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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RUBEN HERNANDEZ et al., Defendants and Appellants.	B225746 (Los Angeles County Super. Ct. No. BA335073)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lance A. Ito, Judge. Affirmed in part, reversed in part and remanded with directions.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Ruben Hernandez.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Joel Rodriguez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Scott A. Taryle and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

This case involves eight separate instances of real estate loan transaction fraud. Ruben Hernandez engaged in six of these transactions, aided and abetted by Joel Rodriguez as to four, and which involved the properties located at 9918 Tristan Drive (Tristan Drive Property), 4400-4402 Berenice Avenue (Berenice Avenue Property), 10045 Chaney Avenue (Chaney Avenue Property), 10522 Pico Vista Road (Pico Vista Road Property), 9207 Stoakes Avenue (Stoakes Avenue Property), and 9108 Orizaba Avenue (Orizaba Avenue Property). Rodriguez also committed such fraud as to his two properties, one at 15063 Cullen Street (Cullen Street Property) and the other at 6271 Santa Rita Avenue (Santa Rita Property).

Rodriguez and Hernandez (collectively, defendants) appeal from the respective judgments entered against them following a jury trial that resulted in their conviction of multiple counts of making a false financial statement (Pen. Code, §532a, subd. (1); counts 45, 47-49 [Rodriguez]); counts 44, 45, 47, 49 [Hernandez])[1] and grand theft (§§487, subd. (a); counts 55-59 [Rodriguez]; counts 52, 53, 55 [Hernandez])[2] and true findings on the related $500,000 and the $1.3 million excess taking allegations (§§ 186.11, subd. (a)(2), 12022.6, subd. (a)(3)).[3]

The trial court sentenced Rodriguez to prison for the total term of 12 years and eight months, consisting of the two-year middle term on count 45 and eight months, or one-third the middle term, on each of counts 47, 48, 50, and 51,[4] plus the five-year upper

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

[2] The jury found Hernandez not guilty of resisting an executive officer (§ 69; count 65), and the trial court declared a mistrial as to counts 46 and 48 (§ 532a, subd. (1)), 54 and 56 (§ 487, subd. (a)), and 64 (Veh. Code, § 2800.2, subd. (a)) upon which the jury was deadlocked. As to Rodriguez, the trial declared a mistrial on count 53 (§ 487, subd. (a)) after the jury became deadlocked on that count.

[3] The jury found not true the remaining special allegations as to defendants.

[4] The clerk's transcript indicates the trial court imposed the two-year middle term on count 49 and ordered that sentence to be served concurrently with those imposed on counts 45, 47, and 48. The reporter's transcript, however, reveals the court did not impose any sentence on count 49.

term and a three-year term on the excess taking enhancements pursuant to section 186.11, subdivision (a)(2) and section 12022.6, subdivision (a)(3), respectively.[5] The court imposed the two-year middle term on each of counts 53, 55, 56, 57, 58, and 59, which sentences were stayed pursuant to section 654. The court's minutes reflect Rodriguez was awarded 253 days precommitment credit, consisting of 169 custody days and 84 conduct credit.

Hernandez was sentenced to prison for the total term of 12 years, consisting of the two-year middle term on count 44 and eight months, or one-third the middle term, on each of counts 45, 47, and 49, plus the five-year upper term and a three-year term on the excess taking enhancements pursuant to section 186.11, subdivision (a)(2) and section 12022.6, subdivision (a)(3), respectively. The court also imposed the two-year middle term on each of counts 52, 53, and 55, which sentences were stayed pursuant to section 654. The court awarded him 712 days of precommitment credit, consisting of 475 custody days and 237 conduct days.

On appeal, Rodriguez contends the trial court committed prejudicial error in denying his motion to exclude evidence seized pursuant to administrative subpoenas. The court deprived him of his right to an impartial jury (U.S. Const., 6th Amend.) by erroneously denying his motion under *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258 (collectively, *Batson/Wheeler*) based on the prosecutor's improper pattern of dismissing minority venire jurors. The trial court violated his right to due process (U.S. Const. 5th, 6th & 14th Amends.) by refusing to sever his trial from that of Hernandez after ruling as admissible evidence of Hernandez's bat, "'enemies list'" and his "'voodoo doll'" collection and Hernandez's untruthful bankruptcy testimony. Reversal of the judgment is compelled, because the trial court's dismissal of the automobile fraud charges in counts 1-43, 60 through 62, and 66 was inadequate to cure the prosecution's prejudicial failure to comply with the discovery mandate of *Brady v. Maryland* (1963) 373 U.S. 83. Rodriguez was deprived of a fair trial and due process in

[5] The court also imposed a concurrent two-year middle term as to count 49.

light of the trial court's numerous evidentiary errors and by the trial court's failure to instruct the jury pursuant to CALJIC No. 3.16 that the testimony of Hernandez, an accomplice, had to be corroborated.

Rodriguez challenges the sufficiency of the evidence to support his convictions for aiding and abetting Hernandez's fraudulent real estate transactions. He also challenges his convictions for committing fraudulent real estate transactions as to his own two properties.

He further contends that the judgment must be reversed due to cumulative, prejudicial multiple error in this close case, which deprived him of a fair trial and constituted a miscarriage of justice.

Lastly, Rodriguez claims the trial court committed sentencing error by imposing the excess taking enhancements, because the lending institutions never lost any money from the loans, which were secured by deeds of trust on real property. He also contends he is entitled to an award of an additional 84 conduct days under section 4019, as amended on January 25, 2010.

Hernandez contends the evidence is insufficient to support either excess taking enhancement under sections 186.11 and 12022.6. He contends he is entitled to an award of an additional 238 conduct days under section 4019, as amended on January 25, 2010.

Each defendant joins in the arguments made by his codefendant to the extent such argument might inure to his benefit.

Respondent concedes the trial court erred in omitting orally to award precommitment credits to Rodriguez and in miscalculating the custody credit awarded Hernandez but contests the amount claimed by Hernandez. Respondent also contends the trial court committed two unauthorized sentencing errors. The court imposed a sentence as to Rodriguez on count 53, a count on which the jury deadlocked, and thus, the sentence on count 53 must be stricken. The court also failed orally to pronounce sentence on count 49 as to Rodriguez.

Based on our review of the record and applicable law, as to Rodriguez, we reverse his sentence and remand the matter to the trial court for resentencing, including the vacating of the sentence on count 53; oral pronouncement of sentence on count 49; and calculation of his precommitment credit award. As to Hernandez, we reverse his sentence and remand the matter to the trial court for resentencing, specifically for the recalculation of Hernandez's total precommitment credit award. In all other respects, we affirm the judgment as to Rodriguez and Hernandez.

BACKGROUND

We review the evidence, both direct and circumstantial, in light of the entire record and must indulge in favor of the judgment all presumptions as well as every logical inference that the jury could have drawn from the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396; People v. Carter (2005) 36 Cal.4th 1114, 1156; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

I. Investigation and Arrests

In about 2000, Hernandez, the owner, opened Downey Motorcars, a car dealership. In September 2005, Steven Louie, a peace officer and criminal investigator for the California Department of Motor Vehicles (DMV), was assigned to investigate possible identity theft at Downey Motors. Louie discovered that the driver's license number provided to secure an automobile loan to Hernandez belonged to "Sonni Felan," not Hernandez, which led Louie initially to believe Hernandez was a victim of identity theft.

