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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JAIME BASILIO GARCIA et al., Defendants and Appellants.	B231949 (Los Angeles County Super. Ct. No. MA037295)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa M. Chung, Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant Jaime Garcia.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant Javier Esparza.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant Claudio Bernardino.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Marc A. Kohm and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Jaime Garcia, Javier Esparza and Claudio Bernardino were convicted, following a jury trial, of one count of first degree murder in violation of Penal Code section 187, subdivision (a) and one count of kidnapping in violation of section 207, subdivision (a).[1] The jury found true the allegations that a principal was armed with a firearm during the commission of the murder within the meaning of section 12022, subdivision (a)(1). The trial court sentenced each appellant to a term of 26 years to life in state prison, consisting of 25 years to life for the murder plus a one-year enhancement term for the section 12022 allegation. The count stayed sentence on count 2 pursuant to section 654.

Appellants appeal from the judgment of conviction. Bernardino and Esparza contend that the trial court erred in denying appellants' *Wheeler/Batson* motions. Bernardino and Garcia contend that the trial court erred in instructing the jury on aider and abettor liability. Garcia contends the trial court also erred in instructing the jury on culpability under the law of conspiracy. Bernardino and Esparza contend that the trial court erred in failing to instruct the jury that witness Matthew Foust was an accomplice as a matter of law. Esparza also contends that the trial court erred in failing to instruct the jury that the prosecution had the burden of proving accomplice corroboration beyond a reasonable doubt, that duress is not a defense to accomplice aider and abettor liability and that the jury was required to acquit Esparza if it found that Foust was an accomplice. He further contends that cumulative error on the accomplice instructions requires reversal. Bernardino contends that the trial court erred in admitting crime scene photos of the victim. Each appellant joins in the other appellants' contention to the extent applicable. We affirm the judgment of conviction.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Facts

The body of Nicholas Ramirez was found in the trunk of his own car by police on September 18, 2006. The car was located in a desert field. Ramirez had been shot nine times. Ramirez had last been seen by his family on September 16, 2006.

Some physical evidence connected appellants to the murder of Ramirez, but most of the evidence against them came from the testimony of Matthew Foust.

Foust testified that on September 16, 2006, about 2:00 a.m., he arrived at appellant Jaime Garcia's house in Littlerock, California. Foust had driven from his home in Arizona to purchase a set of car rims from Garcia. When Foust arrived, a party was going on in the garage, but Foust went in the house and slept.

That morning, about 6:00 or 7:00 a.m., Foust drove Garcia to Garcia's girlfriend's house, where they picked up the rims. When they returned to Garcia's house, Garcia noticed that the tires on his car were slashed and his speakers were missing. Garcia was noticeably upset. Appellant Javier Esparza, who is Garcia's brother, speculated that it "could have been them guys from last night."

The party the previous night had been a birthday party for Garcia's close friend, Jesse Ramirez. Jesse's brother Nicholas Ramirez, the victim in this case, was at the party. Appellants Esparza and Bernardino were also at the party.

At some point during the party, Jesse got into a fight with Esparza. Jesse left the party about 7:00 or 8:00 a.m., with Martin Guzman, who was living with Garcia at the time. According to Jesse, Guzman took a suitcase and clothes that belonged to Garcia, and slashed the tires of Garcia's car. The two men then took a train to Los Angeles.

After Esparza's comment, Garcia went into the house and got his gun. He then told Foust, "You are going to take us to go find this guy." Foust was scared and did what he was told. He drove Garcia and Esparza to Cesar Reyes's house. Reyes was standing outside, waiting for them. Foust then drove to Ramirez's house.

As Foust and his passengers arrived at the Ramirez house, Nicholas had just finished washing his car and was leaving in that car. According to Ramirez's brother,

David, and sister, Yvonne, this occurred around 10:30 a.m. Yvonne saw Foust's car. Ramirez did not stop. Both Garcia and Esparza told Foust to follow Ramirez.

Foust followed Ramirez to a gas station and pulled in right behind Ramirez's car. Garcia and Reyes got out of the car, approached Ramirez and, after the three men talked, Ramirez returned to his car accompanied by Garcia and Reyes. Garcia entered the front passenger seat and Reyes returned to Foust's car and told him to follow Ramirez's car.

Foust followed Ramirez to appellant Bernardino's house. Foust initially told police that the others went inside the house, but he stayed outside and talked with his girlfriend on his phone. He never went inside. At trial, he denied making those statements. He testified that he went inside with the others.

Inside the house, both Garcia and Reyes asked Ramirez, "Where is my stuff?" or "Where is my stereo?" Reyes hit Ramirez in the face, knocking him to the ground. Reyes began kicking Ramirez. Garcia continued to ask, "Where is my stuff?" Ramirez replied he did not have it and did not know where it was. Bernardino told Garcia to stop because Ramirez was bleeding on his carpet. Bernardino directed Esparza to take Ramirez to the garage. Reyes forced Ramirez into the garage and everyone followed. Garcia ordered Foust to go to the garage.

In the garage, Garcia bound and tied Ramirez to a chair. Ramirez continued to deny he had Garcia's stolen items or that he knew where they were. Esparza now had Garcia's gun and sat down in front of Ramirez while both Garcia and Reyes threatened to kill him if he did not disclose the location of Garcia's items, as well as Reyes's stereo. Eventually, Ramirez said, "I want to die. Just take my life." Garcia then inserted a gag into Ramirez's mouth, Reyes used a pipe to strike Ramirez several times on his head and upper body, and Garcia hit Ramirez several times. For their part, Esparza and Bernardino kicked Ramirez. At some point, Reyes asked Garcia if Foust was "cool." Garcia told Reyes, "Yeah. It's okay," which increased Foust's fear.

Ramirez was walked out of the garage. Garcia ordered him into the trunk of his own car. After Garcia closed the trunk lid, he told Esparza and Reyes to follow him. Esparza and Reyes told Foust, "We're taking your car to follow" Garcia. Esparza sat in

the back seat and Reyes sat in the front passenger seat as Foust drove, following Garcia. Having seen what the men had just done to Ramirez and recognizing that Reyes by himself could have beaten him in a fight, Foust was even more afraid.

