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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LEON ANDREW MARTINEZ, Defendant and Appellant.	B283764 (Los Angeles County Super. Ct. No. VA116931)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

In 1992, Morrad Ghonim paid defendant and appellant Leon Andrew Martinez to murder Ghonim's 17-year-old wife, Vicki Zepeda Ghonim. The case remained unsolved until 2009, when DNA analysis linked Martinez to the crime. Martinez was tried twice. In his first trial, the jury convicted him of conspiring to dissuade a witness, but deadlocked on the murder charge. Upon retrial, the jury convicted Martinez of first degree murder with true findings on various special circumstances allegations. Martinez contends the trial court erred by taking judicial notice, in his second trial, of the dissuading a witness conviction rendered in his first trial; the prosecution violated *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) by failing to disclose a videotape of a 2010 jail cell encounter between him and Ghonim; and the cumulative effect of the purported errors requires reversal. Discerning no error, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

In July 1992, Morrad Ghonim and his 17-year-old wife, Vicki Ghonim,[1] were parents of a young infant.

At that time, Martinez lived on Ramsey Street in La Mirada. He went by the moniker "Demon," had numerous tattoos, including a large "L.A." on his forehead, and often wore "Dickies" brand pants. He had a brother named Wesley Long, and a close friend, Emil Crisan, whom he considered to be a brother.

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[1] For ease of reference, and with no disrespect, we refer to individuals by their first names when more than one witness shares a surname.

The Woody family – including mother Barbara, 16-year-old Selena, and Selena's sister, Deanna – also lived on Ramsey Street. Another sister, Dawn, lived in Whittier. Martinez and Selena were dating.

a. *The murder and the 1992 investigation*

A week or two before the murder, Deanna saw Martinez talking to a Middle Eastern man on Ramsey Street.

On July 23, 1992, at approximately 9:15 p.m., a California Highway Patrol (CHP) officer saw Morrad run a red light and made a traffic stop. Inside the car, Vicki was lying with her head in Morrad's lap, bleeding. Morrad appeared frantic and said someone had just shot his wife. The couple's infant son was in the backseat. Vicki was not breathing and did not have a pulse. Morrad told another CHP officer that he and Vicki had had a hostile encounter with a group of people in Creek Park, in La Mirada. Vicki had flipped the other group off, and when she and Morrad returned to their car, someone shot her.

Harold McQueer and his girlfriend Joanne Beltran were in Creek Park on the evening of July 23. They heard three or four loud popping noises from the other end of the park, and Beltran heard a scream. A man ran past them wearing a black "hoodie" with a "White Sox" logo, and dark pants. As they returned to the parking lot, McQueer noticed a sweatshirt in some bushes and recognized it as the one worn by the running man. After leaving the park, McQueer saw a sheriff's deputy at a gas station, related his observations to him, returned to the park with the deputy, and showed him the clothing in the bushes. The clothing in the bushes included a black baseball jersey with the letters "SOX"; a black hooded sweatshirt; and black Dickies-brand pants. McQueer and Beltran provided a description of the running man,

including that he was Hispanic and approximately 18 to 22 years old.

An autopsy revealed that Vicki had suffered five gunshot wounds, including one fatal wound to her right eye, which penetrated her brain; a second fatal wound behind her right ear, in which the muzzle of the gun almost made contact with her skin; a close-range wound to her right thigh; a superficial wound above her right ear; and a contact, through-and-through wound to her right hand.

A gunshot residue test performed on Morrad's hands was negative.

b. *Martinez's actions after the shooting and his confessions*

On July 23, 1992, near the time of the murder, Martinez called Deanna and asked her to pick him up from a fast food restaurant located near Creek Park. When she arrived, he was wearing a trench coat and asked to be taken home to change. He requested that she park in front of the Woody house, rather than his own house.

In the summer of 1992, Martinez told Selena that he had killed a 16-year-old girl at a park, and he would kill Selena if she told anyone. Three or four days later, Selena told her mother, Barbara, what Martinez had said. Barbara called the police.

