions into his bodily privacy, they were conducted by same-gender officers out of the public view,¹¹ and they were accomplished without physical force or any physical touching of defendant's genitals, buttocks, or anal area. Substantial evidence supports the trial court's implicit finding that the strip searches and visual inspections were not executed with any disrespect toward defendant. The recording of the second search showed the officers urging defendant to remove the object between his buttocks himself; it did not show the officers displaying a "cavalier approach" toward him. The evidence supported the inferences that the window and the door of the cell were closed during the first strip search and visual inspection and that only persons participating in the searches in their official capacity were present during the strip searches and visual inspections. The execution of the second strip search and visual body cavity inspection became necessary and was reasonable due to defendant's lack of cooperation during the first attempt to conduct a visual inspection of the area between defendant's buttocks. The presence of additional officers during the second strip search and visual inspection was reasonably necessary based on defendant's previous noncompliance and Officer Jorgensen's

¹¹ A strip search conducted in public view generally will not be reasonable. (See e.g. *Campbell v. Miller* (7th Cir. 2007) 499 F.3d 711, 713, 715, 718-719 [strip search conducted incident to incident to arrest for possession of marijuana in a residential backyard in view of any occupants of the home and other surrounding houses violated Fourth Amendment]; *People v. Mitchell* (2003) 768 N.Y.S.2d 204, 206-207 [strip search of the defendant incident to his arrest for selling drugs violated his Fourth Amendment rights where it was conducted on the street in full public view; glassine envelopes containing controlled substance recovered from between the defendant's buttocks had to be suppressed]; *Amaechi v. West* (4th Cir. 2001) 237 F.3d 356, 359-362 (strip search incident to arrest for "a two-day old misdemeanor noise violation" was constitutionally unreasonable where it "took place directly in front of the [arrestee's] townhouse, where the other police officers, [her] husband, her five children, and all of her neighbors had the opportunity to observe"].)

reasonable concern that defendant might become combative during the second attempt to avoid discovery of the drugs believed to be secreted on his body.

As to defendant's claim that the police violated section 4030 (see *ante*, fn. 5), we reject any contention that a statutory violation necessarily establishes a violation of the Fourth Amendment. State law "restrictions do not alter the Fourth Amendment's protections." (*Moore, supra*, 553 U.S. at p. 176.) "[I]t is not the province of the Fourth Amendment to enforce state law." (*Id.* at p. 178.) "Absent a federal constitutional violation, the exclusionary rule does not apply. (Cal. Const., art. I, § 28; *In re Lance W.* (1985) 37 Cal.3d 873, 879, 890.)" (*People v. Redd* (2010) 48 Cal.4th 691, 720, fn. 11.)

In this case, the scope and manner of the August 17, 2012 strip searches and visual inspection of defendant's anal area comported with Fourth Amendment standards of reasonableness given the circumstances, which included defendant being under valid arrest for a drug offense, the police having reason to believe that evidence of the offense of arrest would be found in defendant's buttocks area, and the search incident to arrest in the field having failed to uncover that evidence. As this was a reasonable search incident to a custodial arrest, no warrant was required. (See *Birchfield, supra*, 579 U.S. at p. __ [136 S.Ct. at p. 2185]; *Robinson, supra*, 414 U.S. at p. 235.)

C. Challenges for Cause

1. Defendant's Contentions

Defendant contends that the trial court violated his right to a fair trial and an impartial jury under the Sixth Amendment to the United States Constitution by denying his challenges for cause to three prospective jurors, Nos. 2, 6, and 25. While defense counsel exercised peremptory challenges as to Prospective Jurors Nos. 2 and 6, her peremptory challenges were exhausted by the time Prospective Juror No. 25 was placed in the panel. Ordinarily, to preserve a claim that the trial court erred in denying a challenge for cause of an individual juror, "the defendant must challenge the juror for cause, exercise a peremptory challenge [to remove the juror in question], exhaust the

available peremptory challenges, and express dissatisfaction with the jury ultimately selected.” (*People v. Clark* (2016) 63 Cal.4th 522, 565; *People v. Avila* (2006) 38 Cal.4th 491, 539.)

2. *Prospective Juror No. 25*

Prospective Juror No. 25 is the only prospective juror who was unsuccessfully challenged for cause and whose jury service is now the basis for defendant’s constitutional claims.

After the trial court asked about prospective jurors’ connections to law enforcement, Prospective Juror No. 25 told the court, “My best friend at work, her husband is a police officer.” The court asked with respect to witnesses, “Can you come in here and treat police officers the same as you would anybody else?” Prospective Juror No. 25 responded, “I will try. Yes.”

Defense counsel subsequently asked the prospective jurors about prejudice or bias potentially arising from defendant’s “prior convictions for some of the same crimes” for which he was presently on trial. The following exchange took place:

“JUROR NO. 25: I think it’s hard when somebody has been accused of crimes before to not form an opinion prior to hearing all the information.

“[DEFENSE COUNSEL]: And sitting here right now, do you feel that you have a prejudice or bias, one way or another, knowing that that’s evidence that you’re going to hear?

“JUROR NO. 25: I mean it’s hard not to.

“THE COURT: But we come back to the law, which is if I say to you, you can’t have any opinion right now because you really haven’t heard anything.

“JUROR NO. 25: Right.

“THE COURT: Can you sit here and say I have no opinion because that’s what the judge has asked me to do.

“JUROR NO. 25: I have no opinion.

“THE COURT: In all sincerity, it is something that you believe you can do, to follow what I’m asking you to do.

“JUROR NO. 25: I’ll try.

“THE COURT: Okay. I get that.

“[DEFENSE COUNSEL]: And again, . . . of course all we can ask is your best efforts. But the question is, will you be able to do it, not simply will you be able to try. [¶] If you’re coming in with an idea, a prejudice, or bias based on knowing there’s evidence you are going to hear, is this something that you will be feel [sic] confident will not enter your mind for an improper purpose.

“JUROR NO. 25: I don’t know if I can say I’m a hundred percent confident.”

A short time later, the trial court and prospective juror No. 25 had a further colloquy:

“THE COURT: . . . Let’s come back to you. Can you sit here with an open mind?

“JUROR NO. 25: Yes.

“THE COURT: I think that’s a very good way to talk about it. We all have feelings. No question about it. You hear something and you react; right? You can’t help it. We’re human. We’re all human. [¶] The issue is, can we back off from that and say, wait a minute. This is a very special role. Can I keep that open mind. Can I not prejudge. [Juror No. 25], do you think you can get there?

“JUROR NO. 25: I will try. Yes.”

Defense counsel subsequently asked, “Anybody feel uncomfortable or unable to decide a case, or unable to vote not guilty if you don’t hear evidence from the Defense?” Prospective Juror No. 25 responded, “I have to hear everything first before I can make a decision on anything. It’s kind of hard to do all of this hypothetical decision making. I have to hear everything that’s going on with this person, the case, and then make a decision from there. It’s hard to answer questions when you don’t know the whole case.”

Defense counsel also asked Prospective Juror No. 25, “Do you feel comfortable with the entire burden being on the prosecution, and the possibility you will hear nothing from the Defense?” The prospective juror replied, “Yes.”

A discussion was held off the record.

Defense counsel subsequently placed her juror challenges for cause as to Prospective Jurors Nos. 2, 6, and 25 on the record. She stated with regard to Prospective Juror No. 25: “[She] indicated that her best friend works for the Sheriff. She expressed difficulty as being able to put law enforcement on the same footing as other witnesses. She indicated that she wasn’t a hundred percent confident that she could set aside her personal feelings and prejudices.”

The court determined that Prospective Juror No. 25’s statements did not reflect implied or actual bias since “[s]he indicated that she absolutely could try to follow the law,” did not indicate that “she would ignore the law as given,” and she indicated that “she would most emphatically try to set aside that bias.” The court denied the challenge for cause as to that individual juror.

“A trial court’s ruling on a challenge for cause is reviewed for abuse of discretion. [Citation.] We will uphold the court’s decision ‘ ‘ ‘if it is fairly supported by the record, accepting as binding the trial court’s determination as to the prospective juror’s true state of mind when the prospective juror has made statements that are conflicting or ambiguous.’ ” ’ [Citations.] When there is no inconsistency or ambiguity, we will uphold the court’s ruling if it is supported by substantial evidence. [Citation.]” (*People v. Merriman* (2014) 60 Cal.4th 1, 50.)

