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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. LUIS ROLANDO BARAHONA et al., Defendants and Appellants.	B276652 (Los Angeles County Super. Ct. Nos. BA432215 & BA431653)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard S. Kemalyan, Judge. Affirmed and remanded.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant Luis R. Barahona.

Jonathan P. Milberg, under appointment by the Court of Appeal, for Defendant and Appellant Oscar Perez.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Luis R. Barahona and Oscar Perez (defendants) of numerous counts of attempting to set fire and burn property, attempted extortion, and conspiracy to commit extortion, related to their efforts to collect "taxes" from four vendors. The jury also found true gang enhancements alleged as to each count. On appeal, defendants contend the trial court erred in (1) failing to suppress a statement Barahona made to a police officer without having been advised of his *Miranda*[1] rights; (2) excluding evidence that the victims engaged in illegal vending activities; and (3) denying Perez's request for a mistrial based on unanticipated testimony from a witness. We find no merit in these arguments. However, we find the trial court erred in failing to impose sentence on count 2 before staying the sentence on that count. We remand the case to the trial court for the limited purpose of correcting the sentencing error.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the evidence in accordance with the usual rules on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.)

Victims Norma Chautla, Placido Gatica, Reyna Chautla, and Jose Morales[2] sold grocery items out of three vending trucks.[3] On the afternoon of Wednesday, November 12, 2014,

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

[2] We refer to Norma and Reyna by their first names to avoid confusion. Norma and Gatica are husband and wife, Norma and Reyna are sisters, and Reyna and Morales are husband and wife.

[3] Norma and Gatica operate out of the same truck, and Gatica and Reyna each operate their own truck.

Perez and another individual, Maurilio Alvizo,[4] approached Morales while working in his truck in the area of 81st Street and Figueroa in Los Angeles. Barahona was also present and stood on the sidewalk near the truck. Alvizo identified himself as from the 18th Street gang. Alvizo told Morales he would have to start paying $50 in "rent" to Perez, and if he did not pay, he could no longer work in the area. Morales stated he was unable to afford to pay $50.

That evening, Perez, Barahona, and Alvizo approached Norma and Gatica while working in their truck in the area of 81st Street and Figueroa. Alvizo stated they were from the 18th Street gang and collecting "taxes." According to Alvizo, he was given an order to charge Norma and Gatica $50 each Friday; if they did not pay, he was told there would be "consequences" and they would have to leave the area.

Later that evening, Perez and Barahona approached Reyna while working in her truck in the area of 81st Street and Figueroa. Perez stated he was from the 18th Street gang and was collecting taxes. He said he would be collecting $50 each Friday, and if Reyna did not pay, they would destroy her truck.

On Thursday, November 13, 2014, Perez and Barahona approached Morales in his truck. Perez told him he had to pay $50 on Friday, otherwise he would burn his truck.

On Friday, November 14, 2014, Perez and Barahona approached Reyna in her truck. Perez stated he was collecting the rent, and if Reyna did not pay him $50, he would burn and destroy her truck. Reyna refused to pay and drove off.

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[4] Alvizo was charged with the same counts as Barahona and Perez. Although the three individuals were tried together, Alvizo is not a party to this appeal.

On Tuesday, November 18, 2014, Perez and Barahona approached Reyna in her truck. Perez demanded payment and threatened to burn and destroy her truck. Reyna again refused and drove off.

Later that evening, Perez and Barahona approached Norma and Gatica while they were in their truck. Perez stated he was from the 18th Street gang and demanded that Norma and Gatica pay him. Perez said if they did not pay, he would burn Norma and Gatica along with their truck. He also threatened to call members of the 18th Street gang to destroy the truck. Barahona was standing next to Perez and looking from side to side.

Gatica threatened to call the police. Perez responded by asking Barahona to hand him a can of gasoline, and stated they were going to burn the truck. Barahona grabbed a gas can and handed it to Perez. Perez made a motion as if he was pouring gasoline on the truck, and Barahona handed Perez a lighter.

