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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. CARLOS GUADALUPE REYES, Defendant and Appellant.	B266696 (Los Angeles County Super. Ct. No. TA108332)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sean D. Coen, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Carlos Guadalupe Reyes raises contentions of trial court error following his conviction of the stalking, robbery, and first degree murder of his estranged wife. For the reasons discussed below, the judgment is affirmed in part, reversed in part, and remanded for resentencing.

Viewed in accordance with the usual rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

BACKGROUND

This case involves the stalking, robbery, and murder of Veronica Reyes by her estranged husband, appellant Carlos Reyes.[1] On September 11, 2008,[2] appellant stalked Reyes and vandalized Reyes's vehicle while it was parked at her workplace. On October 6, appellant forcibly took Reyes's purse after confronting her in her workplace parking lot. On October 8, appellant shot Reyes to death in the same parking lot.

1. *Introduction*.

Appellant and Reyes were married and had four children together. In 2008, the children ranged in age from twelve to eight. Appellant owned a business that installed car stereos and televisions. He drove a Camry and a BMW. Reyes worked at a business called Coastline Logistics.

In May or June 2008, Patricia Sales met appellant at a bar in Wilmington and began seeing him three or four times a week. Sales testified she and appellant "went out a lot and partied,

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[1] For clarity, we will refer to Veronica Reyes as "Reyes," and appellant Carlos Reyes as "appellant."

[2] All further date references are to the year 2008 unless otherwise specified.

drank," and became romantically involved. Appellant was a heavy drinker; he drank beer and hard liquor, including tequila. Sales knew appellant was married to Reyes and had four children. She met appellant at his house in San Pedro a "couple times." Appellant never talked about his marriage.

Reyes's sister Jessica testified that prior to September 2008, appellant and Reyes had separated, and Reyes had moved in with her parents. Jessica testified that appellant's drinking had increased during this time. Reyes's other sister, Lucy, testified that at some point Reyes initiated divorce proceedings, and on September 10, a juvenile court placed Reyes's and appellant's four children with Lucy. After that, Reyes and appellant were allowed to have only monitored visits with the children. On October 3, Reyes received court permission to live with Lucy and her children for one year. Lucy attempted to get child support from Reyes and appellant, which upset appellant.

2. *September 11: Appellant vandalizes Reyes's car*.

On the morning of September 11, Los Angeles County Deputy Sheriff Romelia Hernandez responded to Coastline Logistics in Carson regarding a "[d]omestic violence vandalism call." Reyes told Hernandez she had a received a phone call from appellant asking if she owned a red Ford Explorer.[3] When Reyes said yes, appellant told her to look out her window and "see what I did to your truck." Reyes ran to where the car was parked and saw that two of the windows had been shattered and one of the tires had been "punched." Reyes called 911. She told Deputy Hernandez that she had been married to appellant for nine years,

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[3] Reyes's sister Jessica had lent her the vehicle.

they were now separated, and she had a restraining order against him because he had assaulted her two weeks earlier.

Hernandez inspected Reyes's vehicle and photographed the damage. Hernandez ran Reyes's name through the computer unit in her car and verified that a restraining order was in place against appellant. The order had been initiated on September 9 and was set to expire on September 23. Hernandez was not able to locate appellant that day.

3. *October 6: Appellant robs Reyes*.

In October 2008, Juan Acosta worked as a security guard for Coastline Logistics and monitored the cars entering and leaving the parking lot. On October 6, Acosta saw Reyes drive into the lot and park her red Ford Explorer. As Reyes got out of her vehicle, appellant approached her from "[a]cross the street beside the bushes." They argued, appellant pushed Reyes, and then he grabbed her "portfolio." Reyes ran after him, but appellant got into a car and drove away. Acosta did not get involved in the incident because he thought it was a personal matter and he was not supposed to intervene.

On October 6, Deputy Sheriff Hernandez again responded to Coastline Logistics around 2:00 p.m. in response to a call reporting the violation of a domestic violence restraining order. Reyes told Hernandez she had received a text message from appellant regarding one of their children; this scared her because appellant said he was coming to her workplace. When Reyes returned to work from lunch, she was approached by appellant who "demanded to know who her boyfriend was, what was his name." When Reyes "refused to tell him," appellant "became very angry" and demanded to see her phone. Instead of showing him her phone, Reyes "showed him the divorce papers." Appellant

responded by grabbing Reyes's purse from her shoulder, running to his car, and driving off. Reyes ran after him, but she could not catch him.

Reyes told Hernandez her purse contained about $300, five tickets to Disneyland, and her cell phone. Hernandez called Reyes's phone number. A man answered and said his name was Carlos. Hernandez said he had committed a crime by taking Reyes's purse, but Carlos denied taking it. When Hernandez asked why he was answering Reyes's phone if he had not taken her purse, Carlos was quiet for a bit and then hung up. Carlos then called Hernandez from Reyes's phone. He said he knew that he was in "a lot of trouble," and he would contact his lawyer and turn himself in if that was what his attorney advised. Hernandez then called Reyes's phone and asked Carlos if he was going to surrender, and Carlos said he would wait to get his attorney's advice. Hernandez asked for his location, but Carlos refused to provide it because "he knew [Hernandez] would go and arrest him."

Reyes told Hernandez she was afraid of appellant because he had previously beaten her and threatened to kill her. Hernandez advised Reyes to park her car near the security cameras at her workplace so there would be a record if anything happened to her. Reyes said appellant sometimes followed her and would sit outside her job and wait for her, which scared her.

