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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MORRAD MODLE GHONIM, Defendant and Appellant.	B279904 (Los Angeles County Super. Ct. No. VA138935)

APPEAL from the judgment of the Superior Court of Los Angeles County. John A. Torribio, Judge. Affirmed as modified.

Brett Harding Duxbury, 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, Senior Assistant Attorney General, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

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In July 1992, Vicky (Zepeda) Ghonim, the wife of defendant and appellant Morrad Modle Ghonim, was shot and killed at a public park in La Mirada. The murder remained unsolved for many years, until the investigation was re-opened as a cold case in 2006. Leon Martinez was convicted in 2015 of fatally shooting Vicky. In 2016, charges were filed against defendant for having solicited Martinez to perform the murder.

A jury convicted defendant of first degree murder, and found true the special circumstance allegations that the murder had been committed for financial gain and by means of lying in wait. The jury also found true the allegation that a principal had been armed with a firearm during the commission of the murder. Defendant was sentenced to life without the possibility of parole, plus one year for the firearm enhancement.

Defendant raises two claims of evidentiary error. He contends the trial court erred in overruling his objection based on the marital privilege and allowing testimony from his second wife about threats he made to her in 2012. He also contends the court abused its discretion in excluding evidence that Martinez was a gang member and that the error violated both state law and his constitutional rights to due process and to present a defense.

Defendant further contends the trial court erred in refusing to remove Juror No. 2642 for cause, and by imposing a $300 restitution fine instead of the statutory amount in effect at the time the offense was committed.

We reduce the restitution fine to $100 and modify the judgment accordingly. We otherwise affirm defendant's conviction.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Events of July 23, 1992

In July 1992, Vicky (Zepeda) Ghonim had been married to defendant for a little over a year, and they had an infant son. Vicky

had been attending John Glenn High School at the time she became pregnant. She quit school, and she and defendant married. Defendant and Vicky lived in the Zepeda family home with their son, Vicky's parents and several other family members.

On July 23, Vicky went to the beach with her friend Anna Ramos. When they got back to Anna's house, Vicky received a call from defendant. He asked her to come home because he had a surprise for her. He wanted to take her and the baby out to dinner.

When Vicky got home, Vicky's younger brother, Roberto Zepeda, who was 15 years old at the time, asked defendant and Vicky if they could go to Golf N' Stuff for the evening. They told him they had plans to go out with the baby instead. They agreed to drop him off at his friend's house on their way out for the evening.

The next day, defendant went to the Zepeda family home in the company of two detectives to deliver the bad news to the family that Vicky had been shot and killed while they were at Creek Park in La Mirada. Several family members were present, including Roberto and an older sister, Martha. Defendant told them they had gone to the park because Vicky liked to take the baby to look at the horses at the stable there. While they were walking, some "gangsters" were "catcalling" at Vicky and she said something back to them. There were some girls with the gang members who started cursing at Vicky. Defendant told Vicky they should leave. As they got into the car to leave, one of the gangsters started shooting at Vicky from the bushes that edged the parking lot. Defendant said he did not get a look at the shooter because he was trying to get the baby in the car seat, and also because the shooter was in the bushes. With Vicky and the baby in the car, defendant quickly backed out of the parking space and drove off. He said he was pulled over by an officer that evening while trying to find Kaiser Permanente hospital, and the officer called for paramedics.

Martha asked defendant why he had not just gone to the fire station across the street from the entrance to Creek Park, and defendant said he just had not thought about it. At one point, one of Martha's uncles got angry and confronted defendant, saying he better tell them what really happened. Defendant said he had "nothing to do with anything."

As part of the original investigation, a statement was taken from Harold McQueer, who had been walking in the park that evening with his girlfriend and her teenage son. As it was nearing dusk, they were walking along a path in the park that went past a stable. Mr. McQueer did not see a lot of people in the park at that time and did not hear any loud voices or yelling. As they got closer to the stable area, Mr. McQueer heard three or four "popping noises" in fairly quick succession, and a scream. They were not sure what it was, but shortly thereafter, a man ran past them on the path, wearing a sweatshirt with a hoodie and white lettering across the front that said "White Sox." When Mr. McQueer and his family got back to the parking lot to leave, he noticed some clothing sticking out from the bushes near the car. He recognized the sweatshirt the man that ran past them had been wearing that said "White Sox." He and his family left the park and pulled into a nearby gas station. Mr. McQueer saw a deputy sheriff at the station. He told the deputy about the incident at the park and the discarded clothing. Deputy John Adams asked him to return to the park and show him the clothing.