After about 5 to 10 minutes of driving, Reyes told Foust to stop the car. When he did so, Reyes got out of the car and ran away. Esparza ordered Foust to continue following Garcia. Foust did as he was told. After Garcia pulled off onto the shoulder near some shrubs, Foust continued on past Ramirez's car for about 100 feet and stopped his car when Esparza told him to stop. Esparza got out of the car and walked towards Ramirez's car while Foust remained inside his car. Foust realized he had an opportunity to leave, but he stayed because he was aware that these men knew where his sister lived and that they were perfectly capable of finding him.

When Foust looked back, he saw Garcia standing over the trunk with the same handgun which he brought with him, the same one Esparza had been holding in the garage. Foust looked away. He then heard at least four to five gunshots. When Foust looked back, he saw Garcia in the back seat area of Ramirez's car and Esparza standing near the driver's door. As Garcia and Esparza entered Foust's car, they both told Foust "Go."

Garcia gave Foust directions to the house where they had earlier picked up Reyes. There, all three went into the house. Garcia and Esparza changed their clothes and shoes, and Foust drove them back to Garcia's house. Garcia and Esparza both told Foust they were going to Arizona with him. Out of fear, Foust drove Garcia and Esparza to Arizona. Garcia and Esparza stayed with Foust for a day or two before leaving on different buses. Before Garcia left, he told Foust "we're going to come and get you" if Foust told anybody what had happened.

Bernardino fled to Mexico. He was eventually arrested by the FBI and brought to California.

On September 18, 2006, the police responded to a call about a suspicious vehicle in a desert field. The vehicle was Ramirez's car with his body in the trunk. Ramirez was bound at the wrists with cords, and gagged with a cloth and masking tape. There were

nine bullet holes in the top of the trunk, and the prosecution expert opined that Ramirez had been shot when the trunk lid was closed. Ramirez had suffered nine gunshot wounds. The bullet pattern on the trunk lid and Ramirez's position inside the trunk were consistent with the shooter firing straight down into the trunk, firing three shots at Ramirez's head and six shots over Ramirez's torso.

Ramirez was shot with James Wilson's .40-caliber Smith & Wesson semi-automatic handgun, which was stolen during a September 2005 burglary of Wilson's Littlerock residence.[2] Blood splatter matched to Garcia was found on the wall of the Wilson residence immediately after the burglary, leading to the conclusion that Garcia was the burglar.

Ramirez's car was tested for fingerprints and five fingerprints were obtained from the right trunk lid on the left edge. Two of those prints matched Bernardino's fingerprints, specifically his right ring finger and his right little finger.

Blood stains found on the entry way carpet of Bernardino's house were consistent with Ramirez's blood. Blood stains consistent with Ramirez's blood were also found in the garage.

The exterior and interior passenger side door handles of Ramirez's two-door car were swabbed for DNA evidence. DNA samples were taken from underneath the door handles where someone would grab them to open the door and on the edge. None of the DNA samples taken from Ramirez's car matched Ramirez. Based on two of the swabs taken from the driver's side door, there was enough for a partial profile. However, there was insufficient genetic information for a complete profile as to either. One of the swabs had a mixture of the DNA. The other swab contained DNA contributed by a single source, a male. It was possible to exclude Esparza's brother, Yvan Esparza, and Bernardino as the contributors of the DNA.

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[2] This gun was not recovered after the murder. Matching was possible because Wilson had kept spent casings from rounds fired by the gun.

A partial profile was also taken from passenger side interior and exterior door handles. It was a partial profile because there was a single locus where there was no genetic information. Genetic information was obtained from the rest of the sample, and it was a near complete profile. The genetic profile was consistent with having been contributed by Esparza. By contrast, Ramirez, Garcia, Yvan Esparza, Bernardino were all excluded from that profile. The frequency of occurrence of that genetic profile was one in 831 trillion. The sample was not classified as a "match" to Esparza's profile due to the missing information as to the single locus.

A partial DNA profile obtained from the gag found in Ramirez's mouth was consistent with a mixture of at least two people. There was not enough genetic information to include or exclude Esparza. However, it was possible to exclude Ramirez, Garcia, Yvan Esparza, and Bernardino.

A pair of Nike shoes were obtained from Esparza in late February 2007. Based on a presumptive blood test, the right shoe sole, close to the bottom of the sole, tested positively for blood. However, no DNA was found on the sole of the shoe, and DNA found on the side of the sole was insufficient for reliable testing.

Appellants presented no evidence on their behalf.

Discussion

1. *Wheeler/Batson* motions

Bernardino and Esparza contend that the trial court erred in denying their motions for mistrial pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79, made on the ground that the prosecutor had improperly excluded two African-American jurors on the basis of their race. Garcia joins this contention. The court found that appellants had not made a prima facie case. Appellants contend that the prosecutor's use of peremptory challenges to exclude these two members from the jury panel without race-neutral justifications, was discriminatory and violated their state and federal constitutional rights to a fair trial.

The Sixth and Fourteenth Amendments of the United States Constitution, and Article I, section 16 of the California Constitution guarantee a right to trial by jury to the criminal defendant, including the right to a unanimous verdict rendered by an impartial jury. (*Batson v. Kentucky*, *supra*, 476 U.S. 79; *People v. Wheeler*, *supra*, 22 Cal.3d 258.)

The essential prerequisite to having an impartial jury is that it include as jurors a representative cross-section of the community. (*Taylor v. Louisiana* (1975) 419 U.S. 522, 528.) "[T]he only practical way to achieve overall impartiality [or a heterogeneous jury] is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out." (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 266-267.)

This rule is frustrated when a prosecutor, through the use of peremptory challenges, seeks to systematically exclude an identifiable segment of the community from the jury. (See, e.g., *People v. Motton* (1985) 39 Cal.3d 596; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 258.) Thus, peremptory challenges may not be used to remove prospective jurors solely on the basis of presumed group bias, which has been defined as a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds. (See, e.g., *People v. Crittenden* (1994) 9 Cal.4th 83, 115; see also *People v. Johnson* (1989) 47 Cal.3d 1194, 1215.)