4. *October 8: Appellant kills Reyes.*

On October 6, Patricia Sales met appellant at a Budget Inn that was close to the Crystal Casino in Compton. Appellant was already drinking in a room at the hotel when she arrived. Appellant and Sales both drank beer, but appellant also drank tequila and took some pills. Sales described appellant as a heavy

drinker. They stayed together on October 6 and 7 at the Budget Inn, and then moved to the hotel at the Crystal Casino on the night of October 7. During this time, appellant became "quiet" and "a little distraught." Sales also testified that during this period, appellant had been "normal with me, just quiet."

On the morning of October 8, Sales needed to take her daughter to school. She asked appellant for a ride to Wilmington, but he called her a cab instead. The last time Sales saw appellant was about 6:30 a.m.

At trial, on viewing video surveillance footage from the casino on October 8, Sales testified that the footage showed appellant walking away from the casino's tables at 7:00 a.m. and returning to their hotel room. At 7:03 a.m., appellant walked out of the room holding a beer in his hand and then drove off in his black BMW.

Sometime prior to 8:30 a.m., Reyes's sister Lucy received a telephone call from appellant asking why Reyes was late for work. He asked about his kids, and specifically asked if Lucy thought his oldest child "will ever forgive me for everything I have done." Appellant also said he was going to surrender to authorities.

Around that same time, Reyes was on the telephone with her sister, Jessica. At some point, Jessica heard Reyes exclaim, "No, no, no," followed by a loud noise that sounded like a car accident.

That same morning, Shirley Olsen was working at the Schenker Logistics office in Carson. At 8:30 a.m., she was sitting in her cubicle on the second floor, facing a window that looked out onto the street. Olsen testified she heard gunshots and then "saw . . . a red SUV move backwards in like a U arc and then I saw a

man walking from that SUV toward the street. And as I kept watching . . . a black BMW came out of the parking lot" and drove off. Olsen testified she had heard four or five gunshots "and then a pause and then two or three more."

At this time, Acosta, the security guard, was inside the warehouse of Coastline Logistics. He testified he heard four gunshots, went to the parking lot, and saw a black BMW drive off. Acosta went to the guard shack, saw Reyes's Explorer next to it, and saw Reyes's body inside the vehicle.

Terrence Ervin was working on the loading dock of Coastline Logistics that morning when he heard six to eight loud bangs. He ducked because he recognized the sounds to be gunshots. Ervin saw a red SUV make a U-turn around the guard shack. Ervin ran to the vehicle and tried to render aid to Reyes, who was "slumped over" and "very bloody." Ervin checked Reyes's neck for a pulse but could not feel one.

Paramedics arrived and declared Reyes dead at 8:50 a.m. She had sustained multiple gunshot wounds, including two shots to the head and five shots to the torso.

5. *Investigation into the murder*.

Los Angeles County Deputy Sheriff Jesus Argueta responded to the murder scene. He spoke with Lucy, who showed him a text message that had been sent to her cell phone at 10:30 a.m. by appellant, which stated: "Your husband is next. LOL." Lucy understood the message to mean that appellant was going to kill her husband next.

Video surveillance footage obtained from Coastline Logistics showed Reyes driving into the parking lot, followed by appellant in a black BMW. Appellant was wearing clothing that was similar to what he was wearing in the surveillance video

taken at the casino that morning. The Coastline Logistics footage showed appellant shoot Reyes, get back into his BMW, back his car up, sideswipe a parked Toyota Tacoma, and then drive away.

Los Angeles County Deputy Sheriff John Edwards discovered appellant's BMW parked on Banning Boulevard. Inside the vehicle, he saw a case of beer and a beer bottle in the center console. The BMW had damage to the front and rear passenger doors. This damage was consistent with the damage to the Toyota Tacoma that had been parked in the Coastline Logistics parking lot that morning. The glove compartment contained a receipt from the Budget Inn and appellant's California identification card. There was some marital dissolution paperwork that had been filed by Reyes. There were also restraining orders against appellant; one order had been filed on September 23, 2008, by Reyes, with a hearing date of October 7, 2008,[4] and the other order had been filed on August 22, 2008, by Reyes, with a hearing date scheduled for September 9, 2008.

On October 8, at approximately 11:00 a.m., Alberto Raygoza was working as a Mexican customs agent at the San Ysidro checkpoint entrance near Tijuana. As a 2008 gray Toyota Camry approached the checkpoint, a red light activated to indicate that the car should be randomly checked. Rather than turning into the check point, however, appellant attempted to go

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[4] The September 23, 2008 document was titled "Reissue Temporary Restraining Order." The document stated that Reyes was asking the judge to reissue the prior temporary restraining order because a proof of service of the prior order on appellant had not been filed. Detective Louie Aguilera could not state whether the restraining orders were served on appellant.

straight. Raygoza asked another agent to assist him in directing the vehicle to the checkpoint.

Appellant stopped for the inspection. In response to questioning, appellant said that the car belonged to his wife, he was coming from San Diego, and he was going to Tijuana. Appellant said he was a computer repairman and his name was "Arturo Lopez." Raygoza directed appellant to a second inspection point, where Raygoza took apart the car's stereo and found a hidden .40-caliber Glock handgun.

Guillermo Auyon, a special agent from the California Department of Justice, was assigned to the foreign prosecution law enforcement unit. As part of his duties, Auyon acted as a liaison with foreign governments on matters involving law enforcement issues. On October 8, 2008, Detectives Aguilera and Salerno requested Auyon's assistance in attempting to locate appellant in Mexico. Auyon was told that appellant could be driving a silver Camry. A liaison with the federal attorney general's office in Mexico gave Auyon information that a silver Camry crossing the border into Mexico had been stopped and a .40-caliber Glock discovered. A prosecution expert testified that bullets fired from this handgun matched the rounds that killed Reyes.

On May 2, 2014, approximately seven years after Reyes's murder, appellant was extradited from Mexico.

Appellant presented no evidence on his own behalf.