At some point, Norma went to the opposite end of the truck and called 911. A short time later, a police helicopter approached the area, and Perez ran to a nearby building carrying the gas can. The police eventually detained Perez and Barahona. One of the responding officers recovered the gas can, which contained approximately one-half to one cup of gasoline.

Additional Gang Evidence

The prosecution's gang expert, Los Angeles Police Department (LAPD) Officer Leovardo Guillen, testified there are approximately 6,000 18th Street gang members in Los Angeles. The area around 81st Street and Figueroa is within the gang's territory. The gang's primary color is blue, and members use various signs and often wear Los Angeles Dodgers clothing. One

of the gang's primary activities is extortion, and members require businesses operating within the gang's territory, such as street vendors, to pay them "taxes." When presented with a hypothetical mirroring the facts of this case, Officer Guillen opined that the crimes were committed for the benefit of and in association with a gang.

LAPD Officer Vincent Henson testified that on November 7, 2014, he made contact with Barahona and Perez in a laundromat parking lot. During that encounter, Barahona admitted being a member of the 18th Street gang.

Verdict and Sentencing

Barahona, Perez, and Alvizo were tried together. The jury convicted Barahona and Perez of two counts of attempting to set fire and burn property (Pen. Code, § 455; counts 1 and 2),[5] six counts of attempted extortion (§ 524; counts 3, 6, 7, 8, 9, 11),[6] and one count of conspiracy to commit extortion (§ 182, subd. (a)(1); count 10). The jury found true the gang allegations as to each count (§ 186.22). The jury deadlocked on the counts related to the attempted extortion of Norma, Gatica, and Morales on November 12, 2014 (counts 4, 5, and 12). The trial court declared

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[5] All further unspecified section references are to the Penal Code.

[6] The six attempted extortion counts related to the following incidents: the November 12 attempt to extort Reyna, the November 13 attempt to extort Morales, the November 14 attempt to extort Reyna, and the November 18 attempts to extort Reyna, Norma, and Gatica.

a mistrial as to those counts, and they were subsequently dismissed in the interests of justice.[7]

The trial court sentenced Barahona and Perez to an aggregate prison term of 14 years and 8 months.[8] It awarded defendants 1,248 days of custody credit, and ordered them to pay various fines and fees and register as arson offenders and gang members.

Barahona and Perez appealed.

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[7] The jury found Alvizo not guilty of the two counts of attempting to set fire or burn property (counts 1 and 2), and deadlocked on the extortion and conspiracy charges (counts 3 through 12).

[8] The sentences consisted of the following: Eight years for count 1, consisting of the high term of three years for the base term, plus a five-year gang enhancement (§ 186.22, subd. (b)(1)(B)). One year and eight months for counts 3, 8, 9, and 11, consisting of one-third of the mid-term of two years for the base term, plus one-third of the mid-term of three years for the gang enhancement (§ 186.22, subd. (b)(1)(A)), to be served consecutively. Seven years for counts 6 and 7, consisting of the high term of three years for the base term, plus the high term of four years for the gang enhancement (§ 186.22, subd. (b)(1)(A)), to be served concurrent with the sentence for count 1. One year and eight months for count 10, consisting of one-third of the mid-term of two years for the base term, plus one-third of the mid-term of three years for the gang enhancement (§ 186.22, subd. (b)(1)(A)). The court stayed the sentence on count 10 under section 654. As to count 2, the court stated it was staying the sentence under section 654, but did not actually impose a sentence.

DISCUSSION

I. The Trial Court Did Not Err in Declining to Suppress Barahona's Statement to a Police Officer

Defendants contend the trial court erred in failing to suppress, on *Miranda* grounds, Barahona's statement to a police officer that he was a member of the 18th Street gang. We disagree.