Officer Doug Garrett of the California Highway Patrol was on patrol the evening of July 23, 1992, in an area approximately seven miles from Creek Park. On Firestone Boulevard, just north of the 605 Freeway, a car ran a red light in front of him. Officer Garrett pulled the car over. When he walked up to the car, he could hear defendant, in the driver's seat, yelling that someone had shot his

wife. A woman was slumped over in the front passenger seat toward defendant's lap, and there was a baby in a car seat in the back. Officer Garrett called for backup and for an ambulance, and then started to perform CPR even though the woman appeared to be dead already and had no pulse.

Officer Todd Overzet arrived on the scene. Officer Overzet saw Officer Garrett performing CPR, so he attempted to speak with defendant. Defendant seemed "distraught." Defendant reported that he and his wife had been at Creek Park, his wife got into a "verbal altercation" with some people in the park, they got into their car to try to leave, and then one of the "suspects" opened the passenger door and shot his wife. Defendant said he could not describe the suspects or say how many there were because he backed out of the parking lot very fast and was trying to find a hospital when he was pulled over.

Defendant and the baby were transported to the Norwalk Sheriff Station. Defendant was interviewed about the incident and a gunshot residue test was performed on his hands. No gunshot residue was detected.

No one was arrested and the case remained unsolved.

2. The Re-opening of the Investigation

In 2006, the investigation of Vicky's murder was re-opened as a cold case. The clothing recovered from the park was sent for DNA testing. A sample from the waistband of the pants came back as matching the DNA of Leon Martinez, who had a criminal record. A sample taken from the outside of the sweatshirt matched the DNA of Emil Crisan (later determined to live in the same home as Martinez).

The case was transferred to Detectives Howard Cooper and Mitch Loman. In June 2010, they asked defendant to accompany them to Creek Park to go back over the details of the incident. The

interview was videotaped. Defendant told the detectives that Vicky liked to go see the horses at Creek Park. They had been going to the park since they were in high school. Defendant said everything was fine at first, but then there were some people that started to say things to Vicky. Defendant could not recall exactly what was said, but thought it was something like "Where are you from?" Defendant kept telling Vicky they should go. He could not remember a lot of detail, just that he heard gunshots when he was putting his son in the car seat and he also heard Vicky scream. Defendant said he then panicked and drove away as quickly as possible and was eventually pulled over while looking for a hospital.

In light of the DNA test results, Detective Cooper arranged, in October 2010, to have Martinez, who was serving time in prison on another matter, brought to Men's Central Jail for an interview. Detective Cooper told Martinez he was investigating the murder of a woman in a park in 1992. He did not give him any further details of the crime. Thereafter, Martinez made a phone call from jail to his wife. During the call, Martinez told his wife to call "Chicky" and tell him that homicide detectives were going to talk to Chicky, and that Chicky should say that Emil, who had since passed away, had done the murder in 1992 "for money." Martinez told his wife the murder involved some girl and her husband but he had nothing to do with it.

Detectives Cooper and Loman arrested defendant in October 2010. They arranged for him to be placed in a jail cell with Martinez and recorded their interaction. Neither defendant nor Martinez acted as if they knew each other or remembered each other from 18 years earlier. Defendant was released from custody.

Following his release, defendant moved to the island of St. Martin where his father ran a business. He thereafter moved to Antigua and opened his own business.

3. The Conviction of Martinez in 2015

In February 2015, Martinez was convicted of Vicky's murder. The jury found true that the murder was committed by lying in wait and for financial gain. In a separate trial, Martinez was also convicted of dissuading a witness, Selena Woody, his girlfriend in 1992. After those convictions, Martinez agreed to testify against defendant for a reduced sentence. Instead of facing a possible term of life without the possibility of parole, Martinez would be sentenced to 28 years to life.

After Martinez signed the agreement with the prosecutor, Detective Cooper rearrested defendant.

4. The Charges and Jury Trial

In February 2016, defendant was charged by information with one count of murder. (Pen. Code, § 187, subd. (a).) It was alleged that a principal was armed with a firearm in the commission of the offense within the meaning of section 12022, subdivision (a)(1). The information further alleged the special circumstances of lying in wait and financial gain. (§ 190.2, subd. (a)(1)&(15).) Defendant pled not guilty and denied the special allegations.