“The trial court is in the best position to make this assessment [of a prospective juror’s state of mind], since it can observe demeanor and tone, and decide credibility firsthand. [Citation.]” (*People v. Carasi* (2008) 44 Cal.4th 1263, 1290.) “ ‘[A]ppellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person’s responses (noting, among other things, the person’s tone of voice,

apparent level of confidence, and demeanor) gleans valuable information that simply does not appear on the record.’ [Citation.]” (*People v. Jones* (2012) 54 Cal.4th 1, 41.) “When the trial court’s assessment of a prospective juror’s capacity to serve is based at least in part on the juror’s tone, demeanor, or other elements that cannot be reflected in the written record, its ruling is owed deference by reviewing courts. (*People v. Avila* (2006) 38 Cal.4th 491, 529.)” (*People v. Zaragoza* (2016) 1 Cal.5th 21, 37.)

In this case, Prospective Juror No. 25 backed off her original statements. In response to the court’s comments, she indicated that she could consider the case with an open mind and not prejudge it. Given the deferential standard of review, defendant has not established that the trial court abused its discretion by rejecting his challenge for cause of this prospective juror.

3. *Prospective Jurors Nos. 2 and 6*

Even assuming Prospective Jurors Nos. 2 and 6 were biased, defense counsel exercised peremptory challenges against them and they did not serve on the jury. Consequently, those prospective jurors “could not possibly have affected the jury’s fairness. [Citation.]” (*People v. Souza* (2012) 54 Cal.4th 90, 131; cf. *People v. Harris* (2013) 57 Cal.4th 804, 838 [since alternate juror never served on the defendant’s jury, any erroneous denial of defendant’s challenge for cause could not have been prejudicial].) Accordingly, we may reject defendant’s claim of error as to those two prospective jurors “without examining the merits” of the challenges for cause against them. (*People v. Yeoman* (2003) 31 Cal.4th 93, 114 (*Yeoman*)).

In *Yeoman*, the defendant challenged four prospective jurors for cause, but none of them “sat on [the] defendant’s jury because he peremptorily challenged each.” (*Yeoman*, *supra*, 31 Cal.4th at p. 114.) The California Supreme Court explained: “The harm to defendant, if any, was in being required to use four peremptory challenges to cure what he perceived as the trial court’s error. Yet peremptory challenges are given to defendants subject to the requirement that they be used for this purpose. (*People v. Gordon* (1990)

50 Cal.3d 1223, 1248, fn. 4[, disapproved on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 835].) While defendant's compliance with this requirement undoubtedly contributed to the exhaustion of his peremptory challenges, from this alone it does not follow that reversible error occurred. An erroneous ruling that forces a defendant to use a peremptory challenge, and thus leaves him unable to exclude a juror who actually sits on his case, provides grounds for reversal only if the defendant '*can actually show that his right to an impartial jury was affected . . .*' (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1087-1088, italics added[, dictum disapproved in *People v. Black* (2014) 58 Cal.4th 912, 919-920 (*Black*)].) In other words, the loss of a peremptory challenge in this manner ' "provides grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him." ' (*People v. Hillhouse* (2002) 27 Cal.4th 469, 487, italics added, quoting *Ross v. Oklahoma* [(1988) 487 U.S. 81,] 89; cf. *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 315-317.)" (*Ibid.*)

"*Yeoman* sets forth the correct standard for a defendant to demonstrate prejudice after properly preserving a claim that the defense used peremptory challenges to cure a trial court's erroneous denial of one or more for-cause challenges." (*Black, supra*, 58 Cal.4th at p. 920.) " " "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean" ' a constitutional violation occurred. (*People v. Farley* (2009) 46 Cal.4th 1053, 1096.)" (*Id.* at p. 917.) " "[P]eremptory challenges are not of constitutional dimension,' but are merely 'a means to achieve the end of an impartial jury.' [Citation.] Mere loss of a peremptory challenge does not automatically constitute a violation of the federal constitutional right to a fair trial and impartial jury. [Citation.] If no biased or legally incompetent juror served on defendant's jury, the judgment against him does not suffer from a federal constitutional infirmity, even if he had to exercise one or more peremptory challenges to excuse prospective jurors whom the court should have excused for cause. [Citation.]" (*Id.* at pp. 916-917.) "[A]n erroneous denial of a challenge for cause to one juror is not

reversible error when it deprives a defendant only of a peremptory challenge to another juror. [Citations.]” (*Id.* at p. 917.)

D. *Juror Questionnaires*

Defendant asserts that the superior court’s unexplained loss of completed juror questionnaires violated his right to due process under the Fourteenth Amendment to the United States Constitution because there was not an adequate record to permit meaningful review, and the deficient record requires reversal.

The trial court’s settled statement regarding the juror questionnaires stated that (1) “[t]he prospective jurors did not complete written questionnaires in this case as written juror questionnaires were not used” and (2) “[e]ach prospective juror in the box received a copy of a ‘Juror Questionnaire’ which contained written questions that the court used in conducting oral voir dire of the jurors.”

Since no written juror questionnaires are missing from the record on appeal, there is no actual controversy to be resolved by this court. “It is settled that ‘the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.’ ” (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132.)

E. *Prior Drug Convictions*

1. *Background*

Before trial, the prosecution asked the court to rule on the admissibility of five prior convictions of drug offenses under Evidence Code section 1101, subdivision (b), to prove defendant’s intent to sell the controlled substances found in his possession on August 17, 2012. Those convictions included 1984 and 1985 convictions for violating former Health and Safety Code section 11359 (possession for sale of marijuana), a 1990 conviction for violating Health and Safety Code section 11351.5 (possession for sale, or purchase for purposes of sale, of cocaine base), and two 1990 convictions for violating

former Health and Safety Code section 11352 (transportation, sale, or furnishing of specified controlled substances). The prosecutor maintained that “the length of incarceration in between the current offense and the prior offenses, and the conduct in between those offenses” mitigated the remoteness of those past convictions that were relevant to defendant’s intent to sell controlled substances. The court was informed that defendant was convicted of a violation of Health and Safety Code section 11350 (possession of specified controlled substances), sentenced to a two-year term and paroled in September 1987 and that defendant “spent the better part of the 90’s in custody,” and after his release, he incurred additional drug charges of which he was convicted.

Defense counsel argued that the 1990 convictions were dissimilar to the charged offenses in that they involved sales to a confidential informant made from a house rather than hand-to-hand sales. She also pointed out that there was no information regarding his conduct surrounding the 1984 and 1985 convictions. She argued that the court was required to consider the circumstances underlying the convictions in evaluating whether the evidence was admissible under Evidence Code section 1101, subdivision (b). Defense counsel further argued that the court should exclude the prior convictions under Evidence Code section 352 because of their remoteness in time and the danger that the jury would consider them as evidence of criminal propensity.

The trial court ruled in favor of the prosecution, citing *People v. Pijal* (1973) 33 Cal.App.3d 682, which held that “[s]ince [the] appellant’s knowledge of the narcotic contents of the drug and his intent to sell were at issue, evidence of his prior narcotic offenses was clearly admissible to show his guilty knowledge, motive and intent [Citations.]” (*Id.* at p. 691, fn. omitted.) The trial court further indicated that it had performed an Evidence Code section 352 analysis and determined that the five prior convictions were admissible under Evidence Code section 1101, subdivision (b), on the issues of intent and lack of mistake.

At trial, the court read the parties' stipulation regarding the five prior drug convictions to the jury.¹² It later instructed the jurors that they may, but were not required to, consider the evidence of the uncharged offenses "for the limited purpose of deciding whether or not the defendant acted with the intent to sell cocaine base in his possession on August 17, 2012." It admonished: "Do not consider this evidence for any other purposes, except for the limited purpose of determining defendant's state of mind or intent, and defendant's credibility. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit a crime." The court specifically told the jurors that the evidence was "not sufficient by itself to prove that the defendant is guilty of the crimes charged in this case" and that "[t]he People must still prove each charge beyond a reasonable doubt."