Further investigation caused Louie to discard this belief. After comparing Hernandez's signature in his DMV file with that on other documents, including his social security number and auto salesperson applications, Louie concluded Hernandez's signatures were different.

From his review of DMV's database, Louie located nine vehicles registered to Hernandez at three different addresses. According to the loan files for the nine vehicles, Hernandez listed Coast to Coast Mortgage as his employer.

On July 18, 2006, during a search of the Coast to Coast offices pursuant to warrant, Louie located and seized an altered, inauthentic California driver's license for Rodriguez. He also seized various checks, credit reports and tax returns, and loan documents regarding real property on Chaney Avenue, Santa Rita Avenue, and Berenice Avenue. Louie located additional documents, including some regarding the subject real estate loans and certain automobile loans, during a search of a public storage facility on Woodruff Avenue in Downey.

Based on additional investigation, Louie discovered that in 2004 and 2005, Downey Motorcars had written checks to Rodriguez, who deposited the checks in a Bank of America account ending in "9806." Checks from this account were then made out to various credit unions. In most instances, the sums deposited by Rodriguez into the Bank of America account matched the amounts paid out shortly afterward to the credit unions.

Louie's investigation disclosed that during 2005 Rodriguez had hired Innovative Credit Services to perform credit checks and generate credit reports on certain individuals. The credit of Rodriguez, the owner[6] and an employee of Coast to Coast Mortgage, was checked under a different social security number. Hernandez's credit also was checked under a social security number that was not his.

Rodriguez was arrested on September 16, 2008. On February 12, 2009, Hernandez was arrested after an officer rammed his vehicle into Hernandez's following a high speed chase, during which Hernandez drove evasively to avoid four pursuing vehicles with full emergency lights and sirens activated.

After Hernandez's arrest, during the search of his house on Thorndike Road in Pasadena, which had been the subject of a stakeout, Louie discovered credit profiles for

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6 We reject respondent's recital that it is "undisputed fact that Rodriguez was the owner of Coast to Coast Mortgage" based on a citation to the preliminary hearing transcript as a matter not of record in that this "fact" was not before the jury, the trier of fact. (*People v. Schulze* (1959) 169 Cal.App.2d 430, 431 [statements of counsel in brief not part of record on appeal].) Nonetheless, the jury was entitled to find Rodriguez was the owner of Coast to Coast Mortgage based on trial testimony of Leonardo Vargas, who worked for Innovative Credit Cervices, a credit reporting agency, who knew Rodriguez.

Rodriguez and for Hernandez's parents. These profiles corresponded to several profiles in the loan files Louie had seized. Louie also found inmate locator information for Rodriguez, who had been arrested in 2008. He further found two handguns; a baseball bat wrapped in pieces of paper on which were printed the names and pictures of various individuals connected to this case;[7] and dolls stuck with pins and submerged in a cup of murky liquid. Legal case numbers along with the names of Louie, the prosecutor at trial, and the names of other DMV investigators and attorneys were written on the dolls.

II. The Eight Real Estate Financial Transactions

A. The Santa Rita Avenue Property Loans

Rodriguez was convicted of the crimes charged in counts 51 (making a false financial statement) and 58-59 (grand theft) based on the loans he obtained on the Santa Rita Avenue Property.

On October 17, 2003, Washington Mutual, then owner of Long Beach Mortgage, loaned Rodriguez approximately $100,000 on the real property at 6271 Santa Rita Avenue. Rodriguez acted as the broker in addition to being the borrower. He interviewed himself and requested a credit check on himself. In light of insufficient information, two of three credit agencies were unable to formulate a rating on Rodriguez.

On June 2, 2005, Washington Mutual made a second $100,000 home equity loan on the Santa Rita property based on certain notarized documents. Through another notarized document, this loan was later modified to increase Rodriguez's line of credit by an additional $80,000. Rodriguez's fingerprint matched the fingerprints in the two notary books with respect to these two loans.

On February 16, 2005, Indymac Bank refinanced the Santa Rita property in the amount of $331,500, which included a payment to Washington Mutual in the amount of $102,723.24 and cash back to Rodriguez in the amount of $22,917.62. For this loan, Rodriguez again was the borrower and acted as the broker.

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[7] At trial, the prosecution characterized the papers as constituting Hernandez's "enemies list."

For these loans, Rodriguez used a social security number beginning with "516," which number belonged to Patricia Sue Brown. At trial, Brown denied she gave Rodriguez permission to use her identity for any purpose.

B. The Cullen Street Property Loan

Rodriguez was convicted of the crimes in counts 50 (making false financial statement) and 57 (grand theft) arising from the loan on his Cullen Street Property.

On February 22, 2005, World Savings Bank loaned Rodriguez $367,200 on the Cullen Street Property, which already had a mortgage in the amount of $510,000. The loan was secured following a face-to-face interview between Rodriguez, as borrower, and Robert Guarjardo at the office of Coast to Coast Mortgage, the broker.

This loan was originally a "full documentation" loan, which would have required Rodriguez's tax returns, but it had been changed to a "stated income" loan, which required less documentation, which the bank never got from Rodriguez. A purported Bank of America account statement listed the amount in his account by approximately $70,000 more than the actual amount in that account which ended in "9806." For this loan, Rodriguez again used Brown's social security number although Brown had not authorized him to use her identity. Additionally, certain checks Rodriguez wrote to close escrow were rejected. One check was rejected for lack of funds. Banco Popular declined to honor certain checks Rodriguez attempted to draw on a Coast to Coast Mortgage business account ending in "4204." A document in the Banco Popular file requested information on an outstanding account on which a bank employee's signature was forged.

Indymac Bank denied Rodriguez's application for a $109,000 home equity line of credit on the Cullen Street Property. The bank discovered that in Rodriguez's request for a credit check through Coast to Coast Mortgage, he had used an inaccurate social security number. The bank also noted the loan would have involved a "non-arm's length transaction," namely, Rodriguez would have been both the borrower and the broker.

The notary stamp of William Ice Cochran, a former notary public, appeared on various documents pertaining to the Cullen Street Property, and there were entries in his

notary book he did not make. In late 2005 or early 2006, Cochran had lost his notary journal and stamp at the Coast to Coast Mortgage office while visiting his mother, who worked there. He had returned five times to the office in an unsuccessful attempt to find the missing items.

C. The Berenice Avenue Property Loan

Hernandez and Rodriguez were convicted of committing the crimes charged in counts 49 (making a false financial statement) and 55 (grand theft) arising from the loan on the Berenice Avenue Property.

On July 13, 2005, Long Beach Mortgage loaned $399,500 to Hernandez on the Berenice Avenue Property pursuant to which Hernandez realized $144,000 in cash as equity. The credit report indicated Hernandez's score was 709, a "good risk." His loan documents indicated his previous employment was with Coast to Coast Mortgage and that he was employed by Royal Pacific Investments with an income of $10,000 per month. The loan application reflected Rodriguez, on behalf of Coast to Coast Mortgage, conducted a face-to-face interview with Hernandez and that a Fannie Mae form application had been filled out. The social security number beginning with "610" on the application did not belong to Hernandez.

D. The Tristan Drive Property Loan

Hernandez and Rodriguez were convicted of the crimes in counts 45 (making a false financial statement) and 53 (grand theft) with respect to the Tristan Drive Property loan.