The case proceeded to a jury trial in late October 2016. We reserve a discussion of the facts related to voir dire and the evidentiary rulings to parts 1, 2 and 3 of the Discussion below.

Roberto Zepeda, Martha (Zepeda) Guzman, Anna Ramos, Harold McQueer, Detective Cooper and the deputies and patrol officers who participated in the original investigation and the re-opening of the investigation in 2006 testified to the facts set forth in parts 1, 2 and 3 above.

Both Roberto and Martha described their sister Vicky as sweet but feisty, with a "big personality." They both agreed that if

someone had been catcalling or yelling at her, Vicky would definitely have said something back.

Javier Gonzalez testified. He said that in 1992 he was the best friend of Roberto. A few weeks before the July 23 shooting, Javier received a phone call from defendant. During the call, defendant was "sobbing" and "terribly upset," telling Javier that he believed Vicky was going to leave him. Defendant asked Javier if he would talk to Vicky for him. Several days later, but before Javier had a chance to talk to Vicky, defendant called him again. This time, defendant seemed happy and did not mention his previous turmoil. Defendant asked Javier if he and his girlfriend would go out on a double date with him and Vicky. It was the first time he had ever asked them to double date, so it seemed odd, but Javier agreed and they made plans for a week later. However, Vicky was shot and killed before the arranged date.

Martinez testified and admitted he had been convicted in 2015 of Vicky's murder, that he had agreed to testify against defendant in exchange for a reduced sentence, and that he was still currently serving his sentence.

Martinez explained that in 1992, he earned money by selling drugs and was known by the nickname "Demon." He did a lot of cocaine and could become aggressive when he did drugs. He was dating Selena Woody at the time. Selena's sister, Deanna, was dating a friend of his, Anthony Rodriguez.

Martinez said Rodriguez introduced him to defendant sometime in July 1992. They met in front of Martinez' s mother's home in La Mirada. Defendant bought cocaine from him and then asked if he would kill defendant's wife for $20,000. The next day, defendant and Martinez met again and went to Creek Park to discuss more details. Defendant told Martinez he wanted the shooting to look like a robbery, but otherwise did not get into a lot of

specifics. He told Martinez he would drive Vicky to the park and Martinez should take care of it while they were in the car.

Near dusk on July 23, 1992, Martinez was waiting by a tree near the parking lot for defendant to show up. Martinez was wearing black pants over a pair of shorts, and a black sweatshirt over a button-up T-shirt. He wore the extra layer to take off after he did the shooting.

Defendant eventually arrived and parked. Martinez walked up to the passenger side window and saw that there was a baby in the car, behind the front passenger seat. He fired his first shot from about a foot away from Vicky's head. The shot did not kill her. Vicky put her hands up and screamed and pleaded with him not to hurt the baby. Martinez shot her again in the head, but she was still screaming. He then shot her in the leg to make her move her hands down away from her head. Once she reached down to her leg, Martinez shot Vicky in the eye and she immediately slumped over. Defendant passed Martinez an envelope through the window.

Martinez started jogging away from the parking lot. He threw his top layer of clothes into some bushes and then walked out of the park to a Del Taco restaurant across the street. He called Deanna Woody and she came with Rodriguez to pick him up. Rodriguez knew what he was going to do in the park, but Deanna had no idea. Once he got into the car with them, he offered to take them to dinner.

Martinez admitted he was sent to prison shortly thereafter on an assault with a deadly weapon charge. He also admitted to having several other convictions, including burglary, false imprisonment, and drug sales. Martinez admitted he confessed to having committed the murder to Deanna and Selena Woody sometime in 1998, but never confided in anyone else, including his current wife.

Martinez admitted he lied to his current wife numerous times while in custody awaiting trial for Vicky's murder. He explained that he had numerous telephone conversations with her from jail where he denied any knowledge of the murder, tried to blame it on Emil since he had already passed away, and told her he was being pressured to make up a story about defendant. Martinez said he lied to his wife because he did not want her to know he had done this murder. He agreed to testify so he could get a shorter sentence and the possibility of parole in the future. He said he had lied then, but he was telling the truth in court.