2. *Admissibility Under Evidence Code Sections 1101, subdivision (b), and 352*

Defendant asserts that the trial court abused its discretion in ruling on the admissibility of the five prior convictions by failing to consider whether the similarities between the currently charged offenses and the prior crimes supported an inference that defendant probably harbored the same intent in each instance. He claims that the court's analysis under Evidence Code section 352 was "similarly uninformed." He maintains that the erroneous admission of the five prior convictions requires reversal of the conviction of count 1 (Health & Saf. Code, § 11351.5) (possession for sale) under either

¹² The court told the jury that the parties had stipulated to the following facts: (1) "On July 26, 1984 [defendant] was convicted of violating Health and Safety Code section 11359, possession for sale or purchase for sale of marijuana"; (2) "On October 10, 1985 [defendant] was convicted of violating Health and Safety Code section 11359, possession for sale or purchase for sale of marijuana"; (3) "On October 3, 1990 [defendant] was convicted of violating Health and Safety Code section 11351.5, possession for sale or purchase for sale of cocaine base"; (4) "On October 3, 1990 [defendant] was convicted of violating Health and Safety Code section 11352, transportation, sale, or distribution of cocaine"; (5) "[O]n October 3, 1990 . . . [defendant] was convicted of violating Health and Safety Code section 11352, transportation, sale, or distribution of cocaine."

the *Watson* or *Chapman* standard of review. He suggests that the “erroneous admission of [his] five prior drug convictions . . . served only to paint him as a person who was likely to engage in illicit drug sales[] and to encourage jurors to convict him on the basis of his ‘suspicious character and previous acts.’ ”

“We review for abuse of discretion a trial court’s rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352. [Citations.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) “To be relevant, an uncharged offense must tend logically, naturally and by reasonable inference to prove the issue(s) on which it is offered. [Citations.] [The Supreme Court has] long recognized ‘that if a person acts similarly in similar situations, he probably harbors the same intent in each instance’ [citations], and that such prior conduct may be relevant circumstantial evidence of the actor’s most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution. [Citations.]” (*People v. Robbins* (1988) 45 Cal.3d 867, 879.)

“The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.]” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).) “ ‘[W]hen the other crime evidence is admitted solely for its relevance to the defendant’s intent, a *distinctive* similarity between the two crimes is often unnecessary for the other crime to be relevant. Rather, if the other crime sheds great light on the defendant’s intent at the time he committed that offense it may lead to a logical inference of his intent at the time he committed the charged offense if the circumstances of the two crimes are substantially similar even though not distinctive.’ [Citation.]” (*People v. Demetrulias* (2006) 39 Cal.4th 1, 16-17.)

“ ‘[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the

presence of the normal, i.e., criminal, intent accompanying such an act’ (2 Wigmore, *supra*, (Chadbourn rev. ed. 1979) § 302, p. 241.) In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ‘ “probably harbor[ed] the same intent in each instance.” [Citations.]’ (*People v. Robbins, supra*, 45 Cal.3d 867, 879, 248.)” (*Ewoldt, supra*, 7 Cal.4th at p. 402.)

The remoteness in time of other-crimes evidence usually goes to its weight, not to its admissibility under Evidence Code section 1101, subdivision (b). (*People v. Archerd* (1970) 3 Cal.3d 615, 638-639, abrogated on another ground in *People v. Nelson* (2008) 43 Cal.4th 1242, 1254-1255.) In exercising its discretion, the trial court should consider remoteness. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1245 [evidence of second degree murder 17 years before second killing not too remote to have significant probative value regarding the defendant’s mental state during later offense].)

Assuming arguendo that the defendant’s contentions regarding the admissibility of the five prior drug convictions were not forfeited by entering into the stipulation that he had suffered those convictions without explicitly reserving his challenges for appeal (cf. *People v. Hovey* (1988) 44 Cal.3d 543, 568), we conclude that the trial court acted within its discretion in ruling that the evidence was admissible under Evidence Code section 1101, subdivision (b). Those drug crimes were probative on the issue of intent even if the specifics of their commission were different (see Evid. Code, § 210), their probative value increased with each instance, and they served to negate intent to possess for mere personal use. The court also acted within its discretion in finding that the prior convictions were not too remote in light of defendant’s criminal history.

“The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.” (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

“ ‘The “prejudice” referred to in Evidence Code section 352 applies to evidence which

uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. . . .’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) “ ‘[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.’ [Citation.]” (*People v. Doolin* (2009) 45 Cal.4th 390, 439 (*Doolin*).)

The parties’ stipulation regarding the defendant’s five prior drug convictions was not inflammatory and certainly not more inflammatory than the charged offenses. Since the underlying crimes resulted in convictions, they did not pose “the danger that the jury might have been inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offenses” or increase “the likelihood of ‘confusing the issues’ (Evid.Code, § 352), because the jury had to determine whether the uncharged offenses had occurred.” (*Ewoldt, supra*, 7 Cal.4th at p. 405.)

The trial court did not abuse its discretion in determining that the evidence of the five prior drug convictions was admissible under Evidence Code sections 1101, subdivision (b), and 352. Moreover, the court guarded against the risk that jurors would misuse those convictions as propensity evidence by giving a limiting instruction. In the absence of any indication to the contrary, we must assume that the jury understood and “obeyed the express language of the instruction not to use the other-crimes evidence to establish defendant’s character or his disposition to commit crimes.” (*People v. Hayes* (1990) 52 Cal.3d 577, 625; see *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

3. Due Process

“[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.]” (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Where a defendant does not raise a due process

objection to the admission of evidence in the trial court, “the constitutional argument is forfeited to the extent the defendant argued on appeal that the constitutional provisions required the trial court to exclude the evidence for a reason not included in the actual trial objection.” (*Id.* at pp. 437-438.) Nevertheless, on appeal, the “defendant may argue an additional legal consequence of the asserted error in overruling the [evidentiary] objection is a violation of due process. [Citations.]” (*Id.* at p. 438, fn omitted.)

“[R]ejection, on the merits, of a claim that the trial court erred on the [evidentiary] issue actually before that court necessarily leads to rejection of the newly applied constitutional ‘gloss’ as well. No separate constitutional discussion is required in such cases” (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.) Here, defendant has not established that the trial court abused its discretion under state law in ruling on his evidentiary objections to the admission of the five prior drug convictions.

In any event, as in *People v. Ghebretensae* (2013) 222 Cal.App.4th 741 (*Ghebretensae*), “[t]he crux of appellant’s prejudice argument is that the jury . . . used the evidence as propensity evidence.” (*Id.* at p. 755.) Here, as in *Ghebretensae*, the trial court gave a clear limiting instruction that precluded the jurors from using the “prior crimes” evidence to show propensity to commit a charged offense. We presume, as we did in *Ghebretensae*, that the jurors followed the trial court’s instructions. (See *People v. Scott* (2015) 61 Cal.4th 363, 399.)

In *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, which defendant cites, the court recognized that the admission of evidence from which no permissible inferences may be drawn may violate due process. (*Id.* at p. 1384.) “Even then, the evidence must ‘be of such quality as necessarily prevents a fair trial.’ [Citation.]” (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d at p. 920.) “As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness

fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.” (*Lisenba v. California* (1941) 314 U.S. 219, 236.)

The court’s ruling regarding the admissibility of evidence of the five prior drug convictions did not render defendant’s trial fundamentally unfair. There were legitimate inferences that could be drawn from those convictions and, under the limiting instruction given, the parties’ stipulation as to those convictions did not render his trial fundamentally unfair.

F. Restrictions on Cross-Examination

1. Background

At trial, Officer Jorgensen testified to his observations of defendant on August 17, 2012. He testified that he had performed approximately 20 strip searches during his career as a police officer. The officer did not perform a strip search of every person that he took to the preprocessing center, but rather he exercised his discretion in deciding whether to conduct a strip search. He indicated that, in the absence of observations suggesting that someone had hidden narcotics on himself, he did not conduct a strip search.

Out of the jury’s presence, defense counsel indicated that she wished to question Officer Jorgensen concerning a strip search of defendant that occurred on January 31, 2013 to impeach his trial testimony regarding the circumstances under which he conducted strip searches and to show that the officer had a motive to exaggerate his testimony about the August 17, 2012 offenses (disappointment and frustration with the outcome of the January 31, 2013 strip search) and was biased against defendant. Defense counsel indicated that Officer Jorgensen’s police report disclosed that, after observing a hand-to-hand transaction between defendant and an unidentified male on January 31, 2013, the officer arrested defendant for loitering with intent to commit a narcotics transaction. According to the report, the officer discovered cash and a substance believed

to be marijuana on defendant and then transported defendant to the main jail, where a strip search of him was conducted with negative results.

The prosecutor argued that the evidence adduced by such cross-examination would not impeach Officer Jorgensen. He also objected on Evidence Code section 352 grounds that such cross-examination would involve an undue consumption of time and create substantial danger of confusing the issues.