A. Background

During trial, Barahona sought to suppress his statement to Officer Henson indicating he was a member of the 18th Street gang. Barahona argued the statement was inadmissible because he had not been given *Miranda* advisements prior to answering the officer's questions. In order to decide the *Miranda* issues, the court heard testimony from Officer Henson outside the presence of the jury. (See Evid. Code, § 402.)

Officer Henson testified that, on November 7, 2014, he and his partner came across Barahona, Perez, and a third individual in the parking lot of a laundromat. After witnessing a suspicious handshake, the officers suspected the men were dealing drugs. The officers drove their patrol car into the parking lot, exited the car, and approached the men, stating something to the effect of, "What are you guys up to?" The officers did not have their guns drawn and did not order the men to do anything. Officer Henson explained they were investigating a possible narcotics sale. The officers asked the men if they could pat them down for weapons. The men agreed, and the officers conducted pat-down searches for weapons. The men did not have their hands on the patrol car during the searches. The officers ended their investigation after they did not find any drugs or weapons.

Officer Henson then asked Barahona a few questions in order to complete a Field Identification card (F.I. card). Officer Henson's tone of voice was casual as he spoke to Barahona, and he did not yell. Officer Henson asked Barahona if he was a member of the 18th Street gang, and Barahona responded that he was. According to Officer Henson, Barahona was not free to leave until he completed the F.I. card. The entire encounter lasted between 10 and 15 minutes, and the men were never handcuffed, physically restrained, or told they could not leave.

After hearing Officer Henson's testimony, the trial court denied Barahona's motion to suppress. The court noted that *Miranda* advisements are required only when a person is subjected to custodial interrogation, and are not required prior to general on-the-scene questioning as to facts surrounding a crime. In determining Officer Henson was not required to advise Barahona of his *Miranda* rights, the court stated it considered the totality of the circumstances, including the following: (1) Barahona was not arrested; (2) the detention lasted between 10 and 15 minutes; (3) the questioning occurred in a parking lot; (4) there were two officers and three suspects; (5) Officer Henson's demeanor and questioning were casual; and (6) Barahona was not handcuffed or placed up against the patrol car.

B. Legal Principles

"To protect the constitutional privilege against self-incrimination, the *Miranda* rule requires that before the police may question the defendant during a custodial interrogation, the defendant must be advised of the right to remain silent and to an attorney and that any statements made may be used against him or her in court. [Citation.] If the defendant invokes the right to

silence or to an attorney, the interrogation must cease. [Citation.] [¶] Generally, statements elicited in violation of these *Miranda* principles may not be used against the defendant at trial . . . . This exclusionary rule is applied in prophylactic fashion to deter coercive investigative questioning and advance the trustworthiness of trial evidence, even if the defendant's statements were voluntary apart from the *Miranda* violation." (*People v. Andreasen* (2013) 214 Cal.App.4th 70, 86; see *Edwards v. Arizona* (1981) 451 U.S. 477, 481–482.)

Miranda protections "are triggered only if a defendant is subjected to a custodial interrogation." (*People v. Andreasen*, *supra*, 214 Cal.App.4th at p. 86.) "An interrogation is custodial when 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citation.]" (*People v. Kopatz* (2015) 61 Cal.4th 62, 80; see *Yarborough v. Alvarado* (2004) 541 U.S. 652, 663.) "Whether a person is in custody is an objective test." (*People v. Linton* (2013) 56 Cal.4th 1146, 1167.) The pertinent question is, " 'would a reasonable person in the suspect's position during the interrogation experience a restraint on his or her freedom of movement to the degree normally associated with a formal arrest.' [Citations.]" (*People v. Bejasa* (2012) 205 Cal.App.4th 26, 35.)

"Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.]" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400; see *People v. Bradford* (1997) 14 Cal.4th 1005, 1032–1033.) When reviewing the trial court's determination that a defendant did not undergo custodial interrogation, " 'we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine

from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.' [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 385.)