During the subsequent years Deanna became close friends with Martinez and often visited him after he and his family moved to Buena Park. They discussed the 1992 murder, and Martinez confessed to killing Vicki. Martinez said the husband stated the couple was having marital problems, and set the wife up to be killed. Martinez was supposed to go to Creek Park and make the incident look like a robbery. The husband agreed to

pay Martinez half the money beforehand, and the other half when the murder was complete. When Martinez approached the victim's car at the park, Vicki was holding her baby in her arms. The husband grabbed the baby away from her, and she repeatedly pleaded with Martinez, " 'Please don't hurt my baby.' " Martinez shot her, but she did not die, so he shot her three or four additional times and then fled.

In approximately 1998, Deanna stopped visiting Martinez.

c. *The cold case investigation*

(i) *Discovery of the note pertaining to Barbara's 1992 call*

The case was assigned in 2006 to Sheriff's Sergeants Howard Cooper and Mitch Loman. In the case file, Cooper discovered a handwritten note dated July 30, 1992. It memorialized a phone message from Barbara, in which she stated the shooter was "Demon," i.e., Martinez. Barbara claimed she had observed Morrad pick Martinez up two days prior to the murder. She opined that a relative of Martinez's was having an affair with Morrad and had paid to have Vicki murdered. Cooper telephoned Barbara, who by then was living in the Riverside area, but she claimed not to know what he was talking about.

(ii) *DNA evidence*

A homicide investigator assigned to review cold cases submitted the clothing found in the bushes for DNA testing in 2006. DNA recovered from the clothing was compared against reference samples from Martinez, Crisan, Long, and Morrad. In 2009, it was determined that DNA from the waistband of the pants was a mixture of at least three people, with the major contributor being Martinez. The odds that another man would be the major contributor were one in four quadrillion. Crisan was

excluded as a contributor. DNA from a semen stain on the sweatshirt was a mixture of at least two people, with the major component belonging to Crisan; appellant was excluded as a contributor.

(iii) *Interviews with the Woody family*

After receiving the DNA results in 2009, Cooper went to Barbara's Riverside home. Dawn happened to be there, visiting. Barbara initially denied knowledge of the murder and her 1992 phone call to police, but Dawn encouraged her to talk to Cooper. Eventually, Barbara stated the victim's husband had hired someone to kill the victim.

Within a few days Cooper conducted a recorded interview with Deanna. Deanna provided him with information about the crime that would not have been known to the public, but corresponded to the facts known to police. She stated that Martinez had admitted committing the killing, and had threatened that if she told anyone, he would kill her and her family. Deanna appeared very reluctant and frightened.

In July 2009, Cooper and Loman conducted a recorded interview of Selena. Selena at first denied knowledge of the murder because she was afraid for herself and her family. Eventually she told the sergeants that Martinez had told her he had committed the murder.

(iv) *Interview with Martinez*

On October 20, 2010, the sergeants interviewed Martinez. He claimed he had lived in Anaheim or Buena Park, not La Mirada, at the time of the murder; had never been to Creek Park; did not use the moniker "Demon"; and denied any involvement in the murder. He said Long had used the monikers Chickee and

Demon. Martinez mentioned Crisan, but did not state that Crisan committed the crime.

d. *Martinez's efforts to dissuade witnesses*

Later that day, Martinez called his wife, Eva Martinez, from jail. Their call was recorded and played for the jury. Martinez told Eva authorities were "trying to get" him on a 1992 murder charge, and "somebody was snitching." He related that a girl was murdered in a La Mirada park, it was "her and her husband," and "somebody" was saying "some guy named Demon did it." He told Eva to contact "Chicky" (that is, his brother, Long), because the homicide detectives would be talking to Long. Martinez instructed Eva to tell Long to say: (1) Crisan, his "brother that passed away" "did it" for money, and Martinez had nothing to do with it; (2) that Chicky used the nickname "Little D" and there was no big Demon; and (3) in 1992 Martinez lived in Anaheim, not La Mirada, and "never came around" there. Martinez denied committing the murder. He told Eva there was no evidence, and the case would soon be dismissed.

In a November 2, 2010 jail call, Martinez mused to Eva, "who would know about this." Eva said that "Sunshine" (Martinez's former wife, Sunshine Smith Martinez) "sees them all the time." Martinez replied, "Selena. She sees Selena." Martinez stated that Sunshine needed to "get a hold of" Selena. Martinez suggested Selena could be a witness for him.