On July 20, 2005, Fieldstone Mortgage loaned Hernandez $695,000 on the Tristan Drive Property. The loan, however, was in two parts, because Hernandez had put down zero money. Coast to Coast Mortgage was the broker for the loan. Rodriguez, the broker on behalf of Coast to Coast Mortgage, conducted a face-to-face interview with Hernandez. Rodriguez requested a credit report on Hernandez through Innovative Credit Services. Hernandez signed a notarized affidavit attesting to his identity, and Hernandez's fingerprint matched the one on the notarized documents.

The social security number beginning with 610 on the loan application did not belong to Hernandez. Certain supporting loan documents indicated that on March 15, 2005 Hernandez was the holder of a Bank of America account in the amount of $68,245.72. The statement dates on the loan application for this account, however, did not match Bank of America's own records. Additionally, according to the bank's records, on April 14, 205, less than a month after the loan application date, the account only contained $97.41.

E. The Chaney Avenue Property Loans

Hernandez and Rodriguez were convicted of the crimes charged in counts 47 (making a false financial statement) and 55 (grand theft) arising from the loans made on the Chaney Avenue Property.

On August 1, 2005, Long Beach Mortgage made two loans in the total amount of $975,000 to Hernandez with respect to the Chaney Avenue property. Coast to Coast Mortgage was the loan broker. Rodriguez, acting on behalf of the broker, interviewed Hernandez and provided the bank with information about Hernandez. On the loan application, Hernandez gave a social security number beginning with 610 which did not belong to him. In the supporting loan documents, Hernandez supplied conflicting home addresses, income, and tax withholding accounts.

F. The Pico Vista Road Property Loans

Hernandez and Rodriguez were convicted of the crimes charged in counts 48 (making a false financial statement) and 56 (grand theft) arising from the loans on the Pico Vista Road Property.

On August 1, 2005, Resmae loaned Hernandez the $705,000 purchase price of the Pico Vista Road Property. In the supporting loan documents, the social security number beginning with 610 listed for Hernandez was not his. Following the face-to-face interview between Rodriguez, the broker, and Hernandez, the borrower, the loan was approved.

G. The Stoakes Avenue Property Loan

Hernandez was convicted of the crimes charged in counts 44 (making a false financial statement) and 52 (grand theft) with respect to the loans on the Stoakes Avenue Property.

On August 18, 2005, People's Choice Home Loans Bank loaned Hernandez $632,000 with respect to the Stoakes Avenue Property. The loan was split in half, because Hernandez put down zero money. The loan had been approved in spite of certain irregularities. Anthony Pasha, the agent for the broker Harman Mortgage Services, Inc., did not complete the interview as required by regulation. The lender relied on the broker to ensure the accuracy of Hernandez's biographical information, including his driver's license, date of birth, and social security number, on the Identification Verification Form, which was designed to prevent fraud. The social security number beginning with 610 on the loan application did not belong to Hernandez. Hernandez's signature was on the loan documents, and his fingerprint matched the one on the documents, which were notarized.

H. The Orizaba Avenue Property Loans

Hernandez was convicted of the crimes charged in counts 46 (making a false financial statement) and 54 (grand theft) with respect to the loans on the Orizaba Avenue Property.

On August 19, 2005, BNC Mortgage loaned Hernandez the funds needed to buy the $605,000 Orizaba Avenue Property.[8] The social security number beginning with 610 on the loan application was not Hernandez's. The signature of the escrow officer on the "Request for Verification of Rent or Mortgage," which was part of the loan application, was forged.

Hernandez presented a defense of third party culpability. He testified that while running Downey Motorcars, he had completely entrusted employees Marisela Alvarez, Leticia Medrano, and Joanna Albarez to set up and manage all his bank accounts. He

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[8] Hernandez wrote a $2,000 "good faith deposit" check for the escrow but the escrow officer did not know if it cleared.

testified that his purported signatures on the real estate loan documents were all forged and denied making any payments on any of the subject real estate. Rather, Medrano and Alvarez had control over the accounts used to make those payments. Hernandez later began to realize that Medrano and Alvarez were mismanaging the dealership's money. In November 2005, during a "raid," his inventory was taken from his dealerships.

During trial, Hernandez admitted knowing Rodriguez since 1998 or 1999 and acknowledged during the bankruptcy proceedings following closure of his dealership, Hernandez had lied when he testified that he did not know Rodriguez. Hernandez testified that after he began working as an outside consultant for Saul Cruz, a former Downey Motorcars employee who had opened his own automobile dealership, Happy Motorcars, at the same location, Hernandez noticed in Cruz's office unusual loan files and credit applications with defendants' names on them.

Hernandez also testified about the benevolent purposes served by the dolls with the names of the investigators and the bat wrapped in paper with names on it found in his house. He characterized the dolls as an element of his Catholic faith in which the pins stuck in the dolls were a form of "spiritual acupuncture" to cleanse evil from the individuals the dolls represented. He also believed the dolls would assist in ensuring people were not put in jail wrongfully. He added the paper wrapped bat with names served to make those named "strong," not to harm the individuals listed on the paper.

In his defense, Rodriguez relied on the prosecutor's omission to discuss with Louie whether the latter had consulted a handwriting expert as to the various documents in this case.

DISCUSSION

1. Denial of Suppression Motion Not Error

Rodriguez contends the evidence seized pursuant to the search warrant should have been suppressed (§ 1538.5), because the trial court erred in refusing to quash and

traverse the search warrant, which was supported only by information gathered through administrative, not criminal, subpoenas.[9] No error transpired.

In his motion, Rodriguez asserted the administrative subpoenas issued by Louie to the automobile lenders could not be used in furtherance of a criminal investigation. As authority, he cited *De La Cruz v. Quackenbush* (2000) 80 Cal.App.4th 775 (*De La Cruz*). The trial court denied the motion, finding Rodriguez had no privacy interest in either the financial documents held by the third party lenders or in the notary journals, which items pertained to "the financial institutions [who] were themselves the victims of a criminal scheme to defraud."

Ordinarily, the trial court acts as a finder of fact in presiding over the hearing of a suppression motion (§ 1538.5), and thus, its factual findings, "whether express or implied, must be upheld if they are supported by substantial evidence." (*People v. Lawler* (1973) 9 Cal.3d 156, 160.) On appeal, "it becomes the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness." (*Ibid.; People v. Loewen* (1983) 35 Cal.3d 117, 123.)

Absent a valid expectation of privacy in the item seized, Rodriguez's claim of illegal search and seizure in violation of the federal constitution cannot stand. (See, e.g., *People v. Carter* (2005) 36 Cal.4th 1114, 1140-1141.) He fails to point to any evidence in the record that would support a claim of privacy in either the financial documents or the notary journals seized pursuant to the administrative subpoena issued by Louie. We conclude that Rodriguez, as a mere customer, has no privacy interest in the bank records subpoenaed by a law enforcement agent, namely, Louie, a sworn peace officer. (*United States v. Miller* (1976) 425 U.S. 435, 437, 440 442-444 [No Fourth Amendment interests

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[9] Hernandez's failure to join in this motion by Rodriguez below forfeits Hernandez's claim of error on appeal. (See, e.g., *People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) Even if no forfeiture occurred, his claim of error lacks merit for the same reasons that Rodriguez's claim of error is unsuccessful. (See, e.g., *People v. Rundle* (2008) 43 Cal.4th 76, 116, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn 22.)

of customers implicated as to checks and other documents, such as financial statements and deposit slips containing "only information voluntarily conveyed to the banks . . . in the ordinary course of business" and therefore "issuance of a subpoena to a third party to obtain the records of that [customer] does not violate the rights of a defendant, *even if a criminal prosecution is contemplated at the time the subpoena is issued*"; italics added; see also, *People v. Slaton* (1990) 222 Cal.App.3d 1041, 1043, 1046-1047 [no reasonable expectation of privacy in false financial statements submitted to defraud enders]; cf. *De La Cruz, supra*, 80 Cal.App.4th 775, 785, 790 [Insurance Commissioner exceeded authority by revoking De La Cruz's brokerage license for refusing to surrender employee list and trust account records requested without a search warrant, because "although De La Cruz may have 'a reduced expectation of privacy' in his records [citation] his expectation has not been reduced to zero"].)