6. *Trial outcome.*

A jury convicted appellant of first degree murder, stalking, and robbery, with firearm use enhancements (Pen. Code, §§ 187,

646.9, subd. (b), 211, 12022.53).[5] He was sentenced to a prison term of 54 years to life.

CONTENTIONS

Appellant contends: (1) the trial court erred by refusing to instruct the jury on heat-of-passion voluntary manslaughter as a lesser included offense of murder; (2) the trial court erred by excluding the testimony of certain defense witnesses; (3) the trial court erred by ruling Reyes's hearsay statements were admissible under the doctrine of forfeiture by wrongdoing; (4) there was insufficient evidence to sustain appellant's stalking conviction; (5) the trial court erred by admitting evidence of a prosecution witness's prior testimony; (6) the prosecutor committed misconduct during closing argument; (7) appellant's convictions must be reversed because of cumulative error.

DISCUSSION

1. *Trial court did not err by refusing to instruct on voluntary manslaughter.*

Appellant contends the trial court erred by refusing to instruct the jury on heat-of-passion voluntary manslaughter as a lesser included offense of the murder charge. We disagree.

a. *Background.*

During the discussion on jury instructions, defense counsel requested instructions on heat-of-passion voluntary manslaughter as a lesser included offense of murder. Counsel argued that starting in August 2008, events had been "snowballing," and that by October 3, appellant had learned "that his kids are going to remain out of the house and he is not going

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[5] All further statutory references are to the Penal Code unless otherwise specified.

to get custody." Shortly thereafter, appellant received divorce paperwork from Reyes and could not obtain information about her boyfriend. In addition, appellant had been drinking during this period of time and also "taking some sort of pills." Appellant confronted Reyes on October 6, and had continued drinking heavily up to October 8, the date of Reyes's death.

As to the provocation element of heat-of-passion voluntary manslaughter, defense counsel argued "the evidence that we have . . . is . . . a statement by Veronica Reyes combined with apparently [her] showing [appellant] divorce papers close in time to that statement that she's not going to tell [appellant] who the boyfriend is, I think that that is sufficient provocation. . . . So I think that combined with the subjective element where he was intoxicated . . . he acted in a heat of passion . . . ." Counsel continued, "I know that there are cases that talk about whether or not divorce is enough, but I think we have more than that here. I think what we have is . . . not only the cumulative effect of what happened in dependency court, but I also think that we have the issue as it relates to . . . adultery or infidelity. I know that there isn't evidence in the record saying that she . . . was cheating on [appellant], but there is certainly enough there because of the confrontation . . . on October 6, 2008 . . . to circumstantially suggest that there was something going on there and it was enough . . . to inflame [appellant's] passions."

Although the trial court agreed to give a voluntary intoxication mitigation instruction, it refused to give a heat-of-passion instruction because of insufficient evidence. The court noted that under *People v. Marshall* (1996) 13 Cal.4th 799, marital problems alone did not justify a heat-of-passion instruction. Moreover, Reyes had not done anything to provoke

appellant: "[T]he closest thing that I've been able to observe is a provocative act of showing . . . the dissolution of marriage papers, but that in and of itself is insufficient to warrant the giving of voluntary manslaughter [instruction] as a lesser included offense." The trial court also cited *People v. Lujan* (2001) 92 Cal.App.4th 1389, while concluding that it "is not provocative conduct for a woman who has been separated from her estranged husband for four or five months and who has filed for divorce to later develop a romantic relationship with another individual. In this, again . . . there is no evidence of that that we have here before us. The showing of the [divorce] papers . . . occurred two days prior to the killing of Veronica Reyes, and it is insufficient to provide the instruction for voluntary manslaughter. [¶] [Counsel], you made reference to drinking of the defendant, and, again, I found that there was sufficient evidence of that to give voluntary intoxication instructions. You also mentioned taking of drugs, what we have in the record is that Ms. Sales saw him take a pill. We don't know what that pill was. [¶] It's for those reasons . . . that the court finds that there's insufficient evidence warranting the giving of [a] voluntary manslaughter instruction."

b. *Legal principles.*

"When there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of a lesser included offense, the court must instruct upon the lesser included offense, and must allow the jury to return the lesser conviction, even if not requested to do so. [Citations.]" (*People v. Webster* (1991) 54 Cal.3d 411, 443.) In this context, "substantial evidence" is evidence from which reasonable jurors could conclude the lesser offense, but not the greater, had been committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162

(*Breverman*).) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]" ' that the lesser offense, but not the greater, was committed. [Citations.]" (*Ibid*.) "On appeal, we review independently the question whether the trial court improperly failed to instruct on a lesser included offense. [Citation.]" (*People v. Souza* (2012) 54 Cal.4th 90, 113.)

Voluntary manslaughter is a lesser included offense of murder. "An intentional, unlawful homicide is 'upon a sudden quarrel or heat of passion' (§ 192(a)), and is thus voluntary manslaughter [citation], if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an ' "ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." ' [Citations.] ' "[N]o specific type of provocation [is] required . . ." ' [Citation.] Moreover, the passion aroused need not be anger or rage, but can be any ' " '[v]iolent, intense, high-wrought or enthusiastic emotion' " ' [citation] other than revenge [citation]." (*Breverman*, *supra*, 19 Cal.4th at p. 163.) "The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People v. Lee* (1999) 20 Cal.4th 47, 59.)

Thus, "[t]he heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago . . . 'this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1252–1253.)

c. *Discussion*.