Defense counsel asserted that “Evidence Code section 352 must bow to the due process rights of a defendant to a fair trial” and “to his right to present all relevant evidence of significant probative value to his defense.” Her theory was that evidence of the January 31, 2013 incident would cast “reasonable doubt on the accuracy and reliability of Officer Jorgensen’s observations and conclusions” as to the August 17, 2012 incident.

The trial court observed that the recording of the August 17, 2012 strip search substantiated the officers’ belief that defendant was secreting an object believed to be a controlled substance in his buttocks and the decision to strip search him. The court expressed a “deep concern” that if evidence concerning the January 31, 2013 hand-to-hand transaction was introduced, the jurors would believe that defendant must have engaged in a hand-to-hand drug transaction on August 17, 2017. The court found the evidence of the January 31, 2013 search lacked any probative value or at the most had “marginal minimal probative value,” and it found that the evidence would be “unduly confusing” for the jury.

2. Analysis

Defendant contends that the trial court’s refusal to allow cross-examination of Officer Jorgensen concerning the arrest and strip search of defendant on January 31, 2013 violated his Sixth Amendment right to confront adverse witnesses.

The Confrontation Clause of the Sixth Amendment does not prevent “a trial judge from imposing any limits on defense counsel’s inquiry into the potential bias of a

prosecution witness.” (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 (*Van Arsdall*)).) “On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” (*Ibid.*) Rather, “ ‘the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’ *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (*per curiam*) (emphasis in original).” (*Ibid.*; *id.* at pp. 674 [error to decline to consider whether evidentiary ruling was “harmless in the context of the trial as a whole.”], 684 [“constitutionally improper denial of a defendant’s opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis”].)

In *Van Arsdall*, “the trial court prohibited *all* inquiry into the possibility that [a prosecution witness] would be biased as a result of the State’s dismissal of his pending public drunkenness charge” (*Van Arsdall, supra*, 475 U.S. at p. 679) under a state rule allowing the exclusion of evidence where “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.” (*Id.* at p. 677 & fn. 2.) The United States Supreme Court concluded that “the court’s ruling violated [the accused’s] rights secured by the Confrontation Clause.” (*Id.* at p. 679, fn. omitted.) The court explained that “a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby ‘to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.’ *Davis v. Alaska* [(1974)] 415 U.S. [308,] 318.” (*Id.* at p. 680.) That burden is met where “[a]

reasonable jury might have received a significantly different impression of [a prosecution witness's] credibility had [defense] counsel been permitted to pursue his proposed line of cross-examination.” (*Ibid.*)

“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” (*Davis v. Alaska, supra*, 415 U.S. at p. 316.) “[T]he cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness.” (*Ibid.*) An attack on a witness’s credibility may be “effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.” (*Ibid.*) “The partiality of a witness is subject to exploration at trial, and is ‘always relevant as discrediting the witness and affecting the weight of his testimony.’ 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970).” (*Ibid.*) Bias describes “the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party.” (*United States v. Abel* (1984) 469 U.S. 45, 52.) “Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.” (*Ibid.*)

In this case, however, evidence of the negative results of the subsequent, unrelated strip search of defendant on January 31, 2013 would have a negligible tendency in reason to undermine Officer Jorgensen’s credibility at trial. Although the officer had testified that he does not perform strip searches at the preprocessing center unless his observations lead him to believe that an arrestee has secreted a controlled substance on his person, the officer could have considered his observations of defendant in toto in deciding to conduct a strip search of him on January 31, 2013.

In addition, defendant’s claim that the officer had a bias or motive to exaggerate at trial what had occurred on August 17, 2012 because he was frustrated with or disappointed by the negative results of the January 31, 2013 strip search was simply too

speculative. The evidence of that later strip search and its outcome was not “a prototypical form of bias” (*Van Arsdall, supra*, 475 U.S. at p. 680) and did not in itself demonstrate that the officer had a motive to exaggerate or lie, from which it could be inferred that he did exaggerate or lie, about what transpired on August 17, 2012.

Moreover, as the trial court observed, the officers’ testimony as to their August 17, 2012 observations regarding defendant retrieving a plastic-wrapped object from his buttocks area (believed to be cocaine base or other controlled substance), and then returning it to that area, was corroborated by the object recovered from that location during the strip search at the jail, which was recorded. The recording was shown to the jury. There has been no showing that a reasonable jury might have had a significantly different impression of Officer Jorgensen’s credibility if defense counsel had been allowed to question him regarding the January 31, 2013 strip search. (*Van Arsdell, supra*, 475 U.S. at p. 680.) Defendant has not shown a violation of his right to confrontation.

G. Alleged Unconstitutional Restriction of Defense Evidence

Defendant also argues that the trial court violated his Sixth Amendment right to present a defense by refusing to allow him to testify regarding his arrest and strip search on January 31, 2013 and by refusing to allow Raj Jayadev to testify regarding what defendant told him about the January 31, 2013 incident.

1. Background

At trial, out of the jury’s presence, defense counsel asserted that Officers Jorgensen and Akery had threatened defendant’s life on January 31, 2013 during a strip search of him. According to the defense proffer, the officers indicated that an individual known to defendant “had been put on life support” and that “we’re gonna do you the way we did him.” Defense counsel sought a ruling permitting defendant to testify regarding those alleged events because they were relevant to the officers’ credibility and their alleged bias against defendant and motive to lie. The trial court initially ruled that

evidence of the strip search on that date was irrelevant and inadmissible, but that evidence of the officers' threats was admissible.

Defense counsel further explained that there was a pattern of officers claiming that they had observed a hand-to-hand transaction, arresting a defendant for loitering with intent to commit a drug offense, and then strip searching him. She argued that the unproductive strip search on January 31, 2013 supported the theory that officers were testifying falsely about their observations on August 17, 2012. She contended that evidence regarding the January 31, 2013 strip search was relevant to the officer's "credibility, motive, bias, [and] prejudice against [defendant]" and that restriction of his testimony would affect the jurors' perception of him and violate his right to due process and a fair trial.

The trial court stated that merely because nothing was found during the January 31, 2013 strip search, it could not be argued that nothing was found during the August 17, 2012 strip search in the jail. The court determined that evidence of the January 31, 2013 strip search was inadmissible under Evidence Code section 352 because it would "unnecessarily confuse the jurors" and "create an implication that the law does not support." The trial court previously had expressed concern that jurors might regard evidence of Officer Jorgensen's observations of an apparent hand-to-hand transaction in January 2013, the discovery of marijuana and cash on defendant incident to his arrest, and the ensuing strip search as evidence that defendant had in fact engaged in a drug sale on August 17, 2012.

Defendant testified in his own behalf. On redirect examination on January 31, 2014, defendant indicated that he encountered Officers Jorgensen and Akery in January 2013. The officers did not immediately recognize him, and they asked for his "ID." Defendant testified that the officers, at some point during his contact with them, mentioned a man nicknamed Jelly, who defendant had heard from a mutual friend was in the hospital. According to defendant, one of the officers said, "We're going to do you

just like we did him,” and he indicated that Jelly was on a life support machine. The officer told defendant, “We [are] tired of the games. We gonna do this right now or you’re gonna be just like him.” Defendant indicated at trial that he was still scared of Officers Jorgensen and Akery due to the statements because they “have badges and guns.” Defendant conceded that at the time of trial, he had not yet filed a complaint against the officers.

2. *Governing Law*

“Few rights are more fundamental than that of an accused to present witnesses in his own defense. [Citations.]” (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) “In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” (*Ibid.*) Also, “a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense.” (*Rock v. Arkansas* (1987) 483 U.S. 44, 49.) “In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant’s constitutional right to testify.” (*Id.* at p. 56, *id.* at p. 62 [“Arkansas’ *per se* rule excluding all posthypnosis testimony infringes impermissibly on the right of a defendant to testify on his own behalf. [Fn. omitted.]”].) “The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.” (*Washington v. Texas* (1967) 388 U.S. 14, 19.)

“‘As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense.’” (*People v. Hall* (1986) 41 Cal.3d 826, 834;

see *Rock v. Arkansas* (1987) 483 U.S. 44, 55 [the right to present ‘relevant testimony is not without limitation’].) As long as the trial court’s restrictions on a defendant’s right to testify are not ‘arbitrary or disproportionate to the purposes they are designed to serve,’ a court may limit a defendant’s testimony pursuant to a rule of evidence if ‘the interests served by [the] rule justify the limitation imposed on the defendant’s constitutional right to testify.’ (*Rock*, at p. 56.)” (*People v. Mickel* (2016) 2 Cal.5th 181, 218-219.)