In a November 10, 2010 call, Martinez told Eva to "get a hold of Sunshine and tell Sunshine she needs to go fuckin' shut her stupid ass friend up. Tell her to quit running her mouth and fuckin' telling lies." Eva replied, "I know what I have to do . . . leave it at that." In a second call that day, Martinez asked Eva, "Remember the name I showed you at visiting?" He told Eva to

have his mother "get a hold of fuckin' him and have him talk to his fuckin' wife's sister." He also said, "I think you should go talk to that broad . . . and find out what she exactly told them dicks." Martinez said it was "real important" for Eva to "go talk to that other girl and find out, . . . who else the dicks have talked to," "[c]ause I be finding out who these dicks talked to, I can fuckin' narrow it down to who's trying to smut me up. [¶] . . . [¶] I got a feeling it's one of these jealous bitches."

On November 29, 2010, at approximately 4:00 p.m., a woman called Selena at her workplace and stated, " 'Do [you] know what happens to snitches?' " Selena responded, " 'Yes, I do. They get thrown in ditches.' " The woman hung up. Selena, upset, angry, and "a little scared for [her] children," informed Sergeant Cooper. She believed the call was from Martinez's wife and was related to the Ghonim murder case. Phone records indicated Eva called Selena's place of employment at the time the threatening phone call was made.

On December 24, 2010, Eva visited Martinez in jail. He asked her to obtain photographs of those "old surfer" cars known as "Woodies." The prosecutor argued that this was a coded request for photographs of the Woody women, which Martinez could use to intimidate them.

2. *Procedure*

As noted, Martinez was tried twice. In 2014, his first jury convicted him of conspiring to dissuade a witness (Pen. Code, § 136.1, subd. (c)(2).)[2] The jury was unable to reach a verdict on the murder count, deadlocking 11 to 1 for guilt, and the trial

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[2] All further undesignated statutory references are to the Penal Code.

court declared a mistrial on that count. At the second trial, a jury convicted Martinez of first degree murder. (§ 187, subd. (a).) It found true special circumstances allegations that the murder was committed for financial gain and was carried out by lying in wait. (§ 190.2, subds. (a)(1), (15).) It also found Martinez personally used a handgun. (12022.5, subd. (a).)

In accordance with an agreement between the People and Martinez, in exchange for Martinez's truthful testimony at Morrad's subsequent trial, the trial court sentenced Martinez to 25 years to life in prison for the murder, plus a consecutive three-year term for dissuading a witness. It ordered victim restitution and imposed a restitution fine, a suspended parole revocation restitution fine, a criminal conviction assessment, and a court operations assessment. Martinez appeals.

DISCUSSION

1. *The trial court did not err by taking judicial notice of Martinez's prior conviction*

During trial, the prosecutor asked the court to take judicial notice of the fact Martinez had been convicted, in the first trial, of dissuading a witness, i.e., Selena. The prosecutor averred the evidence was relevant to show Martinez's consciousness of guilt. Defense counsel conceded there was "some relevancy" to the prior conviction, but objected that the evidence was cumulative and prejudicial because it would cause the jury to feel it had to convict Martinez of murder. The trial court overruled defense counsel's objections. Defense counsel declined the trial court's offer to give a specific limiting instruction.

At the close of the prosecution's case, the trial court took judicial notice that on March 7, 2014, Martinez was "convicted of dissuading a witness, that being Selena Woody[.]"[3]

Martinez argues the trial court erred by taking judicial notice of the conviction because it was irrelevant and unduly prejudicial. The error so infected the trial with unfairness, he contends, as to deny him due process. We disagree.

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) Evidence is relevant if it 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; *People v. Lopez* (2013) 56 Cal.4th 1028, 1058, overruled on another ground by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Mills* (2010) 48 Cal.4th 158, 193.) Judicial notice may be taken of the records of any California court. (Evid. Code, § 452, subd. (d).)

Under Evidence Code section 352, a court has discretion to exclude evidence if its probative value is substantially outweighed by the probability its admission will create a substantial danger of undue prejudice, i.e., if it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome. (*People v. Case* (2018) 5 Cal.5th 1, 43.) Evidence is prejudicial if it " ' "uniquely tends to evoke an

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[3] In fact, Martinez was convicted of conspiring to dissuade a witness (§ 136.1, subd. (c)(2)), rather than dissuading a witness. However, defense counsel never objected to the inaccurate characterization of the conviction and Martinez does not raise this inaccuracy as a basis for his appellate challenge. For ease of reference, we sometimes hereinafter refer to the conviction as dissuading a witness.

emotional bias against defendant as an individual and . . . has very little effect on the issues." ' " (*People v. Williams* (2013) 58 Cal.4th 197, 270.)

A trial court has broad discretion in determining whether evidence is relevant and whether Evidence Code section 352 precludes its admission. (*People v. Lopez*, *supra*, 56 Cal.4th at p. 1058; *People v. Mills*, *supra*, 48 Cal.4th at p. 195; *People v. Williams* (2008) 43 Cal.4th 584, 634.) We apply the deferential abuse of discretion standard when reviewing a trial court's ruling on a relevance or Evidence Code section 352 objection. (*People v. Fuiava* (2012) 53 Cal.4th 622, 667–668; *People v. Lee* (2011) 51 Cal.4th 620, 643; *People v. Kerley* (2018) 23 Cal.App.5th 513, 570.)

Here, the fact Martinez conspired to dissuade Selena from telling police what she knew was relevant to show his consciousness of guilt. "[A]n accused's efforts to suppress evidence against himself indicate a consciousness of guilt." (*People v. Vines* (2011) 51 Cal.4th 830, 867, overruled on another point by *People v. Hardy* (2018) 5 Cal.5th 56, 104; Evid. Code, § 413; *People v. Lee* (1994) 28 Cal.App.4th 1724, 1740; CALCRIM No. 371.) Where the defendant has authorized a third person to attempt to suppress testimony, evidence of such conduct is admissible against the defendant. (*People v. Gray* (2005) 37 Cal.4th 168, 220; *People v. Williams* (1997) 16 Cal.4th 153, 200–201; *People v. Nelson* (2011) 51 Cal.4th 198, 214.) The necessary nexus between the defendant and the alleged suppression of evidence is shown when the attempt to suppress was made by a third party with the defendant's knowledge or authorization. (*People v. Nelson*, at p. 214.)

Among other things, in Martinez's first jailhouse call to Eva, he told her "somebody was snitching." In the November 2, 2010 phone call, Eva noted that Martinez's former wife, Sunshine, "sees somebody all the time." Martinez replied, "Selena. She sees Selena." Martinez said Sunshine "needs to get a hold of her." During Martinez's November 10, 2010 call, Martinez told Eva "get a hold of Sunshine and tell Sunshine she needs to go fuckin' shut her stupid ass friend up. Tell her to quit running her mouth and fuckin' telling lies," and "shut the fuck up." Eva replied, "Don't worry about that . . . I know what I have to do . . . ." In a subsequent call that day, Martinez said it was difficult for him to contact people from jail. When Eva protested that Martinez had yelled at her, he replied: "but what I'm telling you to do. It's not the thing with you and me talking here on the phone it has to do with you talking to other people out there on a different phone. Not on your phone." He also said, "you're the only one I got out there helping me . . . ." Thus, while it was Eva who called and threatened Selena, the jury could readily infer from her phone conversations with appellant that appellant authorized and directed her actions. (See *People v. Foster* (2007) 155 Cal.App.4th 331, 333 [defendant's request to a third party to tell the victim not to testify against him supported defendant's conviction for attempting to dissuade a witness]; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1589–1591; *People v. Moore* (1945) 70 Cal.App.2d 158, 163–164.) Therefore, the fact of the conviction was relevant to prove Martinez's consciousness of guilt.

Nor was the evidence prejudicial within the meaning of Evidence Code section 352. The fact Martinez attempted to quiet Selena, to whom he had confessed the murder, was highly

relevant to show his consciousness of guilt, which in turn was significant evidence bolstering the People's case. Evidence Martinez had suffered the conviction was not inflammatory and was not likely to evoke an emotional bias against him. Certainly, evidence regarding the attempt to dissuade Selena was less inflammatory than evidence that he committed the murder. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 144; *People v. Jones* (2011) 51 Cal.4th 346, 371.) " ' " 'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence 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." ' " (*People v. Henriquez* (2017) 4 Cal.5th 1, 28.)

Contrary to Martinez's argument, *People v. Hicks* (2017) 4 Cal.5th 203 (*Hicks*), does not compel a contrary result. There, the defendant, while driving under the influence, led police on a high speed chase, causing a fatal accident. (*Id.* at p. 206.) He was charged with murder and several lesser related offenses. The jury deadlocked on the murder charge, but convicted on the lesser related charges of evading an officer, gross vehicular manslaughter, and driving under the influence. (*Id.* at pp. 206, 209.) On retrial, the defense unsuccessfully requested that the trial court instruct the jury that defendant had been convicted of gross vehicular manslaughter in connection with the collision, thus making clear to the jury that, regardless of its verdict on the murder count, defendant would be held accountable for his wrongful conduct. The retrial jury convicted defendant of second degree murder. (*Id.* at p. 208.)

Relying on the principle that a trial court must instruct on *lesser included* offenses to avoid forcing an all-or-nothing choice

between conviction of the charged offense and acquittal, on appeal defendant argued the same principles should apply when a defendant is retried after a deadlock on a greater offense and conviction of a *lesser related* offense. (*Hicks*, *supra*, 4 Cal.5th at p. 210.) Our Supreme Court agreed that some instruction was necessary, but disagreed that the jury should be told of the prior conviction. It reasoned: "At the heart of this case is the risk that a retrial jury asked to resolve a single charge will let considerations of punishment enter into its deliberations. [Citations.] But this risk can cut both ways. Defendant is obviously disadvantaged if the retrial jury believes it is faced with an all-or-nothing choice and convicts him of murder rather than have him go unpunished. Conversely, the People are disadvantaged if the jury is told that the defendant has already been convicted of a serious homicide offense and then speculates about why, if that is so, the murder charge is being retried, or about the punishment defendant will face with or without an additional murder conviction. [Citations.]" (*Id.* at p. 212.) To evenhandedly address these risks, and avoid the possibility defendant's jury would be given the false impression of an all-or-nothing choice, *Hicks* concluded the jury could be instructed that cases are sometimes tried in segments; it must not consider the issue of punishment; and it should not speculate about whether defendant might be held criminally responsible in some other segment of the proceedings. (*Id.* at pp. 205, 212–213.)

To the extent *Hicks* is relevant, it does not support defendant's argument. The issue in *Hicks* was distinct from that presented here: the court addressed an instructional, not an evidentiary, question. Here, the offense of which the court took judicial notice — dissuading a witness — was not a lesser

included or lesser related offense to murder. Moreover, *Hicks* did not consider whether evidence of a prior conviction could be introduced to prove consciousness of guilt, and did not hold such evidence was impermissible. (*People v. Brown* (2012) 54 Cal.4th 314, 330 [cases are not authority for propositions not considered].)

Hicks's discussion of *People v. Johnson* (2016) 6 Cal.App.5th 505, suggests it is not improper to advise the jury of the result of a prior proceeding. In *Johnson*, a jury convicted the defendant of gross vehicular manslaughter, but deadlocked on a murder charge. On retrial, the court informed prospective jurors, during voir dire, that defendant had been convicted of two of the three charges in the prior trial, and the jury's task was to address the one unresolved count. The Court of Appeal found these statements insufficient to dispel the false impression of an all-or-nothing choice between a murder conviction and complete exoneration, and concluded the trial court should have informed the jury of the gross manslaughter conviction. (*Hicks*, *supra*, 4 Cal.5th at p. 214, discussing *People v. Johnson*, at pp. 510–511.) *Hicks* disagreed, reasoning: "We think the information the trial court gave the prospective jurors in *Johnson*, informing them that the defendant had previously been convicted of ' "two of the three charges" ' [citation], was sufficient to dispel the false impression of an all-or-nothing choice, and it avoided any disadvantage to the defendant from being unable to urge a vehicular manslaughter conviction," even without the trial court specifically informing the jury of the nature of the prior conviction. (*Hicks*, at p. 214.) *Hicks* thus approved the jury being told that defendant had suffered convictions in the same case, albeit unspecified, in a prior proceeding. In short, *Hicks*

addressed a distinct issue and does not stand for the proposition that a jury must be kept in the dark regarding a defendant's prior convictions when relevant as evidence in the case.

In any event, even assuming the trial court took judicial notice of Martinez's conviction in error, we discern no prejudice. The erroneous admission of evidence "does not require reversal except where the error or errors caused a miscarriage of justice." (*People v. Richardson* (2008) 43 Cal.4th 959, 1001; Evid. Code, § 353, subd. (b); cf. *People v. Hicks*, *supra*, 4 Cal.5th at p. 215.) " '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*People v. Richardson*, at p. 1001; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. (*People v. Hamilton* (2009) 45 Cal.4th 863, 930; *People v. Partida* (2005) 37 Cal.4th 428, 439.)

Evidence of the phone calls between Eva and Martinez, and Selena's testimony about the threat, was admitted into evidence, and appellant does not challenge its admissibility on appeal. He concedes there was sufficient evidence to show he and Eva conspired to dissuade Selena from testifying. Thus, the jury already had before it powerful and largely undisputed evidence that appellant wished to silence Selena and authorized Eva to intimidate her. The fact he was *convicted* of the offense added little to the evidence already before the jury. Additionally, the jury was instructed that if Martinez fabricated evidence or attempted to persuade a witness to testify falsely, that conduct

was insufficient by itself to prove guilt. (CALJIC No. 2.04.) This instruction further dispelled any possible prejudice. (See *People v. Henriquez*, *supra*, 4 Cal.5th at p. 33; *People v. Holloway* (2004) 33 Cal.4th 96, 142.) It is therefore not reasonably probable the jury would have rendered a more favorable result for him even had the court declined to take judicial notice of the conviction.[4]

Martinez argues evidence of the prior conviction could have signaled to the jury that he committed additional acts, other than those related at trial, to dissuade Selena. To the contrary, we do not believe evidence of the conviction would have encouraged the jury to engage in such speculation. The jury was instructed that it must determine what facts were proved "*from the evidence received* in the trial and *not from any other source*." (CALJIC No. 1.00, italics added.) We presume the jury follows the trial court's instructions. (*People v. Case*, *supra*, 5 Cal.5th at p. 32; *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 515.)

Martinez further insists that the fact the court took judicial notice of the dissuading conviction must have been prejudicial because his first jury deadlocked on the murder charge, and "evidence in both the first and second trials was nearly identical." (See *People v. Soojian* (2010) 190 Cal.App.4th 491, 520 [fact first trial resulted in a hung jury has been considered by some courts as persuasive on the question of prejudice].) But the evidence in the two trials was not identical. In the second trial, the defense rested without putting on evidence. In the first trial, the defense

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[4] In light of our conclusion, we need not reach the parties' arguments regarding whether the evidence of the conviction was also relevant insofar as it related to Selena's credibility as a witness.

offered the testimony of defendant's ex-wife and mother of his child, Sunshine, and of defendant's brother, Long. Among other things, Sunshine testified that, after she and Martinez began dating, Selena and Deanna came to visit Martinez numerous times over a two-year period, and Selena displayed a flirtatious attitude toward him. Martinez never told Sunshine he had been involved in the murder. Long testified that Martinez "dumped" Selena, making her sad and angry. Thereafter, Long dated Selena, and she talked about how she had loved Martinez. Long believed Selena was still "bitter" about the fact Martinez broke up with her. Selena never told Long that Martinez had admitted participating in the murder. Long also explained that in 1992, Martinez and Crisan were like brothers and were together all the time. They often wore each other's clothing. In the summer of 1992, Martinez did not live with their mother in La Mirada; he lived with Crisan in Buena Park. The parties stipulated that Crisan died of a self-inflicted gunshot wound in November 1995. While we do not speculate regarding how this evidence impacted the first jury, the trials cannot be characterized as identical. Moreover, the vote in the first trial was 11 to 1 for guilt, hardly a strong showing the case was close.