Appellant argues the following time-line provides evidence warranting a heat-of-passion voluntary manslaughter instruction: Appellant and Reyes separated in August 2008, after nine years of marriage. On August 27, a dependency court ordered the four children to live with Reyes's sister, Lucy; appellant and Reyes were allowed supervised visitation only. Lucy filed for financial support from appellant and Reyes to provide for the children, which made appellant angry because he was heavily in debt. On September 11, appellant vandalized Reyes's vehicle in the parking lot of her workplace. On September 29, Reyes filed for divorce. On October 3, a dependency court allowed Reyes to live with the children at Lucy's residence. On October 6, appellant confronted Reyes in the parking lot of her workplace and demanded to know the name of her boyfriend and to see her cell phone. Reyes refused and

then showed him the divorce papers. Appellant grabbed Reyes's purse and fled. From the afternoon of October 6 to the morning of October 8, appellant stayed in motel rooms with Patricia Sales. He drank heavily the entire time and ingested pills. Appellant was still drinking when he left the Crystal Casino on the morning of October 8, and he fatally shot Reyes soon thereafter.

Appellant relies on such cases as *People v. Berry* (1976) 18 Cal.3d 509, in which a series of events lasting weeks was held to have cumulatively resulted in reasonable provocation that caused one partner in a romantic relationship to suffer clouded reason. Appellant urges that the present case is analogous, suggesting that the provocation evidence extended beyond his feelings of jealousy because he was also upset that Reyes had filed for divorce, he was facing the possibility of losing custody of his children, Lucy had asked him for money to help support the children, and Reyes had shown him the divorce papers shortly before he killed her.

We do not agree with appellant there was substantial evidence of the objective component of voluntary manslaughter. Our Supreme Court has explained: "*We are directed to no authority that the existence of marital problems, without more, warrants a heat of passion instruction*. Absent from this case is any evidence even remotely similar to the provocative conduct by the victim in [*Berry*] where we held it error not to give a heat of passion instruction. In that case, the victim wife had engaged in a two-week pattern of sexually arousing the defendant husband and taunting him into jealous rages over her love for another man, conduct we concluded would stir such a passion of jealousy, pain and sexual rage in an ordinary man of average disposition as to cause him to act rashly from this passion." (*People v.*

Marshall, *supra*, 13 Cal.4th at pp. 848–849, italics added; see also *People v. Lujan*, *supra*, 92 Cal.App.4th at p. 1414 ["It is not provocative conduct for a woman who has been separated from her estranged husband for four or five months and who has filed a petition for dissolution of marriage to later develop a romantic relationship with another individual."]; *People v. Hyde* (1985) 166 Cal.App.3d 463, 473 [extreme jealousy and preoccupation with former girlfriend's new boyfriend was not sufficient provocation: "we refuse to countenance any suggestion that [the victim's] mere dating of [Hyde's former girlfriend] after she broke up with Hyde constitutes provocation"].)

We would add this thought. It is incomprehensible to us that any reasonable person would feel justified in lashing out against an estranged romantic partner—based on the mere suspicion that she had started seeing someone new—when the person himself had been involved in a months-long affair and had just finished a weekend of drinking and sex with his girlfriend.[6]

The trial court did not err by refusing to instruct on heat-of-passion voluntary manslaughter.

2. *Trial court did not err by excluding certain defense witness testimony.*

Appellant contends the trial court erred prejudicially by excluding certain testimony from three potential lay witnesses and one potential expert witness. These contentions are without merit.

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[6] Having so concluded, we need not consider whether there was substantial evidence of the subjective element of voluntary manslaughter.

a. *Background*.

Prior to the defense case, the trial court heard motions regarding proposed defense testimony. Defense counsel made the following offer of proof with regard to three lay witnesses and one expert witness:

(1) Oscar Gonzalez would testify that he had been Reyes's co-worker at Coastline Logistics. Gonzalez would say he and Reyes occasionally socialized along with other co-workers, went out drinking together, and exchanged text messages. Although Gonzalez apparently would have testified that he and Reyes had not been in any sort of relationship, defense counsel argued that appellant *suspected* Gonzalez was Reyes's new boyfriend, pointing out that "[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], *or be conduct reasonably believed by the defendant to have been engaged in by the victim*. [Citations.]" (*People v. Lee* (1999) 20 Cal.4th 47, 59, italics added.)

(2) Reyes's sister Jessica would testify that Reyes seemed happy because of her relationship with Gonzalez.

(3) Reyes's sister Irene would testify that based on Reyes's statements, Irene believed appellant had started to drink more from August to October.

(4) Roberto Flores de Apodaca, a psychologist, would testify, based on appellant's long history of drinking, that appellant had a medical disorder ("maladaptive alcohol behavior").

The trial court ruled the psychologist could testify as to appellant's medical diagnosis, but that he could not repeat any case-specific details provided to him by appellant because that would be inadmissible hearsay. The trial court also ruled that

except for direct percipient observations, any testimony from the three lay witnesses was inadmissible. Finally, the trial court ruled that any testimony from Gonzalez would have little relevance because it appeared that he and Reyes had only seen each other with groups of fellow workers.

b. *Discussion*.

"[W]e apply 'the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence.' [Citation.]" (*People v. Thompson* (2016) 1 Cal.5th 1043, 1120.) "A trial court has abused its discretion when its ruling ' "fall[s] 'outside the bounds of reason.' " ' [Citation.]" (*People v. Kopatz* (2015) 61 Cal.4th 62, 85.) The trial court here did not abuse its discretion by excluding the proposed defense testimony.

Irene's proposed testimony about appellant's drinking habits was properly excluded because it was based on conversations with Reyes, not on Irene's own personal knowledge. (See *People v. Montoya* (2007) 149 Cal.App.4th 1139, 1150 ["[t]o testify, a witness must have personal knowledge of the subject of the testimony"]; accord, Evid. Code, § 702, subd. (a) ["Subject to Section 801 [expert testimony], the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter."].) Because defense counsel conceded that Irene's testimony was not based on personal knowledge, the trial court properly excluded it.

The court also reasonably excluded the proposed testimony of Jessica and Gonzalez. Defendant argued these witnesses would have shown that Reyes and Gonzalez were romantically involved. But as the trial court ruled, their testimony was not relevant because it was quite clear to the jury that appellant *believed* Reyes had a boyfriend and this belief caused him to be

jealous; whether or not Reyes actually did have a boyfriend was not important.

Finally, as to the proposed expert witness, appellant properly conceded in a supplemental letter brief that, after the recent Supreme Court decisions in *People v. Sanchez* (2016) 63 Cal.4th 665, 682–683 and *People v. Williams* (2016) 1 Cal.5th 1166, 1199–1200, it is clear the trial court properly excluded any proposed testimony that would have consisted of the expert testifying to appellant's case-specific hearsay statements, even if they helped to form the basis of the expert's opinion. (See *id*. at p. 1200 ["We recently held that the hearsay rule of Evidence Code section 802 does not allow prosecution experts to rely on case-specific hearsay to support their trial testimony."].)

As for appellant's complaint that the trial court's ruling resulted in a constitutional violation because appellant was prevented from putting on a case, the courts have routinely rejected attempts to convert ordinary evidentiary rulings into issues of constitutional dimension. "Defendant claims his constitutional rights to due process, to present a defense, to confront the evidence against him, and to a reliable and nonarbitrary determination of guilt were violated by the trial court's evidentiary rulings. [Citations.] His attempt to inflate garden-variety evidentiary questions into constitutional ones is 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. . . . Accordingly, the proper

standard of review is that announced in *People v. Watson* [(1956) 46 Cal.2d 818, . . . and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension . . . .' [Citation.]" (*People v. Boyette* (2002) 29 Cal.4th 381, 427–428.)

The trial court did not err by excluding the disputed proposed defense testimony.

3. *Trial court properly admitted Reyes's statements under the forfeiture by wrongdoing doctrine and Evidence Code section 1390.*

Appellant contends the trial court erred by admitting, under the forfeiture by wrongdoing doctrine and Evidence Code section 1390, the testimony of Sheriff's Deputy Romelia Hernandez regarding statements made to her by Reyes. We disagree.

a. *Legal principles.*

The Confrontation Clause bars admission of testimonial hearsay unless "the declarant is unavailable" and "the defendant has had a prior opportunity to cross-examine." (*Crawford v. Washington* (2004) 541 U.S. 36, 59 [124 S.Ct. 1354] (*Crawford*).) But a defendant's confrontation rights are subject to certain exceptions, including the forfeiture by wrongdoing doctrine, which allows admission of unconfronted testimonial statements "where the defendant ha[s] engaged in wrongful conduct designed to prevent a witness's testimony." (*Giles v. California* (2008) 554 U.S. 353, 366 [128 S.Ct. 2678]; see also *Crawford*, *supra*, 541 U.S. at p. 62 ["the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds"]; *United States v. Jackson* (4th Cir. 2013) 706 F.3d 264, 265 ["so long as a defendant intends to prevent a witness from testifying, the forfeiture-by-wrongdoing exception applies even if

the defendant also had other motivations for harming the witness"]; *United States v. Cazares* (9th Cir. 2015) 788 F.3d 956, 975 [accord]; *United States v. Houlihan* (1st Cir. 1996) 92 F.3d 1271, 1279 [accord]; *People v. Banos* (2009) 178 Cal.App.4th 483, 504 [accord].)

California's counterpart to the forfeiture by wrongdoing doctrine is codified in Evidence Code section 1390. Evidence Code section 1390, subdivision (a), provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party that has engaged, or aided and abetted, in the wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Evidence Code section 1390, subdivision (b), provides: "(1) The party seeking to introduce a statement pursuant to subdivision (a) shall establish, by a preponderance of the evidence, that the elements of subdivision (a) have been met at a foundational hearing. [¶] (2) The hearsay evidence that is the subject of the foundational hearing is admissible at the foundational hearing. However, a finding that the elements of subdivision (a) have been met shall not be based solely on the unconfronted hearsay statement of the unavailable declarant, and shall be supported by independent corroborative evidence."

b. *Background*.

The trial court held an evidentiary hearing, pursuant to Evidence Code section 1390, to determine whether Reyes's statements to Deputy Hernandez were admissible.

At the section 1390 hearing, Deputy Hernandez testified to several hearsay statements by Reyes. Deputy Hernandez testified that on September 11, Reyes said appellant had called and told her to look out the window to see what he had done to

her vehicle. Hernandez confirmed that Reyes's vehicle had been damaged. On October 6, Hernandez again spoke to Reyes, who said appellant had approached her in the company parking lot, asked her boyfriend's name, and then forcibly taken her purse. Hernandez called Reyes's stolen cell phone and spoke to appellant, who acknowledged that he was in a lot of trouble, but refused to divulge his location, telling Hernandez that "he knew if [she] knew where he was at, [she] would go and arrest him." On cross-examination, Hernandez confirmed that during these phone conversations she had told appellant, " 'We're going to be arresting you.' "

Juan Acosta testified at the evidentiary hearing that he saw Reyes arrive at work on October 6 and park her Ford Explorer. Acosta saw appellant come out from behind some bushes, argue with Reyes, and then grab her "portfolio" and drive off. In addition, there was video surveillance footage showing this incident.

Defense counsel asserted that forfeiture by wrongdoing is a narrow exception aimed at persons seeking to dissuade or prevent witnesses from testifying. Counsel argued: "[B]ased on the evidence that we have here today, there is nothing that I could point to nor that I think the court could point to to show that . . . the murder of Veronica Reyes was done to prevent her from going to the police or testifying against [appellant] or going to court for the vandalism, the robbery, or the stalking. There is . . . really not even any circumstantial evidence to suggest that. . . . [W]hat we have is kind of a classic situation where there are these alleged actions taken by [appellant] where he's angry at Veronica Reyes . . . but I think it's completely unclear as to why. I don't think there is any evidence to suggest that that

anger is being directed towards her to try to prevent her from either going to the police or pursuing charges against him or . . . if charges were filed, that she wouldn't testify against him." Counsel further asserted there was insufficient corroboration to satisfy the requirements of Evidence Code section 1390.

The trial court concluded the elements of section 1390 had been met: "The fact that there was a restraining order that was present during this time and the fact that there were elements possibly of a robbery that did occur would indicate to the court that there was this ongoing criminal [behavior]. Now, to say that . . . there would have to be charges filed . . . for this statute to come to fruition . . . I don't think that's what the Legislature intended. I am satisfied that the elements of 1390 have been satisfied . . . ." The trial court added, "The sole intent of the defendant need not be simply to persuade or procure the unavailability of the witness. There could be concurrent intents."

c. *Discussion*

Appellant argues the trial court's conclusion was incorrect because "[h]e did not make any statements that he was concerned she would go to the police." But as the trial court pointed out, the United States Supreme Court said in *Giles v. California*, *supra*, 554 U.S. at p. 377: "Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier

abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify."

In the present case, there was evidence supporting a reasonable inference that appellant had cause for concern about Reyes going to the police. In fact, the record shows appellant knew Reyes had *already* gone to the police, because during his conversations with Deputy Hernandez he acknowledged he was in "big trouble" and that Hernandez intended to arrest him.

Appellant asserts there was "reason to doubt whether [Reyes's] hearsay statements were entirely trustworthy" because allegations of abuse by an estranged spouse "are commonly made in the midst of divorce and custody disputes." But Reyes's statements to Deputy Hernandez about the vandalism and robbery were corroborated by Hernandez's observation of Reyes's vandalized car, by Acosta's eyewitness account of the robbery, and by the surveillance videotape. This satisfied the requirement of Evidence Code section 1390, subdivision (b), that "the unconfronted hearsay statement of the unavailable declarant . . . shall be supported by independent corroborative evidence." There was no reason to doubt the credibility of Reyes's statements to Hernandez.

We conclude the trial court did not abuse its discretion by ruling that Reyes's hearsay statements were admissible. (See *People v. Thompson*, *supra*, 1 Cal.5th at p. 1120 [" 'the abuse of discretion standard of review [is applied] to any ruling by a trial court on the admissibility of evidence' "]; *People v. Kopatz*, *supra*, 61 Cal.4th at p. 85 [trial court abuses its discretion only if ruling falls outside bounds of reason].)

4. *There was insufficient evidence to convict appellant of felony stalking*.

Section 646.9 describes two different stalking crimes. Subdivision (a) defines a so-called "wobbler" covering "[a]ny person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family." Subdivision (b) defines felony stalking as covering "[a]ny person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party." Appellant contends there was insufficient evidence to prove he committed felony stalking and, therefore, his conviction must be reduced to a violation of section 646.9, subdivision (a). We agree.

The record shows that in September 2008, Reyes had asked a court to reissue the temporary restraining order because a proof of service on appellant had not been filed. On cross-examination, Detective Aguilera conceded he could not say whether the restraining order that was the basis for appellant's felony stalking conviction had ever been served on appellant, and that "there's no proof of service in this documentation."

In response, the Attorney General argues that when appellant's BMW was searched on October 8, police found a restraining order that had been filed on September 23 (with a hearing date of October 7), "and that appellant again went to Coastline Logistics, confronted Reyes, and stole her purse on October 6, 2008. As such, there was adequate evidence to support appellant's conviction for stalking in violation of a court

order." However, as authority for this conclusion, the Attorney General cites *People v. McClelland* (1996) 42 Cal.App.4th 144, a felony stalking case in which there had been no question as to service. (See *id*., at pp. 149, fn. 2, 153, fn. 3 [although proof of service for temporary restraining order contained clerical error, victim testified she had a friend serve defendant and defendant admitted this at trial; "because both defendant and [victim] were present [at issuance of the final restraining order], no proof of service was necessary"].) Moreover, as appellant points out, the prosecution had elected to designate the September 11 incident as the one giving rise to the stalking charge; hence, even if actual notice could substitute for proof of service, appellant's actual notice that there was a restraining order in effect in *October* was irrelevant.

The Attorney General states that, if we find insufficient evidence of a valid court order, then we should reduce appellant's conviction to a violation of section 646.9, subdivision (a). We agree and will do so. (See *People v. Navarro* (2007) 40 Cal.4th 668, 677 ["Numerous cases, both from this court and the Courts of Appeal . . . [have] modif[ied] a verdict on appeal to reflect a conviction on a lesser included offense after finding insufficient evidence supported conviction of the greater offense"].)

5. *No prejudicial error in admitting prior testimony of prosecution witness.*

Appellant contends there was prejudicial error because the prosecution failed to make reasonable efforts to secure the trial testimony of a potential witness who was a Mexican national. We are not persuaded.

a. *Background*.

The prosecution witness at issue was Alberto Raygoza, the Mexican customs agent who randomly stopped appellant's car at the border and discovered the murder weapon, which appellant had hidden behind his car stereo. At an evidentiary hearing, Guillermo Auyon, a special agent with the California Department of Justice, testified that he acted as a liaison with foreign governments to locate witnesses. In July 2014, he was asked to locate Raygoza, so he submitted a request to Homeland Security and received Raygoza's last known email address and telephone number. Auyon eventually had an email exchange with Raygoza, during which Raygoza indicated he did not trust Mexican government officials because he had been laid off from his customs job and was suing the Mexican government. Eventually Auyon and Raygoza spoke in person, and Auyon said the Los Angeles District Attorney's Office would arrange for Raygoza's travel and cover his expenses. Raygoza asked for a copy of the subpoena and a letter to his employer requesting his appearance in court in Los Angeles. On March 5, 2015, Raygoza informed Auyon that he had been approved at work to take leave without pay in order to testify.

On March 16, 2015, Raygoza arrived in Los Angeles, and on March 18 he testified at a videotaped "conditional examination."[7] Raygoza had been reimbursed for his travel expenses, given accommodations, and provided witness fees.

On April 14, 2015, Auyon contacted Raygoza again and asked if he would return to Los Angeles to provide additional testimony. Raygoza refused, saying that he was "disillusioned

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[7] See section 1335 et seq.

from the process." On April 16, 2015, Auyon and Detective Aguilera contacted Raygoza and again requested his presence at trial, but Raygoza refused, saying he could not afford to miss work. Raygoza explained that the witness fees did not equal his lost wages and would not cover his family expenses. In addition, when he tried to cash his witness fee check, he was told by the Mexican bank that it would take 60 days for the check to clear. Raygoza remained "pretty adamant" that he would not return to Los Angeles to testify at the trial. Auyon had no further contact with him after that conversation.

Auyon testified he was aware of the cooperation treaty between Mexico and the United States regarding court matters. His understanding of the treaty was that a request could be submitted to the United States Attorney's Office, which could then send the request to the foreign ministry of Mexico. In the present case, Auyon was never asked to contact the United States Attorney's Office.

The prosecutor argued that having Auyon contact Mexican officials after Raygoza refused to return would have been pointless because Auyon had already been in contact with Raygoza and knew where he worked. Moreover, Raygoza's main reason for not returning was that the witness fees were insufficient to support his family. Defense counsel argued the prosecution should have made greater efforts to contact Mexican authorities or Raygoza's employer to ascertain if there was another way to support Raygoza's family while he came to the United States to testify. Defense counsel also complained that the prosecution had not availed itself of the 1987 Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty, which contained provisions designed to facilitate witness testimony.

The trial court agreed with defense counsel that, due to the treaty with Mexico, the mere fact that a witness was in Mexico was not enough to render the witness unavailable. The court noted, however, that the treaty did not provide the "power to compel the witness" to come to the United States to testify. The court stated, "I'm not sure what else the People could have done," and concluded that the prosecution had acted with due diligence and, therefore, Raygoza was an unavailable witness and his March 2015 testimony could be presented to the jury. Because the defense had cross-examined Raygoza at the conditional examination, which had been videotaped, the jury would be able to evaluate Raygoza's credibility.

The recording of Raygoza's former testimony was played for the jury.

b. *Legal principles.*

A defendant's right of confrontation "seeks 'to ensure that the defendant is able to conduct a "personal examination and cross-examination of the witness, in which [the defendant] has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." ' [Citation.] To deny or significantly diminish this right deprives a defendant of the essential means of testing the credibility of the prosecution's witnesses, thus calling 'into question the ultimate " 'integrity of the fact-finding process.' " ' [Citation.] [¶] Notwithstanding the importance of the confrontation right, it is not absolute. [Citation.] Traditionally, there has been 'an exception to the confrontation requirement where a witness is

unavailable and has given testimony at previous judicial proceedings against the same defendant [and] which was subject to cross-examination . . . .' [Citation.] Before the prosecution can introduce testimony from a prior judicial proceeding, however, it 'must . . . demonstrate the unavailability of' the witness. [Citation.] Generally, a witness is not unavailable for purposes of the right of confrontation 'unless the prosecutorial authorities have made a good-faith effort to obtain [the witness's] presence at trial.' [Citations]." (*People v. Cromer* (2001) 24 Cal.4th 889, 896–897, fn. omitted.)

"This traditional exception is codified in the California Evidence Code. [Citation.] Section 1291, subdivision (a)(2), provides that 'former testimony,' such as preliminary hearing testimony, is not made inadmissible by the hearsay rule if 'the declarant is unavailable as a witness,' and '[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.' Thus, when the requirements of section 1291 are met, the admission of former testimony in evidence does not violate a defendant's constitutional right of confrontation. [Citation.]" (*People v. Herrera* (2010) 49 Cal.4th 613, 621, fns. omitted.)

Under Evidence Code section 240, subdivision (a)(5), a witness is unavailable when he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) "We have stated that whether due diligence was demonstrated is a 'factual question to be determined by the trial

court according to the circumstances in each case; under familiar rules the trial court's ruling will not be disturbed unless an abuse of discretion appears.' [Citation.]" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1296.)

"[A]ppellate courts should independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial." (*People v. Cromer*, *supra*, 24 Cal.4th at p. 901.) "We review the trial court's resolution of disputed factual issues under the deferential substantial evidence standard [citation], and independently review whether the facts demonstrate prosecutorial good faith and due diligence [citation]." (*People v. Herrera*, *supra*, 49 Cal.4th at p. 623.)

c. *Discussion*.

Appellant relies principally on the case of *People v. Sandoval* (2001) 87 Cal.App.4th 1425 (*Sandoval*), in which a witness who testified at the preliminary hearing was unavailable to testify at trial. *Sandoval* stated that the question presented was "whether the prosecution, to establish the unavailability of a crucial witness who is a Mexican citizen currently residing in Mexico, must show it made a reasonable, good faith effort to obtain the attendance of the witness at trial. We conclude the defendants' right of confrontation requires such a showing. Since no such showing was made here, we reverse the defendants' convictions for murder and related crimes." (*Id*. at p. 1428, italics added.)

The prosecution's failure in *Sandoval* to make the required good faith effort was demonstrated at an evidentiary hearing, which revealed that Zavala (the missing witness) "was living in

Mexico. He stated he would be willing to testify if he could get a passport and visa to enter the United States legally. He needed money to travel to Mexico City to apply for a passport and visa. He also needed money to make the trip to California. [¶] A . . . prosecutorial investigator . . . learned Zavala must appear personally at an American Consulate in Mexico to apply for a visa. Zavala indicated he needed about $100 to make that trip. The prosecution decided not to assist Zavala to make the trip and apparently did nothing more to secure his attendance at the trial." (*Sandoval*, *supra*, 87 Cal.App.4th at p. 1432.)

The trial court's finding of unavailability in these circumstances was erroneous: "[T]he trial court found Zavala unavailable simply because he was in Mexico and was a Mexican citizen. While this test may have properly determined availability under Evidence Code section 240, the test violates the confrontation clause under the circumstances of this case. Zavala was statutorily unavailable because the trial court could not utilize its own process to compel Zavala's attendance at the trial. The Supreme Court has made clear, however, that to satisfy the confrontation clause, the prosecution must make a reasonable, good faith effort to obtain the witness's presence at the trial. [Citation.]" (*Sandoval*, *supra*, 87 Cal.App.4th at pp. 1443–1444.))

In the case at bar, appellant complains that the prosecution did not sufficiently explore its options with regard to providing Raygoza enough money to overcome his refusal to return. Appellant argues that, "As in *Sandoval*, the failure to take [further] steps to secure the attendance of a witness who had previously voluntarily travelled to the United States from Mexico

to testify, and who was willing to return, compels the conclusion that the prosecution failed to meet its burden of due diligence."

We cannot agree with this reasoning. Raygoza did not appear to be "willing to return" to testify at trial, and thus the problem was *convincing* him to make a second trip notwithstanding his many complaints about what had happened when he came the first time. Unlike *Sandoval*, the prosecution here did not fail to obtain the witness's trial appearance merely because it refused to come up with $100.

We conclude the trial court did not err by allowing Raygoza's former testimony to be read to the jury.

6. *There was no prosecutorial misconduct.*

Appellant contends the prosecutor committed misconduct during closing argument by violating the trial court's direction that no reference be made to the fact that, during the intervening time between the killing of Reyes and appellant's eventual extradition to California to stand trial, he spent seven years in a Mexican prison. We disagree.

a. *Background.*

Prior to trial, the court ruled that any evidence that appellant had been convicted in Mexico for having a firearm and had served time in a Mexican prison was irrelevant. After jury selection, the court reminded counsel of this ruling, saying: "[A]gain the People are allowed to, in essence, use the word that the individual was extradited from Mexico. Now, of course, there won't be anything else regarding fighting extradition if there was a fight, et cetera. It's just the fact that he was extradited."

During rebuttal argument to the jury, the prosecutor said, "Now, I'm going to ask you to bring justice [in] this case. The defendant has escaped justice for the last almost seven years, and

I'm going to ask you to not let him get away with it. Bring justice." Defense counsel objected that the reference to "escaping justice" constituted improper argument. The court overruled the objection.

b. *Legal principles*.

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights – such as a comment upon the defendant's invocation of the right to remain silent – but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action ' "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' [Citation.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 298.)

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "When we review a claim of prosecutorial remarks constituting misconduct, we examine whether there is a reasonable likelihood that the jury

would have understood the remark to cause the mischief complained of. [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 689.)

c. *Discussion*.

Appellant asserts the prosecutor's comment constituted "improper argument" because it "invited the jury to convict [him] because he had escaped justice. Both the trial court's previous in limine ruling and the timing of the argument rendered any objection or admonition futile." According to appellant, the reason this constituted improper argument was that "[a] prosecutor may not imply the non-existence of evidence in support of the defense after successfully excluding the evidence from the jury," and here "[t]he trial court explicitly excluded evidence that appellant was in a Mexican prison before he was extradited to the United States to stand trial for murder. The improper argument permitted the prosecution to 'smuggle in by inference claims that could not be argued openly and legally.' "

Appellant is essentially arguing that because of the trial court's ruling, defense counsel was not permitted to respond by saying: "But appellant didn't escape justice because he spent seven years in a Mexican prison." However, appellant is ignoring the fact the trial court also ruled that the prosecution could talk about the fact that appellant had been extradited from Mexico to stand trial (a ruling that appellant does not contest). All the prosecutor did was argue that appellant had escaped justice for these crimes (murder, stalking and robbery) by fleeing; the fact that appellant served time in a Mexican prison for some other crime does not detract from the fact that appellant did in fact escape justice for these crimes for all the time that went by before he was extradited. Appellant argues, "The prosecutor knew that

appellant had not escaped justice, but had in fact spent the past seven years in a Mexican prison." But appellant did not spend seven years in a Mexican prison for any crime that he committed against Reyes; he did time (presumably) for trying to cross the border with a hidden gun in his car.

There was no prosecutorial misconduct.

7. *There was no cumulative error*.

Appellant contends the cumulative prejudicial effect of the various trial errors he has raised on appeal requires the reversal of his convictions. However, other than the insufficient evidence of felony stalking (an error we will correct), we have found no error. Accordingly, we need not address appellant's claim of cumulative error. (See *People v. Melendez* (2016) 2 Cal.5th 1, 33.)

DISPOSITION

The judgment is affirmed in part, reversed in part, and remanded for resentencing. Appellant's conviction for felony stalking is reversed and reduced to a conviction for simple stalking under section 646.9, subdivision (a). The matter is remanded to the trial court for resentencing.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.