The exclusion of irrelevant evidence does not deprive a defendant of his right to present a defense. (See *People v. Thornton* (2007) 41 Cal.4th 391, 445; *People v. Babbitt* (1988) 45 Cal.3d 660, 682, 684 (*Babbitt*); Evid. Code, § 350.) In addition, “[a] defendant’s right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. [Citations.]” (*United States v. Scheffer* (1998) 523 U.S. 303, 308 (*Scheffer*), fn. omitted.)

“A defendant’s interest in presenting [relevant] evidence may thus “‘bow to accommodate other legitimate interests in the criminal trial process.’” [Citations.] As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused’s right to present a defense so long as they are not ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’ [Citations.] Moreover, [the United States Supreme Court has] found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused. [Citations.]” (*Scheffer, supra*, 523 U.S. at p. 308.)

“[A] state court’s application of ordinary rules of evidence—including the rule stated in Evidence Code section 352—generally does not infringe upon [a defendant’s right to offer a defense through the testimony of witnesses]. [Citations.]” (*People v. Cornwell* (2005) 37 Cal.4th 50, 82 (*Cornwell*) disapproved on another ground in *Doolin supra*, 45 Cal.4th at p. 421, fn. 22; see *Crane v. Kentucky* (1986) 476 U.S. 683, 689-690.) A defendant does not have “‘a constitutional right to present all relevant evidence in his

favor, no matter how limited in probative value such evidence will be so as to preclude the trial court from using Evidence Code section 352.’ [Citations.]” (*Babbitt, supra*, 45 Cal.3d at pp. 684-685.) But “‘Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of *significant* probative value to his defense.’” (*Id.* at p. 684.)

2. *Alleged Threats and Strip Search of Defendant on January 31, 2013*

Defendant contends the court’s rulings limiting cross-examination of Officer Jorgensen and restricting the defense’s presentation of evidence regarding his January 31, 2013 “encounter” with Officers Jorgensen and Akery violated his right to due process and a fair trial under the Fourteenth Amendment to the United States Constitution. Defendant claims that these rulings “eviscerated [his] defense to the possession for sale charge, which was that Officer Jorgensen fabricated his testimony about seeing [him] engage in a hand-to-hand exchange of money for a small object before they arrested him.” Defendant also contends that his testimony about the January 31, 2013 arrest and strip search “was necessary to place [his own] testimony about the threats in an understandable context” He claims that, if he had been allowed to testify about the entire incident, his testimony, if believed, would have shown that the officers had “*expressed* hostility toward [him] prior to testifying in this case” and that they had “acted on [their] hostility by strip searching him without justification” on January 31, 2013.

Defendant has failed to establish that the challenged rulings constituted an abuse of discretion under state law or impinged upon his constitutional rights.¹³ Defendant was

¹³ Defendant also argues that the restriction of his testimony about the January 31, 2013 arrest and strip search “stands on the same constitutional footing as the erroneous restriction of [the defense] cross-examination of Officer Jorgensen about the same incident.” The United States Supreme Court “has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes. See *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (*per curiam*) (observing that ‘the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to . . . expose [testimonial] infirmities through cross-examination’).

permitted to testify regarding the officers' alleged threats made toward him while he was in custody on January 31, 2013. The outcome of the January 2013 strip search does not support a reasonable, nonspeculative inference that Officer Jorgensen fabricated his account of another hand-to-hand transaction since marijuana and cash were found on defendant when he was arrested. Moreover, even if evidence of that strip search was marginally relevant, it was unnecessary to the more direct argument, which defense counsel was free to make, that the threatening statements on January 31, 2013, if believed, were an expression of officer hostility toward defendant that reflected a bias or a motive to lie that he had been observed engaging in a hand-to-hand drug transaction on August 17, 2012. (See Evid. Code, §§ 210 [definition of "relevant evidence"], 780, subd. (f) [in determining the credibility of a witness, the trier of fact may consider "[t]he existence or nonexistence of a bias, interest, or other motive"]; *Silvey v. Hodgdon* (1874) 48 Cal. 185, 188 ["The credibility of an adverse witness may be assailed by proof that he cherishes a feeling of hostility towards the party against whom he is called"].)

Evidence of the arrest and strip search in January 2013 was not of significant probative value to the defense's theory of the case, and the trial court could reasonably conclude that such evidence should be excluded under Evidence Code section 352. "Although a criminal defendant is constitutionally entitled to present all relevant evidence of significant probative value in his favor, this does not mean the court must allow an unlimited inquiry into collateral matters; the proffered evidence must have more than slight relevancy. [Citations.]" (*People v. Marshall* (1996) 13 Cal.4th 799, 836.) While "Evidence Code section 352 must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of *significant* probative value to his or her defense" (*People v. Cunningham* (2001) 25 Cal.4th 926, 999), "[t]he excluded

See also *Jordan v. Warden*, 675 F.3d 586, 596 (C.A.6 2012); *Brown v. Ruane*, 630 F.3d 62, 70 (C.A.1 2011)." (*Nevada v. Jackson* (2013) __ U.S. __, __ [133 S.Ct. 1990, 1994].)

evidence in the present case was not so vital to the defense that due process principles required its admission. [Citations.]” (*Cornwell, supra*, 37 Cal.4th at p. 82.)

3. *Exclusion of Testimony by Raj Jayadev*

a. *Background*

On February 3, 2014, defense counsel told the court that she had a new defense witness, Raj Jayadev, who had known defendant since 2010 through the De-Bug organization. Defense counsel wanted to call Jayadev to rehabilitate defendant’s credibility, and she indicated that “it was not until January 2013 that [Jayadev] heard from [defendant] about these [officers’] threats” and that Jayadev would testify that he heard about the threats from defendant during meetings at De-Bug and defendant “appeared to be genuinely frightened.”

Defense counsel admitted that Jayadev had been in the courtroom during some of defendant’s testimony and the testimony of defense witness Betsy Wolf-Graves, who knew defendant through Silicon Valley De-Bug, an organization that helps people in the criminal justice system.¹⁴ The prosecutor told the court that Jayadev had been in the courtroom through the entire trial. Defense counsel ultimately conceded that she did not “know exactly how much of the trial Mr. Jayadev ha[d] been present for.” She explained that she had not anticipated that Jayadev would be called as witness until defendant testified about the officers’ threats. Defense counsel indicated that over the preceding weekend, she had attempted to locate a witness who could provide a prior consistent statement. She was seeking to present Jayadev’s testimony to rehabilitate defendant’s credibility as to the threats. She suggested that the prosecutor be allowed to thoroughly cross-examine Jayadev regarding his presence during the trial. Because of the violation

¹⁴ Wolf-Graves was called as a defense witness. She testified that she was a licensed clinical social worker and that she had known defendant since 2010. She indicated that defendant had conscientiously attended De-Bug’s regular weekly meetings. She stated that she believed defendant when he said something and that defendant had a reputation for truthfulness.

of its in limine order excluding witnesses from the courtroom during trial, the trial court refused to permit the defense to call Jayadev as a witness.¹⁵

b. *Analysis*

Defendant now asserts that the trial court's refusal to allow Jayadev to testify for the defense constituted an abuse of discretion and violated his constitutional right to present a defense.

Under Evidence Code section 777, a trial court may generally "exclude from the courtroom any [nonparty] witness not at the time under examination so that such witness cannot hear the testimony of other witnesses." (Evid. Code, § 777, subd. (a); see § 777, subd. (b).) "The purpose of [a witness exclusion] order is to prevent tailored testimony and aid in the detection of less than candid testimony. (*Geders v. United States* (1976) 425 U.S. 80, 87.)" (*People v. Valdez* (1986) 177 Cal.App.3d 680, 687.) "It is . . . anticipated trial counsel will advise witnesses to remain outside until they have testified and are excused." (*Id.* at p. 692.)