Similarly, Rodriguez has no privacy interest in any notary journal that depicts his thumbprint and signature. The existence of such an interest would contravene the express purpose for requiring notarization, namely, to provide verification of a transaction as opposed to concealing the transaction. Specifically, "[u]pon written request of any member of the public, . . . the notary shall supply a photostatic copy of the line item representing the requested transaction" and "shall provide the journal for examination and copying in the presence of the notary public upon receipt of a subpoena duces tecum or a court order, and shall certify those copies if requested." (Gov. Code, § 8206, subds. (c) & (e); see generally, Gov. Code, § 8205.)

2. Denial of *Batson/Wheeler* Motions Not Error

Rodriguez contends the court erred in denying his *Batson/Wheeler* motion as to Juror No. 12, in which Hernandez joined, and that the court also erred in denying such motion as to five other jurors: Jurors No. 2028, 3823, 5661, 5686 and 9191.[10]

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[10] Hernandez forfeits any claim of error as to these other five jurors. At trial, he expressly refused to join in Rodriguez's motion as to Jurors No. 2028 and 3923 and remained silent when Rodriguez made the motion as to Jurors No. 5661, 5686 and 9191.

Defendants have failed to carry their burden to demonstrate the People exercised a peremptory challenge based on improper racial bias.[11]

As established under *Batson/Wheeler*, "[b]oth the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based on group bias, such as race or ethnicity. [Citations.] When the defense raises such a challenge, these procedures apply: 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide. . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]' [Citations.]

"To make a prima facie showing of group bias, 'the defendant must show that under the totality of the circumstances it is reasonable to infer discriminatory intent.' [Citations.] When. . . it is unclear whether the trial court used the recently disapproved 'strong likelihood' standard, rather than the correct 'reasonable inference' standard, 'we review the record independently to determine whether the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis.' [Citation.]" (*People v. Davis*, *supra*, 46 Cal.4th 539, 582-583.)

Where no prima facie case is shown, "the prosecutor [is] not required to provide reasons for his [or her] challenges, nor [is] the court required to determine the validity and sincerity of any reasons that [are] proffered." (*People v. Salcido* (2008) 44 Cal.4th 93, 143-144.) Moreover, discriminatory intent is not necessarily demonstrated based on the mere racial or ethnic makeup of the panel. A suspicion of discriminatory intent may

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[11] Respondent refers to the prosecution's dismissal of prospective "jurors of color." As our Supreme Court points out, "'people of color' is not a cognizable group for *Wheeler* analysis. No California case has ever recognized 'people of color' as a cognizable group." (*People v. Davis* (2009) 46 Cal.4th 539, 583.) Generally, this broad term can include multiple racial, national, or heritage groups at once.

be dispelled by "obvious race-neutral grounds for the prosecutor's challenges to the prospective jurors in question." (*People v. Davis*, *supra*, 46 Cal.4th at p. 584; see also, *People v. Guerra* (2006) 37 Cal.4th 1067, 1101-1102 [circumstance of "only [one] Hispanic sitting in the jury box, leaving only two other Hispanics on the entire panel," "standing alone, is not dispositive on the issue of whether defendant established a prima facie case"], overruled in part on other grounds by *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Mindful of these principles, we conclude the trial court did not err in denying the subject *Batson/Wheeler* motions. The record amply supports the court's findings that Jurors No. 2028, 3823, 12, 5661, 5686 and 9191 were not excused based on any race-related or other improper reason.

a. Juror No. 2028

Counsel for Rodriguez objected to dismissal of Juror No. 2028 (also Juror No. 7), who worked as an orderly at Cedars-Sinai Hospital and had no experience in accounting or any similar subject. He stated Juror No. 2028 appeared to be African American and had not indicated any bias in favor of the defense. The prosecutor expressed doubt the juror was of that race or any other suspect race for the purposes of *Batson/Wheeler* in view of his name, complexion and white-orange color hair. Juror No. 2028 indicated he was of mixed Hawaiian, Filipino, Chinese, Puerto Rican, and Caucasian ancestry.

After finding a prima facie case had been shown, the trial court invited the People to respond. The prosecutor explained Juror No. 2028 was excused for reasons unrelated to race. He was very young, namely 21 years old, single, without children, and he had a facial piercing and appeared to have dyed hair. Also, he only had a high school education and marked on his juror questionnaire "N/A" next to the question whether he read newspapers and magazines. The prosecutor indicated that in view of the juror's limited life experience, he would not be an appropriate juror for a case which involved complex financial records and transactions and he would have difficulty in comprehending real estate and car loan contracts the like of which he had never before seen. The prosecutor

noted his dismissal of this juror for inadequate education was consistent with two other peremptory challenges of jurors with only a high school education.

Although conceding Juror No. 2028 was not African American, Rodriguez's counsel argued the jury would benefit from his diversity and the fact he was employed and possessed a bank account, and the possibility he might obtain news from other sources rebutted the assertion he was unsophisticated.

The trial court denied the *Batson/Wheeler* motion based on the race-neutral explanation offered by the prosecutor. The court pointed out that of particular concern was that Juror No. 2028 did not appear "to have ever applied for a mortgage" and "[g]iven his young age, he does not list any car loans in the questionnaire" and "appears to have no loan industry experience."

b. Juror No. 3823

Juror No. 3823 (also identified as No. 10), was studying to be a social worker and attempting to transfer from a community college to a four-year university. She lived at home with her parents and had never financed the purchase of a car or home. She had not been employed in the past two years. Rodriguez's counsel objected to the prosecutor's excusal of this juror. He argued the 22-year-old juror was Hispanic, as were defendants. The prosecutor responded no prima facie case of racial animus had been shown and, in any event, the juror was not suitable, because she had no employment history or bank accounts and neither a car loan nor a home mortgage. Also, she was studying social work in school, which arguably was incompatible with the skepticism required to review accounting and finance matters.

In denying the *Batson/Wheeler* motion, the trial court found no prima facie showing had been made. The court pointed out the juror did not completely answer the questions in the juror questionnaire, omitting responses to several areas and leaving out where she lived and not disclosing anything about her studies. Also, she had no occupation listed, no banking experience, and no prior jury service. The court concluded Juror No. 3823 was "a very unsophisticated person, not somebody that I would choose

for a jury that has sophisticated issues [as] in this particular case." The court noted the prosecutor also had passed on this juror "several times."

c. Juror No. 12

Rodriguez's counsel, joined by counsel for Hernandez, objected to dismissal of Juror No. 12, an African American female. He expressed his belief that the prosecution began dismissing minority jurors who had withstood prior peremptory challenges once the jury panel began consisting of more minority jurors. The prosecutor argued dismissal of the juror was not race-based and no improper benefit would inure to the prosecution from such dismissal since defendants were Hispanic. The prosecutor pointed out this juror already had withstood several rounds of peremptory challenges by the prosecution.

The trial court denied the *Batson/Wheeler* motion, finding no prima facie showing the dismissal was race-motivated. The court found "this particular juror" "is a life experience challenged person" and that she also "did not answer several of the questions [on the juror questionnaire]. For example, 'What is your impression of the District Attorney's Office? What is your impression of the California DMV? What is your impression of the Social Security Administration? Several questions she never answered, even just to say, 'Gee, I have no impression.'" The court added it also "place[d] great weight in the fact that the People had passed on her, with her in the jury, several times." The court noted that rather than decreasing, the number of minority jurors had increased during the jury selection process.

d. Juror No. 5661

Juror No. 5661 (also identified as Nos. 7 and 80) appeared to be Hispanic. He was a retired grocery worker and indicated he was a very slow reader who became even slower with age. He denied that the 200 or so exhibits in this case would present a problem for him. Rodriguez's counsel objected after the prosecutor excused Juror No. 5661. He reiterated his belief that the prosecution's peremptory dismissal of minority jurors increased proportionally with their numbers on the panel. Although conceding the

juror only had a seventh grade education, counsel argued that, as a careful reader, Juror No. 5661 would be helpful on the panel.

In denying *the Batson/Wheeler* motion, the trial court found Rodriguez had failed to make the requisite prima facie showing. The court indicated the juror would have difficulty serving in view of his slow reading skills which became worse as he aged. The court pointed out he would have "to sit and go through five binders of documents, as the People have proffered" and this case "involves dozens of counts of fraud."

e. Juror No. 5686

Juror No. 5686 (also identified as Juror No. 87) resided with the mother of his two young children and worked as a part-time retail store clerk. He intended to study business. Rodriguez's counsel objected to dismissal of this juror, pointing out the juror was Hispanic, he had some college experience, and he had indicated the ability to be impartial.

The trial court denied the *Batson/Wheeler* motion for lack of a prima facie showing the dismissal was race-motivated. The court pointed out Juror No. 5686 "was unable to answer several of the questions [in the juror questionnaire]" and when asked for his impressions as to certain matters, "he gave no response to several of the questions." As an example, the court noted "on half of page six he did not give us any answers." The court further pointed out "[h]e has no financial background" and "all he has is a student loan, no other banking business, no other banking connections." The prosecutor added that Juror No. 5686 appeared unreliable, because he only had a part-time job and he was unwilling to marry the mother of his children.

f. Juror N. 9191

Juror No. 9191 (also identified as Nos. 3 and 108) was a Hispanic male who worked for the United States Postal Service. He indicated that jury duty would cause financial hardship, because although he would be paid for his jury service, he would lose the extra pay he earned by working overtime and he had mortgage payments to make on two houses. He believed he had "slight A.D.D. [Attention Deficit Disorder" and

indicated he did not "know if [he] could focus with all these documents," although he later acknowledged he thought he "could manage to get through this, yeah." Rodriguez's counsel objected to the prosecution's dismissal of Juror No. 9191, arguing he was a longtime postal employee and knowledgeable about mortgages, financing, and rent.

In denying the *Batson/Wheeler* motion, the trial court found no prima facie showing of a race-related reason for the dismissal of Juror No. 9191. The court pointed out the juror was "not happy to be here because of his financial situation" and noted "the issue is the comprehension of financial matters." The court noted that although Juror No. 9191 had not been "professionally diagnosed, . . . he does say that 'My attention span is slow'" and "he says 'I have a small case of A.D.D.'" The court also pointed out the jury panel only had four "Whites" and was substantially mixed racially and that four or five Hispanics already were in the alternate jury pool.

The record thus discloses substantial evidence that the excusal of Jurors No. 2028, 3823, 12, and 5686 were based on inadequate life experience, a valid race-neutral reason (*People v. Cruz* (2008) 44 Cal.4th 636, 657-661 [life experience and prosecutor's perceived level of juror's maturity]; *People v. Reynoso* (2003) 31 Cal.4th 903, 924-925 (Reynoso) [juror's occupation and level of education]; *People v. Gonzales* (2008) 165 Cal.App.4th 620, 631 [youth and lack of life experience]). Jurors No. 5661 and 9191 also were excused for a race-neutral reason, namely, the lack of minimal ability to serve as a juror, such as inadequate reading skills or adequate attention span. (*Reynoso*, *supra*, at p. 925.)

3. Denial of Motions to Sever Trials of Defendants Not Error or Abuse of Discretion.

Rodriguez contends the trial court erred in denying his motions to sever his trial from that of Hernandez. There was no error or abuse of discretion.

At a pre-trial evidentiary hearing, Rodriguez's counsel advised he would move to sever Rodriguez's trial if evidence of Hernandez's voodoo dolls, "enemies list," baseball bat (collectively, "voodoo evidence") were admitted, because no foundation existed for

admission of this evidence against Rodriguez and it would prejudice his defense. After ruling this evidence was admissible, the trial court held a hearing on whether to sever the trials of defendants.

In opposing severance, the prosecutor argued defendants had a close criminal association. Rodriguez was the broker for four of the fraudulent real estate loans Hernandez had obtained. Downey Motorcars paid Rodriguez and Coast to Coast Mortgage thousands of dollars. Rodriguez held the account with Innovative Credit Services, the agency he hired to obtain false credit reports for himself and Hernandez. Rodriguez personally had bought two vehicles from Hernandez fraudulently. Hernandez listed Coast to Coast Mortgage as his employer on fraudulent loan applications. Rodriguez's counsel responded that such relationships were irrelevant to the issue of whether the voodoo evidence would be prejudicial. The prosecutor argued a limiting instruction would cure the minor evidentiary problems regarding the voodoo items. The trial court denied the severance motion.

In his bankruptcy proceedings, Hernandez made certain statements in reports of how he spent the funds he obtained from the fraudulent loans and inconsistent statements about whether he did or did not know Rodriguez. During a discussion about admissibility of these incriminating and inconsistent statements, Rodriguez's counsel renewed his severance motion. He indicated Rodriguez would be deprived of his constitutional right to confrontation pursuant to *Crawford v. Washington* (2004) 541 U.S. 36 should the bankruptcy statements be admitted during the People's case-in-chief and Hernandez later declined to testify.[12]

In denying the severance motion, the trial court ruled the prosecution would not be allowed to introduce the bankruptcy testimony unless Hernandez testified and that such

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[12] The prosecution and the court considered the issue of right to confrontation, instead, to be implicated by *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123.

testimony would be allowed only for impeachment purposes and Hernandez then would be available for cross-examination.

"When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials." (§ 1098) "[A] 'classic case' for joint trial is presented when defendants are charged with common crimes involving common events and victims." (*People v. Singh* (1995) 37 Cal.App.4th1343, 1374.) On the other hand, severance is appropriate where a joint trial poses a serious risk that would compromise a particular right of one defendant or preclude the jury from reaching a reliable judgment as to guilt or innocence, and a less drastic measure, such as a limiting instruction, would not cure any risk of prejudice. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40 (*Coffman and Marlow*).) A trial court's ruling on a severance motion is reviewed "based on the facts as they appeared when the ruling was made" under the deferential abuse of discretion standard, that is, whether joinder resulted in gross unfairness amounting to denial of due process. (*Ibid*.; *People v. Burney* (2009) 47 Cal.4th 203, 237; *People v. Carasi* (2008) 44 Cal.4th 1263, 1296.)

The trial court ruled the voodoo evidence was admissible only to prove Hernandez's consciousness of guilt. That this evidence was admissible against Hernandez but not against Rodriguez does not require separate trials. (*People v. Goodall* (1982) 131 Cal.App.3d 129, 141.) The trial court's limiting instructions restricting admission of evidence only against one defendant and for that purpose alone dispelled any potential prejudice arising from admission of the voodoo evidence. (*Coffman and Marlow*, *supra*, 34 Cal.4th 1, 40 [limiting instructions often suffice to deflect potential prejudice from evidence not cross-admissible against codefendants].)

Additionally, the record does not support Rodriguez's claim of a "spill over" prejudicial effect. Neither Louie nor the prosecutor characterized the challenged evidence as pertaining to "voodoo"; rather, such evidence was referred to as "strange items"; "artifacts"; or "dolls." The names of Rodriguez and his wife also were on the

"enemies list." Although Juror No. 10 was shocked to learn her cousin was on the "enemies list," no prejudice to Rodriguez ensued from this incident. Juror No. 10 was dismissed, and discussions began anew with an alternate juror in her stead. The remaining jurors indicated their impartiality was not affected thereby and that they could disregard the incident in considering the evidence.

For the first time on appeal, Rodriguez urges that severance was mandated, because "there was no way to get around what Hernandez might say" and that the bankruptcy testimony made Rodriguez appear "dirty" through association. His sole challenge to Hernandez's bankruptcy testimony was based on his right to confrontation and cross-examination. His counsel specifically emphasized: "It's a *Crawford* issue." The trial court denied his renewed severance motion on "confrontation/cross-examination grounds." Rodriguez's objections under *Crawford* were rendered moot when his counsel in fact cross-examined Hernandez when he testified at trial. Those objections were not broad enough to encompass his newly raised distinct and different prejudice claim. Rodriguez therefore has forfeited this prejudice claim by failing to bring it before the trial court. (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1194.)

4. Voodoo Evidence and Organizational Charts Rulings Not Error or Abuse

Rodriguez, joined by Hernandez, renew their objections below that the voodoo evidence and certain organizational charts should have been excluded as prejudicial under Evidence Code section 352. Admission of this evidence was neither error nor an abuse of discretion.

a. Voodoo Evidence

The dolls and bats were covered with the names of individuals, including prosecutors, judges, and investigators, connected to the automobile and real estate fraud charges in this case. As to such evidence, the prosecutor argued, "What stronger evidence could we have of [his] knowledge of [his] fugitive status and knowledge that [he was] fleeing the jurisdiction of this Court and that flight shows [his] consciousness of

guilt?" This evidence was admitted solely to prove Hernandez's consciousness of guilt. The trial court gave multiple limiting instructions to this effect.

In the absence of contrary evidence, we presume the jury understood and adhered to the trial court's admonitions that the voodoo evidence was admitted against Hernandez only and solely to show his consciousness of guilt in fleeing from law enforcement. (*People v. Chavez* (1958) 50 Cal.2d 778, 790.) No prejudice therefore flowed to Rodriguez from admission of this evidence.

As to Hernandez, the voodoo evidence was highly probative of his consciousness of guilt. That this evidence was damaging to Hernandez does not demonstrate the prejudice condemned by Evidence Code section 352. "'"'The "prejudice" referred to in. . . 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. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" [Citation.] [¶] The prejudice that section 352 "'is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' [Citation.]" [Citation.] In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' [Citation.]" (*People v. Doolin*, *supra*, 45 Cal.4th 390, 439.)

b. Organizational Charts

During trial, the prosecution presented to the jury certain charts, which organized and summarized background information regarding the various real estate loans, including purchase prices, addresses, and dates. These charts were admitted over objection by counsel for defendants. Although overruling Rodriguez's counsel's

objection these charts deprived Rodriguez of due process by implying the prosecution's evidence was true, the trial court admonished the jury prior to introduction of a chart that the chart contained summaries of information already before the jury and that it was for the jury to decide whether the information in fact was true.

This case involved multiple counts of complex real estate financial transaction fraud in which the jury was presented with different dates, places, and players and confronted with the need to trace the conduct of defendants through the various real estate transactions. The trial court did not abuse its broad discretion in allowing admission of these charts as demonstrative evidence to illustrate the testimony of witnesses and as a visual aid to assist the jury to understand this testimony (see, e.g., *People v. Mills* (2010) 48 Cal.4th 158, 207; *Robinson v. Cable* (1961) 55 Cal.2d 425, 429.) Additionally, any potential prejudicial effect from admission of these charges was dispelled by the trial court's admonitions, which the jury is presumed to have understood and followed. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

5. Dismissal of Automobile Counts Adequate Discovery Error Sanction

Rodriguez contends mistrial on the automobile fraud counts was not an adequate remedy for the prosecution's failure to turn over exculpatory evidence that a third party might be culpable for the real estate fraud transactions.[13] We disagree.

During cross-examination of Louie by Rodriguez's counsel, the trial court sustained hearsay objections to questions about whether Saul Cruz, a former Downey Motorcars manager, had been investigated for fraud. The court then inquired whether Louie had asked any prosecuting agency to file charges against Cruz. The court sent the jury out of the courtroom after Louie responded affirmatively but added the Cruz charges were unrelated to the charges against defendants.

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[13] Hernandez forfeited any claim of error in this regard by expressly approving of a mistrial on the automobile charges as the appropriate remedy for the prosecution's dereliction.

Louie then stated he investigated Cruz for embezzlement and a scam known as "flooring" fraud, which involved cars on the showroom floor, at the automobile dealership Cruz had opened at the former Downey Motorcars location after Hernandez declared bankruptcy. He advised it was expected that the District Attorney's Office in Downey soon would file formal charges against Cruz.

Counsel for Rodriguez and for Hernandez essentially argued Louie's revelation about Cruz was exculpatory in that Cruz, who had been Downey Motorcars' general manager for five years prior to its closure, could have falsely written their names on the subject fraudulent loans. Following review of two reports on Cruz, which totaled 38 pages (collectively, report), prepared by Louie, counsel for Rodriguez and for Hernandez argued the crimes reported against Cruz were substantially similar to those charged against defendants, and thus, this report should have been disclosed to the defense. Counsel further argued that had they seen the report earlier, their arguments that Cruz framed Hernandez or Rodriguez, or both, would have been stronger.

Rodriguez's counsel moved for dismissal of the charges with prejudice arising from prosecutorial misconduct in failing to turn over these reports, a violation of the discovery mandate in *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). Alternatively, he indicated he would call witnesses to testify about Cruz's alleged crimes, because cross-examination of Louie on this matter was not adequate.

The prosecutor objected that Cruz's alleged frauds took place after Downey Motorcars had closed and his name was not on any of the evidence in this case. He pointed out counsel never subpoenaed Cruz although he had known for some time that Cruz admitted assisting in the falsifying of automobile loan applications at Downey Motorcars. The prosecutor added it was not likely Cruz could have framed either defendant, because defendants had used bank accounts in the real estate frauds that were separate from that of Downey Motorcars where Cruz had worked.

The trial court found the allegations against Cruz in the reports were similar but not identical to those against defendants. After finding the prosecution had not acted in

bad faith in not disclosing the Cruz report, the court concluded the defense should have been provided an adequate opportunity to conduct its own investigations. Rodriguez's counsel objected to the court's proposed mistrial as to the automobile counts as to both defendants, which the court indicated would allow them to "proceed with the real estate counts which are untainted and unrelated to Saul Cruz." He argued this approach would not cure all the problems, because it would not allow the defense to explore why Louie failed to disclose the report, namely, a possible bias against Rodriguez. The court denied counsel's request to cross-examine Louie about ulterior motives.

The prosecutor objected to mistrial on the automobile counts. After inquiring of defendants, who each agreed to a mistrial on the automobile counts, the court entered its order declaring a mistrial on the automobile counts as to both defendants. Counsel for Rodriguez, not joined by Hernandez's counsel, advised that he was not waiving his rights to assert *Brady* or other discovery error beyond that found by the court.

Although conceding "the Cruz evidence was discoverable and should have been disclosed under both *Brady* and state law," Respondent contends the court's declaration of a partial mistrial on the automobile counts served to cure the error. We agree. Contrary to Rodriguez's contention, a mistrial as to all counts was unwarranted.

The trial court is imbued with wide discretion in fashioning the appropriate sanction, including none, for a discovery violation with the goal of ensuring a fair trial. (*People v. Ayala* (2000) 23 Cal.4th 225, 299; *People v. Wright* (1985) 39 Cal.3d 576, 591; *People v. Zamora* (1980) 28 Cal.3d 88, 100.) In this instance, the court acted well within its discretion in tailoring its order narrowly to ensure both the People and the defense would receive a fair trial.

A mistrial on the real estate fraud counts as well as the automobile fraud counts would have resulted in a windfall to the defense, because the discovery which should have been disclosed beforehand only pertained to these latter counts. Rodriguez does not contend otherwise. Rather, his position is that dismissal of the automobile fraud counts alone prejudiced him, because he was unable to cross-examine Louie on whether he

withheld the potentially exculpatory information out of bias against Rodriguez and to call witnesses regarding certain statements they made to Louie during his investigations. He also asserts that earlier testimony about Hernandez's bad conduct pertaining to the automobile fraud counts tainted Rodriguez in the eyes of the jury, reinforcing the jury's "worst nightmares about used car salesmen."

We are not persuaded. Dismissal of the automobile fraud counts alone did not prejudice Rodriguez's defense. He was afforded ample opportunity to inquire of Louie about any bias he might entertain against Rodriguez during cross-examination following Louie's testimony in the People's case in chief. Moreover, he fails to demonstrate in what particulars his inability to question witnesses about certain statements they made during Louie's investigation impaired his ability to present his defense. Lastly, it is sheer speculation, and thus, of no moment, Rodriguez's assertion that the jury had formed an ill opinion of Rodriguez through association with Hernandez whose bad behavior regarding the automobile fraud counts already was before the jury. Speculation is not evidence, much less substantial evidence. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 1002; see also, *People v. Morris* (1988) 46 Cal.3d 1, 21 [nor may a reasonable inference "'be based on suspicion alone, or on imagination, speculation ["as to probabilities"], supposition, surmise, conjecture, or guess work'"], disapproved on a different point in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.)

6. Omission of CALJIC No. 3.16 Cured by Other Instructions

Rodriguez contends the trial court committed reversible error by omitting CALJIC No. 3.16, which instructs the jury that the testimony of an accomplice must be corroborated. We conclude that the giving of other instructions which substantially conveyed the same directive to the jury rendered this omission nonprejudicial.

Rodriguez was an accomplice of codefendant Hernandez as a matter of law. "For instructional purposes, an accomplice is a person "who is liable to prosecution for the *identical offense* charged against the defendant on trial in the cause in which the testimony of the accomplice is given." [Citations.]' [Citation.] 'In order to be an

accomplice, the witness must be chargeable with the crime as a principal [citation] and not merely as an accessory after the fact [citations]. [Citation.]' [Citation.]" (*People v. Felton* (2004) 122 Cal.App.4th 260, 268.)

"No conviction can be had upon the testimony of an accomplice unless such testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense[.]" (*Coffman and Marlow*, *supra*, 34 Cal.4th 1, 103.) CALJIC No. 3.16 instructs the jury on this mandate as follows: "If the crime of ___ was committed by anyone, the witness___ was an accomplice as a matter of law and [his] [her] testimony is subject to the rule requiring corroboration.

Although the trial court omitted to give CALJIC No. 3.16, the court more than adequately conveyed the essence of CALJIC No. 3.16 to the jury through its accomplice instruction based on CALJIC Nos. 3.10, 3.11, 3.12, 3.13 and 3.18. In pertinent part, the court instructed: "You cannot find a defendant guilty based upon the testimony of a codefendant that incriminates the defendant unless that testimony is corroborated by other evidence which tends to connect that defendant with the commission of the offense. [¶] . . . [¶] If there is no independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated. [¶] If there is independent evidence which you believe, then the testimony of the accomplice is corroborated. [¶] The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of his accomplices, but must come from other evidence. [¶] To the extent that a codefendant gives testimony that tends to incriminate a defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in light of all the evidence in this case."

In view of the accomplice instruction given, the trial court's omission of CALJIC No. 3.16 was nonprejudicial. (See *People v. Wilson* (2008) 43 Cal.4th 1, 20 ["not reasonably probable that the jury would have reached a more favorable verdict had it

been instructed with CALJIC No. 2.71.7" where "the trial court thoroughly instructed the jury on judging the credibility of a witness"]; cf. *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 185 [no accomplice corroboration instructions whatsoever].)

7. Substantial Evidence as to Counts 45, 47, 48, 49, 55 And 56

Rodriguez challenges his convictions on counts 45, 47 through 49, 55 and 56, which concern the loans for which he acted as the broker for Hernandez, as unsupported by the evidence. We find the evidence to be substantial.

He essentially contends that his role was merely to pass along the false information to the lenders, because Hernandez was "smart enough" to falsify all the information on the Tristan Drive Property, the Chaney Avenue Property, the Pico Vista Road Property, and the Berenice Avenue Property loans. The record refutes this contention and reveals ample evidence to support the jury's finding that Rodriguez was in fact culpable as an aider and abettor of Hernandez as to the crimes charged in these counts.

A "person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) In finding Rodriguez to be an aider and abettor, the jury was entitled to infer in light of the totality of the circumstantial evidence presented that Rodriguez not only forwarded the false information to the lenders, he necessarily did so with knowledge of the information's falsity and with the intent to facilitate the commission of the crimes charged in the subject counts. Hernandez used the same credit checking company retained by Rodriguez, who obtained fraudulently favorable credit reports, and, in so doing, Hernandez also obtained false credit reports in favor of himself. Moreover, in most of these fraudulent real estate loan transactions Rodriguez acted as the face-to-face interviewer of Hernandez. Also, in 2004 and 2005, Downey Motorcars,

owned by Hernandez, wrote checks to a Bank of America account ending in 9806 on which Rodriguez wrote checks for deposit at various credit unions.

Contrary to Rodriguez's assertion, it was not incumbent on the prosecution to establish he knew the social security numbers on the fraudulent loan documents in fact belong to a person other than Hernandez in order to prove Rodriguez aided and abetted Hernandez in making a false financial statement (§ 532a, subd. (1) and grand theft (§ 487, subd. (a); see also § 484).

