Filed 3/28/18 P. v. Cardenas CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MELANIE VANESSA CARDENAS et al., Defendants and Appellants.	B268341 (Los Angeles County Super. Ct. No. GA076747)

APPEALS from judgments of the Superior Court of Los Angeles County, Cathryn F. Brougham, Judge. Reversed in part and affirmed in part as to Defendants and Appellants Melanie Vanessa Cardenas and Marlin Alarcon Najarro. Affirmed as to Defendants and Appellants Guadalupe Pilar Castaneda, Jazmin Garcia Moreno and Alberto Eduardo Garcia Moreno.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant Guadalupe Pilar Castaneda.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant Jazmin Garcia Moreno.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant Melanie Vanessa Cardenas.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant Alberto Eduardo Garcia Moreno.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant Marlin Alarcon Najarro.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Melanie Vanessa Cardenas was Azteca America's payroll manager. Based on allegations that Cardenas diverted Azteca funds to herself and to the other defendants and appellants—Marlin Alarcon Najarro, Jazmin Garcia Moreno, Alberto Eduardo Garcia Moreno and Guadalupe Pilar Castaneda—defendants were charged with and found guilty of, among other things, receiving stolen property. They all appeal, contending that a severance motion should have been granted, the prosecutor violated *Brady*,[1] evidentiary errors prejudiced them, the prosecutor engaged in pervasive misconduct, there was insufficient evidence to support the

---

1 *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

judgments, and the jury instructions lowered the burden of proof. We reject all contentions except one: Cardenas and Najarro could not be convicted of and sentenced on grand theft and on receiving stolen property, and we therefore reverse their convictions for receiving stolen property. We otherwise affirm the judgments as to them and the other defendants.

FACTUAL AND PROCEDURAL BACKGROUND

I. The prosecution's case-in-chief

Azteca America (Azteca) is a Hispanic television network. Its principal place of business is in California, but its parent company, T.V. Azteca, is in Mexico. Adrian Steckel was Azteca's chief executive officer (CEO). From 2006 through 2007, Luis Mariano Cortez was Azteca's chief financial officer (CFO), but Martin Breidsprecher replaced him in 2008.

Four of the five defendants worked at Azteca. Cardenas was Azteca's payroll manager; Najarro[2] worked in accounting, reconciling banking and accounting records; Jazmin Moreno worked in programming; and Castaneda, it appears, was a news assistant.[3] Alberto Moreno[4] (Jazmin's brother) did not work for Azteca.

During the relevant 2006 through 2008 time frame, Azteca paid some employees' salaries by direct deposit. Other payments,

---

[2] Najarro is sometimes referred to as Alarcon in the record.

[3] Cardenas's monthly salary was $5,026; Najarro's monthly salary was $5,000; Jazmin's monthly salary was $5,835; and Castaneda's monthly salary was $3,335.

[4] To avoid confusion, we refer to Alberto and Jazmin by their first names.

such as pay advances (which Azteca sometimes allowed), expense reimbursements and overtime, could also be directly deposited into an employee's bank account separately from regular salary. Cardenas managed the direct deposit payroll system. Her duties included entering payroll information into Millennium,[5] a computer system that generated and kept track of payroll. Payments outside of regular payroll (advances or expense reimbursements, for example) were called "adjustment authorization[s]" and Azteca's CFO had to approve them in writing. If the CFO approved them, then Cardenas filled out and submitted a "Direct Deposit Adjustment Authorization" form to Qqest, a third party vendor which handled Azteca's payroll. That form listed, for example, the name of the employee receiving the payment, his or her bank account number, and the amount to be deposited. Qqest would then withdraw the money from Azteca's account and directly deposit it into the employee's bank account listed on the form. Cardenas was then supposed to enter that information into Millennium so that, for example, any advance was deducted from the employee's next payroll. If Cardenas did not log payments into Millennium, then Azteca would, in effect, not know of them.

However, it was Najarro's job as a junior accountant to reconcile Azteca's payroll with its bank accounts on a monthly basis. Najarro, who worked at Azteca from May 2006 through March 2008, had to investigate discrepancies and to issue a report by the fifth of every month. She was also supposed to

---

[5] "Millennium" is spelled inconsistently in the record and we adopt its common spelling.

forward account balances of Azteca's bank records to a supervisor.

Rodolfo Garcia Sandoval (Garcia), Azteca's internal auditor, conducted regular audits. During an audit in mid-2008, he discovered irregularities regarding some direct deposits. He asked Cardenas for the Qqest forms directing those deposits, but the file she gave him was a "mess" and missing forms. Garcia therefore asked Qqest for the forms. Seventy-five forms directed payments to accounts associated with defendants, but the payments were not entered into Millennium. Garcia also could not find CFO authorizations from Cortez or Breidsprecher for the payments. Someone from Azteca tried to speak to Cardenas on November 13, 2008, but she had left early for a doctor's appointment. She never returned or responded to attempts to contact her.

After informing Azteca's chief legal officer, Horacio Medal, of the irregularities, Azteca hired an outside forensic accountant, John Sboto of Gailey and Associates, to investigate. Sboto reviewed the Qqest forms, corresponding Azteca bank records, and accessed Millennium to determine whether the suspect transactions were recorded. He concluded that the suspect transactions were not in Millennium.