"A party who recognizes the court's authority and chooses to keep a potential witness present presumably does so knowing that except on good cause the witness will no longer be available for testimonial purposes. Later, if the party seeks to call the witness who remained in the courtroom, the prior knowledge of the court order and apparent election to keep the witness present will be deemed 'fault' as in 'you were responsible for keeping the witness present.' " (*Valdez, supra*, 177 Cal.App.3d at p. 692.) "Only in the 'without fault' case is contempt the sole sanction." (*Id.* at p. 696.) Counsel may not "defy the court's exclusion order, insist on the presence of the witness,

¹⁵ On appeal, defendant suggests that no such in limine order was ever made. But we reject that argument since the parties and the trial court all referred to and acknowledged the existence of such order during their discussion of the defense request to call Jayadev as a witness. The record reflects that, before trial, the court identified by number and granted multiple in limine motions. It is an appellant's burden to affirmatively show error by an adequate record. (See *In re Kathy P.* (1979) 25 Cal.3d 91, 102; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

and successfully assert a constitutional right to the witness' testimony absent good cause." (*Id.* at p. 692.)

But a witness's violation of a witness exclusion order "does not furnish grounds to refuse permission to testify, at least where the party who seeks to offer the testimony was not 'at fault' in causing the witness's violation of the exclusion order. (*People v. Boscovitch* (1862) 20 Cal. 436; *People v. Valdez* (1986) 177 Cal.App.3d 680, 692-695; *People v. Willingham* (1969) 271 Cal.App.2d 562, 571; *People v. Tanner* (1946) 77 Cal.App.2d 181, 187.)" (*People v. Redondo* (1988) 203 Cal.App.3d 647, 654.) Thus, where the witnesses' disobedience of an exclusion order was "without fault on [the defendant's] part," the witnesses' disregard of the order "constituted no ground for the exclusion of their testimony." (*People v. Boscovitch, supra*, at p. 436 (*Boscovitch*).) In general, contempt proceedings against the disobedient witness is the "proper recourse" for violation of a witness exclusion order. (*People v. Duane* (1942) 21 Cal.2d 71, 80; see *Boscovitch, supra*, at p. 436.)

In this case, the violation of the court's witness exclusion order could not be attributed to a witness's contumacy. Defendant knew to whom he had disclosed the supposed threats, and defense counsel was presumably aware of what defendant would say if and when she questioned him about those threats. In the exercise of its discretion, the trial court could reasonably attribute "fault" to defendant and/or his counsel who apparently had not planned to call Jayadev as a witness and impliedly had not directed Jayadev to obey the witness exclusion order as a potential witness.

Some courts have viewed disqualification of a witness as too harsh a sanction for a violation of a witness exclusion order. (See *United States v. Smith* (4th Cir. 2006) 441 F.3d 254, 263 ["Exclusion of a witness' testimony is 'an extreme remedy' that 'impinges upon the right to present a defense,' and thus should be employed sparingly."]; *United States v. Hobbs* (9th Cir. 1994) 31 F.3d 918, 922 [given "constitutionally based right of the defendant to present evidence in his favor, disqualification of defense witnesses is too

harsh a penalty to impose in the absence of misbehavior by the defendant or his counsel”).) Nevertheless, the California Supreme Court has indicated that, “[a]lthough completely excluding evidence of an accused’s defense theoretically could rise to th[e] level [of a violation of a defendant’s right to present a defense], excluding defense evidence on a minor or subsidiary point does not impair an accused’s due process right to present a defense. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 58.)” (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103, cert. den. *sub nom. Fudge v. California* (1995) 514 U.S. 1021.)

Where a “trial court misstepped [by improperly excluding evidence on a minor or subsidiary point], ‘[t]he trial court’s ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.’ (*In re Wells* (1950) 35 Cal.2d 889, 894.) Accordingly, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. California* (1967) 386 U.S. 18, 24).” (*People v. Fudge, supra*, 7 Cal.4th at p. 1103.)

In this case, the excluded testimony was not central or vital to defendant’s defense. Jayadev’s testimony would have tended to rebut a possible inference that defendant had recently fabricated those threats since he had not filed any complaint against the officers. But the jury heard the testimony of defendant’s sister, who stated that she had heard about the threats against defendant from a family member. Moreover, Jayadev’s testimony was of marginal relevance since Jayadev was not present during the alleged threats against defendant, and defendant’s supposed statements to Jayadev were made when he already had a strong motive to attempt to discredit the officers. A felony complaint based on defendant’s conduct on August 17, 2012 was filed on September 11, 2012.

Defendant has not convinced us that the constitutional right to present a defense absolutely bars a trial court from disallowing witness testimony as a sanction for violating a witness exclusion order. (Cf. *Taylor v. Illinois* (1988) 484 U.S. 400, 410, 414-415 [rejecting the defendant's argument that the compulsory process clause of the Sixth Amendment to the United States Constitution absolutely bars the trial court from precluding the testimony of an undisclosed, surprise witness as a discovery sanction, and stating that "mere invocation" of a defendant's right to offer witnesses in his favor "cannot automatically and invariably outweigh countervailing public interests"].) In any case, an evidentiary ruling violating a defendant's right to present a defense is subject to harmless error analysis. (See *Crane, supra*, 476 U.S. at pp. 690-691; see also *Chapman v. California, supra*, 386 U.S. at p. 24 (*Chapman*) [federal constitutional error must be harmless beyond a reasonable doubt].)

Here, any error in disallowing witness Jayadev's testimony was harmless under any standard. Defendant was not convicted of selling cocaine base in violation of former Health and Safety Code section 11352, subdivision (a) as charged in count 2, and the count was dismissed. Uncontroverted evidence established that defendant brought a controlled substance into a jail in violation of section 4573. Thus, the exclusion of Jayadev's testimony was harmless under any standard as to count 3.

With respect to count 1 (possession for sale of cocaine base), any error in disallowing Jayadev's testimony was harmless under any standard given the strength of the prosecution's case. (Cf. *Van Arsdall, supra*, 475 U.S. at p. 684.) Officer's Jorgensen's testimony was generally consistent with and largely cumulative of Officer Blackerby's testimony. Defendant speculates that since the officers worked as a team, "jurors skeptical of Jorgensen's motive to testify against [him] might very well attribute the same motive to Blackerby." We cannot assume that the jurors would have made such a surmise without any supporting evidence.

Contrary to defendant's assertion, the evidence of his intent to sell was not equivocal. The officers' testimony that they had observed a completed hand-to-hand drug transaction, involving defendant's retrieval of a golf-ball-sized object from his buttocks area and his replacement of it there, and a second transfer of money to defendant was corroborated by (1) the large sum of money found in various locations during the search incident to his arrest and (2) the cocaine base recovered from between defendant's buttocks during a strip search, a recording of which was played for the jury. The object turned out to be a plastic bag that contained a larger bag of cocaine base and an individual bindle. A prosecution's expert opined that defendant possessed the cocaine base with the intent to sell. There was no countervailing expert testimony presented to the jury.

Defendant's credibility was damaged more by his evasive, inconsistent, and unbelievable answers to questions than by the exclusion of Jayadev's testimony. At one point at trial, when defense counsel asked defendant what happened next after he was strip searched for the second time on August 17, 2012, defendant answered in part: "They claimed they found the drugs, and they probably did." At another point, when asked whether he "had a baggie of crack cocaine in [his] buttocks," defendant answered, "Maybe. Maybe not." Although defendant also denied having crack cocaine between his buttocks on August 17, 2012, this testimony was refuted.

Defendant admitted that he had been convicted of three drug offenses in 1990, that he had been twice convicted of possession for sale of marijuana in the 1980's, and that he had been convicted of robbery in 1981. The parties stipulated that defendant had five convictions of drug offenses, and they tended to negate possession of the cocaine base for personal use. The prior conviction of robbery, a crime of moral turpitude, was relevant to defendant's credibility. (See *People v. Collins* (1986) 42 Cal.3d 378, 395.)

Thus, even assuming the trial court erred by refusing to allow Jayadev to testify, the error was harmless under any standard of review. (See *Chapman, supra*, 386 U.S. at p. 24; *Watson, supra*, 46 Cal.2d at p. 836).

H. Cumulative Prejudice

Citing *People v. Hill* (1998) 17 Cal.4th 800 (*Hill*), defendant seeks reversal of the judgment on the ground of cumulative prejudice. He argues that the allegedly erroneous admission of his prior convictions to prove intent and the trial court's allegedly erroneous restriction of cross-examination rendered the trial fundamentally unfair in violation of his "federal constitutional right to due process and a fair trial under the Fourteenth Amendment" to the United States Constitution. He suggests that proof of his possession of cocaine base on August 17, 2012 was "straightforward," while proof of his intent to sell was "much weaker." He claims the alleged errors "had a synergistic effect," and they were cumulatively prejudicial.

We are mindful that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]" (*Hill, supra*, 17 Cal.4th at pp. 844-845.) In this case, however, we have found no error.