C. Discussion

Defendants contend that Officer Henson was required to advise Barahona of his *Miranda* rights prior to questioning him about his gang affiliation. They assert Barahona was subject to custodial interrogation because a "reasonable person in Barahona's position would have felt restrained in a manner normally associated with formal arrest," and Officer Henson's questions were likely to elicit incriminating responses. In support of their argument that Barahona was in custody, defendants rely on the facts that Barahona was briefly detained for a suspected drug transaction, and the officers did not inform him he was not under arrest, could decline to answer questions, and was free to leave. Defendants maintain that, because Officer Henson failed to advise Barahona of his *Miranda* rights, the trial court erred in refusing to suppress his statement indicating he was a member of the 18th Street gang.[9] We disagree.

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[9] Barahona asserts the trial court determined he was in custody while questioned by Officer Henson. In support, he points to the trial court's statement, made while considering the admissibility of the statement to Officer Henson, that "[c]learly, Mr. Barahona was in custody when he made the statements to Officer Arias." Barahona implies the court misspoke and intended to refer to Officer Henson rather than Officer Arias.

Initially, whether Barahona was in custody is ultimately a question of law that we independently review. (*People v. Leonard, supra*, 40 Cal.4th at p. 1400.) Therefore, the trial court's conclusion on the custody issue is irrelevant for our

Although Barahona was briefly detained during questioning, that fact alone is not dispositive of the custody question. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 436–440 [traffic stop not custodial]; *People v. Clair* (1992) 2 Cal.4th 629, 679 [temporary investigatory detention not custodial]; see also *Stansbury v. California* (1994) 511 U.S. 318, 325 [officer's views concerning nature of interrogation are relevant only if manifested to the individual].) We must consider the totality of the circumstances, including " '(1) whether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention: (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning.' [Citation.] Additional factors are whether the officer informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement, whether the police were aggressive, confrontational, and/or accusatory, and whether the police used interrogation techniques to pressure the suspect. [Citation.]" (*People v. Davidson* (2013) 221 Cal.App.4th 966, 972; see *People v. Moore* (2011) 51 Cal.4th 386, 395.)

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purposes. In any event, it is clear from the record that the court did not misspeak when referring to Officer Arias. Directly before considering whether the statement to Officer Henson was admissible, the trial court ruled that separate statements made to Officer Arias—which Barahona made while under arrest on May 12, 2013—were inadmissible. From this context, it is clear the court's reference to Officer Arias was meant to distinguish the circumstances surrounding the statement made to Officer Henson from those surrounding the statements made to Officer Arias.

Here, the totality of the circumstances—as evidenced by the trial court's findings and the undisputed facts[10]—overwhelmingly point to a conclusion that Barahona was not in custody. Barahona was never formally arrested. The encounter with the officers occurred in an open, public space—a parking lot of a laundromat. The entire encounter was relatively brief, lasting between 10 and 15 minutes, and the individuals outnumbered the police officers three to two. The manner of questioning was casual, and the officers were not aggressive or accusatory. At no point did the officers draw their weapons or make any show of force. Barahona was never informed he was under arrest or not free to leave. Nor was he restrained in any manner; he remained standing at all times, was not put in handcuffs, and was not placed against or inside the police car. Although the officers pat searched Barahona, they did so only after obtaining his permission. The fact that the officers obtained consent prior to the search was a strong indicator that Barahona was not under arrest. In addition, the questioning regarding Barahona's gang affiliation occurred after the pat search was complete and the officers had failed to find any weapons or drugs. Under these circumstances, a reasonable person would not have felt restrained in a manner normally associated with formal arrest, and Officer Henson was not required to advise Barahona of his *Miranda* rights. Accordingly, the trial court did not err in declining to supress Barahona's statement to Officer Henson.

Defendants contend that, even if the officers could ask Barahona questions while investigating a suspected narcotics sale, once the officers failed to find any drugs or weapons and

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[10] Defendants do not dispute Officer Henson's testimony regarding the circumstances of the encounter.

ended their investigation, they were no longer permitted to ask Barahona interrogatory questions without advising him of his *Miranda* rights. According to defendants, because Officer Henson asked Barahona about his gang affiliation after the narcotics investigation had concluded, Barahona's response was inadmissible absent a proper *Miranda* warning.

This argument is based on the erroneous assumption that Barahona was in custody when questioned about his gang affiliation. For the reasons we discussed, a reasonable person under these circumstances would not have felt restrained in a manner normally associated with formal arrest. This is especially true once the officers searched Barahona, but declined to arrest him and instead began asking standard questions necessary to complete the F.I. card. Because Barahona was not in custody, Officer Henson was not required to advise him of his *Miranda* rights.

II. The Trial Court Did Not Err in Excluding Evidence of the Victims' Alleged Unlicensed Sale and Transportation of Cigarettes

Defendants contend the trial court erred in precluding them from impeaching the victims with evidence of their alleged unlicensed sale or transportation of cigarettes. We disagree.

A. Background

During a break in Gatica's testimony, Alvizo's counsel sought the court's permission to question him regarding whether he illegally sells individual cigarettes. Counsel argued selling individual cigarettes constitutes fraud against the government and went to Gatica's credibility. Counsel further indicated he had numerous witnesses who would testify it is common practice

for "these vendors" to sell individual cigarettes. Barahona joined in Alvizo's request.

The court stated it was not inclined to allow such questioning because it "does not go to the facts or the foundation of what the case is about," was merely a "fishing expedition[,] and . . . would be misleading to the jury." Nonetheless, the court allowed Alvizo's counsel to question Gatica on the issue outside the presence of the jury. (See Evid. Code, § 402.) In the course of such questioning, Gatica denied selling any cigarettes.

Thereafter, Barahona filed a written motion requesting that the court allow defense counsel to impeach the victims with evidence that they sell cigarettes from their trucks. Barahona asserted that such conduct violates Revenue and Taxation Code sections 30149 and 30475, subdivision (a), which make it a misdemeanor to engage in business without the requisite license and transport cigarettes without a permit.[11] Barahona further implied that such acts constitute tax evasion, which is a crime of moral turpitude. In addition, Barahona argued he should be permitted to ask Gatica whether he sold cigarettes simply because he suspected Gatica would lie in front of the jury. Barahona stated the following: "During the 402 hearing, Mr. Gatica denied that he sells cigarettes from his truck. Presumably, if asked the same question in front of the jury he would give the same answer. If the defense produces witnesses

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[11] Revenue and Taxation Code section 30475, subdivision (a), makes it a misdemeanor to transport cigarettes without a permit. For the sake of simplicity, we refer to such activity as "unlicensed" transportation rather than "unpermitted" transportation.

who have purchased cigarettes from the truck, jurors may conclude Mr. Gatica is a liar."

The trial court excluded the evidence under Evidence Code section 352. The court acknowledged that if the victims untruthfully denied illegal vending activity in front of the jury, it would go to their credibility. However, the court determined such questions should not be posed in the first instance because they would not be productive in assessing the ultimate issues in the case. On the other hand, they would create a danger of confusing the issues and misleading the jury, and would be a distraction.

B. Legal Principles

Generally, the trier of fact may consider "any matter that has any tendency in reason to prove or disprove the truthfulness of [a witness's] testimony . . . ." (Evid. Code, § 780.) "Misconduct involving moral turpitude may suggest a willingness to lie." (*People v. Wheeler* (1992) 4 Cal.4th 284, 295.) Accordingly, "[a] witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction . . . ." (*People v. Clark* (2011) 52 Cal.4th 856, 931 (*Clark*).) Conversely, uncharged misconduct not involving moral turpitude is generally irrelevant for purposes of impeachment. (*Ibid.*)

"The California Supreme Court has divided crimes of moral turpitude into two groups. (*People v. Castro* (1985) 38 Cal.3d 301.) The first group includes crimes in which dishonesty is an element (i.e., fraud, perjury, etc.). The second group includes crimes that indicate a ' "general readiness to do evil," ' from which a readiness to lie can be inferred. [Citation.] Crimes in the latter group are acts of 'baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or

to society in general, contrary to the accepted and customary rule of right and duty between man and man.' [Citation.]" (*People v. Chavez* (2000) 84 Cal.App.4th 25, 28–29.)

Evidence of a witness's past misconduct involving moral turpitude remains "subject to the trial court's exercise of discretion under Evidence Code section 352." (*Clark, supra*, 52 Cal.4th at p. 931, fn. omitted.) Evidence Code section 352 vests in the trial court broad discretion to exclude relevant evidence when "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "This discretion allows the trial court broad power to control the presentation of proposed impeachment evidence ' " 'to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' [Citation.]" ' " (*People v. Mills* (2010) 48 Cal.4th 158, 195.) Evidence of a witness's misconduct not resulting in a conviction "generally is less probative of immoral character or dishonesty and may involve problems involving proof, unfair surprise, and the evaluation of moral turpitude." (*Clark*, *supra*, 52 Cal.4th at pp. 931–932.)

We review a trial court's exclusion of evidence under Evidence Code section 352 for abuse of discretion. (See *People v. Brown* (2003) 31 Cal.4th 518, 534.) "Where . . . a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest

miscarriage of justice. [Citations.]' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.)

C. Discussion

Defendants failed to show that the victims' supposed illegal activities constituted misconduct involving moral turpitude. Absent such a showing, the evidence was not relevant to the victims' credibility. (*Clark, supra*, 52 Cal.4th at p. 931.) Defendants have not pointed us to any authority, nor have we located any in our own research, holding that violations of Revenue and Taxation Code sections 30149 and 30475, subdivision (a), constitute crimes of moral turpitude per se. There is good reason for the absence of such authority. Although these sections make certain unlicensed sales or transportation of cigarettes misdemeanors, neither statute requires that the offender knew a license was required. That an individual unknowingly failed to obtain a requisite license does not, by itself, evidence that the individual is dishonest, immoral, or evil.

Defendants appear to recognize this, and thus suggest that the unlicensed sale or transportation of cigarettes is an act of moral turpitude because it constitutes tax evasion. Defendants, however, made no offer of proof before the trial court that the victims evaded taxes by selling or transporting cigarettes without a license. Nor have defendants shown that the two activities are inextricably intertwined. Moreover, even if defendants could make such a showing, a failure to pay taxes does not constitute moral turpitude absent an intent to defraud the government. (*In re Higbie* (1972) 6 Cal.3d 562, 570.) There is nothing in the record to even suggest the victims harbored such an intention.

In any event, the trial court did not abuse its discretion in excluding such evidence under Evidence Code section 352.

Even if Barahona could establish facts showing the victims' moral turpitude—for example, by showing that the victims knowingly failed to obtain the requisite licenses in order to avoid taxes—the probative value of the evidence was minimal. Further, proving the victims illegally sold or transported cigarettes in order to evade taxes was certain to require a significant amount of trial time. Based on Gatica's testimony at the Evidence Code section 402 hearing, the victims were likely to deny such illicit activity when questioned on cross-examination. As a result, proving the underlying conduct likely would have ballooned into four separate, and time-consuming, mini-trials.[12] Focusing so much attention on these issues also risked confusing the issues and misleading the jury. The trial court did not abuse its discretion by declining to devote substantial time to such relatively trivial matters.

Defendants further contend they should have been allowed to question Gatica regarding his sale of cigarettes simply because Gatica was likely to deny it on the stand. This argument puts the proverbial cart before the horse. In order to inquire into Gatica's sale of cigarettes, defendants first had to show such evidence was relevant and that its probative value was not substantially outweighed by the probability that its admission would necessitate undue consumption of time or create substantial

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[12] Alvizo's counsel represented to the court that he had witnesses who would testify to purchasing cigarettes from the victims. However, neither Alvizo nor the other defendants explained how they intended to prove that the victims lacked the requisite licenses at the time of those sales and were attempting to avoid taxes. Although Barahona's counsel represented that one cannot obtain a license to sell cigarettes from a vending truck, she failed to provide any authority for that proposition.

danger of undue prejudice, of confusing the issues, or of misleading the jury. As we discussed, they failed to do either. The court did not abuse its discretion in refusing to allow Barahona to inquire into Gatica's sale of cigarettes.

III. The Trial Court Did Not Abuse its Discretion in Denying Perez's Motion for a Mistrial

Defendants contend the trial court erred in denying Perez's motion for a mistrial following a witness's unanticipated testimony. We disagree.

A. Background

Alvizo's mother, Estela Castillo, testified in his defense on October 8, 2015. In response to questioning by Alvizo's counsel, Castillo stated that, on November 12, 2014, she saw Alvizo get into a car with two other individuals. She identified one of the individuals as Barahona, and implied the other individual was Perez.

In response to this testimony, Perez's counsel requested a mistrial, asserting she did not anticipate Castillo would testify that Perez was in the car with Barahona. Alvizo's counsel stated he believed Castillo was simply mistaken in her testimony. He explained that he had spoken to other witnesses who were present that day, none of whom identified Perez as being in the car. Perez's counsel requested a "short continuance" to have an investigator talk to one of those witnesses, and Alvizo's counsel indicated he could provide her the necessary information within 15 minutes.

The court denied Perez's motion for a mistrial and request for a continuance. It recognized that testimony placing Perez in a car with Alvizo and Barahona on November 12, 2014, was relevant to the conspiracy charges. The court noted that the

longer the defendants were together that day, the more influential the prosecutor's theory of an implied conspiracy. Nonetheless, the court found it sufficient that counsel could cross-examine Castillo and further investigate the issue using information provided by Alvizo's counsel. In addition, there was other evidence showing the three defendants were present at Norma and Gatica's truck on November 12, 2014. Therefore, the fact that Perez may have been with Barahona and Alvizo earlier in the day was not unduly prejudicial or suggestive.

After the court denied Perez's motion, Castillo resumed her testimony. Upon further questioning by Alvizo's counsel, Castillo admitted she had been prescribed glasses, but does not wear them. On cross-examination by Perez's counsel, Castillo stated she was approximately 20 feet from the car when she saw Perez. She also admitted she had been diagnosed with cataracts a year earlier, but had not received treatment. Castillo further testified she had not previously told anyone Perez was in the car on November 12, 2014.

Alvizo called his final witness the afternoon of October 13, 2015. After the witness completed his testimony, Perez's counsel represented to the court that an investigator was unable to subpoena a witness who could potentially rebut Castillo's testimony. Counsel stated she wanted to add that fact to her request for a mistrial. The court did not reconsider its denial of Perez's mistrial motion.

B. Applicable Law

A trial court has the authority to grant a mistrial when a defendant has been incurably prejudiced by a trial event. (*People v. Jenkins* (2000) 22 Cal.4th 900, 985–986; *People v. Woodberry* (1970) 10 Cal.App.3d 695, 708.) "A motion for mistrial

presupposes error plus incurable prejudice." (*People v. Gatlin* (1989) 209 Cal.App.3d 31, 38.) Whether an error is "incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) We review a trial court's denial of a motion for a mistrial under the abuse of discretion standard. (*People v. Maury* (2003) 30 Cal.4th 342, 434; *People v. Bolden* (2002) 29 Cal.4th 515, 555.) Under this standard, a defendant bears the burden on appeal of demonstrating that the trial court, in denying his or her mistrial motion, exercised its discretion in an arbitrary, capricious, or absurd manner. (See *People v. Dunn* (2012) 205 Cal.App.4th 1086, 1094.)