When an objection to a party's use of peremptory challenges is raised under *Batson v. Kentucky*, *supra*, 476 U.S. 79 or *People v. Wheeler*, *supra*, 22 Cal.3d 258, the trial court's first duty is to determine whether a prima facie case has been shown. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 97.) If a prima facie case is shown then the burden shifts to the prosecutor to show a racially neutral reason for his use of peremptory challenges. (*Ibid*.) "'A "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]'" (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.)

"'[A] defendant may make out a prima facie case of group bias in jury selection by showing that 'the totality of the relevant facts gives rise to an inference of discriminatory

purpose.'" (*People v. Avila* (2006) 38 Cal.4th 491, 548.) "[A] defendant makes out a prima facie case of group bias when he produces 'evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.'" (*Ibid*.)

When a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, a reviewing court is required to consider the entire jury selection record. (*People v. Howard* (1992) 1 Cal.4th 1132, 1154; *People v. Sanders* (1990) 51 Cal.3d 471, 498.) This consideration is not solely limited to a review of counsel's presentation at the time of the motion. (*People v. Howard*, *supra*, 1 Cal.4th at p. 1155.)

a. Prospective Juror No. 8

During voir dire, Juror No. 8 stated she was a substitute resource teacher living in Lancaster. Her ex-husband worked as an assembler. She had one son, a minor. Juror No. 8 said she was familiar with the term "snitch" and said she assumed there were reasons people do not want to talk to the police, including being concerned for their personal safety.

When Juror No. 8's husband was a juvenile, he was arrested. According to Juror No. 8: "He had -- they had a trial in Juvenile Court, I guess. I don't know all the incident because I didn't know him then. I do know it was let go. It was against his father. His father and mother were having a domestic dispute, and he stepped in on behalf of his mother. [¶] *When the police came, somebody had to go*. He was one of the people taken because he was involved. Because it was against his mom and involved his father, they let him go." (Italics added.)

After the prosecutor used a peremptory challenge to excuse prospective Juror No. 8, Garcia's counsel made a *Batson* motion. He contended that the juror's answers were "within the bounds." He added that he thought her comments about snitches were favorable to the prosecution. Counsel for Esparza joined the motion and stated this juror was the first Black venire person seated in the jury box. The court disagreed, stating that there had been other Black venire persons. Bernardino's counsel also joined the motion, arguing that they really knew very little about the juror and that "nothing that she said []

would be detrimental at all to the prosecution's case." Counsel also argued that "there is no really valid reason for the prosecution to excuse her."

The trial court found that no prima facie case of racial discrimination had been established. The court reasoned: "There was an incident concerning her husband, domestic violence he suffered as a minor. It is, obviously, a close relationship. [¶] . . . I understand it may not be domestic violence. [¶] The Court finds a race-neutral reason."

The prosecutor asked for and received permission to explain her use of the peremptory challenge. She stated: "It was based on her statement that when she was talking about her husband was arrested as a minor, that someone -- when the police came, someone had to go, indicating that the police felt they had to make an arrest. Her husband was the victim of that decision and ultimately not convicted by the court system. [¶] I feel that shows a bias and a proper nonrace-related reason to excuse." The prosecutor also addressed Esparza's claim that Juror No. 8 was the first and only African-American venire person, pointing out the defense had previously excused an African-American venire person and that there was currently an African-American venire person in the jury box.

We see no error in the trial court's ruling that appellants did not establish a prima facie claim of racial discrimination. The prosecutor had excused only one out of three African-American venire persons.[3] When as here, the voir dire itself presents an obvious race-neutral reason for excusing the venire person in question, the defendant has failed to raise a reasonable inference of discrimination and so has failed to make a prima facie case. (*People v. Avila*, *supra*, 38 Cal.4th at p. 554 [no inference of discrimination where prospective juror's "written answers to the questionnaire and her responses during oral voir dire disclosed a number of 'reasons other than racial bias for *any* prosecutor to challenge her,'"]; *People v. Turner* (1994) 8 Cal.4th 137, 168.)

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[3] The race-based challenge of even one prospective juror is wrong. However, standing alone, the mere fact that one prospective African-American out of three is excused suggests that the motivating factor in the excusal is not race-based.

Here, as the court pointed out, Prospective Juror No. 8 said that her husband had been involved in a domestic violence offense. She also indicated that he was arrested (and apparently prosecuted) simply because "somebody had to go." This answer clearly reflects a mistrust of the police, which would be a race-neutral reason to excuse her. Since this reason was apparent from the voir dire, her excusal did not give rise to an inference of discrimination. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 703 [use of peremptory challenges to exclude prospective jurors whose relatives or family members have had negative experiences with criminal justice system is not unconstitutional] disapproved on other grounds by *People* v. *Doolin* (2009) 45 Cal.4th 390; see also *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125 [prospective juror's view that her son "was harassed by authorities and falsely accused of using drugs" was sufficient race-neutral reason for exercising peremptory challenge]; cf. *People v. Arias* (1996) 13 Cal.4th 92, 137-139 [voir dire responses from which a prosecutor could infer an "apparent distrust of the system" adequate race-neutral reasons].) Appellants have not identified any non-African-American venire person who was similarly situated to prospective Juror No. 8 but who was not challenged by the prosecutor.

Even assuming for the sake of argument that the trial court erred in finding no prima facie case, we would find the error harmless. The prosecutor met her burden of providing a valid race-neutral reason for challenging the juror. The prosecutor explained that she challenged the juror because the juror stated that her husband was a "victim" of a decision by the police and the prosecutor believed that this showed bias. The prosecutor's belief is a reasonable one based on the record. Bias against the police is a valid non-racial reason to excuse a juror.

b. Prospective Juror No. 6

Juror No. 6 was a retired homemaker who lived in Palmdale and had three adult children. When asked what "bringing someone to justice" meant, she stated: "Well, I think just thinking of the phrase what is probably meant by those who are saying it is, it is almost an assumption that the person, the defendant, is already guilty so they are going to

let justice serve or, you know, they are going to be convicted. But I think it is an assumption that they are already guilty. So we're, you know, he's going, too."

In responding to the prosecutor's questions about the single-witness rule, Juror No. 6 stated she was uncomfortable with the rule because "I thought that it is supposed to be based on evidence which is objective and, personally, I feel like it is a totally subjective decision like I believe [the witness] is credible or I don't believe he is credible." She added: "And I know and I -- the law is saying, well, you can do that; you can make a subjective decision. And I am uncomfortable with that."

The prosecutor then explained that testimony is also evidence and "[t]he judge is telling you a person coming in and testifying, a single witness is sufficient to prove that fact" and asked Juror No. 6, "would you be able to do that?" Juror No. 6 responded, "If there was evidence to support what the witness was saying, I couldn't just make a subjective decision that I believe he was telling the truth or not."

After the prosecutor used a peremptory challenge to excuse Juror No. 6, Garcia's counsel made a *Batson* motion. Counsel for Bernardino and Esparza joined. Counsel for Garcia argued that he believed that this was the third African-American juror that the prosecutor had excused. Counsel stated that he believed that Juror No. 4 had been an African-American and been excused by the prosecutor, but noted that the prosecutor had stated that she believed the juror was White. Counsel argued that Juror No. 6 "seemed to agree with all the questions that were asked of her. She agreed with all the concepts. . . . [S]he had a little trouble in regard to the fact that she thought it was too subjective perhaps that rather than being an objective standard. And I think when the court explained that to her, she continued to nod her head and began to understand that although it is subjective, it is an objective look at all the facts."

The court did not make a finding as to Juror No. 4's race. There was no dispute that the juror at issue, Juror No. 6, was African-American. The court found no prima facie case. The court explained: "This particular juror had made mention of evaluating credibility of witnesses that she felt it was a subjective decision and that she was uncomfortable with that. She linked that to the concept that beyond a reasonable doubt it

appeared to be more of an objective decision. [¶] I did do some subsequent questioning, and I don't disagree with defense counsel's observation that she appears to be nodding her head when I talked about a juror's job as judging credibility or believability of witnesses. She also seemed somewhat uncomfortable in her responses on the issue of whether a single witness can prove a fact. She had mentioned that she would need additional evidence to support that."

The prosecutor explained her reasons for using the challenge. She stated: "She did have a very direct opinion that she wanted more than just a single witness. She wanted something else on top of that after having had the law explained to her, and she was firm when she stated that. [¶] She also made the assumption that the phrase 'bring someone to justice,' that she said -- she volunteered that the assumption was that the defendant is guilty. And she was also nodding to [Garcia's counsel's] discussion in his voir dire questions about the Innocence Project and misidentification of African American defendants. She was nodding throughout in response to [counsel's] discussion of that issue. And for all -- and she also said that the word 'justice' to her is finding someone not guilty."

We see no error in the trial court's ruling that appellants did not establish a prima facie claim of racial discrimination. When, as here, the voir dire itself presented an obvious race-neutral reason for excusing the venire person in question, the defendant has failed to raise a reasonable inference of discrimination. (*People v. Avila, supra*, 38 Cal.4th at p. 554 [no inference of discrimination where prospective juror's "written answers to the questionnaire and her responses during oral voir dire disclosed a number of 'reasons other than racial bias for *any* prosecutor to challenge her'"]; *People v. Turner, supra,* 8 Cal.4th at p. 168.)

Here, as the court pointed out, Prospective Juror No. 6 seemed uncomfortable with the idea of judging credibility and also uncomfortable with the rule that a single witness can prove a fact, and wanted more evidence to support a fact. This is an obvious race-neutral reason for excusing a juror. (See *People v. Crittenden, supra*, 9 Cal.4th at p. 116 [denial of *Wheeler* motion upheld where excused prospective juror "had shown

indecisiveness and could not decide whether she would be able to follow the law"].) Indeed, Juror No. 6's indecisiveness arguably provided grounds to excuse her for cause. (See, e.g., *People v. McDermott* (2002) 28 Cal.4th 946, 981; see also *People v. Pride* (1992) 3 Cal.4th 195, 229.)

Even assuming for the sake of argument that the trial court erred in finding no prima facie case, we would find the error harmless. The prosecutor met her burden of providing a valid race-neutral reason for challenging the juror. She explained that she excused the juror because of her statement that she wanted something on top of single witness testimony to prove a fact. As we discuss, *ante*, this is a valid non-racial reason to excuse a juror.

2. CALCRIM No. 400

The trial court instructed the jury with the following version of CALCRIM No. 400: "A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the perpetrator. Two, he may have aided and abetted a perpetrator, who directly committed the crime. A person is guilty of a crime whether he committed it personally or aided and abetted the perpetrator."[4]

Bernardino contends that this instruction is erroneous and has been criticized as misleading by Division Two of this Court in *People v. Samaniego* (2009) 172 Cal.App.4th 1148. He further contends that the instruction omitted or misdescribed an element of the offense and so violated his federal constitutional right to a jury trial. Esparza and Garcia join in these contentions.

Respondent contends that appellants have forfeited these claims by failing to object and/or request a modification in the trial court. Appellants respond that there was no forfeiture because a trial court has a sua sponte duty to give correct instructions and erroneous instructions may be reviewed pursuant to section 1259 even in the absence of a

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[4] The second paragraph of that instruction, not relevant here, reads as follows: "Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be guilty of other crimes that occurred during the commission of the first crime."

trial court objection. They also contend that if these claims are forfeited, counsel was ineffective for failing to object and/or request modification.

The version of CALCRIM No. 400 used in this case was the 2010 version, which was modified to delete the "equally guilty of the crime" language that the Court in *Samaniego, supra,* found problematic. Now the instruction reads simply "is guilty of a crime." The 2010 version is a correct statement of the law, and is not misleading.

The trial court also instructed the jury with CALCRIM No. 401, which specifically told the jury that a person "*aids and abets* a crime if he knows of the perpetrator's unlawful purpose and he specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate a perpetrator's commission of that crime." Thus, the instructions as a whole made it clear that appellants could only be convicted as aiders and abettors if they shared the same intent as the perpetrator.[5]

Appellants are correct that the Court in *People v. McCoy* (2001) 25 Cal.4th 1111, held that an aider and abettor may be guilty of a greater crime than the perpetrator, and that the reasoning of *McCoy* also means that an aider and abettor may be guilty of a lesser crime than the perpetrator. However, even assuming that a trial court had a duty to instruct sua sponte on this principle of law, such a duty would only arise where there was evidence that an aider and abettor had a less culpable mental state than the perpetrator. Appellants point to no such evidence here.

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[5] To the extent that appellants contend that the jury's question about aiding and abetting showed that the instructions on aiding and abetting were flawed, we do not agree. The jury question involved the conspiracy instruction on felony murder, specifically, paragraph 3, which provides: "If a defendant did not personally commit Kidnapping, then a perpetrator, whom the defendant was aiding and abetting or with whom a defendant conspired, personally committed Kidnapping." The jury asked: "'If a defendant did not personally commit kidnapping, . . .' then what did he/she do?" If anything, this question suggests that the jury was troubled by the law of conspiracy, which would permit a defendant to be found guilty of a crime on the basis of his membership in a conspiracy, rather than on the defendant's own acts of assistance. It does not show error in the aiding and abetting instructions.

As Bernardino acknowledges, his culpability for murder under a direct aiding and abetting theory is based on his statement: "Don't blast him here. Take him out to the desert." This statement was made after Esparza sat down in front of Ramirez with a gun as Garcia and Reyes threatened to kill Ramirez if he did not reveal the location of the men's property, Ramirez replied that he wanted to die and the men gagged him. After Bernardino made his statement, Garcia untied Ramirez, made him walk to his car and told him to get in the trunk. Ramirez complied. Garcia drove off in Ramirez's car, telling Reyes and Esparza to follow in Foust's car.

Thus, Garcia and Reyes stated their intent to kill Ramirez. Bernardino told them to take Ramirez to the desert. "It would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberations and premeditation, which is all that is required. [Citation.]" (*People v. Samaniego, supra*, 172 Cal.App.4th at p. 1166.) Bernardino points to nothing which would contradict that logic in his case. Thus, the trial court had no duty to instruct the jury that Bernardino could be guilty of a lesser degree of murder than the perpetrator.

Similarly, Esparza was aware of Garcia's stated intent to kill and provided assistance. Assuming Garcia was the shooter, Esparza returned the gun to him, and directed Foust to follow Garcia and thereby provide a ride after the killing. As is the case with Bernardino, it would have been virtually impossible for Esparza to have done these things with knowledge of Garcia's intent without at least a brief period of premeditation and deliberation. Esparza points to nothing which makes the impossible possible. Thus, the trial court had no duty to instruct the jury that Esparza could be guilty of a lesser degree of murder than the perpetrator.

Garcia stated his intent to kill Ramirez. Garcia then put Ramirez in the trunk of the car, arranged for Esparza and Reyes to follow in Foust's car, drove to the desert, stopped the car and waited for Esparza to come to the car. Assuming that it was Esparza who did the actual shooting, Garcia's statements and acts show intent, premeditation and deliberation. Thus, the trial court had no duty to instruct the jury that Garcia could be guilty of a lesser degree of murder than the perpetrator.

Further, even if we were to assume that the trial court had a sua sponte duty to instruct on the general principle of varying culpability in all aiding and abetting cases, we would find no prejudice to appellants because there is simply no evidence to suggest that their mental states only rendered them culpable of second degree murder. There is no possibility that appellants would have received a more favorable verdict if such an instruction had been given. For this same reason, appellants' counsels' failure to request such an instruction did not constitute ineffective assistance of counsel. Assuming that appellants' federal constitutional claims were not forfeited, we would find them meritless for the reasons set forth above. (See *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

3. CALCRIM Nos. 403 and 417

Bernardino contends that the trial court erred in instructing the jury that it only had to determine whether "the crime of Murder" was a natural and probable consequence of the target crime or, in the case of conspiracy, the common plan or design of the crime that a defendant conspired to commit. He contends that the court should have instructed the jury that in order to find Bernardino guilty of murder, it had to determine whether first degree murder was a natural and probable consequence of the target crime/conspired crime. Bernardino contends that the erroneous instruction violated his federal constitutional rights to a jury trial and due process. Garcia and Esparza join in these contentions.

Respondent contends that appellants have forfeited these claims by failing to object or request a modification of the instruction in the trial court. Appellants respond that there was no forfeiture because a trial court has a sua sponte duty to give correct instructions and erroneous instructions may be reviewed pursuant to section 1259 even in the absence of a trial court objection. They also contend that if these claims are forfeited, counsel was ineffective for failing to object and/or request modification.

Appellants and respondents agree that the only case discussing the degree of murder under the natural and probable consequences doctrine issue is *People v. Woods*

(1992) 8 Cal.App.4th 1570.[6] We agree as well. We will assume for the sake of argument that *Woods* is applicable.

In *Woods, supra*, the Court of Appeal stated: "If the evidence raises a question whether the offense charged against the aider and abettor is a reasonably foreseeable consequence of the criminal act originally aided and abetted but would support a finding that a necessarily included offense committed by the perpetrator was such a consequence, the trial court has a duty to instruct sua sponte on the necessarily included offense as part of the jury instructions on aider and abettor liability." (*People v. Woods, supra*, 8 Cal.App.4th at p. 1593.) The Court added: "However, the trial court need not instruct on a particular necessarily included offense if the evidence is such that the aider and abettor, if guilty at all, is guilty of something beyond that lesser offense, i.e., if the evidence establishes that a greater offense was a reasonably foreseeable consequence of the criminal act originally contemplated, and no evidence suggests otherwise. [Citations.]" (*Ibid.*)

Here, the evidence establishes that the greater offense of first degree murder was a reasonably foreseeable consequence of the assault and no evidence suggests that second degree murder was. During the assault, Garcia and Reyes stated their intent to kill

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[6] Both appellants and respondent devote a significant portion of their arguments on this issue to discussing cases which involve instructions on attempted murder under the natural and probable consequences doctrine. After completion of briefing in this matter, the California Supreme Court issued its opinion in *People v. Favor* (July 16, 2012, S189317) ___ Cal.4th ___. In *Favor*, the Supreme Court held that a trial court need only instruct the jury to determine whether attempted murder was the natural and probable consequence of the target. The court has no duty to instruct the jury that a premeditated attempt to murder must have been a natural and probable consequence of the target offense. In reaching this conclusion, the Supreme Court made it clear that its analysis rested on the fact that attempted premeditated murder and attempted unpremeditated murder are not divided into degrees and are not separate offenses. Thus, cases discussing attempted murder under the natural and probable consequences doctrine are not useful in this case. We note that in deciding *Favor*, the Supreme Court distinguished *People v. Woods, supra,* on the ground that *Woods* involved murder, where there are different degrees of the offense. Nothing in the Court's discussion of *Woods* suggests any disapproval of that case.

Ramirez unless he told them where their property was. Esparza was holding a gun in plain sight during these statements. Ramirez, who had been badly beaten at that point, stated that he just wanted to die. The men then gagged Ramirez, and thereby ended Ramirez's opportunity to tell them what they wanted to hear. Bernardino then told the men not to "blast" Ramirez there, but to take Ramirez to the desert. Under these facts, at the time of the garage assault, premeditated and deliberate first degree murder was not only foreseeable, it was inevitable. In order for Ramirez's subsequent murder to be second degree murder, the men would have had to abandon their plan to kill Ramirez, then end up killing him anyway without premeditation and deliberation. Such a turn of events was not reasonably foreseeable. Thus, the trial court had no duty to instruct the jury that second degree murder was a foreseeable consequence of the target crimes.

Further, even if we were to assume for the sake of argument that the trial court had a sua sponte duty to instruct on the general principle of the foreseeability of the degrees of murder in all natural and probable consequences cases, we would find no prejudice to appellants because there is simply no evidence to suggest that second degree murder was a foreseeable consequence of the target crimes. There is no possibility that appellants would have received a more favorable verdict if such an instruction had been given. For this same reason, appellants' counsels' failure to request such an instruction did not constitute ineffective assistance of counsel. Assuming that appellants' federal constitutional claims are not forfeited, we would find them meritless for the reasons set forth above. (See *People v. Boyer*, *supra*, 38 Cal.4th at p. 441, fn. 17.)

4. Conspiracy instructions

Garcia contends that CALCRIM No. 417 as given permitted the jury to convict the defendants of kidnapping and murder without finding that a kidnapping or murder occurred. He further contends that the instruction omits an element of the offense and violates his federal constitutional rights to due process and trial by jury. Bernardino and Esparza join in these contentions.

In his opening brief, Garcia acknowledges that he did not object to the instruction in the trial court, but contends that his claim of error is based on the fact that a trial court

has a sua sponte duty to give legally correct instructions. He asks, in the alternative, that we review his claim pursuant to section 1259. Respondent replies that Garcia and his co-appellants have nevertheless forfeited their federal constitutional claims.

Claims that an instruction is misleading or erroneous are reviewed in the context of the instructions as whole to determine whether it is reasonably likely that the jury misconstrued or misapplied the challenged instruction. (*People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on another ground by *People v. Doolin*, *supra*, 45 Cal.4th 390.) We see no reasonable possibility or probability that the jury understood the instruction in the manner suggested by Garcia.

The first half of CALCRIM No. 417 sets forth general principles of liability for coconspirators' acts. The very first sentence of CALCRIM No. 417 tells the jury that "A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy *commits the crime*." (Italics added.) Thus, the instruction clearly requires that the charged crimes have been actually committed and that the perpetrator was a member of the conspiracy. The second sentence of the instruction tells the jury that "a member of a conspiracy is also more criminally responsible for any act of any member of the conspiracy if *that act is done* to further the conspiracy and the act is a natural and probable consequence of the common plan or design of the conspiracy." (Italics added.) Again, the instruction requires that the criminal act for which the conspirator is responsible has actually occurred.

Garcia complains of error in the following portion of the jury instruction, found in the second half of the instruction: "To prove that a defendant is guilty of the crime charged in Counts 1 and 2, the People must prove that: [¶] 1. A defendant conspired to commit one of the following crimes: Kidnap and Murder; [¶] 2. A member of the conspiracy committed Assault with a Deadly Weapon and/or Assault by Force likely to produce great bodily injury to further the conspiracy; [¶] AND [¶] 3. Murder was a natural and probable consequence of the common plan or design of the crime that a defendant conspired to commit."

At worst, this portion of the instruction fails to repeat the requirements already spelled out at the beginning of the instruction. It does not suggest that the jury disregard those requirements. We see no possibility that the jury understood the instruction as a whole as permitting them to convict a defendant of a crime which did not actually occur. Thus, assuming that appellants' federal constitutional claims were not forfeited, they would have no merit for the reasons set forth above. (See *People v. Boyer, supra*, 38 Cal.4th at p. 441, fn. 17.)

5. Accomplice instructions

Section 1111 provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

Esparza makes four arguments of error in connection with the court's instructions about accomplices. He contends that the court erred in failing to instruct the jury that (1) the prosecution had the burden of proving accomplice corroboration beyond a reasonable doubt; (2) duress is not a defense to aider and abettor liability for murder; (3) the jury was required to acquit Esparza if it determined that Foust was an accomplice; and (4) Foust was an accomplice as a matter of law. He further contends that cumulative error requires reversal. Esparza acknowledges that he did not object to the accomplice instructions in the trial court, or request their modification. He requests that we review the instructions pursuant to section 1259. Bernardino also argues that the trial court should have instructed that Foust was an accomplice as a matter of law. Bernardino and Garcia join Esparza's accomplice contentions.

a. Burden of proof

Esparza contends that accomplice corroboration is an element of the substantive charge or an additional fact that adds to a defendant's sentence, and so the prosecution must prove accomplice corroboration by proof beyond a reasonable doubt. He contends that CALCRIM No. 334, which tells the jury that only slight corroboration is required, constitutes a violation of his right to a jury trial and proof beyond a reasonable doubt

under *Apprendi v. New Jersey* (2000) 530 U.S. 466. Bernardino and Garcia join this contention. We do not agree.

"*Apprendi* held that every finding that exposes the defendant to punishment, or increases the punishment possible for a crime, must be submitted to a jury and proved beyond a reasonable doubt." (*People v. Anderson* (2009) 47 Cal.4th 92, 116.)

Accomplice corroboration does not expose a defendant to additional or increased punishment. The punishment for a crime remains the same for a defendant convicted of a crime whether he is convicted by corroborated testimony from an accomplice or by testimony from an eyewitness unconnected to the commission of the crime.

Section 1111, requiring corroboration of accomplice testimony, is not an element of murder or any other crime. (*People v. Frye, supra* 18 Cal.4th at p. 968 ["We are aware of no decision, and defendant cites to none, supporting the proposition that section 1111 establishes an issue bearing on the substantive guilt or innocence of the defendant or otherwise constitutes an element of a criminal offense"] disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th 390.)

Under federal law, "[t]he uncorroborated testimony of an accomplice is sufficient to sustain a conviction unless it is incredible or insubstantial on its face." (*United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282.) Thus, the Constitution does not require corroboration of accomplice testimony. There was no violation of appellants' constitutional rights.

b. Accomplice as a matter of law

Esparza and Bernardino contend that the trial court had a duty to instruct the jury that Foust was an accomplice as a matter of law. Bernardino contends that the trial court's failure to give this instruction violated his federal constitutional rights to due process and a fair trial, and to present a defense. Garcia joins these contentions. We do not agree.

Section 1111 provides: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

Whether a witness is an accomplice is a factual question for the jury "unless there is no dispute as to either the facts or the inferences to be drawn therefrom." (*People v. Garrison* (1989) 47 Cal.3d 746, 772; see also *People v. Brown* (2003) 31 Cal.4th 518, 557 ["'a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are "clear and undisputed"'"].)

Here, as the trial court noted in explaining the need to have the jury determine whether Foust was an accomplice, "there are enough ambiguities, there is prior inconsistencies with his prior statements to the detective versus his testimony. Some of them he says are admitted untruths."

The trial court was correct that the issue of whether Foust was an accomplice was a matter for the jury to decide. The jury was free to consider Foust's actions, disbelieve his claims that he was afraid and ignorant of appellants' intent and find that he was an accomplice. The jury was not required to reach that conclusion, however. Foust's claim that he only helped in the kidnapping because he was afraid would, if believed, provide a defense to the kidnapping charge and to felony murder based on that charge. He claimed that he did nothing during the assault, which, if believed, would mean that he did not commit assault and could not be convicted under a natural and probable consequence theory. To the extent Foust contended that any help he rendered in the assault was due to fear, that would also be a defense to assault and he could not be convicted under a natural and probable consequences theory. At one point, Foust contended that he was outside during the assault. He also testified that he did not know what the men were planning in driving the victim to the desert. If believed, these statements could make him not liable for murder under a direct aiding and abetting theory.

Since the facts were in conflict, it was for the jury to decide which facts to believe and thereby decide whether Foust was an accomplice or not. The court did not err in failing to instruct that Foust was an accomplice as a matter of law. There was no violation of appellants' federal constitutional rights.

c. Acquit as matter of law

Esparza contends that there was insufficient corroborating evidence and so the court had a duty to instruct the jury that it was required to acquit him if they found that Foust was an accomplice. Bernardino and Garcia join this contention. We do not agree.

"Circumstantial evidence is sufficient to corroborate the testimony of an accomplice, and slight evidence may be sufficient corroboration." (*In re Gay* (1998) 19 Cal.4th 771, 776.) It is enough that the corroborative evidence tends to connect defendant with the crime in a way that may reasonably satisfy a jury that the accomplice is telling the truth. (*People v. Sanders* (1995) 11 Cal.4th 475, 535.)

There is sufficient corroborating evidence to sustain the verdict. DNA evidence connected Esparza to the murder. Ramirez had just finished washing his car when appellants arrived. Ramirez was found two days later, dead in the trunk of his car, in an isolated area. When the car was examined after the murder, there were very few fingerprints or DNA deposits. Police did obtain DNA from underneath the interior and exterior passenger side door handles of Ramirez's car. This material provided a near complete genetic profile. There was only a single locus where there was no genetic information. Only one person in 841 trillion would have that profile. Esparza's genetic profile was consistent with the genetic profile of the DNA from the car. In addition, blood was found on one of Esparza's shoes, although there was not enough for reliable testing.

This is slight evidence linking Esparza to the commission of the offenses. Esparza speculates that he might have gone on a beer or drug run with Ramirez the night before during the party and left DNA on the car then and Esparza might not have thoroughly cleaned his car the next day. There is no evidence to support this speculation.

Similarly, Bernardino's fingerprints were found on the trunk of Ramirez's newly washed car. Blood stains consistent with Ramirez's blood were found in the entry way of Bernardino's house and in his garage.

This is slight evidence linking Bernardino to the commission of the offenses. Bernardino too speculates that he might have left his fingerprints on the car during a beer

run the night before, and then Esparza missed a spot in cleaning his car the next day. While there was evidence that Bernardino went on a beer run, there is no evidence that he touched the trunk.

There was evidence that Garcia stole a .40 caliber gun from James Wilson, and that this stolen gun was used in the murder. This is slight evidence linking him to the crime. Garcia speculates that he might have gotten rid of the gun before the shooting, and thereby implies that the gun could have been used by someone else. There is no evidence of this.

d. Sua sponte duty

Garcia contends that the trial court had a sua sponte duty to instruct the jury that duress is not a defense to aiding and abetting murder. He further contends that the trial court's failure to give this instruction violated his federal and state constitutional right to a jury trial. Bernardino and Esparza join these contentions. We do not agree.

Appellants are correct that duress is not a defense to first degree murder, or to aiding and abetting first degree murder. (*People v. Anderson* (2002) 28 Cal.4th 767, 770-773; *People v. Vieira* (2005) 35 Cal.4th 264, 290-291.) However, assuming for the sake of argument that a trial court would ever have a duty to give the instruction described by Garcia, it would have such a duty only if the evidence showed a person was seeking to avoid liability for murder by describing duress. That was not the case here.

Duress occurs when a person commits a crime or aids and abets a crime, but does so out of fear arising from threats or menace.[7] Foust did claim to fear that appellants would hurt him (or his family). Foust's claims of fear were coupled with claims that he did not know what appellants were planning to do, or in the case of the assault, that he merely observed the assault and did not help in any way.

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[7] The threat or menace must be accompanied by a direct or implied demand or requires that the actor commit the criminal act. (*People v. Steele* (1988) 206 Cal.App.3d 703, 706.) Here, Foust reported no demands that he commit a criminal act. Appellants' reported demands were simply that Foust drive them around.

When asked why he did not drive away after he got his tire rims, Foust stated that he did not want to drive appellants to find Ramirez, but did so because he was afraid. However, at that point, appellants had not made any threats against Ramirez. Foust described their subsequent contact with Ramirez as an apparently consensual one. Foust eventually pulled up behind Ramirez at a gas station, and Garcia and Reyes got out and walked up to Ramirez. Foust said: "It looked like they were talking to him." Ramirez then got into the driver's seat of his own car and Garcia got into the passenger side. Reyes returned to Foust's car. Foust did not see a gun during this encounter.

Once the group was at Bernardino's house, appellants' intent to at least assault Ramirez became clear. Foust claimed, however, that he simply stood around while the assault occurred, and did not participate in it or assist or encourage it in any way. Thus, even if Foust were in fear during this time, there is no evidence that his fear caused him to commit a criminal act.

After appellants put Ramirez in the trunk of the car, Foust stated that he was scared when told to follow that car. At the same time, Foust also claimed: "I didn't know what was going to go on." He added: "So I didn't – I didn't know what these guys were going to do next."

The issue of fear arose primarily in connection with Foust's explanation for not fleeing from appellants when he got the chance. Appellants suggested that if Foust really did not share in appellants' plans, he would have fled when given the opportunity. Foust claimed that fear prevented him from fleeing. Foust also implied that his fear prevented him from questioning what appellants were doing.

While Foust's arguments may have indirectly bolstered his claim that he did not intend to help appellants, they do not amount to a claim of duress. Thus, the trial court had no sua sponte duty to instruct that duress is not a defense to murder. Assuming that appellants' constitutional claim was not waived, we would find it meritless for the reasons set forth above. (See *People v. Boyer, supra,* 38 Cal.4th at p. 441, fn. 17.)

e. Cumulative error

Appellants contend that even if the above-described claims of error would be harmless individually, cumulatively they are prejudicial. We have found no error in the instructions, and so appellants' claim of cumulative prejudice fails.

6. Crime scene photos

The trial court admitted two photographs showing the victim in the trunk of the car. Bernardino contends that the photos were prejudicial and had no probative value and so the trial court abused its discretion in failing to exclude the photos under Evidence Code section 352. He also contends that the admission of the photos violated his federal constitutional rights to due process, a fair trial and trial by jury. Garcia and Esparza join this contention.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

A trial court has broad discretion to weigh the probative value of evidence against its potential prejudicial impact. A court's decision that the probative value of the evidence outweighs its prejudicial impact will not be disturbed on appeal unless the court exercised its discretion in "'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Here, the trial court expressly weighed the risk of undue prejudice against the probative value of the photographs, and found that the probative value outweighed any prejudice. The court found that the state of the victim showed intent, premeditation and deliberation for the murder charge. The binding and gagging of the victim also showed intent for the kidnapping charge. The extent of the beating injuries helped explain the amount of blood in Bernardino's house and garage. The court found that although there was dried blood in the photos, the photos were not inflammatory.

We see no abuse of discretion in the trial court's decision. The photos showed the severity of Ramirez's beating injuries and thus provided physical evidence that corroborated Foust's testimony as to how the crime occurred, including explaining the blood stains at Bernardino's residence. (*People v. Gurule* (2002) 28 Cal.4th 577, 624 [the "jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case"]; *People v. Cowan* (2010) 50 Cal.4th 401, 476 ["a prosecutor is not required to rely solely on oral testimony when a visual image would enhance the jury's understanding of the issues"].) The photographs were also relevant to show appellants' mental state. (*People v. Crittenden, supra,* 9 Cal.4th at pp. 133-134 ["The photographs showing the victims' wounds, including the two autopsy photographs, were highly probative as to the kind and degree of force used on the victims, . . . The photographs depicting the thoroughness with which the victims had been bound were highly probative of, among other issues, the planning and deliberation with which the offenses were executed, because they tended to establish that defendant took great care to render his victims helpless, having brought from his own apartment a pillowcase from which he fashioned the bindings."].)

The trial court found that the photographs showed only dried blood and were not inflammatory. We have reviewed the photos and agree with the court. To the extent that Bernardino believes the photos were "gruesome," because of decomposition, we do not agree. (See, e.g., *People v. Davis* (2009) 46 Cal.4th 539, 558, 615 [photograph of victim's badly decomposed body not gruesome].)

There was other evidence of the extremely cruel and pointless nature of the crime itself. The photos simply illustrated that evidence; they did not show the crime as worse than it was. (See *People v. Zapien* (1993) 4 Cal.4th 929, 958 ["'the statute uses the word [prejudice] in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]'"].) Since the photos were probative and not unduly prejudicial, their admission did not deny appellants their rights to due process, a fair trial or trial by jury.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.