I. Denial of Defendant's Motion to Strike Prior Robbery Conviction

1. Background

Defendant moved to strike his 1981 robbery conviction on the ground it was constitutionally invalid. With respect to that conviction, a copy of the criminal complaint, the minutes of defendant's change of plea, and the sentencing minutes were filed in support of defendant's motion to strike. The change-of-plea minutes did not specifically reflect that the court had admonished defendant and obtained his waiver of his rights to confrontation and a jury trial and against self-incrimination (see *Boykin v. Alabama* (1969) 395 U.S. 238, 243; *In re Tahl* (1969) 1 Cal.3d 122, 132-133 (*Tahl*)).

The complaint, filed in 1981, alleged that defendant committed felony robbery on or about August 21, 1981 by taking a purse and its contents from a woman by means of force and fear. The change-of-plea minutes showed that the hearing was held on November 10, 1981 before Judge Peter Stone, that “A. Bender” was the deputy district attorney, and that “W. Campbell” was defendant’s counsel. They indicated that defendant entered a conditional plea for a maximum punishment of a three-year state prison term (specified as the “midterm”) to a charge of violating section 211 (robbery) and that there was a stipulation based on the preliminary hearing transcript that a factual basis existed for the plea. They also stated: “After examination and permission by the Court, defendant’s plea of Not Guilty is withdrawn, and defendant enters a plea of Guilty to Count one, PC 211.” The sentencing minutes reflect that, on December 3, 1981, defendant was placed on three years of formal probation and that defendant was required to serve a one-year county jail term for robbery as a condition of probation.

Defendant’s declaration filed in support of his motion to strike stated as to his change of plea on November 10, 1981 (1) that he did not recall being advised of his right to a jury trial, (2) that he was not advised of his right to confront and cross-examine witnesses, (3) that he was not advised of his right against self-incrimination, (4) that he recalled his attorney advising him “not to say anything and just to let him accept the deal,” (5) that he believed that he was pleading to grand theft, not robbery, and (6) that he was not advised of the maximum penalties for a robbery conviction. The People filed three declarations in opposition to defendant’s motion to strike: (1) the declaration of retired Judge Peter Stone, (2) the declaration of former Deputy District Attorney Albert C. Bender, and (3) the declaration of retired public defender and private criminal defense attorney William Campbell.

Judge Stone stated in his declaration that, on November 10, 1981, he “was assigned to preside over [the] Superior Court.” While Judge Stone recalled presiding over cases in which Bender was the deputy district attorney and Campbell was the

defense attorney, he could not specifically remember defendant's case. He did recall that Bender and Campbell "were thorough and well prepared."

In his declaration, Judge Stone stated: "As a judge, it was my regular habit and custom to advise all defendants entering a guilty plea or no-contest plea of their *Boykin-Tahl* rights, that is the right against self-incrimination; the right to legal counsel and representation; to jury trial; and to confrontation and cross-examination of adverse witnesses." He stated that he was certain to read the charge to which the defendant was pleading and that he advised the defendant of the maximum penalty for a conviction of the offense. Judge Stone asked each defendant whether "he/she understood his/her rights" and whether "he/she waived them." It was his "habit, custom, and practice to make a specific finding" as to whether the plea was "knowingly, intelligently, and voluntarily entered."

According to Judge Stone's declaration, whenever he took a plea, he used a script, which included advisement of the charge(s) to which the defendant was pleading, the maximum penalty for those charge(s), and the *Boykin-Tahl* rights. Judge Stone indicated that he did not go forward with accepting a guilty or no contest plea without the script and that he followed the script at the time of defendant's plea. In addition, he always asked the deputy district attorney and defense attorney whether they had any further voir dire, which allowed any oversight by him to be pointed out and corrected.

Judge Stone further declared that in 1981 he was "well aware" "of the necessity to advise defendants of their constitutional rights when taking a plea." It was his "habit and custom to give *Boykin-Tahl* advisements to each defendant as required by law, to be sure that each defendant entered an express waiver of those rights, and to advise each defendant of the charge(s) to which he/she was pleading and the consequences of pleading to such charge(s)." Judge Stone declared that, to the best of his knowledge, he did not fail to give the required advisements of those rights to defendant, fail to take

express waivers of those rights from defendant, or fail to advise defendant of the charge to which he was pleading and the consequences of pleading to that charge.

In his declaration, Bender indicated that he was a deputy district attorney in the Santa Clara County District Attorney's Office from 1968 until 2004 and that in 1981 he was "primarily assigned to handling homicide matters." He had no independent recollection of defendant's plea. But in 1981, Bender was "well aware" "of the necessity that defendants be advised of their constitutional rights when entering a guilty plea." It was Bender's "habit and custom to be sure that the *Boykin-Tahl* advisements were given to each defendant as required by law, to be sure that each defendant entered an express waiver of those rights, and to be sure that each defendant was advised of the charge(s) to which he or she was pleading and the consequences of pleading to such charge(s)." Bender indicated that he used a felony plea checklist to mark off each right or consequence as it was given in open court and acknowledged by the defendant. If the court failed to advise the defendant of each of his or her rights or consequences of his or her plea, Bender advised the defendant.

Bender further recollected that Judge Stone was "a thorough and well informed judge," who advised each defendant of his or her rights and of the consequences of his or her plea and who ensured that each defendant waived his or her rights, and that attorney Campbell was "a thorough and well informed defense attorney." Bender stated in his declaration that to the best of his knowledge, defendant was advised of the consequences of pleading guilty to a violation of section 211, he was advised of each of his constitutional rights under *Boykin-Tahl*, and he expressly waived those rights except for the right to counsel.

Campbell stated that in 1981 he was practicing as a private criminal defense attorney, but that he did not specifically remember defendant's case.¹⁶ He declared that

¹⁶ Campbell indicated that he worked as a deputy public defender in Santa Clara County before going into private practice for a number of years and that, in 1987, he

in 1981 he was “well aware” “of the necessity of advising clients of their constitutional rights when taking a plea.” Campbell stated that it was his “habit and custom to be sure that each client was given the *Boykin-Tahl* advisements as required by law, to be sure that each client entered an express waiver of those rights, and to be sure that each client understood the charge(s) to which he/she was pleading and the consequences of pleading to such charge(s).” He stated that he would not have advised defendant not to say anything and just to accept the deal. To the best of Campbell’s knowledge, defendant was advised of his *Boykin-Tahl* rights, defendant expressly waived those rights except the right to counsel, and defendant understood the charge to which he was pleading and the consequences of pleading to that charge.

On August 1, 2014, the trial court held a hearing on defendant’s motion to strike the prior robbery conviction, and defense counsel submitted the motion for decision on the papers. The court considered the declarations of Judge Stone, the prosecutor, and the defense counsel who participated in the plea proceeding in 1981. The court denied the motion, finding that defendant had been properly advised of his rights and knew that the charge to which he had pleaded was robbery.

2. *Analysis*

On appeal, defendant asserts that the trial court erred when it denied his motion to strike because he did not knowingly waive all his *Boykin-Tahl* rights before entering a guilty plea and that he did not know that he was pleading to robbery. He maintains that the trial court’s decision “lacks substantial support in the record” because the record of the plea was silent and none of the declarants had any individualized recollection or proof of the plea proceeding at issue. He argues that his assertion that he had believed he was pleading to grand theft rather than robbery “has a particular ring of truth, as any

returned to the Santa Clara County Public Defender’s Office and remained there until his retirement in 2004.

California criminal practitioner knows that grand theft from the person . . . is frequently offered as a lesser charge to robbery in cases of purse snatching”¹⁷

In California courts, a criminal defendant may collaterally “challenge the validity, in his present trial, of a prior felony conviction on *Boykin-Tahl* grounds.” (*People v. Allen* (1999) 21 Cal.4th 424, 435 (*Allen*); but cf. *Custis v. United States* (1994) 511 U.S. 485, 487 [a defendant in a federal sentencing proceeding may not collaterally attack the validity of previous state convictions that are used to enhance his sentence under the Armed Career Criminal Act of 1984 except as to convictions obtained in violation of the right to counsel].) For purposes of such collateral attack on a conviction, we must generally presume that “final judgments are valid, that official duty was performed, and that proceedings were regular.” (*Allen, supra*, at pp. 449-450; see Evid. Code, §§ 664, 666; see *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1303 (*Curl*).) “Application of these rules means we must assume, until the contrary appears, that court proceedings were conducted in compliance with applicable rules, including those set forth in *Tahl*.” (*Allen, supra*, at pp. 449-450.)