2. *Martinez has not established a* Brady *violation*

a. *Additional facts*

In March 2017, Martinez filed a motion for a new trial on the ground that the prosecution violated *Brady* by failing to disclose to the defense a videotape of a 2010 jailhouse encounter between him and Morrad. Defense counsel's declaration, offered in support of the new trial motion, averred the following. On October 20, 2010, detectives placed Martinez and Morrad in a jail cell together as part of a ploy to obtain incriminating information

against both men. The ploy was unsuccessful, however; although the men exchanged a few words, neither appeared to recognize the other, and neither made incriminating statements. Morrad was released from custody and no case was filed against him until after Martinez was convicted and agreed to testify against him. According to defense counsel, the judge in Morrad's trial made a factual finding before the jury that the two men did not appear to know each other.

Prior to Martinez's trial, the prosecution provided defense counsel with an *audiotape* of the jailhouse encounter, but did not disclose the existence of the *videotape*. Defense counsel first learned of the videotape when it was played at Morrad's trial.[5] After Morrad's conviction, the deputy district attorney provided defense counsel with a copy of the videotape.

In his new trial motion, Martinez argued that the videotape was exculpatory because it tended to demonstrate he did not recognize Morrad, contradicting the prosecution's theory that Martinez and Morrad had "repeated interactions" prior to the murder. Had Morrad actually hired Martinez, it was reasonable to assume that "there would be some expression of visual recognition or look of surprise" by one or both of the men, or that they would have attempted to conceal their prior relationship. Instead, counsel argued, "upon being placed together in a cell the two men [did] not display any surprise or recognition of each other." They engaged in "minor interactions" that they would

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[5] Defense counsel averred that the investigating detectives' reports did not reference the ploy or the fact a videotape existed. One of the detectives testified, in Morrad's case, that he was unaware of the videotape's existence.

have avoided had they sought to conceal their relationship. The People did not file a written opposition. The trial court denied the new trial motion without elaboration.

Martinez contends the prosecution's failure to disclose the videotape requires reversal of his murder conviction. We disagree.

b. *Legal principles*

The due process clause of the federal constitution requires a prosecutor to disclose to the defense all material evidence known to the prosecution team that is favorable to the defendant, even in the absence of a request. (*Kyles v. Whitley* (1995) 514 U.S. 419, 432–441; *Brady*, *supra*, 373 U.S. at p. 87; *People v. Clark* (2011) 52 Cal.4th 856, 981–982.) "For a defendant to obtain relief under *Brady*, ' " '[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.] Prejudice, in this context, focuses on 'the materiality of the evidence to the issue of guilt and innocence.' [Citations.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]. A defendant instead 'must show a "reasonable probability of a different result." ' [Citation.]" [Citation.] We independently review the question whether a *Brady* violation has occurred.' " (*People v. Masters* (2016) 62 Cal.4th 1019, 1067; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 175–176; *People v. Salazar* (2005) 35

Cal.4th 1031, 1043.) The " 'requisite "reasonable probability" is a probability sufficient to "undermine[ ] confidence in the outcome" on the part of the reviewing court.' [Citation.]" (*People v. Salazar*, at p. 1050.) Evidence is favorable to the defense if it helps the defense or hurts the prosecution. (*People v. Clark*, *supra*, 52 Cal.4th at p. 982; *People v. Verdugo* (2010) 50 Cal.4th 263, 279.)

Martinez urges that his and Morrad's "familiarity and recognition of each other was potentially critical to the prosecution case." Evidence they did not recognize each other was material because it contradicted the prosecution's theory of the case and raised a reasonable doubt that he was guilty. He acknowledges that defense counsel was given the exculpatory audiotape prior to trial, and that it showed the two men did not acknowledge each other. Nonetheless, he avers that the videotape was "far more critical to appellant's defense" as there was "no demonstration that appellant and Morrad knew each other while together for many hours."

There is no dispute the prosecution failed to disclose the videotape, and we assume it was exculpatory. We also accept, for purposes of argument, Martinez's assertion that the videotape contains no showing that the two men recognized each other.[6] However, Martinez has failed to demonstrate the videotape was material within the meaning of *Brady*.

Contrary to Martinez's arguments, much of the exculpatory value he avers inhered in the videotape was already disclosed to the defense by virtue of the audiotape. Martinez concedes that

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[6] Neither the audiotape nor the videotape have been made a part of the record on appeal.

the audiotape reflected that the two men did not acknowledge each other verbally. In other words, they did not make statements indicating they knew or recognized each other. The men's lack of familiarity thus would have been apparent from the audiotape alone. Similarly, the audiotape would have demonstrated that the men sought to "avoid" each other by engaging in only limited conversation. The audiotape thus provided most of the evidence Martinez contends was crucial to his defense. (Cf. *People v. Masters*, *supra*, 62 Cal.4th at pp. 1066, 1068 [prosecution's failure to fully disclose benefits witness received in exchange for testifying was not material where, inter alia, "the gist of the agreement" was disclosed].)

The only thing the videotape might have added was that the men did not display surprise or any nonverbal cues indicating they recognized each other.[7] But, as the People argue, such evidence had limited value at best. According to the evidence, Martinez and Morrad met only once or twice in 1992 prior to the July 1992 murder. At the time, Martinez was 19 years old and had facial tattoos "pretty much all over his face." The jailhouse encounter occurred in October 2010, over 18 years after their earlier contacts. By that time, Martinez's facial tattoos had been removed. As a matter of common sense, both men were likely to have aged during that period, making it likely their appearances had changed considerably. Indeed, one of the Woody sisters, Dawn, testified that she did not recognize Martinez without his

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[7] Of course, because the videotape has not been made a part of the record on appeal, this court has no way to discern whether it was of such quality, or shot at such an angle, as to allow a jury to determine whether the men did, or did not, demonstrate surprise or show a fleeting moment of recognition.

tattoos. Absent a showing that the two men had a significantly higher degree of familiarity with each other or had maintained contact over the years, and that they looked largely the same as they had in 1992, the fact they did not recognize each other in 2010 was hardly surprising. Any significance that might have attached to the men's failure to recognize each other was seriously undercut by the passage of time and the fact it was never established that they knew each other well. Under these circumstances, we cannot conclude the videotape was material within the meaning of *Brady*. " '[N]ot every nondisclosure of favorable evidence denies due process.' " (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1049.) "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." (*United States v. Agurs* (1976) 427 U.S. 97, 109–110; *People v. Fauber* (1992) 2 Cal.4th 792, 829.) There is no reasonable probability the videotape would have put the case in such a different light as to undermine confidence in the verdict. (See *Kyles v. Whitley*, *supra*, 514 U.S. at p. 435.)

Smith v. Cain (2012) 565 U.S. 73, cited by Martinez, is distinguishable. There, the defendant was charged with killing five people during an armed robbery. A single witness, Boatner, identified Smith as one of the three shooters, and claimed he had been face to face with Smith during the initial moments of the robbery. No other witnesses and no physical evidence implicated Smith. (*Id.* at p. 74.) The prosecution failed to disclose to the defense that Boatner originally told a detective he could not see any of the perpetrators' faces and could not identify anyone. (*Id.* at p. 75.) The *Smith* court determined the suppressed

evidence was material under *Brady*. Boatner's testimony was the only evidence linking Smith to the crime and his undisclosed statements directly contradicted his trial testimony. Evidence that on the night of the killings Boatner made contradictory remarks that he could identify the first gunman, but not the other two, "merely [left the court] to speculate about which of Boatner's contradictory declarations the jury would have believed." (*Id.* at p. 76.) As is readily apparent, however, the facts in *Smith* bear no resemblance to those in the instant matter. The nondisclosure of a key eyewitness's contradictory statements regarding the only evidence tying the defendant to a crime is a far cry from the profoundly less significant evidence at issue here.

3. *Cumulative error*

Martinez contends that the cumulative effect of the purported errors requires reversal. As we have found no errors to accumulate, we reject appellant's cumulative error claim. (See generally *People v. Woodruff* (2018) 5 Cal.5th 697, 783; *People v. Mora and Rangel*, *supra*, 5 Cal.5th at p. 499.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.