C. Discussion

Defendants have failed to show any error, let alone an incurably prejudicial error, that would warrant a grant of mistrial. Defendants have not identified, nor could they, any evidentiary bases for excluding Castillo's testimony. Defendants also fail to show any misconduct by Alvizo or the prosecutor. They make no showing that any party purposefully failed to disclose Castillo's testimony in discovery, or otherwise concealed it from Perez. As Perez elicited on cross-examination, Castillo had not previously disclosed her testimony prior to trial. As a result, her testimony took everyone by surprise equally.

Defendants argue that mistrial was warranted because Castillo's testimony was unanticipated. However, mistrial is not the answer to unanticipated testimony, even when that testimony is incriminating. Instead, the solution to unanticipated incriminating testimony is the same as the solution to any incriminating testimony: impeachment of the

witness and the presentation of contradictory evidence. Here, Perez effectively cross-examined Castillo and showed that she suffered from untreated cataracts as of November 12, 2014, and was relatively far from the vehicle. Alvizo's counsel helped in the effort, and elicited from Castillo—his own witness—that she does not wear glasses despite having a prescription for them. Perez was also given the opportunity to present other witnesses who might provide testimony directly contradicting Castillo's unanticipated testimony. This cured any "prejudice."

Perez asserts his counsel did not have sufficient time to prepare for the cross-examination of Castillo or subpoena additional witnesses that might contradict her testimony. Thus, he argues, cross-examination and the presentation of contradictory evidence were not sufficient, and mistrial was the only satisfactory option available to the court. However, Alvizo's counsel offered to quickly provide Perez's counsel information for several witnesses who were present when Castillo claimed to see Perez. Perez fails to explain why his investigator could not contact these potential witnesses while the trial proceeded and Alvizo presented the remainder of his defense. In fact, Castillo was one of Alvizo's first witnesses, and it would be five days until he ultimately rested, and an additional three days until closing arguments. This was sufficient time for the investigator to attempt to make contact with the potential witnesses.

Although Perez subsequently represented to the court that the investigator was unable to subpoena one of those witnesses, he made no showing that he could ever subpoena the witness if given additional time. He also failed to show that the potential witness was available to testify or that his testimony would

actually contradict Castillo's. We perceive no abuse of discretion under these circumstances.

IV. The Court Erred in Failing to Impose Sentence on Count 2

At sentencing, the trial court did not select a term from the triad and pronounce sentence on count 2, noting only that it intended to stay the sentence pursuant to section 654.[13] Where the court intends to stay a sentence under section 654, the proper procedure " 'is to [first] sentence defendant for each count and [then] stay execution of sentence on certain of the convictions to which section 654 is applicable.' [Citations.]" (*People v. Jones* (2012) 54 Cal.4th 350, 353; see *People v. Sanchez* (2016) 245 Cal.App.4th 1409, 1415; *People v. Alford* (2010) 180 Cal.App.4th 1463, 1472; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327.) The court's failure to exercise its discretion to choose a term from the triad and impose it before staying it created an unauthorized sentence. (*People v. Price* (1986) 184 Cal.App.3d 1405, 1411 ["an incorrect application of section 654 produces an unauthorized sentence which may be rectified on remand"]; *People v. Alford, supra*, 180 Cal.App.4th at p. 1472.) Accordingly, we remand the case on this limited issue with directions to the trial court to exercise its discretion to select a term for these counts as to each defendant, impose the term, and then stay it.

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[13] The Attorney General raised this issue in the respondent's brief. Barahona did not address it in his reply brief. Perez did not file a reply brief.

DISPOSITION

The judgment is affirmed and the case is remanded to the trial court to impose lawful sentences on count 2 consistent with the views expressed in this opinion.

BIGELOW, P.J.

We concur:

GRIMES, J.

HALL, J. *

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.