Medal reported the theft to the police in November 2008. Detective Robert Zaun investigated. As part of his investigation, the detective obtained defendants' bank records. Once the detective had those records, he "followed the money trail" by comparing the Qqest forms with defendants' bank statements. He discovered that "every one of those [75] direct deposit amounts went into the personal bank accounts of the five

defendants."[6] Twenty-seven direct deposits went to Jazmin, the first on June 26, 2006 and the last on July 23, 2008, totaling $52,480.77. Fifteen direct deposits went to Najarro, the first on January 16, 2007 and the last on March 11, 2008, totaling $28,079.69. Five direct deposits went to Castaneda, the first on March 3, 2008 and the last on July 29, 2008, totaling $11,432.65. These transactions occurred after Castaneda's employment at Azteca had already ended. Three direct deposits went to Alberto, the first on February 28, 2008 and the last on April 17, 2008, totaling $8,774.34. Finally, Cardenas sent 16 direct deposits to her Wells Fargo account, the first on December 6, 2007 and the last on May 19, 2008, totaling $32,002.13. Cardenas sent nine direct deposits to her credit union account, the first on March 16, 2007 and the last on March 19, 2008, totaling $11,767.50.

The defendants also wrote checks to each other. Around the times that money was deposited into Alberto's accounts, for example, checks were written against his account in similar amounts. The first deposit in the amount of $1,538.47 was made into Alberto's account on or about February 28, 2008. That same day, a check was written against Alberto's account to Castaneda in the similar amount of $1,520. A $2,546.44 deposit was made into Alberto's account on or about April 17, 2008. Around that same day, two checks were written against Alberto's account, one payable to "cash" in the amount of $840 and a second payable to Jazmin in the amount of $1,500. Also, from October 2006 through March 2008, Najarro wrote checks totaling $5,627.66 to

---

[6] At times, the bank account number did not match the name of the employee purportedly receiving the money. A transaction dated October 12, 2007, for example, indicated that a "Julian Chavez" received the payment, but the account number belonged to Najarro.

Cardenas. From June 2007 to August 2008, Jazmin wrote three checks to Castaneda totaling $1,440.

The detective also discovered that all defendants except Najarro had lived at the same location in Long Beach in 2008, although perhaps not at the same time. Jazmin, Alberto and Castaneda also lived at a house in Montebello. Jazmin and Castaneda considered themselves to be sisters.

II. Defense case

Mark McLaughlin was a computer forensics expert. He reviewed two files produced by the Glendale Police Department made from Cardenas's hard drive. He discovered that approximately 10,700 emails and 25,000 files had been deleted. The "last access date" was November 14, 2008, which was the day after Cardenas left Azteca.

Cardenas testified extensively about Azteca's unusual accounting practices. Cortez, for example, was not on payroll or in Millennium because he didn't have "papers" to work in the United States; however, payments to him were authorized. Cortez and similarly situated people, including CFO Steckel, whose salaries were not reported in Millennium, were called Azteca Ghosts. Cardenas was told to change the "work state" for Joshua Mintz, who was in California but wanted her to "put his state in Florida so he wouldn't lose his homestead." Once, she wrote a personal $3,000 check to her boss, Cortez, so that he could pay Jorge Chavez. The payment was not recorded in Millennium or in payroll. Another time, payments went through Rosio Junco for Chavez. Cardenas also identified other Qqest forms directing payments that were not in Millennium.

According to Cardenas, she received email authorizations for the deposits requested in People's exhibits 1 through 75. If

she was told to leave something out of Millennium, she did. As to payments to Najarro reflected in those exhibits, Cardenas was instructed to make them to compensate Najarro for doing additional work. As to Jazmin, some payments were to compensate her for her work on a reality boxing show called Retador for Azteca. The show originally was being filmed in Las Vegas but it moved to Mexico, and Jazmin was flying back and forth. Jazmin was entitled to all payments reflected in People's exhibits 1 through 75. As to Alberto, Cardenas needed to get money to Mexico to pay for Retador's production costs. Jazmin gave account numbers to Cardenas, who put money into the accounts for production costs. Jazmin gave her Alberto's account because Jazmin wanted to keep the money separate from her personal account. The payments Cardenas made to herself were for freelance work she did for Retador. Those payments were not in Millennium although they were "still processed through payroll," meaning "I would send them to Luis Mariano Cortez or Martin Breidsprecher and Fernando Haces." The treasurer would transfer funds from "main payroll or his main company account to the payroll account."

Adam Gonzalez testified that he was in Mexico City working on Retador from February through May 2008. Alberto was there that entire time working as part of the camera crew.

David Wall, a forensic accountant, reviewed Azteca's books and records and found them to be "unreliable" and opined that executives deliberately manipulated accounting records. He based his conclusion on, for example, evidence that Rosio Junco took out money in her name but gave it to Jorge Chavez at the CFO's direction; that Breidsprecher directed reimbursement for

expenses incurred by Steckel to be paid to someone else; and that Steckel's salary was reduced from $150,000 to $4,000.

Wall found evidence that four of the challenged Najarro deposits were authorized.

III. Procedural background

An information filed in November 2010 alleged various crimes against Cardenas, Castaneda, Alberto, Jazmin and Najarro. But, due primarily to discovery issues, the case did not go to trial until September 2015. After the trial court denied Castaneda's and Alberto's motion to sever their trial, the case went to a joint trial against all defendants on the following charges: count 1, grand theft of personal property against Cardenas and Najarro (Pen. Code, § 487, subd. (a))[7] and count 3, receiving stolen property against all five defendants (§ 496, subd. (a)). On September 29, 2015, a jury found defendants guilty as charged.

The trial court sentenced defendants on November 17, 2015. As to Cardenas, the court suspended imposition of sentence on count 1 and placed her on five years' felony probation, ordering her to serve 365 days in jail. On count 3, the court granted probation but imposed a concurrent 120 days in jail. Per the minute order, on count 1, Najarro was placed on five years' formal probation and ordered to serve one day in jail and to complete 60 days of community service. She was sentenced to a concurrent five years' formal probation on count 3. Jazmin, Alberto and Castaneda were placed on five years' probation, and

---

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

ordered to serve one day in jail and to perform 30 days of Caltrans. All defendants were ordered to pay restitution.

CONTENTIONS

Defendants raise numerous contentions on appeal regarding (1) the trial court's refusal to sever Castaneda's and Alberto's trial, (2) whether the prosecution violated *Brady*, (3) evidentiary errors, (4) prosecutorial misconduct, (5) sufficiency of the evidence, and (6) handwritten notations on jury instructions.[8]

DISCUSSION

I. Severance

Castaneda and Alberto moved to sever their trial from the other defendants on the grounds that the prosecutor was bootstrapping the weak case against them onto the stronger one against Cardenas and Najarro, there were conflicting defenses, and Jazmin would be unable to testify in Alberto's defense in a joint trial. The trial court disagreed with these arguments and denied the motion. We discern no abuse of discretion or prejudice to defendants from the joint trial.

There is a preference for joint trials: " 'When two or more defendants are jointly charged with any public offense, . . . they must be tried jointly, unless the court order[s] separate trials.' " (§ 1098.) This preference for joint trials promotes economy and efficiency and serves the interests of justice by avoiding the " ' "scandal and inequity of inconsistent verdicts." ' " (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40 (*Coffman and Marlow*).) The classic case for joinder thus presents itself where

---

[8] Defendants have joined in each other's arguments.

the defendants are charged with common crimes involving common victims. (*Ibid.*) However, severance may be appropriate "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Massie* (1967) 66 Cal.2d 899, 917, fns. omitted; see also *People v. Souza* (2012) 54 Cal.4th 90, 111.)

We review the denial of a severance motion for an abuse of discretion, judged on the facts as they appeared at the time of the ruling. (*People v. Masters* (2016) 62 Cal.4th 1019, 1049; *Coffman and Marlow*, *supra*, 34 Cal.4th at p. 41.) If the trial court abused its discretion, reversal is required only if it is reasonably probable the defendant would have received a more favorable result in a separate trial. (*Masters*, at p. 1048.) Even if the ruling was correct when made, reversal is required if the defendant shows joinder actually resulted in "gross unfairness," amounting to a denial of due process. (*Id.* at p. 1049.)

In a general sense, this was a classic case for joinder. All five defendants were charged with receiving property stolen from the same victim, and two of those defendants (Cardenas and Najarro) were additionally charged with the actual theft of that property. Using direct deposit authorization forms, Cardenas diverted Azteca funds into her bank account and the accounts of the four other defendants, all of whom except Alberto were at some point employed by Azteca. Also, the prosecution's theory as to Najarro was she aided and abetted that theft by failing to reconcile Azteca's accounts, which should have shown any discrepancy.

Alberto and Castaneda argue that severance was nonetheless proper because, first, the prosecution bootstrapped the weaker case against them onto the stronger one against Cardenas and Najarro. Alberto thus points out that he was the only defendant who didn't work at Azteca and he was in Mexico when the deposits were made into his account. And, when the deposits were made into Castaneda's account, she no longer worked at Azteca. Certainly, one way of viewing this evidence was that Alberto's and Castaneda's connection to the crime was the most attenuated. Another view is that the absence of Alberto's connection to Azteca and that Castaneda was no longer Azteca's employee made the deposits all the more suspicious: why would Azteca monies be in their accounts unless they were connected to the scheme? We therefore do not agree that there was a spillover effect such that a stronger case bolstered a weaker one. But, even if Alberto and Castaneda had different levels of involvement in the crimes and different personal backgrounds from the other defendants, that alone did not compel severance or render a joint trial grossly unfair. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 383.) Any difference in the strength of the case against each defendant was not sufficient to warrant severance.

Second, the voluminous accounting evidence did not enhance the risk Alberto and Castaneda would be prejudicially associated with Cardenas and Najarro. Rather, there was no evidence Alberto and Castaneda took part in manipulating records, and this was not the prosecution's theory of the case as to them. We therefore do not agree that the jury would have believed they were involved in manipulating Azteca's records, as opposed to simply having benefitted from other defendants'

manipulation of them. As the trial court said, the distinction would not be "hard for [the] jury to understand." Moreover, the accounting evidence was relevant in the case against Alberto and Castaneda. It showed how Azteca's direct deposit system worked, Cardenas's role at Azteca, how money was diverted, and that people connected to Alberto and Castaneda had the opportunity to divert money. A single trial thus avoided the duplication, time and expense separate trials would have necessitated.

Third, although we do not agree that Alberto's and Castaneda's defenses conflicted with the other defendants' defenses, even if they did, severance is rarely compelled on that ground. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 150.) To obtain severance on this narrow ground, the defendant must demonstrate that the conflict is so prejudicial that the defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates both defendants are guilty. (*Ibid.*; *Coffman and Marlow*, *supra*, 34 Cal.4th at p. 41.) "Stated another way, ' "mutual antagonism" only exists where the acceptance of one party's defense will preclude the acquittal of the other.' " (*People v. Hardy* (1992) 2 Cal.4th 86, 168.) That is not the case here. Alberto's and Castaneda's defense that they did not know about the deposits was not necessarily antagonistic to Cardenas's defense that Azteca authorized the deposits: the deposits could have been authorized *and* Alberto and Castaneda did not know about them.

Finally, Alberto and Castaneda contend that denying severance prejudiced them because Jazmin would have testified at the severed trial that Alberto had no knowledge of the

deposits.[9] However, their argument on appeal differs from their offer of proof at the hearing below. When the trial court asked how Jazmin could, without speculating, testify what Alberto knew, Jazmin's counsel responded that, as Alberto's sister, Jazmin had "constant and frequent contact" with Alberto. When the court pointed out that such contact did not render Jazmin's testimony nonspeculative, counsel admitted that "if the court is going to be that loose with speculation, then, yes, it is speculation." Counsel added that Jazmin could say she never talked to Alberto about anything illegal. On appeal, Alberto makes a different argument: Jazmin "probably" would have testified that she gave Alberto's bank account information to Cardenas and that she, Jazmin, withdrew the funds, all without Alberto's knowledge. This was not the offer of proof made below, and therefore we do not consider it, given that our review is based on the facts as they appeared at the time of the ruling. (*People v. Masters*, *supra*, 62 Cal.4th at p. 1048.) As to the offer of proof that was made, the evidence was speculative. Also, that Jazmin and Alberto never discussed anything illegal did not exonerate Alberto of knowing that the monies were in his account, a fact bolstered by his contemporaneous withdrawal of those funds.

We therefore conclude that the trial court did not abuse its discretion and that the joint trial did not deny defendants due process.

II. *Brady*

Defendants next contend that the prosecution's *Brady* obligations were violated by Azteca's failure to produce

---

[9] It is unclear how such testimony is relevant to Castaneda.

Millennium records and Azteca's alleged deletion of emails and files from Cardenas's computer. This contention is based on several mistaken premises—first, that records were withheld and, second, that Azteca's alleged failure to provide those records implicate *Brady*. But, before addressing those issues, we first set forth the history of discovery in some detail, because it highlights our ultimate conclusion that any fault in the defense failure to obtain information about Millennium or regarding preservation of records does not lie with the prosecution or implicate *Brady*.

A. *Pretrial discovery proceedings*

Over the course of approximately four years, from 2011 through 2015, the parties engaged in protracted discovery disputes and proceedings. Those disputes initially concerned defense requests for employee W-2's, payroll registries and accounts payable records. This led to a hearing in September 2011 at which defense counsel complained that Azteca was "stonewalling." In response, the prosecutor suggested that defense counsel subpoena Azteca's records, because section 1054 was inapplicable.

A month later, on October 31, 2011, the prosecutor represented that, although the prosecution had everything it needed to go to trial, Azteca was working to comply with the defense discovery request. Two Azteca employees testified about discovery issues. Carmen Viveros, who was in charge of employee records, testified that Cardenas, who had been solely in charge of payroll and the payroll database, left the payroll documents in disarray. Viveros was unable to locate many of the documents requested in discovery, and she was still going through boxes of disorganized documents. Medal also testified at the hearing. Neither Viveros nor Medal was asked about

Millennium. The hearing culminated in the issuance of orders, in October 2011 and April 2012, directing all counsel, accountants and investigators to go to Azteca and to review documents pertinent to the case. That review apparently took place, because, on July 16, 2012, Cardenas's counsel said that the last of the documents he needed had been turned over and, "[a]s I understand from all parties, this is the last of the outstanding documents necessary for everyone to be ready to proceed." Other defense counsel agreed.

That agreement did not last.[10] At a hearing in January 2014, Jazmin's counsel acknowledged receipt of subpoenaed documents relating to Jazmin's timesheets and Azteca's recent production of 1,000 pages of emails. The prosecutor made clear her understanding that discovery in the hands of law enforcement had been turned over. However, the prosecutor said she would ask Detective Zaun whether he had a hard drive, presumably of Cardenas's computer. The prosecutor then repeated the suggestion that the defense subpoena what it wanted.

On May 6, 2014, Najarro's counsel asked the prosecutor to represent that Azteca had turned over all emails and anything else Azteca had a duty to produce. The prosecutor refused but repeated that everything in the hands of law enforcement had been turned over under section 1054. She repeated the suggestion that if the defense believed there were additional documents, a recourse was available to them: "SDT those records." Najarro's counsel said they hadn't subpoenaed them

---

[10] In November 2012, Cardenas's counsel said that the defense experts were missing two pieces of evidence (cancelled checks from Cardenas's bank and her passport) to complete their work.

because the prosecutor had said " '[t]hat's all we have.' " Azteca's representative then proposed having its employee testify about Najarro's emails. On May 12, 2014, an Azteca employee did testify about emails he had turned over and others that he did not have. A frustrated trial court (Judge Teri Schwartz) then asked for clarification about "what we're doing here," because from its perspective the People were required to turn over all relevant information, and although Azteca was not a law enforcement agency, it was the prosecution's responsibility to provide discovery. The parties also discussed a hard drive, again presumably Cardenas's, that might contain emails between defendants and Azteca.

At the next hearing on May 19, 2014, the trial court said "[t]he fact that the People aren't able at this time, after years of litigation, to say with assurance that Azteca has produced everything that it should produce is something," so it should be "up to a trier of fact. [¶] So that's a tentative, I suppose, with respect to the discovery issues . . . . [Section] 1054 contemplates voluntary discovery. It contemplates the People presenting a case and the People providing the discovery that supports their case. It also contemplates exculpatory evidence being presented to the defense. At this juncture, it just seems to me that . . . this is a jury issue."[11]

Months later, however, there were still outstanding discovery issues. On January 8, 2015, the trial court considered Najarro's request for bank records. The court advised Najarro's counsel to subpoena the records and, if necessary, to file a *Brady* motion. Counsel for Najarro did file a motion for discovery in

---

[11] There was also discussion about Cardenas's hard drive, which had been turned over to the defense.

July 2015, but it merely sought the names of witnesses the People intended to call at trial and their records of arrest, convictions or investigations; expert witness information; exhibits; discovery regarding "SEC fraud and other investigations of Azteca and/or its agents." Although the court did not make a clear ruling on the motion, it noted that the SEC fraud occurred in 2005, before this case began, and the court expressed doubt that the People had any responsibility to disclose that information.

At a later pretrial hearing, the parties discussed the alleged deletion of files from Cardenas's hard drive. The prosecutor had no problem with defense experts saying that documents were modified but did not want any expert to say there were discovery abuses or violations. The trial court then asked if counsel were seeking "to call it discovery violation?" Castaneda's counsel answered, "No," and he and Najarro's counsel said they had no intention of calling it a discovery violation. The court then agreed the issue could be revisited before argument, after the court heard the evidence.

The matter finally went to trial in September 2015, and various prosecution witnesses testified about the Millennium system and how the disputed transactions were not in it. Even so, no imputation of wrongdoing regarding those records was raised until the defense case, when the prosecutor asked Wall whether he understood the prosecution's claim that the 75 transactions were not recorded in Millennium. Wall testified that he had asked for Millennium records but they were not provided to him.

Thereafter, Najarro's counsel took issue with the prosecutor's implication that the defense had failed to provide its

expert with Millennium records. As a cure, she asked for a stipulation that Azteca refused to turn those records over during discovery. The prosecutor represented that this was first time he had heard that the defense did not get Millennium documents. When the trial court said it was too late to bring up discovery violations, Najarro's counsel clarified that she was not arguing a discovery violation: "Those were in the possession of Azteca. They were not in the possession of the District Attorney. [¶] I am not arguing discovery, however, I do say it was improper for that implication to be made given the history." The prosecutor represented that by the time he got the case, the only discovery issue concerned Najarro's bank records, which the court ordered Najarro's counsel to subpoena. The prosecutor did not know if Azteca had refused to turn over Millennium records. Detective Zaun also said he was unaware that Azteca was asked to provide the relevant Millennium records.

At a follow-up hearing on September 24, 2015, Najarro's counsel asked the trial court to strike all testimony regarding Millennium records. The court denied the request, noting that the issue came up after the People rested, no mention was made of a need for Millennium records before trial, and the court did not believe that the prosecution had done anything wrong. Also, the court noted that the defense was that the transactions did not need to be in Millennium because Cardenas was told not to log them into the system, and therefore the evidence was not necessarily exculpatory.

The trial court and the parties then engaged in a heated discussion about what happened during the years of discovery. Defense counsel reminded the court that the prior judge had ordered Azteca to allow record review at its offices, but when

counsel got there, the documents were in disarray, Azteca said records from 2007 had been destroyed, and defense counsel could not make copies. The court said it would instruct the jury that Azteca did not provide copies of Millennium records referenced in the case and provided limited access to review some records. The court gave that instruction.

B. *Millennium*

This history refutes defendants' first premise, that Azteca withheld Millennium records. Specifically, in 2011 and 2012, all counsel and their investigators, pursuant to court order, went to Azteca where they reviewed records. Although the record is not crystal clear, it appears that the defense was given access to Millennium records but was not allowed to copy anything from it. Cardenas's counsel acknowledged that he'd asked for Millennium records and "[w]e all went over there [to Azteca]. . . . You could look at them, but you couldn't take them."

Therefore, defendants' claim that Millennium records were never turned over to the defense is true in the sense it appears that a physical copy of the records was not turned over. It is not true in the sense that the defense was given an opportunity to review Millennium records. If the defense believed that review was inadequate or had other qualms about the access it was given to Millennium records, then it should have made a motion or otherwise raised the issue with the court before trial. The defense did not do so. Indeed, the defense never uttered the word "Millennium" during the protracted pretrial proceedings, notwithstanding that they must have known about Millennium, given Cardenas's familiarity with it and its relevance to the case. And, although the defense did not follow up regarding Millennium records during the years of pretrial discovery, the

trial court gave the following instruction, favorable to the defense: "Azteca did not provide copies of the Millen[n]ium records referenced in this case. Azteca provided limited access to review some of the Millen[n]ium records to the attorneys in this case." We therefore disagree that Millennium records were withheld from the defense. To the extent Azteca gave the defense limited access to those records, the jury was so instructed.

C. *Brady*

We reject defendants' other premise, that Azteca's alleged failure to comply with discovery implicated the prosecution's *Brady* obligations. Under *Brady* and the due process clause of the Fourteenth Amendment, the prosecution must disclose "to the defendant evidence in its possession that is favorable to the accused and material to the issues of guilt or punishment." (*People v. Jenkins* (2000) 22 Cal.4th 900, 954; accord, *Brady*, *supra*, 373 U.S. at p. 87; *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 709; see also § 1054.1.) The *Brady* obligation extends not only to materials the prosecutor personally possesses, but, to some extent, to materials others possess; for example, law enforcement and members of the prosecution team, which includes investigative and prosecutorial agencies and personnel, acting on the government's behalf. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 904; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 437-438.) However, the "prosecution has no general duty to seek out, obtain, and disclose all evidence that might be beneficial to the defense." (*In re Littlefield* (1993) 5 Cal.4th 122, 135, italics omitted; *Kyles*, at pp. 436-437.) *Brady* did not create a general constitutional right to discovery in a criminal case. (*People v. Jordan* (2003) 108 Cal.App.4th 349, 361.)

Questions that might be relevant to whether an entity is part of the prosecution team for *Brady* purposes are whether the party with the information is acting on the government's behalf or under its control; the extent to which the parties are part of a team, participating in a joint investigation or sharing resources; and whether the entity charged with constructive possession has ready access to the evidence. (See *Barnett v. Superior Court*, *supra*, 50 Cal.4th at p. 904.) Here, Azteca was not a member of the prosecution team or otherwise acting on the government's behalf. Azteca was the third party, corporate victim over which the prosecution had no control. Nor was Azteca a governmental agency which was sharing resources with the prosecution or jointly investigating the crime. Finally, to the extent the prosecution had any "ready access" to information, the prosecution turned it over to the defense. Thus, if Azteca withheld Millennium records or destroyed emails and computer files, that behavior cannot be attributed to the prosecution under *Brady* absent some other charge of wrongdoing on the prosecution's part.

There was no such charge against the prosecution. Instead, throughout pretrial proceedings, the prosecution represented at, for example, hearings on January 15 and May 6, 2014, that it had complied with its discovery obligations and turned over all materials in its possession, including Cardenas's computer hard drive. The defense agreed with those representations, making it clear it was not accusing the prosecution of violating its discovery obligations. At a pretrial hearing on September 3, 2015, for example, counsel for Cardenas and for Najarro said they had "no intention" of calling any destruction of Cardenas's emails and

files a discovery violation, and when the court asked if any other defense counsel wanted to weigh in, none did.

Defense counsel continued to maintain at trial that the prosecution had not violated discovery. During Wall's testimony, when it became clear he had not reviewed all Millennium records, Najarro's counsel asked for a stipulation that Azteca had refused to turn over Millennium records. But, she made it clear she was not arguing that there had been a violation of discovery: "Those were in the possession of Azteca. They were not in the possession of [the] District Attorney. [¶] I am not arguing discovery, however, I do say it was improper for that implication to be made given the history." The defense thus was not claiming that the prosecution had violated its discovery obligations but instead took issue with the implication the defense had withheld Millennium records from its expert or that Azteca otherwise had provided full access to those records. Therefore, although defendants on appeal argue that the prosecution violated its discovery obligations, it had heretofore disavowed such a claim.[12]

Even if *Brady* was somehow implicated in all this history, a true *Brady* violation requires a showing that the evidence at issue was favorable to the accused, the State suppressed it, and prejudice. (*People v. Superior Court (Johnson)*, *supra*, 61 Cal.4th at p. 710.) We have already said that the State did not suppress evidence. As to the deleted emails and files from Cardenas's computer, we do not know what they said, and therefore there is no showing they were favorable to the defense. As to what Millennium might have revealed, a significant part of the defense

---

[12] In denying a defense request to strike all testimony regarding Millennium, the trial court agreed that the prosecution had not done anything wrong.

was it did not matter whether the disputed transactions were in Millennium because Cardenas was instructed not to record them in Millennium. We therefore fail to see that the challenged evidence was favorable to the defense or that prejudice from its exclusion ensued.

III. Evidentiary issues

Defendants raise two classes of alleged evidentiary error: first, the trial court improperly excluded evidence and, second, the court improperly admitted evidence. After setting forth the applicable standard of review, we address each class of alleged error.

A. *Standard of review*

Only relevant evidence is admissible. (Evid. Code, § 350.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; see also *People v. Mills* (2010) 48 Cal.4th 158, 193.) But even relevant evidence may be excluded under Evidence Code section 352 if its probative value is substantially outweighed by the probability its admission will create a substantial danger of undue prejudice. (*People v. Williams* (2013) 58 Cal.4th 197, 270-271; *People v. Waidla* (2000) 22 Cal.4th 690, 724.) Evidence is unduly prejudicial if it " ' "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." ' " (*People v. Carter* (2005) 36 Cal.4th 1114, 1168.) We apply the abuse of discretion standard of review to a trial court's ruling on the admissibility of evidence, including one that turns on the relative probativeness

and prejudice of the evidence in question. (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.)

Where evidence is erroneously admitted, reversal is not required except where the error or errors caused a miscarriage of justice. (*People v. Richardson* (2008) 43 Cal.4th 959, 1001; Evid. Code, §§ 353, subd. (b), 354.) " '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*Richardson*, at p. 1001; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. (*People v. Hamilton* (2009) 45 Cal.4th 863, 930.)

B. *Excluded evidence*

Defendants argue that the trial court improperly excluded evidence (1) of Azteca's corrupt business practices, (2) that Medal was not authorized to practice law in California, (3) of emails showing that Azteca directed Cardenas to issue off-the-book payments, and (4) that other employees received unauthorized direct deposits but were not prosecuted.

1. Azteca's corrupt business practices

Defendants first contend that the trial court improperly excluded evidence of Azteca's corrupt business practices; namely, that the SEC brought a civil lawsuit against Azteca's CEO for stealing $109 million, Azteca evaded payroll taxes by issuing "loans" to employees rather than putting them on payroll, Azteca had a "policy" of paying employee A through employee B, and of

Azteca's motive for deleting files from Cardenas's computer. The contention is meritless.

We first dispense with any notion that the trial court generally excluded evidence of Azteca's corrupt business practices. The court merely ruled that the defense could not ascribe a motive to Azteca; for example, by paying people off-payroll, Azteca intended to evade taxes. The court also ruled that although witnesses could testify Azteca paid employee A through employee B, witnesses could not characterize this or any other factual scenario as a "policy" or "practice." Otherwise, the record is rife with evidence of Azteca's suspicious business practices. The bulk of cross-examination during the prosecution's case and the defense case centered on those practices; Azteca, for example, gave so-called loans to employees but did not seek repayment; paid one employee through another employee; reduced Steckel's salary to a minimal amount and paid the remainder off-payroll; and authorized payments to employees but did not record them in Millennium. That the upshot of this evidence was Azteca was avoiding taxes and committing fraud could not have been lost on the jury.

And, notwithstanding the trial court's order that witnesses could not ascribe a motive to Azteca, the parties did not adhere closely to the order. There was direct testimony that Azteca's practices were corrupt. Defense expert Wall, for example, testified that the benefit of characterizing a payment as a "loan" was that loans were not reported as income. This amounted to a "manipulation of the accounting records" and to a bypass of the "usual tax, social security, Medicare deductions" and reporting rules.

Further, if the defense theme that Azteca engaged in the same corrupt practices defendants were being accused of was somehow lost on the jury during the evidentiary portion of trial, that point was driven home in closing statements. The prosecutor acknowledged that the defense theory was "there is tax fraud here." Cardenas's counsel talked repeatedly about Azteca's "tax fraud," Azteca's fraudulent "pattern of conduct" and "culture," that "[this] is the way they do things," and Azteca's "history" of "deliberate[ly] manipulat[ing]" accounting records. Najarro's counsel similarly observed that Azteca was "not afraid of United States laws and rules and regulations. And why should they be? They are getting away with whatever they want."

Thus, the defense engaged in an exhaustive examination of Azteca's business practices, and we fail to see how the trial court's limited attempts to curtail some of that evidence was either an abuse of discretion or, in the face of the voluminous evidence introduced on that issue, could have led to a miscarriage of justice. (See generally *People v. Richardson*, *supra*, 43 Cal.4th at p. 1001.)

2. Medal's California bar membership

To further highlight Azteca's allegedly shady business practices, the defense sought to introduce evidence that Azteca's in-house counsel, Medal, was not licensed to practice law in California. The trial court excluded that evidence, and defendants now contend that its exclusion constituted prejudicial error. We disagree.

The issue arose after Medal testified that he had been Azteca's chief legal officer since 2000. On cross-examination, Medal added that he went to law school in Mexico and passed New York's bar examination. He did not pass California's bar

examination, but he nonetheless was a California bar member under a "classification" applicable to in-house counsel who passed an out-of-state bar. When Cardenas's counsel asked if Medal was admitted to the California bar in February 2013 (years after he began working for Azteca), the trial court sustained the prosecution's relevance objection. Defense counsel countered that evidence Medal had practiced law without a license was relevant to credibility and "to the culture of the company." The court, however, excluded the evidence under Evidence Code section 352, because "we would have to have somebody come in and testify as to what the standards are and what it involves to become a practicing lawyer in California and does that mean in-house." The court added that the evidence was not "relevant to the charges in this case. I understand that you are going to be attacking the company in terms of how they conducted their accounting and I think that is fair game in terms of maybe being sloppy and having loose rules. [¶] But to go out farther and say, well, they had this attorney that wasn't practicing law legally, I don't see the relevancy."

We also fail to see its relevancy. As the trial court said, the evidence would have required additional witnesses and testimony, thereby consuming an undue amount of time on a matter that was, at best, tangential to the issues. No abuse of discretion occurred.

Even if it did occur, any excluded evidence did not prejudice defendants. The defense had an adequate opportunity to attack Medal's credibility by, for example, suggesting he personally took out a questionable loan from Azteca. And, as we have said, there was abundant, other evidence of Azteca's business practices. Also, in closing argument, Najarro's counsel connected those

practices to Medal: "So, why does it matter that their director, their chief legal director of legal compliance wasn't an attorney? Because they don't care about the rules." Therefore, Medal's credibility and how it reflected on Azteca's credibility was before the jury.

3. Breidsprecher's emails

During Cardenas's testimony, she tried to introduce emails showing that Azteca executives told her to engage in fraudulent transactions. First, she discussed how various people, including Steckel (the CEO) and Cortez (CFO and Cardenas's boss) were paid "outside of payroll" so that payments to them were not in Millennium. She was also told to change the "work state" for certain employees so that they could "keep their homestead" and taxes would be paid in a state other than California. When Cardenas's counsel tried to show Cardenas an email from Breidsprecher on that subject and on which she was copied, the prosecutor objected that it was hearsay. Defense counsel responded that the email corroborated Cardenas's testimony and explained her state of mind. The trial court ruled that the email was inadmissible hearsay.

Cardenas continued to testify about Azteca's odd business practices, including that CEOs did not, at certain times, receive a salary. Rather, she was told to reduce Steckel's salary to $210 and she prepared payments for him in other people's names. Thus, Cardenas's counsel asked her whether Breidsprecher via email had ever asked her "to pay somebody else in the name of somebody else." When he tried to show Cardenas the corroborating email from Breidsprecher, the court sustained the prosecutor's hearsay objection. The excluded email directed Cardenas to pay $200 to Marcey Morfin to cover Steckel's daily

expenses. Next, the court excluded an email from Cardenas to Breidsprecher confirming "our verbal conversation in which you approved a $5,000 taxable moving allowance to Rodolfo Garcia Sandoval, which we will gross up." Defense counsel argued that the email showed, consistent with Cardenas's theory of the case, that the CFO authorized her actions, thus the email "explain[s] her actions." The court found that this email also was inadmissible hearsay.

We need not address whether the trial court erred by excluding the emails, because even if they were erroneously excluded, defendants were not prejudiced. The evidence in the emails was otherwise before the jury. Cortez, for example, testified that, for a time, he was paid from Mexico and that his salary was not subject to U.S. taxes. He also knew that Steckel did not receive a salary "on the pay books" in 2006 and 2007 and that there were instances where a payment was processed in the name of one employee but in fact went to another person. Breidsprecher confirmed that the challenged email, defense exhibit W, told Cardenas to reduce Steckel's salary to $210.64. He also confirmed that he sent an email to Cardenas telling her to process Steckel's expenses through another person. There was, therefore, no shortage of evidence that Azteca directed Cardenas to engage in suspicious accounting practices. Any error was not prejudicial. (See generally *People v. Richardson*, *supra*, 43 Cal.4th at p. 1001.)

4. Other wrongdoers

The trial court excluded evidence that Oscar Badillo and Marco Rivera received unauthorized payments. The prosecutor represented that his office elected not to proceed against those individuals. This charging decision was properly excluded

because it was irrelevant. (See *People v. Birks* (1998) 19 Cal.4th 108, 134 [prosecuting authorities ordinarily have sole discretion to determine whom to charge with public offenses].)