On cross-examination, Martinez admitted he made statements reflecting a dislike for people of Middle Eastern descent, like defendant. Martinez also admitted to being high on cocaine when he committed the murder. He denied being a gang member but admitted to associating with gang members, including on the day of the murder. He also said he saw gang members in the park the day of the murder, but he was not with them.

Deanna Woody testified that in 1992 she had just recently moved back in with her mother in La Mirada. Her infant daughter had just undergone a heart transplant. She was dating Rodriguez, who was the father of her children and a friend of Martinez. Martinez, whom she knew as "Demon," lived with his mother on the same street.

About a week before the shooting, Deanna was taking her daughter for a walk in her stroller around the block. She ran into Martinez talking to a man that looked Middle Eastern. She stopped and talked with them and when she mentioned her daughter's recent surgery, the Middle Eastern man told her that he too had heart surgery as a child. He asked her if she was married or seeing someone and she said yes. He then told her that he also had a young child, but that he and his wife were having trouble, that she

was going to leave him and was trying to take his son. He also said that his wife had gone to John Glenn High School.

About a week later, Deanna saw the Middle Eastern man again. She was outside in her front yard, when he walked up and asked her if she knew where Demon was. She said no, but pointed down toward the end of the street as a possibility. Shortly thereafter, a car drove past. The Middle Eastern man was driving and Demon was in the front passenger seat. He waved as they went by. The next day was July 23. She received a phone call from Demon asking her if she could come pick him up at a nearby Del Taco restaurant. She agreed. The Del Taco restaurant was located across the street from the entrance to Creek Park. Both Deanna and Rodriguez drove to the restaurant to get Demon. When they arrived, Deanna noticed there was an unusual number of police cars around. Demon got in the car and asked to be taken home so he could "clean up." He then offered to take them out to dinner. After they returned home from dinner, Deanna saw a news report about a woman having been murdered in Creek Park.

Deanna also testified that several years later, after Demon had been released from prison, she would occasionally see him and his family at their new home in Buena Park. Deanna's sister, Selena, dated Demon. One evening, Demon was talking with Deanna and started to cry. He eventually confided in her that he had shot the woman in Creek Park in 1992. He said he was supposed to have made it look like a robbery gone bad, but when he got to the agreed-upon spot, he saw the woman was holding a baby. He shot her, but she did not die. She continued to scream and plead with him not to hurt the baby. Her husband was in the car and grabbed the baby from her. Demon said he was upset by how the man snatched the baby from the woman. He shot her several more times. Demon said he was supposed to receive $1,000, but was only

paid $500. Deanna never voluntarily went to the police to report the confession, but when Detective Cooper came to interview her in 2009, she told him what Demon had said.

Defendant's second wife, Nisreen Alfaleh, also testified. She said she met defendant in 1994 while in Jordan and their marriage was arranged by their parents. Defendant had a long scar on his chest from having had heart surgery as a child. When they got married, Ms. Alfaleh took care of his son from his first marriage, and they also had five children of their own. Defendant moved to St. Martin in late 2010 and she followed with the children in 2011 after they finished the school year. They then settled in Antigua and ran a beauty product supply store.

In December 2012, Ms. Alfaleh and defendant went to dinner at a restaurant. She learned he had cheated on her, so she told him she planned to return to Texas with the children. Defendant told her it was fine if she moved, but then said: "If you ever think of getting a divorce, I'll hurt you"; "It cost me $500 then, it won't cost me much now"; and "If you divorce me, I will throw some acid on you that makes sure you never get married in your life again." Ms. Alfaleh was scared. She asked defendant if he was referring to his first wife when he mentioned the $500. Defendant did not respond. Because she was scared by defendant's statements, Ms. Alfaleh called her sister to tell her what defendant had said, and booked a flight to Texas within a couple of days. Her divorce from defendant became final in 2014. She contacted Detective Cooper sometime in 2014 and told him of defendant's threats and his statement, "It cost me $500 then, it won't cost me much now."

5. The Verdict and Sentencing

The jury found defendant guilty as charged. The court sentenced defendant to life without the possibility of parole, plus one year for the firearm enhancement pursuant to Penal Code

section 12022, subdivision (a)(1). Defendant was awarded presentence custody credits of 1078 days (719 actual, 359 good time/work time). The court imposed a restitution fine of $300 pursuant to section 1202.4, subdivision (b), among other fines and fees.

This appeal followed.