“When a defendant makes sufficient allegations that his conviction, by plea, in the prior felony proceedings was obtained in violation of his constitutional *Boykin-Tahl* rights, the trial court must hold an evidentiary hearing. At the hearing, the prosecution bears the initial burden of producing evidence that the defendant did indeed suffer the conviction. The defendant must then produce evidence to demonstrate his *Boykin-Tahl* rights were infringed. The prosecution then has the right to rebuttal, at which point reliance on a silent record will not be sufficient. [Citations.]” (*Allen, supra*, 21 Cal.4th at p. 435.) The trial court must make findings based on the evidence, and it must strike from the information any prior conviction found to be constitutionally invalid. (See *People v. Coffey* (1967) 67 Cal.2d 204, 217-218.)

¹⁷ At the time of his 1981 offense, the midterm punishment for felony grand theft was two years, not three years. (Stats. 1976, ch. 1139, §§ 98, 223, pp. 5089, 5124.)

In a collateral attack on a presumptively final conviction in California, “[e]ven if the defendant can prove he did not waive his constitutional rights before pleading guilty, he must also plead and prove he was actually unaware of his rights, and that he would not have pleaded guilty had he known his rights. (*People v. Tassell* (1984) 36 Cal.3d 77, 92, overruled on another ground in *People v. Ewoldt* (1994) 7 Cal.4th 380, 386-387; *In re Ronald E.* (1977) 19 Cal.3d 315, 325, fn. 8; *People v. Cooper* (1992) 7 Cal.App.4th 593, 596-601.)” (*Allen, supra*, 21 Cal.4th at p. 436, fn. 3.) “[A] collateral attack via a motion to strike has always required a showing of prejudice. [Citations.]” (*Id.* at p. 440, fn. 5.)

The parties seem to disagree on the applicable standard of review. Citing *People v. Pride* (1992) 3 Cal.4th 195, 256 (*Pride*), the People insist that a “reviewing court should overturn a trial court’s decision denying a motion to strike [a prior conviction as constitutionally invalid] only if that decision is not supported by substantial evidence.” Citing the same case, defendant agrees that a court’s factual determinations must be upheld if supported by substantial evidence. Citing *People v. Howard* (1992) 1 Cal.4th 1132, 1175 (*Howard*), however, defendant asserts that whether the prior conviction is constitutionally valid is “a legal question subject to de novo review.”¹⁸ (*Italics omitted.*)

¹⁸ This case is not an appeal from a judgment involving the admission of a prior conviction allegation. When a trial court fails to “take *Boykin-Tahl* waivers before accepting the defendant’s admission of the truth of a prior felony conviction allegation,” it commits “what is known as *Yurko* error ([*In re*] *Yurko* [(1974)] 10 Cal.3d [857,] 863).” (*Allen, supra*, 21 Cal.4th at p. 437.) *Howard* “addressed the standard of review for *Yurko* error on direct appeal.” (*Id.* at p. 438.) *Howard* held that “*Yurko* error involving *Boykin/Tahl* admonitions should be reviewed under the test used to determine the validity of guilty pleas under the federal Constitution” (*Howard, supra*, 1 Cal.4th at p. 1175), and it concluded that “a plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances. [Citations.]” (*Ibid.*) Where *Yurko* error is reviewed on direct appeal, “the appellate court is restricted to an examination of the trial record.” (*Allen, supra*, at p. 439.) Following *Howard*, “[i]f the record [on appeal] fail[s] to disclose proper advisements and waivers, the appellate court [is] required to determine further, based on the totality of the circumstances, whether the defendant’s admission in any event was voluntarily and intelligently made.” (*Id.* at p. 438.) Thus, after *Howard*, “an appellate court must go beyond the courtroom colloquy

“*Howard*’s rule of appellate review. . . is indistinguishable from the review applied in *motion hearings* held pursuant to *Sumstine*” (*Allen, supra*, 21 Cal.4th at p. 440, fn. omitted, italics added) on a collateral motion to strike a prior conviction as constitutionally invalid. “[I]n hearing a motion to strike, the trial court will examine the totality of the circumstances to determine the voluntariness and intelligence of the plea.” (*Ibid.*)

On a motion collaterally attacking the constitutional validity of a prior conviction, “the defendant must bear the burden of proving the *constitutional invalidity* of his prior conviction in order to prevail on the motion.” (*Curl, supra*, 51 Cal.3d at p. 1305; see *id.* at p. 1307.) “Neither the defendant nor the prosecutor is limited to the face of the record in the prior proceeding, but may offer any evidence germane to the defendant’s contention he was unaware of his rights when he pleaded in the prior proceeding.” (*Allen, supra*, 21 Cal.4th at p. 439.) A trial court may properly “infer compliance with *Boykin-Tahl* on the basis of ‘habit and custom’ evidence duly admitted at the evidentiary hearing. (See, e.g., *Curl v. Superior Court, supra*, 51 Cal.3d 1292, 1297-1298.)” (*Pride, supra*, 3 Cal.4th at p. 256.)

On appellate review of a trial court’s ruling on motion to strike a prior conviction as constitutionally invalid we defer to the court’s factual findings, express or implied, where supported by substantial evidence. (See *Pride, supra*, 3 Cal.4th at p. 256; cf. *Marshall v. Lonberger* (1983) 459 U.S. 422, 432, 436-437 (*Marshall*); cf. also *People v. Ramos* (1997) 15 Cal.4th 1133, 1154 (*Ramos*); *People v. Glaser* (1995) 11 Cal.4th 354, 362 (*Glaser*).) On the facts so found, we review de novo the question of law whether a defendant’s plea was entered knowingly, voluntarily, and intelligently. (See *United States v. Catchings* (6th Cir. 2013) 708 F.3d 710, 716; *People v. Panizzon* (1996) 13

to assess a claim of *Yurko* error. [Citation.]” (*People v. Mosby* (2004) 33 Cal.4th 353, 361.)

Cal.4th 68, 80; *Marshall supra*, at p. 431; cf. *Ramos, supra*, at p. 1154; *Glaser, supra*, at p. 362.)

The burden of proof was on defendant as the party collaterally attacking the constitutional validity of the prior conviction. (See *Allen, supra*, 21 Cal.4th at p. 436; *Curl, supra*, 51 Cal.3d at pp. 1296, 1304, fn. 7, 1305.) The habit and custom evidence supplied by the declarations refuted defendant's claims concerning his plea to robbery and provided substantial evidence supporting the trial court's implicit findings that Judge Stone advised defendant of his *Boykin-Tahl* rights, obtained defendant's express waivers of those rights, read the robbery charge to defendant, and informed him of the maximum penalty for that charge before accepting defendant's conditional guilty plea to robbery. (See *Pride, supra*, 3 Cal.4th at p. 256; see also Evid. Code, § 1105 ["Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom"].)

Defendant attempts to distinguish *Pride*, pointing out that the prosecution's witnesses in that case (the prosecutor and defense counsel) testified in court and thus were available for cross-examination, the witnesses expressed a high degree of certainty that the judge never deviated in taking pleas, and the plea hearing had taken place only 15 years before the evidentiary hearing. (See *Pride, supra*, 3 Cal.4th at pp. 255-256.) The record does not reflect that defendant attempted to call the declarants to examine them regarding their declarations in this case. Regardless, the differences between the evidence in this case and in *Pride* do not render the evidence insufficient here.

In *Pride*, the trial judge who took the plea was deceased (*Pride, supra*, 3 Cal.4th at p. 255), but in this case the trial judge was alive and provided a declaration as to his habit and custom in taking a plea at the time defendant pleaded guilty to robbery. While the plea hearing may have occurred more than 30 years before the hearing on the motion to strike the prior conviction, the evidence of habit and custom encompassed the very period

when defendant's plea was entered, and in that sense the evidence was not remote in time.

Substantial evidence supported the trial court's implicit factual findings, and on those facts, the prior robbery conviction was constitutionally valid.

DISPOSITION

The judgment is affirmed.

ELIA, ACTING P.J.

WE CONCUR:

BAMATTRE-MANOUKIAN, J.

MIHARA, J.

APPENDIX B

**SUPREME COURT
FILED**

JAN 10 2018

Court of Appeal, Sixth Appellate District - No. H041586

Jorge Navarrete Clerk

S245292

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

GLEN RAY MAXWELL, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice