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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS MOYA et al., Defendants and Appellants.	B264683 (Los Angeles County Super. Ct. No. BA346352)

APPEALS from judgments of the Superior Court of Los Angeles County, Kathleen A. Kennedy, Judge. Affirmed.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant Jose Luis Moya.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant Gabriel Jay Marquez.

Diane E. Berley, under appointment by the Court of Appeal, for Defendant and Appellant Steven Vicente Simmons.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie A. Miyoshi and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

James Fayed (Fayed) arranged for the murder of his wife, Pamela Fayed, by paying one of the couple's employees, Jose Luis "Joey" Moya, $25,000 to kill her. Moya enlisted the assistance of Gabriel Jay Marquez, the boyfriend of his niece, and Steven Vicente Simmons, Marquez's nephew. On July 28, 2008 Pamela was stabbed to death in a Century City parking garage.

A jury convicted Moya, Marquez, and Simmons of first degree murder (Pen. Code, § 187, subd. (a))[1] and conspiracy to commit murder (§§ 182, subd. (a)(1), 187).[2] The jury found true allegations that the three men committed the murder by means of lying in wait (§ 190.2, subd. (a)(15)) and that Moya committed the murder for financial gain (§ 190.2, subd. (a)(1)), but found not true the allegations Marquez and Simmons committed the murder for financial gain. The trial court sentenced all three to life imprisonment without the possibility of parole on the convictions for the murder and imposed and stayed a sentence of

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

[2] The People originally charged Fayed and Moya with murder and conspiracy to commit murder. The People subsequently charged Marquez and Simmons in a separate case. The two cases were consolidated, but the trial court granted Fayed's severance motion after the People elected to seek the death penalty for him. A jury convicted Fayed of murder for financial gain and by means of lying in wait and of conspiracy to commit murder. The jury imposed a sentence of death.

25 years to life on the conviction for conspiracy to commit murder (§ 654).[3]

Moya, Marquez, and Simmons argue the trial court erred in denying their motion under *Batson v. Kentucky* (1986) 476 U.S. 79, 89 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277 (*Wheeler*) (*Batson*/*Wheeler* motion), the court committed instructional error, and substantial evidence did not support their convictions. Marquez and Simmons additionally contend the trial court erred in denying their motion to sever their trials and in admitting Fayed's hearsay statements in a jailhouse recording implicating them in the murder. We conclude there is no merit to any of these arguments, and affirm.

FACTUAL BACKGROUND

A. *The Fayeds, Their Business, and Their Ranch*

The Fayeds were married and had one child, a daughter. Pamela also had an older daughter, Desiree Goudie.

The Fayeds started a business, Goldfinger Coin and Bullion, in Camarillo. Goldfinger maintained accounts for its customers funded with U.S. dollars, gold, or silver. Goudie worked for Goldfinger as a customer service representative. Moya worked for Goldfinger from 2004 until the events giving rise to this case.

When Goldfinger became successful, the Fayeds purchased a house in Camarillo. In 2006 the Fayeds purchased a 200-acre

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[3] The court also imposed and stayed a term for Marquez's prior serious felony conviction (§ 667, subd. (a)(1)).

ranch in Moorpark, which had a main house and a guest house. Moya moved into the guest house and watched over the ranch. He ran errands for Fayed in connection with both the ranch and Goldfinger. Moya was ostensibly on friendly terms with Pamela and Goudie, who visited with him at the guest house when they were at the ranch. Fayed's sister, Mary Mercedes, also lived at the ranch from late 2007 to 2008.

In 2007 Fayed and Pamela decided to divorce. Fayed moved out of the Camarillo house in September 2007; Pamela and her daughters remained there. A month later, Goldfinger fired Goudie, and Pamela stopped going to the Goldfinger office.

B. *Marquez and Simmons*

Moya's sister, Emily, had two daughters, one of whom, Melissa, was Marquez's girlfriend (although one witness, Melissa's cousin, testified they were married). Marquez and Melissa had a child together.

Simmons was Marquez's nephew. In June 2008 a police officer encountered Marquez and Simmons at a market in Oxnard. Simmons told the officer Marquez was his uncle. Melissa had seen Simmons several times with Marquez at parties.

C. *Blood Money and a Red SUV*

1. *The Cash Withdrawal*

In January 2008 Robert Brooks was the chief information officer of Goldfinger, was responsible for information security, and had completed installation of a network for the company. As part of his job he also made withdrawals from automated teller machines to test money laundering limits, which were generally

$800 per withdrawal per bank. He kept records of his withdrawals and returned the money and receipts to Fayed.

In May or June 2008 Fayed asked Brooks to withdraw an aggregate amount of $26,000 and give it to Moya to give to Fayed. Brooks withdrew the money, put it in a cardboard box sealed with security tape, and gave it to Moya. Fayed later told Brooks he had received the money.

2. *Rental of the Red SUV*

Delilah Urrea met the Fayeds when they moved into her condominium complex in the early 2000's, and she started working for Goldfinger in customer service in 2003. On July 3, 2008 Urrea rented a red SUV through Goldfinger's account with a car rental company in Camarillo. Moya picked up the vehicle at the car rental company's office. Goldfinger originally rented the vehicle for Mercedes's son, who also worked for Goldfinger, but, after he got his own car, Moya began driving the red SUV. The red SUV eventually played a role in Pamela's murder.

Miguel Sanchez, who worked for Fayed at the ranch, had responsibility for opening and closing the gates to the ranch—which were kept locked—as people entered or left the property. Sanchez occasionally drove the red SUV, as did Mercedes.

D. *The Murder*

1. *Goldfinger Closes Early*

At Goldfinger, Urrea was told that the office would be open only half a day on July 28, 2008. After leaving work that day, Urrea returned home to find the Fayeds' daughter visiting with her daughter. Urrea expected Pamela to pick up her daughter,

but no one came to get her. Urrea was later instructed Goldfinger would be closed July 29, 2008 and she would be contacted regarding when she should return to work. No one ever contacted her. The Fayeds' daughter ended up staying with Urrea for several days.

2. *The Meeting in Century City*

At 1:00 p.m. on July 28, 2008 the driver of a limousine picked up Fayed and Mercedes in Moorpark and drove them to Century City for a meeting with Fayed's family law attorneys. The driver dropped them off at 2:30 p.m., parked, and waited. Three or four hours later, Fayed called the driver, who picked him up and drove him back to Moorpark.

Pamela met her attorney in Century City at 3:00 p.m., and they went to a meeting at the office of Fayed's lawyers. After the meeting, Pamela's attorney said goodbye to Pamela and went to her car in the parking structure while Pamela took the elevator up to the third floor.

3. *Pamela's Murder in the Parking Structure*

Edwin Rivera finished working at his office in a Century City office building just before 5:30 p.m. He went down to the first floor and entered the adjacent parking structure, where he saw a red SUV parked in the space closest to the building entrance where a green car usually parked. The driver of the SUV was holding the steering wheel and wearing a black, long sleeve hoodie sweatshirt, which Rivera thought was unusual because it was 90 degrees and humid outside. Because the hood of the sweatshirt was hiding the driver's face, Rivera could not tell if the driver was male or female.

Rivera walked up the stairs to the third level, where he parked his car. He sat in his car for 25 minutes, waiting for traffic to decrease before he started to drive home. As he was getting ready to leave, he heard someone scream. At first he thought it was children playing a joke. When he heard a second scream and the words "no, no," he got out of his car and yelled, "What . . . is going on?"

Rivera heard a third scream and headed toward it. When he rounded his car, he saw the red SUV had moved to the third floor and was blocking a black SUV and a red car parked nearby.[4] As Rivera moved toward the red SUV, he saw a tall, skinny man jump out from between the black SUV and the red car.[5] The man was wearing a black hoodie sweatshirt similar to the one Rivera had seen on the driver of the red SUV. The man jumped into the rear driver's side seat of the red SUV. The red SUV sped away, and Rivera started chasing it, running toward the black SUV and red car.

Rivera looked in the direction of the black SUV and the red car and saw a woman covered in blood crouched between the two vehicles. He stopped, and she walked toward him and said, "Please help me. Don't let me die." He told her to sit down and he would get help. He yelled for someone to call an ambulance and the police. When he turned back around, she was on the ground, trying to breathe and making a gargling sound. Rivera

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[4] Pamela drove a black SUV.

[5] Rivera believed this person, who looked about five feet, eleven inches tall, was a man, but he did not get a good enough look to be certain of the person's gender or to make an identification.

saw a big cut on her neck. He ran to the railing and yelled for help.

Pamela died at 6:43 p.m. She sustained multiple stab wounds to her head, neck, and chest, as well as defensive wounds to her arms. The fatal wound was a deep cut to the front of her neck.

4. *Other Witnesses*

Several other witnesses saw portions of the attack and caught quick glances of Pamela's assailant. None of the witnesses who saw the perpetrators, however, was able to identify any of the men they saw.

Maryann Osley left work at approximately 4:00 p.m. and walked to her car, which was parked in the adjacent parking lot. She noticed two men in front of a red vehicle on the second floor. The taller man, who entered the driver's side of the vehicle, was wearing a baseball cap and a "greenish" T-shirt. Osley did not see his face. The other man was on the passenger side of the vehicle; Osley could not see his face, only his upper body. She left the parking garage before the two men did, and she did not see them leave.

Gian Madrid was walking to her car from the elevator in the parking lot next to the office building where she worked. She passed a man and a woman having an argument. Madrid was unable to find her keys and turned back toward the elevator. She saw a slender man in a hoodie sweatshirt and jeans lose his balance while trying to enter a red SUV with tinted windows. He managed to get into the rear seat behind the driver, and the SUV drove away. Madrid then saw a woman lying on the ground.

Matthew Grode, who worked across the street, saw Pamela reaching over the ledge of the parking structure. Someone in a dark hoodie sweatshirt was on top of her, attacking her with both arms moving in a circular motion, while Pamela tried to resist. The assailant then pulled her backwards, out of Grode's view. Grode saw blood on the ledge and the floor of the structure.

Debra Thomas, who worked nearby, looked up and saw Pamela. She yelled for someone to call 911 and provided the caller with information about the attack.

Matthias Stehle heard Pamela screaming and took the elevator up to the third floor of the parking structure. When he saw Pamela, he took off his shirt and wrapped it around her neck to try to stop the bleeding.

5. *Lawyers at the Ranch*

Sanchez had worked at the ranch that morning. As he was leaving, he saw Fayed getting into the limousine. That evening, while in a restaurant in Oxnard, he learned of Pamela's murder. Mercedes called him, and he returned to the ranch to open the gates for a group of lawyers at 11:30 p.m. He called Moya for assistance and knocked on the guest house door but was unable to contact him. Sanchez opened the gates for the lawyers and escorted them to the main house, where he saw Mercedes. Sanchez waited at the ranch until the lawyers left at dawn, when he escorted them out.

E. *The Crime Scene Investigation*

Detective Eric Spear responded to the third floor of the parking structure to investigate the murder. Officers and investigators on the scene had taken photographs and placed

markers to indicate blood on the ground, the antenna and wheel of the red car, and the railing. Pamela's body had been removed. Detective Spear observed Pamela's black SUV parked next to a red car. There was a blood-covered purse at the location. Criminalists were taking swabs of the blood.

The parking structure had a video surveillance system with cameras at the two first-floor entrances and exits. One entrance and exit had no attendant and required a key card. The other entrance and exit required visitors to obtain a ticket to enter and to pay the attendant the amount indicated by the ticket when leaving.

Detective Spear learned the suspect vehicle was a red SUV with a male driver that left the parking structure soon after 6:30 p.m. He reviewed the videos from the surveillance system and observed the only red SUV leaving during the relevant time period. He was suspicious of that vehicle because the driver attempted unsuccessfully to leave through the key card exit. The video from the parking garage showed the driver attempting to manipulate a parking ticket against a key card reader at the garage exit. At one point the driver got out of the vehicle, and Detective Spear had a still photograph made from the video showing the silhouette of the driver. Detective Spear reviewed the surveillance video further and determined the red SUV entered the parking garage at 3:02 p.m.

Detective Spear obtained the parking tickets for that day from the attendant at the visitor's exit. He located a ticket time-stamped with the times the red SUV entered and exited the parking structure.

F. *The Return of the Rented Red SUV*

Shortly after the murder, Moya asked Sanchez to help him return the red SUV to the rental car company in Camarillo. Moya drove the SUV while Sanchez followed in his car. Moya left the SUV at a car wash while Sanchez took him to run errands. A few hours later, they returned to the car wash. Moya picked up the SUV, and Sanchez followed him to the rental car office, which by that time had closed. Moya left the keys in the night drop-off box.

According to Sanchez, it was not unusual for Moya to ask Sanchez to follow him while he returned a rented vehicle or for Moya to wash the vehicle at a car wash before returning it. There were dirt roads at the ranch, and rented vehicles got dirty. The manager of the rental car company noted, however, the red SUV had been detailed and "was in absolutely new condition."

The police had notified the manager of the rental car office in Camarillo they were looking for the red SUV. After Moya returned the SUV, the manager notified the police, who came and got the vehicle.

G. *The Unrelated Federal Investigation and Fayed's Statement in a Jailhouse Recording*

1. *The Federal Investigation*

In 2007 and 2008 the Federal Bureau of Investigation (FBI) and the Internal Revenue Service (IRS) were investigating Goldfinger for illegal money transactions in connection with two alleged Ponzi schemes. In February 2008 Assistant United States Attorney Mark Aveis sought an indictment against Goldfinger and Fayed. He hoped to use it as leverage to obtain

Fayed's permission for an FBI undercover investigation using Goldfinger to investigate the Ponzi schemes.

After Aveis obtained a sealed indictment against Goldfinger and Fayed, he learned of the dissolution proceedings between Fayed and Pamela. He issued a subpoena to the accounting firm involved in the analysis of Goldfinger and the other assets of the marital estate. Pamela's attorney contacted Aveis and said Pamela was willing to cooperate with the investigation of Goldfinger's illegal money transmitting business. Pamela was murdered before Aveis had the opportunity to meet with her.

2. *Fayed's Jailhouse Statements*

A few days after Pamela's murder, Aveis authorized Fayed's arrest on the federal indictment. While Fayed was in federal custody, he spoke to Sean Smith, who was in custody on drug or firearm charges. Aveis arranged to have Smith record a conversation with Fayed. Smith received credit against his prison sentence in exchange for recording his conversation with Fayed.

The People played for the jury the recorded conversation between Smith and Fayed while they were in custody. The two men discussed Fayed's admission he had paid people to murder Pamela, but they had carried out the plan poorly. Fayed and Smith also discussed the possibility of Smith killing the individuals who had killed Pamela, and Smith asked Fayed to write down the name of the individuals he wanted killed and where they could be found. Fayed drew a map of the ranch, instructing Smith that the killer should go to the lower house because his sister and his daughter lived in the upper house.

After Fayed told Smith he wanted to make sure the killer did not go to the wrong place and kill the wrong people, Smith asked, "They all living there or just this one does, the . . . bastard?" Fayed responded, "I don't know if that's true or not. What do you mean? I mean, that's what he said." Smith asked, "The sister's husband. You want him done, too?" Fayed said it was someone who was "[s]upposed to be related through marriage." Fayed acknowledged he and Smith were "planning a fuckin' multiple homicide," and he thanked Smith for "helping [him] out of a fuckin' jam."

Smith also asked Fayed to verify that Moya would be the victim. When Smith asked Fayed for the name of the sister's husband, Fayed said he did not know the sister. Smith asked what Moya had charged Fayed for killing his wife, and Fayed said, "Too much, 25," which Fayed said Moya had for three months before he killed Pamela. Smith said, "You'd be better off paying the bitch her money," and Fayed said, "No . . . she wouldn't . . . listen to reason, dude. She wouldn't listen."

Fayed told Smith he thought Moya drove the car involved in the killing, "but the other kid is who I think (inaudible), I can't see—I haven't seen proof of anything." Smith asked him how many people were involved, and Fayed said, "At the most two, possibly one." Smith asked, "He jumped out of the car and left it running and went around and stabbed her and got back in and left in front of a fuckin' camera?" Fayed said, "Uh-huh."

Fayed and Smith also discussed why the police had not yet arrested Moya or Fayed for the murder. Fayed agreed with Smith he was the prime suspect, "but they can't prove it. That's what I'm wondering if this might stir things up worse or not.

What would you do?" Smith said he would "[h]it him," and Fayed agreed they should "clean it up so they can't—"

Fayed and Smith also discussed why Fayed had hired Moya to kill Pamela rather than doing it himself, Moya's stupidity, and the likelihood Moya would "roll" on Fayed. Smith said, "I can't believe that you would allow . . . this many people to be in on a murder." Fayed said, "I didn't till I found out later." He said he had "the insulation, cause I don't know them, and they don't know me. I never met them. I never seen them." Fayed complained to Smith he had set up four other opportunities for Moya to kill Pamela that were "pre-checked and cleared" at locations that had "no cameras," "four different occasions where [he] had it so it was perfectly clean,"[6] but the men had killed his wife "the day before [his] . . . court hearing at the busiest place in LA," where a camera filmed them. Fayed agreed with Smith that Moya had "to go" because he had botched the job by using a car belonging to Fayed and killing Pamela "under a fuckin' lit area with a frickin' movie camera right there," and then leaving the "hanger [i.e., the knife] in her head and driv[ing] off." Fayed stated, "And then I get home after the one meeting, and I get the call from the lawyers saying she was taken out in the garage while I'm in a meeting."

Fayed again discussed the money he had paid for the murder of his wife and whether Moya split it with the others. Fayed speculated that "maybe [Moya] was the driver and the kid and his dad did the murder. I don't know. But there can't be

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[6] One of these occasions was after a large Fourth of July party at a friend's house in Malibu, another was in a rural canyon in Malibu, and another was when Pamela was alone at the ranch.

anymore than that. . . ." Fayed said he never wanted that many people involved and he could not "sit around here for the rest of my life and worry about whether one of them is gonna . . . finally decide to fess up." Smith told him he did not "need to worry about it anymore."

H. *The Police Investigation*

1. *DNA and Fingerprint Evidence*

The license plate number on the red SUV in the parking structure surveillance video matched that of the red SUV Goldfinger had rented from the rental car company in Camarillo. A police criminalist processed the red SUV for blood and touch DNA. He collected samples from red stains located on the underside of the driver's seat, in the foot well of the second row of seats, on the back of the third row seat, on the third row seat latch, and on the third row seat pillar.

Another police criminalist obtained Pamela's DNA profile. He was able to match it to samples taken from two of the red stains in the red SUV. It also matched a touch DNA sample from the black SUV.

Detective Salaam Abdul arrested Fayed and Moya after he received a copy of the recorded conversation between Fayed and Smith. The detective obtained a buccal swab from Moya and ordered a comparison of Moya's DNA and the DNA samples taken from the red SUV.

A criminalist obtained Moya's DNA profile and compared it to DNA obtained from the red SUV. He found a partial match to DNA found on the gear shift, indicating that individuals other than Moya may have touched the gear shift. The criminalist had

no way of telling how long the DNA sample had been on the gear shift. One of the red stain samples containing Pamela's DNA also contained DNA from at least one male, but Moya's DNA profile excluded him as the contributor.

Detective Abdul began investigating Marquez and Simmons after receiving information about their possible involvement in the crime. The detective had both men arrested and obtained buccal swabs from each of them. The detective noted Marquez is five feet eight inches tall and Simmons is six feet four inches tall.

A criminalist compared the DNA profiles of Marquez and Simmons to those obtained from the red SUV and found no matches. The criminalist also received swabs from the parking ticket but was unable to extract any DNA from them.

A police forensic print specialist compared latent fingerprints on the parking ticket obtained from the parking structure to Simmons's fingerprint exemplar. He was certain the prints on the ticket matched the exemplar.[7]

2. *Cell Phone Evidence*

Sprint provided Call Detail Records (CDR's) for cell phones registered to Marquez and Simmons. CDR's show the general

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[7] A fingerprint identification expert called by Marquez testified the professional community of fingerprint examiners would not accept an opinion stating a fingerprint match was a 100 percent match. The police forensic print specialist acknowledged that scientifically "there is no way you can say it is 100 percent match," but he was nonetheless certain of his identification. His conclusion was verified by two other criminalists.

location of the cell phones when making or receiving calls and the date, time, and duration of the calls. The cell tower a cell phone uses for a call can be within two to ten miles of the phone. AT&T provided CDR's for two cell phones registered to Goldfinger, one of which the Goldfinger phone roster showed was associated with "Joey," Moya's nickname, and one of which was in Fayed's possession when he was arrested.

An FBI agent with the Cellular Analysis Survey Team reviewed the CDR's provided by Sprint and AT&T. The CDR for Marquez's cell phone showed that on July 28, 2008, the date of Pamela's murder, Marquez's phone used cell phone towers in Oxnard, then Simi Valley, then along the 405 freeway, and approached the Century City area at 11:26 a.m. From 1:34 to 3:18 p.m. Marquez's phone used a cell tower southwest of Century City, and used that tower for calls to and from 805-890-6734 between 3:57 and 6:29 p.m. From 6:54 to 7:06 p.m. Marquez's phone used four different cell towers as it moved eastward, away from Century City. Later that night, the phone returned to the Moorpark area. Between March 1 and October 1, 2008, the only time Marquez's phone used cell phone towers in the Century City area was the date of Pamela's murder.

The CDR for Simmons's cell phone showed the phone used towers south of the crime scene, moving north, between 1:16 p.m. and 5:41 p.m. It used a tower south along the 101 freeway at 7:18 p.m. and one farther north at 7:19 p.m. At 7:34 the phone had moved east, but by 7:59 p.m. it was near Moorpark. Like Marquez's phone, the only time between March 1 and October 1, 2008 Simmons's phone used cell phone towers in the Century City area was the date of Pamela's murder.

CDR's also showed that between 11:32 a.m. and 6:29 p.m. Moya's phone and Fayed's phone used AT&T cell phone towers just south of the crime scene. There was a call between the two phones using towers south of the crime scene at 3:01 p.m. Marquez's phone used a Nextel cell phone tower south of the crime scene and Simmons's phone used a Sprint cell phone tower south of the crime scene during this same time period. At 6:00 p.m. Moya's phone received a call from a cell phone with a phone number registered to Goldfinger, and the phone call was made from a cell phone tower south of the crime scene. At 7:08 p.m. Fayed's phone used a cell phone tower just south of the crime scene.

3. *Other Evidence*

The police showed Marquez's girlfriend Melissa a still photograph taken from the video of the parking garage and asked her if the person in the photograph was Simmons. She said it looked like him. She acknowledged, however, that she had previously watched a television program that identified the person on the video as Simmons.

An expert on eyewitness memory and suggestibility called by Marquez discussed differing error rates in identification when eyewitnesses are shown a single individual or asked to identify an individual from a group, using either photographs or live lineups. The expert testified that when the police show an eyewitness an individual and let the eyewitness know that the individual is a suspect, there is an implicit suggestion that the eyewitness should confirm the police identification of the suspect.

DISCUSSION

A. *The Trial Court Did Not Err in Denying the Batson/Wheeler Motion*

Defendants contend the prosecution's use of peremptory challenges to strike three Hispanic male prospective jurors from the panel, and the trial court's denial of defendants' *Batson*/*Wheeler* motion, violated their constitutional rights. Because defendants did not meet their burden of showing a prima facie case of discrimination, however, the trial did not err in denying the motion.

1. *Batson/Wheeler*

A prosecutor's use of peremptory challenges to strike prospective jurors based on race or membership in a cognizable group (*People v. Winbush* (2017) 2 Cal.5th 402, 433 (*Winbush*)) violates a defendant's federal constitutional right to equal protection (*Batson*, *supra*, 476 U.S. at p. 88) and state constitutional right to trial by a jury drawn from a representative cross-section of the community (*Wheeler*, *supra*, 22 Cal.3d at pp. 276-277). Hispanic persons are a cognizable group for purposes of a *Batson*/*Wheeler* motion. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1156, fn. 2 (*Gutierrez*); see *People v. Davis* (2009) 46 Cal.4th 539, 584 [Hispanic-surnamed jurors are a cognizable group]; *People v. Ayala* (2000) 23 Cal.4th 225, 256 ["'[w]hether characterized on the basis of Spanish surname or self-identification, Hispanics are a cognizable population'" for purposes of *Batson*/*Wheeler*].) "Exclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler*

constitutes structural error, requiring reversal." (*Gutierrez*, at p. 1158.)

The trial court uses a three-step process to evaluate a *Batson*/*Wheeler* motion. "'First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination.'" (*People v. O'Malley* (2016) 62 Cal.4th 944, 974; accord, *Gutierrez*, *supra*, 2 Cal.5th at pp. 1158-1159.)[8]

2. *The Excused Prospective Jurors*

The prosecutor exercised her third peremptory challenge on Prospective Juror No. 6. Prospective Juror No. 6 was a registered lobbyist who worked in Sacramento representing businesses and government agencies before the Public Utilities Commission. He had two nephews in law enforcement but he stated his relationships with them would not prevent him from being fair and impartial. He acknowledged he had several bad experiences

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[8] "Ordinarily, we review the trial court's denial of a *Wheeler/Batson* motion deferentially, considering only whether substantial evidence supports its conclusions." (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.) If the record shows the trial court used an incorrect standard, however, we "independently review the record to '"resolve the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race."'" (*People v. Cunningham* (2015) 61 Cal.4th 609, 664.)

with law enforcement "many, many years ago growing up as a teenager in East Los Angeles," when deputy sheriffs stopped him "constantly" for no reason. The court asked if those experiences would bias him against any law enforcement officers who might testify in the trial, and he responded, "Not law enforcement in general. But the individual's conduct would be what I would base my judgment on." Prospective Juror No. 6 said he would not disbelieve law enforcement officers based on what happened to him as a teenager.

The prosecutor exercised her seventh peremptory challenge on Prospective Juror No. 28 (in seat two). Prospective Juror No. 28 was a production supervisor at a manufacturing plant who lived in Culver City and had no prior jury experience. He stated that, if all the other jurors disagreed with him and he believed he was right, he would not change his mind just so everyone could go home. Counsel for Marquez asked him whether, if the prosecution presented evidence that more than one person was involved in the crime and another "person may just have been present[, d]o you think that presence alone is enough to say that that person intended for the crime to happen?" Prospective Juror No. 28 responded, "No."

The prosecutor used her eighth peremptory challenge to excuse Prospective Juror No. 22 (in seat six). Prospective Juror No. 22 was a superior court judge who lived in Beverly Hills. His daughter-in-law was a deputy public defender. He was currently hearing civil cases, although he had previously handled criminal and family law cases. As a lawyer he had been a prosecutor and a defense lawyer in federal court. He lived close to Century City and shopped or went to the movies at the mall relatively often.

He stated that nothing about his work would prevent him from being a fair and impartial juror.

The prosecutor used her ninth peremptory challenge on Prospective Juror No. 24 (in seat eight). He and his wife were postal workers. He stated he had been arrested by the highway patrol for driving under the influence 10 years earlier, and the court had placed him on probation and required him to complete classes. He said nothing about that experience would affect his ability to be fair and impartial.

3. *The Batson/Wheeler Motion*

Before the court excused Juror No. 24, counsel for Marquez made a *Batson*/*Wheeler* motion, asserting the prosecutor "has been systematically kicking Hispanic males. The last two. In fact, they didn't say much, and neither did this one." When the court told her she needed to make a record, counsel for Marquez stated:

"So the person that she initially kicked was the juror seated in seat six. And . . . he was Juror Number Six, and he was an older Hispanic male. He is a lobbyist. He has law enforcement friends. He did mention when he was a kid he had issues with the sheriff, but he said he could be fair. He never said that he—and the court went—brought the elephant in the room with respect to police misconduct cases that have been happening in the news. And he never raised his hand. He never was gung-ho about it." The next one "was Juror Number 28. I don't recall, your honor, what seat that juror was seated at." Counsel stated, "To be honest with you, he never said anything that is remarkable in any way other than the fact he was an Hispanic male."

The court confirmed that the prosecutor used three of nine peremptory challenges to excuse Hispanic males. Counsel for Marquez stated, "Well, the problem is that, given the number of peremptories that we have, it is very easy to hide the people that you are kicking off based on racial animus. So I am just saying systematically she is going to get rid of them. And I think three is a lot. I am making a motion."

The court responded, "Well I don't know that three out of nine is necessarily a lot. But just in the abundance of caution, why don't you [the prosecutor] state your reasons for excusing those three." At that point, counsel for Moya and Simmons joined in the *Batson*/*Wheeler* motion.

The prosecutor explained, "With respect to Juror Number 22 which was Juror Number [6] my reasons for not wanting him on my jury was mentioning of law enforcement, and having a constant reality, during the time, where they were harassing him. And I didn't particularly like the job of the lobbyist. But that was the real reason, was his bad incidents with police officers . . . ."[9]

As to Juror No. 28, the prosecutor explained, "From the very moment he sat down he was, it seemed, discombobulated. He was slow to answer. Even when we excused him, he didn't understand what was happening. He seemed—and I had written down 'slow.' He seemed to be moving very slow and not necessarily understanding everything as quickly as he should. And that was . . . my reason for dismissing him."

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9 The prosecutor was actually referring to the original Juror No. 6. Juror No. 22, who took seat six after Juror No. 6 was excused, was the superior court judge.

The prosecutor said that Juror No. 24 "was young, first of all; his job was postal worker. I usually never keep postal workers. And I did not like his appearance. I did not like the earrings. And the court can look right now and see them. They are the big lobe earrings on his ears. It is not a—it is almost like somebody walking in—as far as I'm concerned—with their pants falling down and showing their underwear. But mostly because he was young, and his occupation. And also his appearance."

The trial court found the defense had failed to establish a prima facie case of discrimination. The court also stated, "But in the event that it was established, I am going to find that the prosecutor has given race neutral reasons for the existence of these peremptories." The court excused Juror No. 24.

4. *Defendants Did Not Meet Their Burden of Establishing a Prima Facie Case of Discrimination*

The trial court found defendants did not meet their burden on the first step of establishing a prima facie case, but the court nevertheless asked the prosecutor to give race- and gender-neutral explanations for her peremptory challenges. The court then made a step three determination that defendants had failed to carry their burden of proving purposeful discrimination.

In *People v. Scott* (2015) 61 Cal.4th 363 the Supreme Court clarified the nature of our review in this situation. The Supreme Court held "where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines

that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson*/*Wheeler* motion with a review of the first-stage ruling. [Citations.] If the appellate court agrees with the trial court's first-stage ruling, the claim is resolved. If the appellate court disagrees, it can proceed directly to review of the third-stage ruling, aided by a full record of reasons and the trial court's evaluation of their plausibility." (*Id*. at p. 391, fn. omitted.) Thus, we begin by reviewing the trial court's first-stage ruling.

A defendant makes a prima facie case "by producing "'evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.'"" (*Gutierrez*, *supra*, 2 Cal.5th at p. 1158.) "'In deciding whether a prima facie case was stated, we consider the entire record before the trial court [citation], but certain types of evidence may be especially relevant: "[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining

jurors belong, these facts may also be called to the court's attention.'"'" (*People v. Parker* (2017) 2 Cal.5th 1184, 1211-1212.)

Our review of defendants' contention the trial court erred in finding no prima facie case of discrimination is hampered somewhat by some confusion in the record. In making their *Batson*/*Wheeler* motion, counsel for the defendants referred to Juror Nos. 6, 28 and 24. When explaining the reasons for her exercise of the peremptory challenges, the prosecutor referred to "Juror Number 22, which was Juror Number [6]." Her statement of the reasons she excused that juror, however, referred to the original Juror No. 6, to whom defense counsel had referred, not Juror No. 22. No one caught the error and asked her to clarify the record.

Defendants' *Batson*/*Wheeler* argument is based on the assumption that Juror No. 22 was one of the three Hispanic male jurors the prosecutor excused. They argue "a disproportionate number, the last three consecutive of the first nine, of the prosecution peremptory challenges excluded Hispanic male jurors in the panel which shows a pattern of invidious group bias." They assert "[the cumulative voir dire of Jurors Nos. 22, 24, and 28 appears [t]o show each of them to have been the ideal juror for this case." To the extent defendants' argument is based on what, as far as we can tell from the record, is an erroneous assumption (i.e., that Juror No. 22 was one of the three Hispanic male jurors the prosecutor asked the court to excuse), the argument is misguided. As for Juror No. 6, defendants appear to acknowledge he was not an "ideal juror for this case" in their comparison of his qualifications with those of Juror No. 22.

Defendants also argue "the trial court's ruling is further undermined by the prosecutor's lack of specific voir dire of Juror

Nos. 22 and 28." Defendants do not explain what "specific voir dire" they are referring to. The record shows the prosecutor asked the prospective jurors hypothetical questions and questioned them further if, for example, they had a problem with a question she asked or a concept she was trying to explain. The prosecutor also questioned some of the prospective jurors about their answers to questions asked by counsel for the defendants. She focused on people who talked about their experiences or the experiences of relatives with the criminal justice system or with incidents that might lead them to sympathize with criminal defendants. For example, the prosecutor asked Juror No. 24 about his arrest for driving under the influence and whether he felt law enforcement had treated him fairly.

The prosecutor's questions during jury selection reflected her primary area of legitimate concern: prior experience with the criminal justice system that might prevent a prospective juror from being fair and impartial. (See *People v. Cowan* (2010) 50 Cal.4th 401, 450 ["[a] prospective juror's negative experience with the criminal justice system, including arrest, is a legitimate, race-neutral reason for excusing the juror"]; *People v. Lenix* (2008) 44 Cal.4th 602, 628 ["'[w]e have repeatedly upheld peremptory challenges made on the basis of a prospective juror's negative experience with law enforcement'"].) Juror No. 6 had already discussed his negative experience with law enforcement; Juror No. 28 stated he had no such experience. The prosecutor questioned Juror No. 24 about his treatment after his arrest. She did not engage in desultory voir dire as to the three Hispanic male jurors that suggested a "previous plan to remove those jurors" (*People v. Motton* (1985) 39 Cal.3d 596, 607, fn. 3), but, as she did with other prospective jurors, asked questions relevant to

her primary area of concern. On this record, the prosecutor's questioning—or lack thereof—of these three prospective jurors did not evidence discrimination. (See *People v. Parker*, *supra*, 2 Cal.5th at pp. 1211-1212.)

And now the critical question: Did the defendants show the prosecutor """struck most or all of the members of the identified group from the venire, or . . . used a disproportionate number of his peremptories against the group"""? (*People v. Parker*, *supra*, 2 Cal.5th at p. 1211.) Because we "undertake an independent review of the record to decide 'the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race,'" defendants must "'make as complete a record of the circumstances as is feasible'" to assist in this determination. (*People v. Taylor* (2010) 48 Cal.4th 574, 614.) This includes showing not only the excused jurors were members of the identified group but also how many members of that group remained on the jury panel, how many of those the prosecutor excused, and whether any ultimately served as jurors in the case. (*People v. Neuman* (2009) 176 Cal.App.4th 571, 581-582; see, e.g., *People v. Bonilla* (2007) 41 Cal.4th 313, 344-345 [comparing the percentage of Hispanic prospective jurors the prosecutor excused to the percentage in the jury pool and noting that a Hispanic man sat on the jury]; *People v. Bell* (2007) 40 Cal.4th 582, 598-599 [prosecutor used two of 16 peremptory challenges against African American women, but three African American men served on the jury], disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

In a similar case before this court, *People v. Jones* (2017) 7 Cal.App.5th 787, "the prosecutor exercised three out of nine peremptory challenges to excuse African-American prospective

jurors. In making the first *Batson*/*Wheeler* motion, [the defendant's] counsel contended that he had stated a prima facie case of race discrimination because the prosecutor had excused two African-Americans from the panel and there was no apparent reason for excluding the challenged jurors. In making the second *Batson*/*Wheeler* motion, [the defendant's] counsel similarly claimed that a prima facie showing had been made because the prosecution had now excused a third African-American from the panel and there was no indication the challenged juror would be favorable to the defense. [The defendant's] counsel urged the trial court to find that the prosecution's use of peremptory challenges showed a pattern of 'systematically excluding' African-American prospective jurors on the basis of their race." (*People v. Jones*, at p. 803.) The trial court noted there were other African-American prospective jurors on the panel, found the defendant had not made a prima facie case of discrimination, and denied the motion. (*Id*. at p. 801.)

Affirming that ruling, we explained that, "[w]hile it is true that '[t]he exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal' [citation], the prima face showing is not made merely by establishing that an excluded juror was a member of a cognizable group. [Citations.] Rather, '"in drawing an inference of discrimination from the fact one party has excused 'most or all' members of a cognizable group [citation], a court finding a prima facie case is necessarily relying on an apparent pattern in the party's challenges." [Citation.] Such a pattern will be difficult to discern when the number of challenges is extremely small.'" (*People v. Jones*, *supra*, 7 Cal.App.5th at p. 803.) As a result, it may be "'"'impossible,'" as a practical matter,

to draw the requisite inference where only a few members of a cognizable group have been excused.'" (*Id.* at p. 804, quoting *People v. Garcia* (2011) 52 Cal.4th 706, 747.) We concluded "the prosecutor's use of three of nine peremptory challenges to excuse African-American prospective jurors was insufficient, standing alone, to establish a prima face case of race discrimination." (*People v. Jones*, at p. 804.)

The prosecutor here similarly used three of nine peremptory challenges to excuse members of a cognizable group—Hispanic males. It is a reasonable inference from defense counsel's statement that the prosecutor was "*going to* get rid of them" that other Hispanic male prospective jurors remained in the panel. While counsel believed three peremptory challenges was "a lot," counsel did not identify any other information that would support an inference of discrimination. (See *People v. Neuman*, *supra*, 176 Cal.App.4th at p. 581 [defendant failed to "state other facts supportive of his challenge which are not apparent to this court on the cold record before us"].) Defendants did not show "the number of [group members] that were in the venire at the time this challenge was made." (*Id.* at p. 583; see *People v. Parker*, *supra*, 2 Cal. 5th at p. 1212, fn. 12 ["'[a] more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge'"]; *People v. Blacksher* (2011) 52 Cal.4th 769, 802 [no prima facie case where "[d]efense counsel failed to show that the prosecution had struck most or all members of the identified group or had used a disproportionate number of challenges against the group"]; *People v. Bell*, *supra*, 40 Cal.4th at p. 599 [no prima facie case where "the record . . . fails to show how many

other Filipino-Americans were in the venire and were not challenged by the prosecutor"].) Defendants also did not show how many group members "remained as prospective jurors" after the prosecutor exercised the three peremptory challenges. (*People v. Neuman*, at p. 582; see *People v. Edwards* (2013) 57 Cal.4th 658, 698 [no prima facie case where defense counsel asserted the challenged prospective juror was African American and there was only one other African American prospective juror].) And defendants did not establish a disparity between the percentage of group members on the panel and the percentage of the prosecution's peremptory challenges used to excuse members of that group. (See *People v. Neuman*, at pp. 583-584.)

These failings "deprive[ ] us of our ability to determine if the record contains substantial evidence to support the trial court's finding that no prima facie case had been made based on statistics and the pattern of peremptory challenges." (*People v. Neuman*, *supra*, 176 Cal.App.4th at p. 581.) That the prosecutor used three of nine peremptory challenges to excuse Hispanic males does not, without more, satisfy defendants' burden of establishing a prima facie case of discrimination. (See *People v. Jones*, *supra*, 7 Cal.App.5th at p. 804.) Defendants have not shown the trial court erred in ruling they failed to meet their first stage burden of establishing a prima facie case of discrimination. This conclusion ends the inquiry, and we do not proceed to the second and third steps of the *Batson*/*Wheeler* analysis. (*People v. Scott*, *supra*, 61 Cal.4th at p. 391.)

B. *The Trial Court Did Not Err in Admitting Fayed's Jailhouse Statements*

Moya, who moved to exclude Fayed's statements to Smith in their entirety, argues the erroneous admission of Fayed's statements to Smith violated his Fourteenth Amendment rights to due process and a fair trial. In particular, he contends the statements were hearsay and not admissible as declarations against penal interest. Marquez, who moved to exclude some of Fayed's statements or, in the alternative, for severance of his trial based on prejudice resulting from Fayed's statements implicating Moya, argues the statements were inadmissible because they were irrelevant and did not qualify as declarations against penal interest. Simmons, who also moved for severance of his trial, argues the statements constituted testimonial hearsay and their admission violated the confrontation clause of the Sixth Amendment. He also contends the statements concerning him and Marquez were double hearsay and not declarations against penal interest. None of these arguments has merit.

1. *Relevant Proceedings*

a. *Moya's Motion In Limine*

Moya filed a motion in limine to exclude Fayed's statements to Smith on the ground they were inadmissible testimonial hearsay and their admission would violate his Sixth Amendment right to confront the witnesses against him under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*). The People argued the statements were not testimonial within the meaning of *Crawford* and were

admissible as declarations against penal interest under Evidence Code section 1230, *People v. Cervantes* (2004) 118 Cal.App.4th 162 (*Cervantes*), and *People v. Greenberger* (1997) 58 Cal.App.4th 298 (*Greenberger*).[10]

The trial court denied the motion. The court ruled Fayed's statements to Smith were not testimonial hearsay within the meaning of *Crawford*. The court also concluded "both *Greenberger* and *Cervantes* survive the *Crawford* analysis, and I think these particular statements that [Fayed] made clearly fall within the *Greenberger* hearsay exception." The court found Fayed's statements constituted declarations against penal interest because he "acknowledged his own participation in the event, his frustration at having given Mr. Moya $25,000, waiting for the event to take place. . . . [¶] . . . [¶] He is worried about his own culpability, and he plans to murder Mr. Moya and others in order to protect himself. But clearly this is non-testimonial, in this court's opinion. And I believe, under the *Crawford* analysis and its progeny . . . that the statement is admissible against Mr. Moya. So your request to exclude the statement at this time is denied."

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[10] The court in *Cervantes* held that, when it is not reasonably anticipated the prosecution will use a statement at trial, the statement is not "testimonial" under *Crawford*. (*Cervantes*, *supra*, 118 Cal.App.4th at p. 174.) The court in *Greenberger* held that "'[e]ven the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor.'" (*People v. Greenberger*, *supra*, 58 Cal.App.4th at p. 329.)

b. *Marquez's First Motion*

Marquez moved to exclude some of Fayed's statements on the ground they were inadmissible hearsay. Marquez "concede[d] that the portion of James Fayed's statement which inculpates himself is admissible." Marquez argued, however, that Fayed told Smith "more than one person" carried out the murder, and Fayed could only have obtained that information from Moya. Because there was no evidence of the circumstances under which Moya conveyed that information to Fayed, there was no basis for the court to find the statement was trustworthy. Therefore, Marquez argued, "the court should exclude the portion of James Fayed's statement that implicates anyone other than himself and Jose Moya." The People opposed Marquez's motion, arguing the statements were declarations against penal interest.

At the hearing on Marquez's motion the trial court suggested "that what counsel should do is listen to [the recording of Fayed's conversation with Smith] again with the notion of whether certain things should be redacted from the statement." The court still believed some, but not all, of Fayed's statements were admissible under *Greenberger*. Counsel for Marquez stated that the information Fayed obtained from Moya would still be inadmissible hearsay, and the court suggested counsel review the recording and identify those statements. The court expressed concern that "there needs to be a little bit of work in that direction before I make any further rulings with regard to the statement." The court ordered counsel for the defendants "to review statements for redactions and for a detailed analysis of what they would like to exclude."

c. *Simmons's Motion for Severance and Marquez's Second Motion To Exclude Fayed's Statements*

Simmons filed a motion to sever his and Marquez's trial from Moya's trial. One of the bases of the motion was that the admission of Fayed's statements regarding what Moya told him that inculpated Simmons and Marquez was inadmissible hearsay. Marquez then filed a motion for separate trials or separate juries and to exclude specified statements of Fayed on the grounds the statements were irrelevant and contained double hearsay and their admission would be unduly prejudicial to him. The People again argued Fayed's statements were admissible as declarations against penal interest under *Greenberger* and *Cervantes*.

The trial court denied Marquez's motion in substantial part. The court said it had reviewed the list of statements Marquez sought to exclude and stated it was concerned because "it is like you want to sanitize this statement to make it . . . hollow, unbelievable, and the personality of the individual who is making the statements . . . would not even come through." The court asked, "How is the jury supposed to weigh the credibility of a statement that's sanitized to the extent that you want to sanitize it? It just doesn't make sense to me. At all."

Counsel for Marquez acknowledged she wanted to sanitize the statements but complained "some of it was so prejudicial because of the way Sean Smith responded, because—I just didn't want there to be any feeling left with the jury that somehow we are talking about these hardcore killers, which is the way he was laying it out." After further discussion, the trial court agreed to exclude references to the Mexican Mafia. The court denied the

request to exclude the statements about other people participating with Moya in the killing. The court noted that, because Fayed did not specifically identify Marquez and Simmons as Moya's confederates, and because his identification of Moya's accomplices—the sister's husband, someone related by marriage, a father and son—did not quite match Marquez and Simmons, the statements might even be exculpatory. Regarding the other statements Marquez claimed were unduly prejudicial, the court found "they are very prejudicial against [Fayed], obviously, but they show the motive, and they are declarations against penal interest and they don't really—I mean, I don't see how [they are] more prejudicial than probative as to the co-defendant[s Marquez and Simmons], so I am going to deny" the motion to exclude those statements.

The court also denied Simmons's severance motion. Once the court excluded the references to the Mexican Mafia and the references to the police classifying Fayed "as a third level terrorist," counsel for Simmons agreed that his motion "has been liquidated."

2. *The Admission of Fayed's Statements Did Not Violate the Confrontation Clause*

In *Crawford* the United States Supreme Court held that out-of-court statements by witnesses that are testimonial violate the Confrontation Clause and are inadmissible, regardless of whether the statements are reliable, unless the witnesses are unavailable and the defendant had a prior opportunity to cross-examine the witnesses. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68.) However, "'statements from one prisoner to another' or 'made unwittingly to a [g]overnment informant' are

not testimonial." (*People v. Washington* (2017) 15 Cal.App.5th 19, 28, quoting *Davis v. Washington* (2006) 547 U.S. 813, 825; see *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1214 ["[p]rivate communications between inmates are not testimonial, and their admission would not violate the principle laid down in *Crawford*"], disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1402 ["statements unwittingly made to an informant are not 'testimonial' within the meaning of the confrontation clause"].) Contrary to Simmons's argument, Fayed's statements to Smith were not testimonial within the meaning of *Crawford*, and their admission did not violate the Confrontation Clause.

3. *Fayed's Hearsay Statements Were Admissible as Declarations Against Penal Interest*

Hearsay statements are generally inadmissible. (Evid. Code, § 1200, subd. (b); see *People v. Sanchez*, *supra*, 63 Cal.4th at p. 674 ["[h]earsay is generally inadmissible unless it falls under an exception"].) One exception, codified in Evidence Code section 1230, "permits the admission of any statement that 'when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.' [Citation.] As applied to statements against the declarant's penal interest, in particular, the rationale underlying the exception is that 'a

person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement against that interest,' thereby mitigating the dangers usually associated with the admission of out-of-court statements. [Citation.] [¶] To demonstrate that an out-of-court declaration is admissible as a declaration against interest, '[t]he proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' [Citation.] 'In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.] [¶] We review a trial court's decision whether a statement is admissible under Evidence Code section 1230 for abuse of discretion." (*People v. Grimes* (2016) 1 Cal.5th 698, 710-711 (*Grimes*), fn. omitted; accord, *People v. Smith* (2017) 10 Cal.App.5th 297, 303.)

The analysis for determining whether Evidence Code section 1230 permits "the admission of 'any statement or portion of a statement not itself specifically disserving to the interests of the declarant'" has evolved. (See *Grimes*, *supra*, 1 Cal.5th at p. 713.) Courts used to strictly interpret the declaration against interest exception to the hearsay rule, with the Supreme Court holding the exception was "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant." (*People v. Leach* (1975) 15 Cal.3d 419, 441; see *Greenberger*, *supra*, 58 Cal.App.4th

at p. 328 ["[o]nly those statements or portions of statements that are specifically disserving of the penal interest of the declarant were deemed sufficiently trustworthy to be admissible," while "[s]tatements not specifically disserving were characterized as 'collateral' statements and inadmissible"].) The reason for the *Leach* rule was that "portions of a confession inculpating others are not as inherently trustworthy as those portions that are actually disserving to the declarant's interests." (*Grimes*, at p. 713.) Thus, under *Leach* the declaration against penal interest exception applied only to statements "genuinely and specifically inculpatory of the declarant . . . ." (*Greenberger*, at p. 329; see *People v. Duarte* (2000) 24 Cal.4th 603 ["a hearsay statement 'which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible'"].)

The Supreme Court in *Grimes* rejected this mechanical approach to determining what constitutes a declaration against penal interest and instead adopted a "contextual approach." (*Grimes*, *supra*, 1 Cal.5th at p. 717.) Under *Grimes*, "'the nature and purpose of the against-interest exception does not require courts to sever and excise any and all portions of an otherwise inculpatory statement that do not "further incriminate" the declarant. Ultimately, courts must consider each statement in context in order to answer the ultimate question under Evidence Code section 1230: Whether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that "a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true.'" [Citation.] Importantly, the

court [in *Grimes*] found that a statement is not 'automatically inadmissible merely because it does not render the declarant more culpable than the other portions of his confession—or because . . . the statement does not "significantly enhance the personal detriment" to a person who has already confessed responsibility for the crime.'" (*People v. Smith* (2017) 12 Cal.App.5th 766, 788-789, quoting *Grimes*, at pp. 716, 717.) Thus, courts now look at the totality of the circumstances to determine the admissibility of portions of a statement that, "though not independently disserving of the declarant's penal interests, also are not merely 'self-serving,' but 'inextricably tied to and part of a specific statement against penal interest.'" (*Grimes*, *supra,* 1 Cal.5th at p. 715, quoting *People v. Samuels* (2005) 36 Cal.4th 96, 121; accord, *People v. Smith*, *supra*, 12 Cal.App.5th at p. 790.)

Moya contends the trial court should have excluded certain statements by Fayed that Moya says were not specifically inculpatory. These include Fayed's statement he had arranged other opportunities for Moya to kill Pamela but Moya failed to follow through and Fayed's statement denying he had anything to do with hiring Marquez and Simmons to assist in the murder. Under the Supreme Court's contextual approach in *Grimes* (which the Supreme Court decided after Moya filed his opening brief), however, Fayed's statements concerning Moya's shortcomings as a hired killer were "not practically separable" from Fayed's inculpatory statements regarding his role as the person who hired Moya to kill his wife. (*Grimes*, *supra*, 1 Cal.5th at p. 717.)

Nor were Fayed's statements an attempt to shift blame to Moya and his companions. Fayed was "candid about his role" in

paying for and attempting to orchestrate Pamela's murder. (*People v. Arauz*, *supra*, 210 Cal.App.4th at p. 1401; see *People v. Samuels*, *supra*, 36 Cal.4th at pp. 120-121 [witness's statement that the defendant paid him to commit murder "was specifically disserving to [the witness's] interests in that it intimated he had participated in a contract killing"].) Fayed's statements were simply an explanation of some of the things that went wrong in Moya's implementation of Fayed's plan to kill Pamela and why Fayed wanted someone to kill Moya; the statements were not an attempt to absolve himself of responsibility for Pamela's killing. Moreover, because in context the statements implicated Fayed in the killing of his wife, they were statements a reasonable person in Fayed's position would not have made unless he believed they were true. (See *Grimes*, *supra*, 1 Cal.5th at p. 716.) The statements were sufficiently disserving to Fayed's penal interests that they were admissible under *Grimes*. (*Id.* at p. 718.)

Simmons argues Fayed's statements regarding the two men who assisted Moya were inadmissible because they were not based on his personal knowledge. Simmons relies on *Greenberger*, where the court held that "[i]n order for a statement to qualify as a declaration against penal interest the statement must be genuinely and specifically inculpatory of the declarant; this provides the 'particularized guarantee of trustworthiness' or 'indicia of reliability' that permits its admission in evidence without the constitutional requirement of cross-examination." (*Greenberger*, *supra*, 58 Cal.App.4th at p. 329.) The court in *Greenberger* noted, "There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception. The trial court must look to the totality of the circumstances in which the statement was

made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry." (*Id*. at p. 334.) *Greenberger* did not impose a personal knowledge requirement; it merely stated that personal knowledge was a factor courts should consider.

To the extent Fayed referred to other people involved in the murder besides Moya, other witnesses independently confirmed that at least two men were involved in the murder. As to the identity of those other people, the trial court observed that Fayed did not specifically identify Marquez and Simmons, and the descriptions he gave did not fully match their appearance. Thus, Fayed's statements could have been exculpatory as to Marquez and Simmons. Marquez acknowledges as much, arguing in support of his contention the evidence is insufficient to support his conviction that Fayed's statements "actually excluded [Marquez] as a suspect in this case."

Finally, even if Fayed's descriptions of the others involved in the murder with Moya were not sufficiently reliable because they were not based on personal knowledge, any error in their admission was harmless. The erroneous admission of hearsay evidence is governed by the harmless error standard in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 887.) Under this standard, "'[w]hen the court abuses its discretion in admitting hearsay statements, we will affirm the judgment unless it is reasonably probable a different result would have occurred had the statements been excluded.'" (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1526; see *People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1, 36 ["[t]he standard for prejudice applicable to state law error in admitting hearsay

evidence is whether it is reasonably probable the appellant would have obtained a more favorable result absent the error"]; *People v. Burroughs* (2016) 6 Cal.App.5th 378, 412 ["[t]o determine whether statutory error exists, we ask whether it is reasonably probable the verdict would have been more favorable to appellant absent the error"]; see, e.g., *People v. Harris* (2005) 37 Cal.4th 310, 336 [error in admitting hearsay evidence was harmless under *People v. Watson* because there was no reasonable probability the error affected the outcome of the trial].)

As the trial court observed, and Marquez acknowledges, Fayed's statements did not specifically identify Marquez and Simmons, and Fayed's descriptions of Moya's two confederates were not entirely accurate descriptions of Marquez and Simmons. The People established Marquez's and Simmons's connection to the murder by presenting evidence of the relationship between the two men, Marquez's relationship to Moya, the cell phone evidence, and the fingerprint evidence. It is not reasonably probable that, absent Fayed's description of the two men he thought assisted Moya, Marquez and Simmons would not have been convicted.

4. *The Statements Were Relevant and Not Unduly Prejudicial*

Marquez argues that "[m]uch of the inflammatory discussion" in the recorded discussion between Fayed and Smith was inadmissible because it was not relevant to the case against Marquez and the undue prejudice of its admission substantially outweighed its probative value. Specifically, Marquez argues the trial court erred in admitting the discussion between Fayed and Smith on the following subjects: (1) why Fayed wanted to kill his

wife, (2) how much Fayed paid to have Moya and others kill his wife and how poorly the killers planned and carried out the murder, (3) how the killers murdered Pamela, (4) how many people were involved in the murder, (5) the relationship among Moya, Marquez, and Simmons, (6) why and how Fayed wanted to kill Moya and the others involved, and (7) how to find and kill Moya. Marquez contends the trial court should have excluded these statements under Evidence Code section 210 and 350 as not relevant because they did not tend to prove or disprove the "disputed fact" in Marquez's trial: "whether Marquez participated in the offense at all" or whether Fayed's "efforts to have Moya killed . . . implicate[d Marquez] at all." He also contends the trial court should have excluded the statements under Evidence Code section 352 because, while the statements "had little, if any, probative value," they were "highly prejudicial" because they "blackened [Marquez's] name by alleged association."

a. *Applicable Law*

Only relevant evidence is admissible. (Evid. Code, § 350; *People v. Melendez* (2016) 2 Cal.5th 1, 23.) Relevant evidence is evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; see *People v. Sanchez*, *supra*, 63 Cal.4th at p. 683.) "'A trial court has "considerable discretion" in determining the relevance of evidence.'" (*People v. Jones* (2017) 3 Cal.5th 583, 609.) We review a trial court's rulings on relevance for abuse of discretion. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1114; *People v. Lam Thanh Nguyen* (2015) 61 Cal.4th 1015, 1073.)

The trial court also has discretion under Evidence Code section 352 to exclude evidence if its probative value substantially outweighs the probability its admission will create a substantial danger of undue prejudice, confusing the issues, or misleading the jury. (*People v. Wall* (2017) 3 Cal.5th 1048, 1069.) "Evidence is prejudicial within the meaning of Evidence Code section 352 if it "'uniquely tends to evoke an emotional bias against a party as an individual'" [citations] or if it would cause the jury to ""prejudg[e]' a person or cause on the basis of extraneous factors."" (*People v. Cowan*, *supra*, 50 Cal.4th at p. 475; accord, *People v. McCurdy* (2014) 59 Cal.4th 1063, 1098; see *People v. Riggs* (2008) 44 Cal.4th 248, 290 ["'[e]vidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome""'].) ""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. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues."" (*People v. Jones*, *supra*, 3 Cal.5th at p. 610.)

b. *There Was No Abuse of Discretion*

The trial court did not abuse its discretion under Evidence Code section 210 in ruling the statements were relevant. The statements regarding the involvement of more than one person in

the murder (including Fayed's repeated use of the words "they" and "that many" and his belief Moya may have been the driver while "the kid and his dad did the murder"), Fayed's understanding of the relationship among Moya, Marquez, and Simmons (including his belief that one of the men was married to Moya's sister rather than, as the evidence at trial showed, married to or dating Moya's niece), and how much Fayed paid Moya and his associates to kill Pamela, tended to prove the involvement of Marquez and Simmons in the murder. As Marquez conceded in the trial court, "these portions shed light on the identity of the person or persons . . . Moya enlisted to kill Pamela . . . ." The amount of money Fayed paid to have his wife killed and whether Moya shared it with his coconspirators, and how they committed the crime, also tended to show that more than one person was involved in carrying out the murder in the parking structure. Fayed's statements that he wanted to cover up his involvement in the crime and protect himself from prosecution by hiring people Smith knew to kill Moya and the others in a "multiple homicide" also strongly tended to prove that other individuals, which other evidence showed were Simmons and Marquez, assisted Mora in committing the murder.

Even the portions of the discussion that Marquez argues were not directly relevant to him and Simmons were relevant to Moya's conduct, and therefore were relevant to whether Simmons and Marquez coordinated their actions with Moya. Fayed's motive for killing Pamela, his payment of money to Moya, his discussion of how the killing occurred, and Moya's flawed execution of the plan to kill Pamela, were all relevant to the prosecution of Marquez and Simmons to the extent the People could prove Marquez and Simmons were Moya's accomplices in

the conspiracy to commit the crime. (See *People v. Maciel* (2013) 57 Cal.4th 482, 516 ["the element of agreeing to commit a crime 'must often be proved circumstantially'"]; *People v. Homick* (2012) 55 Cal.4th 816, 870 [""[t]he existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy,"" italics omitted]; see also *People v. Manson* (1976) 61 Cal.App.3d 102, 149 [evidence incriminating a defendant's accomplices is relevant to the defendant's guilt].)

Moreover, as the trial court pointed out, much of the conversation between Fayed and Smith was relevant to Fayed's credibility. Fayed's efforts to have Moya killed, his complaints about the way Moya and his accomplices carried out the killing, and his discussion about arranging opportunities for Moya to kill Pamela tended to lend credibility to Fayed's confession that he paid Moya to kill Pamela. It placed Fayed's confession in context and provided the jury with a basis for assessing his credibility. (See *People v. Harris*, *supra*, 37 Cal.4th at p. 337 [because the credibility of a key witness is always material, evidence that helps the jury to assess the witness's credibility is relevant]; *People v. Box* (2000) 23 Cal.4th 1153, 1202 [evidence victim was killed at his third birthday party "helped place the testimony of prosecution witnesses in context and assisted the jury in assessing their credibility," and the "trial court was reasonably concerned that requiring witnesses to edit their testimony might make that testimony seem halting and less credible"], disapproved on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10; see also *People v. Pearson* (2013) 56 Cal.4th 393, 460 [Evid. Code, § 356 "'prevent[s] the use of

selected aspects of a conversation . . . so as to create a misleading impression on the subjects addressed'"].)

The trial court also did not abuse its discretion under Evidence Code section 352. As noted, the probative value of much of the discussion between Fayed and Smith was high. True, some of the language Fayed and Smith used was coarse and graphic, as conversations in jail between inmates often are. For example, Fayed said he wanted Moya to "disappear[ ]," Fayed reacted positively to Smith's opinion that the $25,000 payment was "a 'shit pile'" of money, Fayed agreed with Smith's statement "'they [took] the family station wagon under a camera," and Smith told Fayed he would "burn" Mora "to cinder" rather than leaving him "in the middle of a parking lot with a knife in his neck," as Moya had left Pamela. But "[g]raphic evidence in murder cases is always disturbing and never pleasant" (*People v. Cole* (2004) 33 Cal.4th 1158, 1197), and the graphic physical and testimonial evidence in this case included parts of the discussion between Fayed and Smith. (See *People v. Hines* (1997) 15 Cal.4th 997, 1044-1045 ["trial court did not abuse its discretion when it found that any prejudicial effect arising from the jury's listening to defendant's profanity-laden remarks on the tape did not outweigh the conversation's probative value"].)

To the extent Marquez and Simmons suggest evidence of the Fayed-Smith discussion prejudiced them because it linked them to a cold-blooded murder-for-hire plot, they were charged with participating in a cold-blooded murder-for-hire plot. The link was inevitable, and the evidence highly probative. (See *People v. Henriquez* (2017) 4 Cal.5th 1, 28 ["'"[i]n applying section 352, 'prejudicial' is not synonymous with 'damaging'"'"]; *People v. Bryant* (2014) 60 Cal.4th 335, 408 ["'"[e]vidence is not prejudicial,

as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent"""]; cf. *People v. Ruiz* (1998) 62 Cal.App.4th 234, 239 [gang evidence is admissible "when the very reason for the crime is gang related"].) Fayed's statements were highly probative on the existence of the conspiracy to kill Pamela, and the prejudice from their admission did not substantially outweigh that probative value. (See *People v. Maciel*, *supra*, 57 Cal.4th at p. 527 [secretly videotaped statements by the defendant's gang sponsor that they needed "a silencer" to kill the victim "were relevant to the issue of a conspiracy to kill" the victim and were not unduly prejudicial under Evidence Code section 352].)

5. *The Statements Based on Information From Moya Were Admissible*

Simmons argues the trial court erred in admitting statements by Fayed because they contained double hearsay and were not within Fayed's personal knowledge. Specifically, Simmons challenges the admission of Fayed's statements regarding the two men who participated in the murder with Moya. Fayed admitted he had no personal dealings with the two but found out about them later, presumably from Moya.

Multiple hearsay is not admissible unless there is a hearsay exception for each level of hearsay. (*People v. Sanchez*, *supra*, 63 Cal.4th at pp. 674-675; see *People v. Chism* (2014) 58 Cal.4th 1266, 1295, fn. 11 ["multiple hearsay is admissible provided that each hearsay level falls within a hearsay exception"].) Simmons does not point to any statements by Moya that Fayed repeated to Smith. Simmons cites Fayed's statements describing the physical appearance of Moya's "sister's husband,"

how many people may have been involved in the murder, why Fayed had "insulation," who "probably" "did the stabbing," why Fayed wanted his "money back," and how the killers murdered Pamela the day they were supposed to return Fayed's money to him. (See Evid. Code, § 1200, subd. (a) [hearsay rule applies to statements "made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated"]; *People v. Goldsmith* (2014) 59 Cal.4th 258, 273-274; cf. *Browne v. Turner Const. Co.* (2005) 127 Cal.App.4th 1334, 1348-1349 [challenged testimony, while it may have lacked foundation, was not hearsay because it did not purport "to recount 'a statement,' let alone to prove what was 'stated'"].) To the extent Fayed gave Smith information based on statements Moya may have made to Fayed, the hearsay exception for declarations against penal interest applied. As the People correctly point out, "Any portion of Fayed's statements, which was based on information . . . Moya told him, would have also been made in furtherance of the conspiracy to murder [Pamela]. . . . Moya would have had no reason to lie to the person who hired him to kill and it was against his own penal interest to share details about the killing and admit to the killing, even to the man who had hired him. Thus, . . . Moya's statements to . . . Fayed also qualified as declarations against penal interest." Simmons, who did not file a reply brief, does not respond to this argument, essentially conceding its merit. And, as for the second level of hearsay, as noted the hearsay exception for declarations against penal interest applied to Fayed's statements to Smith.

C. *Substantial Evidence Supports the Convictions*

Defendants challenge the sufficiency of the evidence to support their convictions. In determining whether substantial evidence supports the jury's verdict, we review "'the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.'" (*People v. Sanchez* (2016) 63 Cal.4th 411, 453-454.) We "'presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.'" (*People v. Sandoval* (2015) 62 Cal.4th 394, 423.) "'A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict.'" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) """This standard applies whether direct or circumstantial evidence is involved."""" (*People v. Gonzales* (2011) 52 Cal.4th 254, 294.)

1. *Moya*

Moya argues substantial evidence does not support his conviction because the trial court should have excluded Fayed's statements to Smith. Moya contends that, absent those statements, "there is no evidence whatsoever linking [him] directly or indirectly to the planning or the killing of Pamela Fayed." As discussed, however, the trial court did not err in admitting Fayed's statements implicating Moya in the murder-for-hire plan. In addition, the red SUV involved in the killing, which was in Moya's possession and which Moya had cleaned and detailed before he returned it to the rental car company, linked Moya to the murder. The evidence of Brooks's transfer of $26,000 to Moya further connected Moya to the crime, as did the cell

phone evidence placing him, Marquez, and Simmons in the vicinity at the time of the murder. There was substantial evidence to support his conviction.

2. *Marquez*

Marquez correctly notes there is no direct evidence placing him at the scene of the crime. But there was circumstantial evidence he was there. (See *People v. Brooks* (2017) 3 Cal.5th 1, 57.) There was evidence his cell phone was in the vicinity at the time of the crime, as were cell phones belonging to Simmons and Moya. After the crime, Marquez's and Simmons's cell phones returned to Moorpark. Simmons was Marquez's nephew, and the two were seen together on several occasions. Each of these pieces of evidence, standing alone, might not constitute substantial evidence of Marquez's guilt. In reviewing the sufficiency of the evidence to support Marquez's conviction, however, we do not look at the pieces of evidence individually. As noted, we look at "'the entire record in the light most favorable to the judgment'" (*People v. Sanchez*, *supra*, 63 Cal.4th at pp. 453-454) and "'presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence'" (*People v. Sandoval*, *supra*, 62 Cal.4th at p. 423).

Moreover, this case involved a conspiracy to commit murder. "'Conspiracy requires two or more persons agreeing to commit a crime, along with the commission of an overt act, by at least one of these parties, in furtherance of the conspiracy.'" (*People v. Homick*, *supra*, 55 Cal.4th at p. 870.) "'To prove an agreement, it is not necessary to establish the parties met and expressly agreed; rather, "a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or

tacitly came to a mutual understanding to accomplish *the act* and unlawful design.'"" (*People v. Johnson* (2013) 57 Cal.4th 250, 264.) Because "the agreement between the conspirators is the crux of criminal conspiracy, . . . the existence and nature of the relationship among the conspirators is undoubtedly relevant to whether such agreement was formed, particularly since such agreement must often be proved circumstantially. '"The existence of a conspiracy may be inferred from the conduct, *relationship,* interests, and activities of the alleged conspirators before and during the alleged conspiracy.'"" (*People v. Homick*, at pp. 870-871; accord, *People v. Starski* (2017) 7 Cal.App.5th 215, 224.) "'[T]he entire conduct of the parties, their relationship, acts, and conduct . . . may be taken into consideration by the jury in determining the nature of the conspiracy.'" (*People v. Starski*, at p. 224.)

Marquez was the link between Moya, who was paid to kill Pamela, and Simmons, who the evidence showed probably did the actual killing. Marquez had a relationship with Moya's niece and was related to Simmons. The jury could reasonably infer from the cell phone evidence that Marquez also traveled to the Century City area at the same time as Moya and Simmons and left at the same time, just after the killing. Cell phone records indicated that, for a period of many months, this was the only time either Marquez or Simmons was in the Century City area. The relationships among the parties and the fact that Marquez traveled to Century City at the same time as Moya and Simmons, at the same time Pamela was murdered, and at no other times, support a reasonable inference that Marquez knew about and agreed to participate in the murder. The evidence showed there were multiple persons involved in Pamela's murder, and there

was substantial evidence to support the jury's finding that Marquez was one of those persons. (*People v. Starski*, *supra*, 7 Cal.App.5th at p. 224; see *People v. Brooks, supra*, 3 Cal.5th at p. 57 ["'[s]ubstantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence'"].)

Marquez argues Fayed's statements regarding Moya's coconspirators cleared him of any involvement in the crimes because Fayed referred to someone related by marriage, the husband of Moya's sister, and "the kid and his dad," and none of these descriptions fits the relationship between Marquez and Simmons. The recording of the conversation shows, and the jury reasonably could have found, that Fayed did not know the two people who assisted Moya and was not certain of their identities and relationships. Under these circumstances, the fact that Fayed's vague and conflicting references to the two people who assisted Moya in the murder did not precisely match Marquez and Simmons is not conclusive proof that Marquez and Simmons did not participate in the murder. Marquez's assertion regarding Fayed's statements is essentially a request that we reweigh the evidence, which we do not do. (See *People v. Mejia* (2012) 211 Cal.App.4th 586, 609 [rejecting the defendant's argument "that the evidence connecting him to the crime is susceptible to inferences consistent with innocence"].)

Marquez also argues the cell phone evidence did not definitively place him at the scene of the murder. But it placed his cell phone pretty close, and at the right time. Courts routinely admit the type of cell phone evidence the prosecution introduced here. (See, e.g., *People v. Garlinger* (2016) 247 Cal.App.4th 1185, 1195-1197; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1027-1028; see also *U.S. v. Dhinsa* (2d Cir.

2001) 243 F.3d 635, 661 ["telephone records confirm [the defendant's] presence in calling areas near the location where [the victim] was murdered"].) The jury is capable of evaluating the evidence. (See *Garlinger*, at p. 1197.) That the cell phone evidence did not prove Marquez's exact location does not mean there was no substantial evidence to support Marquez's conviction.

Marquez also relies on the fact the jury found he did not commit the murder for financial gain. According to Marquez, this finding meant "the jury rejected the only motive suggested by the prosecution for [his] involvement—money. . . . Thus, the record also fail[s] to establish substantial evidence of a motive in [his] case." Even if we interpreted the jury's not true finding on the murder for financial gain allegation against Marquez to mean the jury rejected this as a motive—as opposed to meaning the prosecution failed to prove Marquez acted for financial gain—motive is not an element of the crime of murder. (See *People v. Smith* (2005) 37 Cal.4th 733, 740 ["evidence of motive is not required to establish intent to kill, and evidence of motive alone may not always fully explain the shooter's determination to shoot at a fellow human being with lethal force"].) Conversely, the absence of motive does not necessarily mean there is no substantial evidence to support the conviction. (See *People v. Jennings* (2010) 50 Cal.4th 616, 645 ["[w]e normally consider three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported—preexisting motive, planning activity, and manner of killing—but '[t]hese factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation'"]; *People v. Stitely* (2005) 35 Cal.4th 514, 543 [same].)

3. *Simmons*

Simmons acknowledges his fingerprint was on the parking ticket, the cell phone evidence placed him at or near the scene of the crime, and Melissa's identification of him in a photograph from the parking garage placed him at or near the scene of the murder. Quoting *People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530, however, he argues: "'Mere presence at the scene of a crime is not sufficient to constitute aiding and abetting, nor is the failure to take action to prevent a crime, although these are factors the jury may consider in assessing a defendant's criminal responsibility. [Citation.] Likewise, knowledge of another's criminal purpose is not sufficient for aiding and abetting; the defendant must also share that purpose or intend to commit, encourage, or facilitate the commission of the crime.'" (See *People v. Lara* (2017) 9 Cal.App.5th 296, 322.)

This principle does not apply to Simmons. There was substantial evidence that Simmons was the actual killer, not merely an aider and abettor. The witnesses described the killer as tall and skinny or slender. Simmons is six feet four inches tall; Marquez is only five feet eight inches tall. Even if Simmons were not the killer, there was substantial evidence he was more than merely present at the scene of the crime. "'Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.'" (*People v. Lam Thanh Nguyen*, *supra*, 61 Cal.4th at p. 1054; accord, *People v. Lara*, *supra*, 9 Cal.App.5th at p. 322.) Cell phone evidence showed Simmons and Marquez were in the area of the crime scene for an extended period of time, and it was the only time they were in that area over a period of many months.

Simmons was related to Marquez, who knew Moya through his girlfriend, Moya's niece (although there was no evidence Simmons had any preexisting relationship with Moya). Immediately after the commission of the crime, Simmons attempted unsuccessfully to manipulate the parking ticket to leave the parking garage through the gate without an attendant. Once the red SUV left the parking garage, he and Marquez drove away from the crime scene and returned to Moorpark. It is reasonably inferable from this evidence that Simmons was not merely present in the Century City parking structure that day but that he went there to commit the murder.

Simmons argues that if he stabbed Pamela there likely would have been blood on the parking ticket and he would have left some DNA or other biological evidence at the crime scene. Perhaps. But that does not mean there was no substantial evidence to support Simmons's conviction. Even if, as Simmons suggests, the People could have presented stronger evidence, that does not mean the evidence they did present was insufficient. The applicable standard of review is substantial evidence, not better or stronger evidence. (See *People v. Manibusan*, *supra*, 58 Cal.4th at p. 87 ["'[w]here the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal'"]; *People v. Cunningham* (2016) 244 Cal.App.4th 1049, 1056 ["'[i]n evaluating the evidence, we accept reasonable inferences in support of the judgment and do not consider whether contrary inferences may be made from the evidence'"]; *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1379 ["[t]o the extent [the defendant] argues there is evidence to support a contrary

inference, he misconstrues and/or misapplies the substantial evidence standard of review"]; *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1324 ["[w]here there is substantial evidence to support the verdict, reversal is not warranted because the circumstances might also be reasonably reconciled with a contrary finding"].)

D. *The Trial Court Did Not Abuse Its Discretion in Denying Marquez's Motion To Sever*

1. *The Joinder and Severance Motions*

After the People filed a motion to join the case against Fayed and Moya with the case against Marquez and Simmons, Fayed filed a motion to sever his trial from Moya's trial, claiming prejudice from the admission of statements by Moya implicating him. Simmons and Moya opposed the People's motion for joinder, and the People opposed Fayed's motion for severance.

At the hearing on the motions the trial court questioned the fairness of requiring Fayed, whose counsel was ready to proceed with the trial, "to delay having his trial for a year or more while other counsel get ready on the cases." The court also noted that, because the prosecution was seeking the death penalty for Fayed, "his trial is a little different than the trials for the remaining defendants would be." The court stated, "Obviously, I think that under the Penal Code, these matters are properly joined, all four. It's one transaction and they certainly could have been filed together had everybody been arrested at the same time, they would have been." The court stated, however, it was inclined to allow Fayed to proceed to trial separately if he would be ready within 90 days.

Counsel for Marquez argued, "For my client, there is minimal evidence against him at best. All the evidence is that somehow he was present at some location near that area. He stands in a very different posture than all the other defendants where the evidence against them is a lot more elaborate and great. So I think that it would be a total injustice to him to have his case, which is a very weak case, to be joined with definitely Fayed and Moya's case where I think there is much greater evidence against them." Counsel for Marquez also pointed out there could be issues regarding the admissibility of Fayed's statements against the other defendants.

The trial court granted the People's motion for joinder of the two cases. When counsel for Fayed was ready to proceed to trial within the 90 days, the trial court severed his case from that of the other three defendants.

As discussed, Marquez subsequently filed a motion for separate trials or separate juries and to exclude certain statements of Fayed on the grounds the statements were irrelevant, contained double hearsay, and were unduly prejudicial to him. The trial court denied that motion.

2. *Applicable Law*

"The Legislature has established a strong preference for joint trials. [Citation.] [Penal Code s]ection 1098 states, in relevant part: 'When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials.' 'Joint trials are favored because they "promote [economy and] efficiency" and "'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'"' (*People v.*

Winbush, *supra*, 2 Cal.5th at pp. 455-456.) The "guiding principles a trial court should follow when exercising" its discretion in ruling on a motion for severance are as follows: """The court should separate the trial of codefendants 'in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.""" (*People v. Thompson* (2016) 1 Cal.5th 1043, 1079.) "'When defendants are charged with having committed "common crimes involving common events and victims," as here, the court is presented with a "'classic case"' for a joint trial.'" (*People v. Winbush*, at p. 456; see *People v. Homick*, *supra*, 55 Cal.4th at p. 848.)

"We review the denial of a severance motion for abuse of discretion, based on the facts as they appeared at the time of the court's ruling.'" (*People v. Winbush*, *supra*, 2 Cal.5th at p. 456.) The defendant has the burden of establishing the trial court abused its discretion in denying severance. (*People v. Zendejas* (2016) 247 Cal.App.4th 1098, 1107.) Finally, "'[e]ven if a trial court abuses its discretion in failing to grant severance, reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial.'" (*People v. Winbush*, at p. 456.)

3. *No Abuse of Discretion*

In arguing the trial court abused its discretion in denying his motion to sever his trial from the trial of Moya and Simmons, Marquez relies on the prejudicial association with codefendants

factor.[11] Marquez argues his "association with the other two defendants in the eyes of the jury as he and his co-defendants sat at the same defense table in the same trial led the jury to convict [him] with the other defendants although there was no substantial evidence that he committed a single criminal act of any kind." He asserts that "the probability of the application of a finding of guilt by association was very high in this case" and that "the jury simply applied a blanket theory of guilt without looking carefully at [his] individual case."

"A prejudicial association justifying severance will involve circumstances in which the evidence regarding one defendant might make it likely the jury would convict that defendant of the charges and, further, more likely find a codefendant guilty based upon the relationship between the two rather than upon the evidence separately implicating the codefendant." (*People v. Letner* (2010) 50 Cal.4th 99, 152; see *People v. Bryant, Smith and Wheeler*, *supra*, 60 Cal.4th at p. 383 ["[t]o justify severance the characteristics or culpability of one or more defendants must be such that the jury will find the remaining defendants guilty simply because of their association with a reprehensible person, rather than assessing each defendant's individual guilt of the

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[11] Marquez does not argue the court should have severed his trial because of an incriminating confession, confusion from evidence on multiple counts, conflicting defenses, or the possibility a codefendant might give exonerating testimony. In addition, although Moya and Simmons joined Marquez's argument, neither makes any separate argument with respect to his motion for severance or prejudice as to him. Because Marquez's argument does not apply to them, we do not address the severance issue with respect to Moya and Simmons. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363.)

crimes at issue"]; *People v. Mackey* (2015) 233 Cal.App.4th 32, 102 ["there is no rule that separate trials must be granted whenever evidence of the bad acts of a codefendant is admissible" because to "allow severance whenever a codefendant's unsavory background might reflect poorly on another defendant would result in severance in so many cases that it would defeat the professed legislative preference for joint trials"].) Severance based on prejudicial association is not justified where the defendant's association with his codefendants merely supports an inference that if the codefendants were involved in the crime, the defendant was too, or merely because the evidence against one defendant is stronger than the evidence against another defendant. (See *People v. Bryant, Smith and Wheeler*, at p. 379 ["severance is not required simply because a joint trial may reduce the likelihood of one or more of the defendants obtaining an acquittal" or "because the prosecution's case will be stronger if defendants are tried together"]; *People v. Letner*, at p. 152 [prosecution's argument that it was probable defendants acted in concert because they had a history of doing so was not an appeal to find guilt by association but was proper argument based on reasonable inferences drawn from the evidence]; see also *Zafiro v. U.S.* (1993) 506 U.S. 534, 540 ["defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials"].)

Here, the evidence of Marquez's involvement was not guilt by association but guilt based on reasonable inferences from evidence, including the Moya-Simmons-Marquez connection, the cell phone usage and movement, Fayed's statements regarding the number of and relationship among the individuals involved in killing his wife, and the proximity of all three defendants to the

crime scene on the day of the murder. (See *People v. Letner*, *supra*, 50 Cal.4th at p. 152.) And to ensure the jury evaluated the evidence against each defendant individually, the trial court instructed the jury to "separately consider the evidence as it applies to each defendant" and to "decide each charge for each defendant separately." (See *ibid.*) We presume the jurors followed this instruction. (See *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 887; *People v. Clark* (2016) 63 Cal.4th 522, 589.)

Marquez also contends severance of his trial was required because the "charges in this case were inflammatory by nature" and his "defense case was much stronger than that of his co-defendants." In particular, Marquez argues that the charges involved a "cold blooded contract killing" with gruesome, bloody photographs of the victim and that there was "a great disparity in the strength of the evidence against" him and Simmons. The presence of inflammatory charges and the relative strength of cases, however, are factors relevant to joinder and severance of charges under section 954, not joinder and severance of defendants under section 1098. (See *People v. Simon* (2016) 1 Cal.5th 98, 123 [factors to consider in severing charges are "(1) whether the evidence relating to the various charges would be cross-admissible in separate trials, (2) whether any of the charges are unusually likely to inflame the jury against the defendant, (3) whether a weak case has been joined with a strong case or with another weak case, and (4) whether one of the charges is a capital offense or the joinder of the charges converts the matter into a

capital case"]; accord, *People v. Landry* (2016) 2 Cal.5th 52, 77; *People v. Capistrano* (2014) 59 Cal.4th 830, 848.)[12]

To the extent the factors for severance motions under section 954 are "instructive" for severance motions under section 1098 (*Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 939), the factors cited by Marquez do not support severance. The issue of inflammatory charges under section 954 "is not whether evidence of a violent offense evokes repulsion, but whether "'strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case" on another crime.'" (*People v. Capistrano*, *supra*, 59 Cal.4th at p. 850; see *People v. Simon*, *supra*, 1 Cal.5th at p. 124 ["the animating concern underlying this factor is not merely whether evidence from one offense is repulsive, because repulsion alone does not necessarily engender undue prejudice"].) There was no evidence, inflammatory or otherwise, Moya and Simmons committed another crime. As Marquez concedes, "There were not two offenses with which to compare the strength of the evidence." While there was evidence (arguably inflammatory) Fayed intended to commit another crime (i.e., killing Moya, Marquez, and Simmons), the trial court had severed Fayed's trial.

Nor did the trial court abuse its discretion because the evidence against Marquez "was much weaker than that against the other defendants." The evidence against Marquez was circumstantial, as evidence often is. (See *People v. Shamblin* (2015) 236 Cal.App.4th 1, 9 ["[e]ven where the evidence of guilt is primarily circumstantial, the standard of appellate review is the

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[12] Marquez also forfeited his argument that the inflammatory nature of the charges required severance by not raising it in the trial court.

same"].) And the evidence was cross-admissible: Most of the evidence would have been the same whether Marquez was tried with Moya and Simmons or separately. (See *People v. Romero* (2015) 62 Cal.4th 1, 30 [cross-admissibility of the evidence "'ordinarily dispels any inference of prejudice'" under section 954.)

People v. Chambers (1964) 231 Cal.App.2d 23, on which Marquez relies, is distinguishable. In that case the People charged the defendant and his codefendant with assaulting an elderly patient in their care. Much of the trial focused on the codefendant's abuse of other patients in her care. (*Id*. at pp. 26-27.) In concluding the joinder of the defendant's trial with that of his codefendant prejudiced the defendant, the court cited to the "voluminous evidence of unrelated acts of brutality by [the codefendant], admissible only because she was on trial for offenses unrelated to that charged against [the defendant]," and "the disgusting, inflammatory character of this evidence, which fastened [the defendant] with moral responsibility (but not criminal responsibility) for the operation of an establishment in which elderly, helpless patients were cruelly treated." (*Id*. at pp. 27-28.) Marquez points to no particularly inflammatory evidence regarding Moya or Simmons. There was no evidence either one had previously acted as a hired killer or committed a similar crime. While there was some arguably inflammatory evidence about Fayed, as noted the trial court severed his trial from Marquez's trial.

E. *There Was No Instructional Error*

1. *The Trial Court Did Not Err in Refusing To Instruct the Jury with CALCRIM No. 336*

Marquez asked the trial court to instruct the jury pursuant to CALCRIM No. 336 that it should view the statement or testimony of an in-custody informant with caution and that the statement must be corroborated.[13] The trial court refused to give

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[13] CALCRIM No. 336 reads: "View the (statement/ [or] testimony) of an in-custody informant against the defendant with caution and close scrutiny. In evaluating such (a statement/ [or] testimony), you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits. This does not mean that you may arbitrarily disregard such (statement/ [or] testimony), but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case." The instruction also tells the jury that an in-custody informant "is someone[, other than (a/an) (codefendant[,]/ [or] percipient witness[,]/ [or] accomplice[,]/ [or] coconspirator,)] whose (statement/ [or] testimony) is based on [a] statement[s] the defendant allegedly made while both the defendant and the informant were held within a correctional institution. . . . ."

CALCRIM No. 336 also provides: "[If you decide that a (declarant/ [or] witness) was an in-custody informant, then] (Y/)you may not convict the defendant of _____ <*insert charged crime[s]*> based on the (statement/ [or] testimony) of that in-custody informant alone. . . . [¶] You may use the (statement/ [or] testimony) of an in-custody informant only if: [¶] 1. The (statement/ [or] testimony) is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the (statement/ [or] testimony); [¶] 3. That supporting evidence connects the defendant to the commission of the crime[s] . . . . [¶]

this instruction because "[t]here was no testimony from an in-custody informant." Defendants argue that, because "the statements of Sean Smith, an in custody informant, were central to the prosecution," the failure to instruct the jurors that they should view his statements with caution and that Smith's statements had to be corroborated lowered the prosecution's burden of proof.

Section 1127a, subdivision (a), defines an in-custody informant as "a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution." Section 1127a, subdivision (b), provides that, when such a person "testifies as a witness, upon the request of a party, the court shall instruct the jury" with the language in CALCRIM No. 336, including that the "'testimony of an in-custody informant should be viewed with caution and close scrutiny.'" (See *People v. Bivert* (2011) 52 Cal.4th 96, 118-119 [CALJIC No. 3.20, the predecessor to CALCRIM No. 336, "adopts the statutory language of section 1127a"]; *People v. Hovarter* (2008) 44 Cal.4th 983, 997 [section 1127a "requires a special jury instruction directing juries to give

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[*Supporting evidence*, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.]"

'close scrutiny' to the testimony of informants"].) The reason for this instruction is that, as the Supreme Court noted in discussing CALJIC No. 3.20: "In-custody informant witnesses have no personal knowledge of the crime, but testify that a defendant made an inculpatory statement to them while in proximity in a county jail or state prison, often in exchange for favorable treatment by law enforcement. . . . In-custody informant witnesses testify to a defendant's confession of guilt or admission of criminal behavior, and such evidence, if believed, carries great weight in the determination of guilt. In order to lessen the possibility of any conviction being based on fabricated testimony, the Legislature offered additional guidance to juries in criminal cases involving in-custody informants." (*People v. Bivert*, at p. 121.)[14]

Smith did not testify as an in-custody informant. In fact, he did not testify at all. (See *People v. Bivert*, *supra*, 52 Cal.4th at p. 121 ["[i]n-custody informant witnesses have no personal knowledge of the crime, but *testify* that a defendant made an inculpatory statement to them while in proximity in a county jail or state prison, often in exchange for favorable treatment by law enforcement," italics added]; cf. *People v. Hovarter*, *supra*, 44 Cal.4th at p. 995 [jailhouse informant testified at trial and "was not the most sterling witness, demonstrating an evasive and

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[14] The jury heard that Smith in fact received favorable treatment in his federal criminal case. Aveis, the federal prosecutor who arranged for Smith to record the conversation with Fayed, testified that federal prosecutors "likely would have recommended some kind of leniency for Smith as to the sentence that he was facing" in his federal case and that Smith "was given credit for having cooperated and providing the recording" of his conversation with Fayed.

truculent mien on the stand"]; *People v. Wilson* (2005) 36 Cal.4th 309, 349 [inmate in county jail testified the defendant admitted to him that he shot the victim].) Nor did Smith submit a "statement" at trial. Although Smith made statements to Fayed on the recording, Smith did not testify or make a statement about what Fayed told him. There was only a recorded conversation between Smith and Fayed, and the jury listened to the recording. The jury heard Fayed's "confession of guilt or admission of criminal behavior" directly (*People v. Bivert*, at p. 121) and was able to evaluate Fayed's credibility without evaluating Smith's. (See, e.g., *State v. Smith* (2008) 289 Conn. 598, 633, 960 A.2d 993, 1016 [the rule that a jailhouse informant's testimony is suspect applies to "a situation in which the informant is reporting what a defendant or codefendant stated or did," but is "inapposite" where a jailhouse recording "presents [a coconspirator's] own statements and the circumstances in which he gave them"].) In these circumstances, CALCRIM No. 336 did not apply, and the trial court did not err in refusing to give the instruction.

2. *The Trial Court Did Not Err in Instructing the Jury with CALCRIM No. 358, and the Defendants Forfeited Any Objection to the Court's Response to the Jury's Question*

Marquez objected to CALCRIM No. 358 regarding evidence of a defendant's out-of-court statements on the ground "there were no statements from any defendant."[15] In discussing

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[15] CALCRIM No. 358 provides: "You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in

whether the trial court should give the instruction, the prosecutor pointed out Sanchez testified "about Moya telling him to follow him to the car wash." The trial court decided to give the instruction and tell the jury Moya was the defendant who made an out-of-court statement, although the court did not initially tell the jury what the statement was. Moya objected, and the court overruled his objection. The court instructed the jury: "You have heard evidence that defendant Moya made an oral statement before the trial. You must decide whether the defendant made any such statement, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements. [¶] Consider with caution any statement made by the defendant tending to show his guilt, unless the statement was written or otherwise recorded."

During deliberations the jury sent the court a question regarding CALCRIM No. 358: "What were the oral statements by Mr. Moya?" The trial court responded: "There was testimony from Miguel Sanchez (ranch hand) about being asked to follow Moya to car wash & rental car place." Moya argues the trial court's modification to CALCRIM No. 358 identifying him as the one who made a statement and the court's answer to the jury's

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whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s]. [¶] [Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]"

question identifying what the statement was transformed the instruction into an improper pinpoint instruction.

In *People v. Diaz* (2015) 60 Cal.4th 1176 the Supreme Court held that trial courts no longer have a sua sponte duty to give the cautionary instruction in CALCRIM No. 358. (*Id.* at pp. 1181, 1190.) Indeed, the Supreme Court noted "it is more appropriate to permit defendants to determine whether to request the instruction than to require the trial judge to give it in every case." (*Id.* at p. 1192.) Nevertheless, the trial court's decision to give the cautionary instruction here and adding Moya's name to the instruction was not error. As the Supreme Court observed, the instruction "can be useful in highlighting for the jury the need to carefully consider a type of evidence that is particularly vulnerable to distortion, whether intentional or accidental." (*Id.* at p. 1194.) And to the extent the court's addition of "Moya" after "defendant" in the first sentence of the instruction amounted to a "modification" of the instruction, all the modification did was identify, in a pattern instruction designed for one defendant, which of the three defendants in the case the instruction applied to. Moreover, nothing in the instruction invited the jury to draw an inference favorable to the prosecution. Rather, the court informed the jurors they had to decide whether Moya made a statement before trial, and, if so, to consider the statement along with the other evidence, to decide how much importance to give the statement, and to consider the statement with caution. Although the instruction told the jurors to consider the statement, if made, with caution *if* it tended to show guilt, the instruction did not tell the jurors the statement *did* tend to show guilt. Because the instruction did not tell the jury to draw any inferences or reach any conclusions based on the statement, the

instruction was not an improper or argumentative pinpoint instruction. (See *People v. Woods* (2015) 241 Cal.App.4th 461, 488 [instruction correctly stating the law was not improper because it did not suggest the jury should draw an inference for or against a party from any particular evidence or "imply that the jury should draw any particular conclusion"]; cf. *People v. Homick*, *supra*, 55 Cal.4th at p. 890 [court must "'refuse an argumentative instruction, that is, an instruction "of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence"'"].)

It was not until the court responded to the jury's question that the court told the jury what the statement was: Moya's request that Sanchez follow him to the car wash and the car rental office. Counsel for defendants, however, all agreed to this response. Therefore, defendants have forfeited any argument the response was erroneous. (See *People v. Salazar* (2016) 63 Cal.4th 214, 248 ["counsel's affirmative agreement with the court's reply to a note from the jury forfeits a claim of error"]; *People v. Debose* (2014) 59 Cal.4th 177, 207 [counsel for defendant forfeited the argument the court erred in responding to a jury question "by affirmatively agreeing with the court's actions"]; *People v. Rogers* (2006) 39 Cal.4th 826, 877 ["counsel's acquiescence in the trial court's response forfeits the claim of error on appeal"].)

3. *The Trial Court Did Not Err in Instructing the Jury with CALCRIM No. 371*

Moya objected to CALCRIM No. 371 regarding an attempt to hide evidence shows awareness of guilt.[16] The prosecution requested this instruction based on "the washing of the SUV." The defendants argued the evidence did not support giving the instruction because there was testimony by prosecution witnesses that, given the location of the ranch, "they always cleaned the cars when they returned" them from the ranch.

The trial court stated, "That's for the jury to decide. That's . . . the some evidence. They could conclude that he tried to hide the evidence by having the car washed, and there is some evidence on their side that they always cleaned the cars and they always returned them that way." The prosecutor pointed out that the manager of the rental car office said the red SUV looked as though it had been detailed and "none of the cars ever returned to that place were as clean." The trial court overruled the objection, stating, "I think there is enough to give the instruction. [Counsel] can make your arguments, and both of you have compelling arguments."

Moya contends there was insufficient evidence to support the instruction. "A trial court properly gives consciousness of guilt instructions where there is some evidence in the record that,

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16 The trial court instructed the jury pursuant to CALCRIM No. 371 as modified: "If the defendant Jose Moya tried to hide evidence, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. [¶] If you conclude that a defendant tried to hide evidence, . . . you may consider that conduct only against that defendant. You may not consider that conduct in deciding whether any other defendant is guilty or not guilty."

if believed by the jury, would sufficiently support the inference suggested in the instructions." (*People v. Bowman* (2011) 202 Cal.App.4th 353, 366; see *People v. Alexander* (2010) 49 Cal.4th 846, 921 ["'there need only be some evidence in the record that, if believed by the jury, would sufficiently support the suggested inference'" of consciousness of guilt]; *People v. Hart* (1999) 20 Cal.4th 546, 620 ["in order for a jury to be instructed that it can infer a consciousness of guilt from suppression of adverse evidence by a defendant, there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference,'" and an attempt to destroy or conceal evidence is enough].) The trial court correctly ruled the evidence Moya had the SUV thoroughly cleaned and detailed before returning it to the car rental office was "some evidence" of an attempt to hide evidence of the crime, which tended to show a consciousness of guilt. (See *People v. Tate* (2010) 49 Cal.4th 635, 689-690 [instruction that attempts by the defendant to conceal evidence tended to show consciousness of guilt was proper where there was evidence the defendant "promptly washed" the clothes he was wearing on the day of the murder]; *People v. Lucas* (1995) 12 Cal.4th 415, 467 ["[e]vidence that defendant arranged to have his car, which the trial evidence indicated could well contain bloody evidence of the crimes, moved and cleaned before the police could inspect it, would tend to prove . . . guilty knowledge"]; *People v. McNeill* (1980) 112 Cal.App.3d 330, 339 [evidence the defendant "washed his hands with an abrasive cleanser to remove evidence of powder residue" justified giving instruction on consciousness of guilt].) The trial court did not err in instructing the jury pursuant to CALCRIM No. 371.

4. *The Trial Court Did Not Err in Instructing the Jury with CALCRIM No. 415*

Finally, defendants argue the trial court's modified version of CALCRIM No. 415 "misdirected the jury that it need not find [that each defendant] intended to agree and did agree with one or more of the other defendants and or with James Fayed to intentionally and unlawfully kill, so long as the jury found that 'a defendant' did so." There was no error, however, in the trial court's instruction.

CALCRIM No. 415 contains options to accommodate one or more defendants. For example, it states: "To prove that (the/a) defendant is guilty of this crime, the People must prove that . . . ." Elsewhere, it states: "(The/One of the) defendant[s][,] . . . ." As given by the trial court, the instruction read:

"The defendants are charged in Count Two with conspiracy to commit Murder in violation of Penal Code section 182. [¶] To prove that a defendant is guilty of this crime, the People must prove that:

"1. A defendant intended to agree and did agree with one or more of the other defendants and or with James Fayed to intentionally and unlawfully kill;

"2. At the time of the agreement, the defendant and one or more of the other alleged members of the conspiracy intended that one or more of them would intentionally and unlawfully kill;

"3. One of the defendants or coconspirators, . . . or all of them committed at least one of the following alleged overt acts to accomplish Murder . . . . [¶¶] AND

"4. At least one of these overt acts was committed in California. . . .

"To decide whether a defendant committed these overt acts, consider all of the evidence presented about the acts.

"To decide whether a defendant and one or more of the other alleged members of the conspiracy intended to commit Murder, please refer to the separate instructions that I will give you for that crime.

"The People must prove that the members of the alleged conspiracy had an agreement and intent to commit murder. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit that crime. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime.

"An overt act is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after a defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself. [¶¶]

"You must make a separate decision as to whether each defendant was a member of the alleged conspiracy. . . ."

Defendants focus on the portions of this instruction that provide: ""To prove that *a* defendant is guilty of this crime, the People must prove that:' . . . '1. *A* defendant intended to agree and did agree with one or more of the other defendants and or with James Fayed to intentionally and unlawfully kill.'" (Italics added.) Moya argues that the use of "a" in point 1 "erroneously directed the jury to convict [him] so long as two people, not including [him], in the conspiracy agreed to kill Pamela Fayed."

"In considering a claim of instructional error . . . we do not look far and wide for all possible usages of a word the defendant has singled out as error nor do we focus solely on that single word. Rather, '[t]he relevant inquiry here is whether, "in the context of the instructions as a whole and the trial record, there is a reasonable likelihood that the jury was misled to defendant's prejudice." [Citation.] Also, """we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given."""" (*People v. Landry* (2016) 2 Cal.5th 52, 95; see *People v. Delgado* (2017) 2 Cal.5th 544, 573-574 ["'the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction"'].)

Considering CALCRIM No. 415 as a whole, it is not reasonably likely the jury was misled in the manner defendants suggest. The instruction tells the jury the People had to prove that, "[a]t the time of the agreement, *the* defendant and one or more of the other alleged members of the conspiracy *intended* that one or more of them would intentionally and unlawfully kill." (Italics added.) The People also had to "prove that *the* members of the alleged conspiracy *had an agreement and intent* to commit murder." (Italics added.) Finally, the court instructed the jury to "make a separate decision as to whether each defendant was a member of the alleged conspiracy." The effect of these portions of the instruction was to require the jurors to find that each member of the conspiracy agreed and intended to commit the murder.

Any reasonable jury would understand that the initial reference to "a defendant" meant "a given defendant" and that the subsequent use of the term "a defendant" in point 1 meant

the same defendant, not any one of the three defendants. Conversely, there is no reasonable likelihood the jury ignored the remainder of the instruction and, focusing solely on the use of the word "a" in point 1, concluded it could convict *a* defendant of conspiracy if it found that the *other* defendants agreed to commit murder. (See *People v. Delgado*, *supra*, 2 Cal.5th at p. 575 [in light of the entirety of the charge to the jury, "there is no reasonable likelihood the jury would have interpreted [the challenged instruction] in this manner"]; see, e.g., *People v. McKinzie* (2012) 54 Cal.4th 1302, 1361 [use of "warranted" rather than "appropriate" in penalty phase instruction was not error where "the instruction properly conveyed to the jury that circumstances 'warrant[ ]' the death penalty when such punishment is appropriate in the eyes of the jury"], disapproved on another ground in *People v. Scott*, *supra*, 61 Cal.4th 363; *People v. Huggins* (2006) 38 Cal.4th 175, 192-193 [despite omission of a word, the instruction adequately conveyed the applicable law, and it was not reasonably likely the jury misunderstood the instruction].)

F. *There Was No Cumulative Error*

Moya asserts that cumulative prejudice from multiple instructional errors requires reversal of the judgment against him. Because there were no instructional errors, there was no cumulative instructional error. (See *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 910; *People v. Lua* (2017) 10 Cal.App.5th 1004, 1019.) Marquez and Simmons argue that cumulative error deprived them of a fair trial and due process of law. We conclude there was no cumulative error as to them either. (See *People v. Wall*, *supra*, 3 Cal.5th at p. 1072.)

DISPOSITION

The judgments are affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.