DISCUSSION

1. The Admission of Statements by Defendant's Second Wife Regarding Threats Made in 2012

Defendant contends the court erred in admitting testimony from his second wife about threats he made to her in 2012 while they were still married. Defendant contends the marital privilege codified at Evidence Code section 980 applied, and the testimony should have been excluded. We disagree.

The trial court admitted the statements and threat defendant made to his second wife on the ground they were not a confidential communication covered by the marital privilege. Ms. Alfaleh testified she was scared by defendant's statements, that she phoned her sister about them, and left defendant several days later, returning to Texas with her children.

Evidence Code section 980 provides, in relevant part, that a spouse has a privilege "to refuse to disclose, and to prevent another from disclosing, a communication if he or she claims the privilege and the communication *was made in confidence* between him or her and the other spouse while they were spouses." (Italics added.)

Our Supreme Court has explained that not every statement made during the course of a marriage is automatically protected by the privilege. The statutory language plainly states that only statements made "in confidence" are covered. " 'To make a communication "in confidence," one must intend nondisclosure [citations], and have a reasonable expectation of privacy [citation].'

[Citation.] 'As a general matter, the claimant of the confidential marital communication privilege has the burden to prove, by a preponderance of the evidence, the facts necessary to sustain the claim. [Citation.] He is aided by a presumption that a marital communication was made in confidence. (Evid. Code, § 917.) The opponent has the burden to prove otherwise [citation] by a preponderance of the evidence [citation].' " (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 420 (*Bryant*).)

Bryant concluded the statement at issue there was not made in confidence because it was a threat to murder the current lover of the husband's estranged wife. "[A]ny expectation of confidentiality would have been unreasonable." (*Bryant*, *supra*, 60 Cal.4th at p. 420.) The circumstances surrounding the making of the threat gave rise to an inference that the husband intended the estranged wife to disclose the statement to the lover in order to end the relationship. (*Ibid.*; see also *People v. Gomez* (1982) 134 Cal.App.3d 874, 879 [threats made to estranged wife that, as soon as their divorce was final, he was going to kill her boyfriend were not made in confidence but rather "to terrorize her"]; *People v. Carter* (1973) 34 Cal.App.3d 748, 752-753 [threat to kill wife's neighbor and neighbor's daughter, made during the course of an assault on wife, were not privileged; spousal privilege "springs from the confidence which exists between [spouses] because of the marital relationship"; "public policy considerations would not be served by shielding as confidential and privileged threats against third persons made by one spouse in the course of criminally victimizing the other spouse"].)

Similarly here, the threats made by defendant to Ms. Alfaleh were not made in confidence, nor are they the sort of communications that public policy seeks to protect in the interest of preserving marital confidences. While dining in a restaurant, defendant threatened to throw acid on his wife and told her it would

not cost him as much as he had paid before, with the intent of terrorizing her into not filing for divorce. Defendant could not have any reasonable expectation of privacy or confidence in making threats to disfigure his wife in a public restaurant. These are not the type of statements a spouse would be expected to protect within the intimacy of the marriage relationship. Indeed, Ms. Alfaleh testified she was frightened, immediately called her sister to tell her what defendant had said, and then left defendant and returned to the United States. We find no error in the court's admission of the statements.

In any event, any error in the admission of the statements was harmless. There was strong corroboration of Martinez's testimony regarding the murder-for-hire plot, including the testimony of Deanna Woody and Harold McQueer. The evidence did not support the defense theory of a gang member shooting Vicky from a distance over a verbal altercation in the park. Defendant has not shown it was reasonably probable he would have received a more favorable verdict had Ms. Alfaleh's brief testimony regarding the 2012 statements been excluded. (*People v. Benavides* (2005) 35 Cal.4th 69, 91 ["[G]enerally, violations of state evidentiary rules do not rise to the level of federal constitutional error."]; see also *People v. Partida* (2005) 37 Cal.4th 428, 439 ["Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error."].)[1]

2. The Exclusion of Gang Evidence

Defendant contends the court erred in excluding evidence that Martinez was a gang member. Defendant argues the gang

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[1] *People v. Watson* (1956) 46 Cal.2d 818, 836.

evidence was highly relevant to his defense that Martinez's motivation for killing Vicky was gang related and had nothing to do with a murder-for-hire plot. Defendant contends the evidentiary error violated both state law and federal constitutional rights to due process and to present a defense. We find no error.

"A trial court's ruling on the admission or exclusion of evidence is reviewed for abuse of discretion." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 131.) " 'Although we recognize that a criminal defendant has a constitutional right to present all relevant evidence of *significant* probative value in his favor [citations], "[t]his does not mean that an unlimited inquiry may be made into collateral matters; the proffered evidence must have more than 'slight-relevancy' to the issues presented." [Citation.]' [Citation.] 'Moreover, this court will not disturb a trial court's exercise of discretion under Evidence Code section 352 unless it is shown the trial court exercised its discretion " 'in an arbitrary, capricious or patently absurd manner.' " [Citations.]' " (*People v. Homick* (2012) 55 Cal.4th 816, 865.)

There was extensive evidence in the record that Martinez had a significant and violent criminal history. He testified with detail about the depraved manner in which he shot Vicky multiple times. He admitted he agreed to testify against defendant in order to get a shorter sentence and the possibility of parole. Defense counsel played telephone calls between Martinez and his wife while he was in jail in which he claimed he was making up the story about defendant's involvement. Defense counsel elicited numerous discrepancies in Martinez's testimony during cross-examination. Defense counsel obtained Martinez's admission that he did not like people of Middle Eastern descent, like defendant, and that he was on cocaine when he committed the murder. Martinez also admitted

that he associated with gang members, including on the day of the murder, and that there were gang members in the park that day.

We find no fault in the trial court's conclusion that under Evidence Code section 352, the probative value of attempting to prove, over Martinez's denials, that he was in fact a gang member was slight, and that the line of questioning would lead to undue consumption of time on "extraneous issues."

Defendant's contention the court's evidentiary ruling violated his constitutional rights is also unavailing. "Ordinarily a criminal defendant's attempt 'to inflate garden-variety evidentiary questions into constitutional ones [will prove] unpersuasive. "As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." ' " (*People v. Thornton* (2007) 41 Cal.4th 391, 443.)

Defendant nonetheless contends the gang evidence was the core of his defense that there was no murder-for-hire plot. However, given the balance of the evidence in the record noted above, defendant's request to present evidence that Martinez was an active gang member was properly deemed collateral. Defendant's ability to present his defense that Martinez, a career criminal, acted alone was not impaired.

In any event, defendant has not shown prejudice from the exclusion of the evidence. Defendant has not shown there is a reasonable probability the verdict would have been different had the trial court allowed him to try to prove Martinez was a gang member at the time of the murder. (*People v. Boyette* (2002) 29 Cal.4th 381, 428 [" 'If the trial court misstepped, "[t]he trial court's

ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense." [Citation.] Accordingly, the proper standard of review is that announced' " in *People v. Watson*].)

3. Prospective Juror No. 2642

Defendant argues the court erred in denying his request to remove Prospective Juror No. 2642 for cause. Defendant contends the juror made statements reflecting a clear bias and admitted it would be difficult for him to acquit defendant even if there was reasonable doubt.

The record of the voir dire proceedings reveals the following relevant facts. Prospective Juror No. 2642 was asked if there was anything in his family history that would prevent him from being fair and impartial. He said, "I don't think so." He then disclosed that he had been arrested about 20 years earlier on a DUI, and also that a family friend was murdered by her husband approximately 30 years earlier. He said he believed he was treated fairly by the police and the prosecutor in his DUI case. He was not sure how the murder case was resolved regarding the family friend. He did not believe either situation would affect his ability to render a verdict in the case or to be fair to either side.

After additional questioning, Prospective Juror No. 2642 said he was currently serving as a volunteer for the Los Angeles County Sheriff's Department. He rode on patrols, helped set up DUI check points, directed traffic, and worked as a clerk at the front desk, among other things.

Defense counsel asked him if he thought, given his work with the sheriff's department, he could give defendant a "fair shake"? He answered: "It's kind of hard to say. I could kind of say yes, but I've seen, you know, a lot of people get out for certain things that I don't think [they] should have." Defense counsel followed up: "[I]s it fair

to say that [it] will be very hard for you to acquit him and find him not guilty even if there is reasonable doubt on the case?" Prospective Juror No. 2642 responded: "I kind of say yes, you know, being on the other side, you know, just kind of want to be the ones to put him in, not get 'em out."

Defense counsel again asked: "So even if there is reasonable doubt, it would be difficult for you to vote not guilty, correct?" He responded, "Pretty much, yes."