A plain reading of these statutory provisions reveals that what is required is the perpetrator knows the falsity of his representations, for instance, that the social security number does not belong to Hernandez.[14] Nothing in these provisions can be construed to require that the perpetrator know the true facts concerning the representations, namely, the identity of the person to whom the social security number truly belongs. (Cf. *Flores-Figueroa v. United States* (2009) 556 U.S. 646, 657 [129 S.Ct. 1886, 1894; 173 L.Ed.2d 853] (*Flores-Figueroa*) ["knowingly" in 18 U.S.C., § 1028, subd.(a)(1), a statute criminalizing identity theft, signifies the accused must be aware that the "means of identification," e.g., social security number, used by the accused belonged to another person and was not merely faked].)

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[14] In pertinent part, section 532a, subdivision (1) provides: "Any person who shall knowingly make or cause to be made. . . any false statement in writing, with intent that it shall be relied upon, respecting the financial condition. . . of himself, or any other person, firm or corporation, in whom he is interested, or for whom he is acting, for the purpose of procuring in any form whatsoever. . . the making of a loan or credit, [or] the extension of a credit . . . for the benefit of himself or of such person, firm or corporation shall be guilty of a public offense."

Theft is defined as: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another. . . or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft." (§ 484.) Grand theft is defined as "Theft committed… [w]hen the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars." (§ 487, subd. (a).)

8. Substantial Evidence as to Counts 50, 51, and 57

Rodriguez challenges his convictions on counts 50, 51, and 57 concerning the Cullen Street Property and Santa Rita Avenue Property loans as unsupported by the evidence in light of *Flores-Figueroa*, *supra*. His challenge is unsuccessful.

Initially, the record reflects substantial evidence supports his convictions on these counts. These properties belonged to Rodriguez, and the false information was submitted by Rodriguez himself. The jury thus was entitled to infer Rodriguez knew that the background information he submitted on the loan applications regarding these properties was false. Moreover, as discussed above, his reliance is misplaced on *Flores-Figueroa*, which is factually inapplicable. That case involved a specific federal statute criminalizing identity theft. Rodriguez was not charged or convicted of violating that statute.

9. Actual Loss Not Element of Excessive Taking Enhancements

Defendants contend the evidence is insufficient to support the excessive taking enhancements under section 186.11, subdivision (a)(1) (loss of $500,000 plus) and section 12022.6, subdivision (a)(2) (loss of $1.3 million plus). They argue the prosecution failed to prove any actual out-of-pocket loss, because the lending banks exercised their security interest in the real property and might have recouped their investments. Their argument is unsuccessful. The applicability of the excessive taking enhancements is unaffected by whether the banks had or exercised a security interest in the real property in question or whether they had been repaid in part or total. Rather, the "loss" referred to in these enhancements is equated with the amount taken. (See, e.g., *People v. Frederick* (2006) 142 Cal.App.4th 400, 421-422; *People v. Mellor* (1984) 161 Cal.App.3d 32, 38-39.)

10. Remand for Further Proceedings as to Sentencing on Counts 49 and 53

As Respondent correctly points out, the trial court committed unauthorized sentencing error in sentencing Rodriguez. On count 53, the court imposed and then stayed the sentence pursuant to section 654. The jury was deadlocked on this count, and

thus, no sentence was appropriate. Similarly, the court's failure orally to pronounce judgment as to Rodriguez's sentence on count 49 also constitutes unauthorized sentencing error. We therefore reverse Rodriguez's sentence and remand the matter for resentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 354; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.)

11. Remand for Further Proceedings Regarding Precommittment Credits

Defendants contend the trial court erred in failing to award them all the precommitment credit to which they are entitled, because the court failed to apply section 4019, as amended by Senate Bill No. 18 (2009-2010 3d Ex. Sess.; Stats. 2009, ch. 28, §50), effective January 25, 2010.[15] We agree.

Defendants were sentenced on June 2, 2010. The court awarded Hernandez precommitment credit in the total amount of 712 days, consisting of 475 custody days and 237 conduct days. Hernandez contends that in light of his arrest and sentencing dates, he is entitled to a total of 952 days of precommitment credit consisting of 476 rather than 475 custody days and, pursuant to Senate Bill No. 18, 476 conduct days. The trial court's minutes reflect the court awarded Rodriguez precommitment credit in the total amount of 253 days, consisting of 169 custody days and 84 conduct days. He contends that under Senate Bill No. 18, he is entitled to an additional 84 conduct days.

Prior to Senate Bill No. 18, a defendant earned two conduct days for every four custody days. Pursuant to Senate Bill No. 18, a defendant earned two conduct days for every two custody days. Respondent concedes Senate Bill No. 18 applies but posits this rather novel theory, without citation to any applicable persuasive authority: The trial court must adhere to the following "bifurcated calculation" procedure in determining a defendant's precommitment credit award under these circumstances: (1) As to a defendant's period of incarceration from arrest until the effective date of the amendment

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[15] Senate Bill No. 18 was superseded upon enactment of Senate Bill No. 76, which amended section 4019 on September 28, 2010. (Sen. Bill 76, Stats.2010, ch. 426, § 1, eff. Sept. 28, 2010).

(January 25, 2010), the court calculates defendant's precommitment credits pursuant to the pre-Senate Bill No. 18 version of section 4019; and (2) As to the defendant's period of incarceration from January 25, 2010 to sentencing, the court calculates defendant's precommitment credits pursuant to the Senate Bill No. 18 version of section 4019.

Pending guidance from our Supreme Court,[16] we conclude that Senate Bill No. 18 is fully retroactive to the date of a defendant's arrest in view of the ameliorative effect of this amendment on section 4019. (See *In re Estrada* (1965) 63 Cal.2d 740, 745; *People v. Doganiere* (1978) 86 Cal.App.3d 237, 239-240 [amendment extending opportunity to earn conduct credits retroactive; see also *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [amendment to section 2900.5 allowing award of precommitment custody credits retroactive].) In its oral pronouncement of judgment, the trial court omitted the calculation of Rodriguez's precommitment credits. The court further erred in failing properly to calculate Hernandez's total precommitment credit award pursuant to Senate Bill No. 18. Remand therefore is warranted for the trial court to rectify these omissions as to Rodriguez. (See *People v. Taylor* (2004) 119 Cal.App.4th 628, 647 [Sentence failing "to award legally mandated custody credits is unauthorized and may be corrected whenever discovered"].)

12. Cumulative Errors Claim of Prejudice Unsuccessful

Defendants' claim of cumulative prejudicial error tainting their judgments of conviction is unsuccessful. No error in this regard transpired as to Hernandez. (*People v. Calderon* (2004) 124 Cal.App.4th 80, 93 ["The zero effect of errors, even if multiplied, remains zero"].) The trial court's error in omitting CALJIC 3.16 as to Rodriguez was de minimus in view of other instructions given which conveyed the same directive as CALJIC No. 3.16. (See, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 944 [relatively few number of errors although "not trivial, their significance to the actual fairness of

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[16] Our Supreme Court has scheduled April 5, 2012 for argument in *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963, which involves the issue of whether the January 25, 2010, amendment (SB 18) to section 4019 is retroactive.

defendant's trial was minimal"]; *People v. Frank* (1990) 51 Cal.3d 718, 736 ["cumulative effect of the few. . .errors too slight to warrant reversal of the penalty judgment"].)

DISPOSITION

The sentence as to Rodriguez is reversed and the matter is remanded to the trial court for resentencing, including the vacating of the sentence on count 53; the oral pronouncement of sentence on count 49; and calculation of his precommitment credit award. The sentence as to Hernandez is reversed and the matter is remanded to the trial court for resentencing, specifically for recalculation of Hernandez's precommitment credit award. In all other respects, the judgments are affirmed as to Rodriguez and Hernandez.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.