The prosecutor then asked further questions. "If I don't prove my case, could you vote not guilty?" Prospective Juror No. 2642 answered "yes." He then seemed confused by the prosecutor's next question, so the prosecutor reiterated: "the first question I asked you is if I don't prove my case, could you come back with a not guilty verdict, and [*sic*] said yes." Prospective Juror No. 2642 confirmed with a yes.

The prosecutor continued: "Okay. [¶] And then I asked you if I prove my case, could you come back with a guilty verdict. [¶] And I didn't understand your response. [¶] Could you come back with a guilty verdict if I prove my case?" Prospective Juror No. 2642 responded: "I'll say yes, I guess, if you can prove it, yes."

The prosecutor elaborated on the burden of proof. "Do you understand that it's – that the defendant is presumed innocent. Okay? And I have the burden of proof. I have to prove that he's guilty. [¶] If I don't do my – if I don't prove that, then you have to acquit him and send him home. [¶] But if I do do my job, then it's your duty to convict him. [¶] Do you understand that?" Prospective Juror No. 2642 responded with a "Yes." And the prosecutor asked, "Can you do that?" Once again, Prospective Juror No. 2642 said he could.

After the court broke for lunch, the parties returned and continued asking questions of the panel for the balance of the

afternoon. The court asked counsel if they passed "for cause." Both the prosecutor and defense counsel said yes. The court then had counsel exercise their peremptory challenges and several prospective jurors were excused. The court recessed for the afternoon.

The next morning, November 2, 2016, voir dire continued during the morning session. Towards the end of the morning, defense counsel exercised his last peremptory. A few minutes later, defense counsel mentioned a prior challenge for cause to Prospective Juror No. 2642. Defendant's challenge to Prospective Juror No. 2642 does not appear on the record. We assume that discussion took place off the record. Respondent does not contend otherwise.

In any event, the trial court indicated that it recalled the challenge and told defense counsel he could renew it. The court then denied defendant's challenge. Prospective Juror No. 2642 was seated on the jury.

"A trial court's ruling on a challenge for cause is reviewed for abuse of discretion. [Citation.] We will uphold the court's decision ' " ' "if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." [Citations.]' " ' " (*People v. Merriman* (2014) 60 Cal.4th 1, 50.)

"During voir dire, jurors commonly supply conflicting or equivocal responses to questions directed at their potential bias or incapacity to serve. When such conflicting or equivocal answers are given, the trial court, through its observation of the juror's demeanor as well as through its evaluation of the juror's verbal responses, is best suited to reach a conclusion regarding the juror's actual state of mind." (*People v. Jones* (2012) 54 Cal.4th 1, 41.)

" '[A]ppellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record.' [Citation.]" (*Ibid.*; accord, *People v. Clark* (2011) 52 Cal.4th 856, 895 ["The trial court is in the best position to determine the potential juror's true state of mind because it has observed firsthand the prospective juror's demeanor and verbal responses."].)

Prospective Juror No. 2642 gave some confusing responses to both defense counsel and the prosecutor. At one point, he stated he thought it might be difficult to acquit, but he also said he could acquit if the prosecution did not prove the case. Given only a cold record and no clear statement of bias, we are in no position to second-guess the trial court's conclusion that the juror could be fair and impartial.

4. The Restitution Fine

Defendant argues, and respondent concedes, that the court erred in imposing a restitution fine of $300. We agree. The record reflects the court intended to impose a statutory minimum restitution fine, but erroneously imposed the current statutory minimum of $300 for a felony conviction. (Pen. Code, § 1202.4, subd. (b)(1).)

"The prohibition against ex post facto laws applies to restitution fines." (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1189.) Therefore, the statute in effect at the time the offense was committed, *not* the time of sentencing, is controlling. (*Ibid.*, italics added.) Here, the murder was committed in 1992 and the statutory minimum restitution fine for a felony at that time was $100. (See Pen. Code, former § 1202.4, subd. (a), § 13967, subd. (a).) The $300

restitution fine is therefore reduced to $100 and the judgment modified accordingly.

DISPOSITION

The judgment of conviction is modified in the following respect: The restitution fine pursuant to Penal Code section 1202.4 is reduced from $300 to $100. The superior court is directed to prepare a modified abstract of judgment and transmit same forthwith to the Department of Corrections and Rehabilitation.

The judgment of conviction is affirmed in all other respects.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

ROGAN, J.*

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