C. *Admitted evidence*

The second class of claimed evidentiary errors concerns the admission of (1) Jazmin's gambling expenses, (2) Qqest forms, and (3) a check from Alberto to Castaneda.

1. Jazmin's gambling expenses

The trial court denied Jazmin's motion to exclude evidence of how much she spent on gambling, finding evidence of the defendants' spending habits to be "highly relevant," especially if the money Jazmin spent was greater than her annual salary. If the amount was in the $4,000-$5,000 range, then the evidence might be less relevant, but, in such case, the court said it would reexamine relevancy. Thereafter, Detective Zaun testified that Jazmin spent $4,331.08 related to gambling over a 22-month period.

The trial court did not abuse its discretion by refusing to exclude this evidence. That Jazmin gambled had some relevance to motive. That the amount averaged about $200 per month over a 22-month period was, we acknowledge, slight evidence of motive. But, that being the case, we fail to see that admitting this evidence was a miscarriage of justice. To the extent the prosecution wanted to suggest that Jazmin needed the stolen money to support a gambling habit, the evidence of that was not compelling. Moreover, defense counsel effectively cross-examined the detective about the $4,331.08 figure, establishing that some of it may not have been spent on gambling but, rather, on other

matters associated with a Las Vegas vacation such as hotel rooms and food.

2. The Qqest forms

Defendants contend that the Qqest direct deposit adjustment authorization forms, People's exhibits 1 through 75, should have been excluded because they were not properly authenticated.[13] We disagree.

The defense objected to the Qqest forms at an evidentiary hearing on the ground they could not be authenticated. The prosecutor argued that they were admissible under Evidence Code sections 1420 and 1421. Castaneda's counsel agreed that, to the extent the forms had Cardenas's signature they were admissible under Evidence Code section 1421, but counsel pointed out that not all forms had her signature. The trial court overruled the objections on the ground they went to the weight of the evidence but not to its admissibility. Garcia, Azteca's internal auditor, thereafter testified that he was familiar with the general Qqest form, the information it required, how it was the payroll manager's duty to fill it out and fax it to Qqest, and how Qqest deposited the funds into the account on the form. In the course of performing an audit, Garcia asked Cardenas for a hard copy of the Qqest forms. What she gave him was a mess and missing forms. On his request, Qqest sent the forms to him via email. He had reviewed People's exhibits 1 through 75, and they were a subset of what Qqest sent him via email. At the close of the People's case-in-chief, the defense renewed its objection, and the court again overruled it, finding that Garcia had authenticated the forms.

---

[13] All counsel objected to their admission.

Under the applicable abuse of discretion standard of review (*Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43, 50-51), we agree that Garcia laid a sufficient ground to authenticate the Qqest forms. "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) "As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321; see also *People v. Dawkins* (2014) 230 Cal.App.4th 991, 1002.)

Defendants' challenge to the authenticity of the documents is based on Azteca's failure to call Qqest's custodian of records. However, that was not the only way the documents could be authenticated. Under Evidence Code section 1421, for example, a writing may be authenticated by evidence that the writing refers to or states matters unlikely to be known to anyone other than the person who the proponent of the evidence claims to be the author. Here, the prosecution claimed that Cardenas authored the forms. Garcia substantiated that claim by testifying that Cardenas, as payroll manager, filled out Qqest forms; hence, the payroll manager was uniquely in possession of the information on the forms. Moreover, all but two of the forms bore Cardenas's signature, and Castaneda's counsel agreed that forms bearing Cardenas's signature were admissible under Evidence Code section 1421.

Defendants also argue that the forms were not business records because they "were obtained with the intent [they] be

used in court," and therefore their admission violated the confrontation clause. (See generally *People v. Sanchez* (2016) 63 Cal.4th 665.) This is incorrect. Garcia testified he obtained the forms in the course of an audit, a function he performed regularly. Castaneda, however, discounts his testimony as "not trustworthy." This amounts to an improper request we second guess the trial court's findings as to authentication.

To the extent defendants also argue on appeal that the Qqest forms were inadmissible hearsay, the record is not clear whether this specific objection was raised below. It is therefore forfeited. (*People v. Wheeler* (1992) 4 Cal.4th 284, 300.) In any event, the Qqest forms were operative documents; that is, the forms were offered as direct evidence that fraudulent payments were made to defendants. (See, e.g., *Jazayeri v. Mao*, *supra*, 174 Cal.App.4th at pp. 315-316.)

Finally, Castaneda claims that admitting the documents violated her confrontation rights because she could not cross-examine the documents' author, Qqest. The prosecution, however, did not claim that Qqest authored the documents. It claimed that Cardenas authored them. Cardenas testified and was subject to cross-examination. Notably, she testified that the payments represented by the forms were authorized. We therefore do not agree that admitting the Qqest forms violated defendants' confrontation rights.

3. The check from Alberto

While cross-examining Detective Zaun, Alberto offered into evidence defense exhibit II, a check dated February 28, 2008 in the amount of $1,520 written against Alberto's account to Castaneda. The detective testified that the signature on the check appeared to be different than the handwriting on the rest

of the check. Similarly, the handwritten endorsement on the back of the check appeared to be in a different handwriting. Castaneda's counsel objected to its admission. In part because the detective had received the check in response to a search warrant, the trial court found no hearsay or foundation problems and admitted it.

We discern no abuse of discretion. The check was not introduced for the truth of the matter, that Alberto wrote the check to Castaneda. Rather, based on the different handwriting, Alberto introduced the check to show that he did *not* write it. Also, Detective Zaun's testimony that the bank produced the check in response to a search warrant was sufficient evidence that the check was what it purported to be—a check drawn against Alberto's account.

IV. Prosecutorial misconduct

Defendants argue that the prosecutor engaged in pervasive misconduct.[14] We disagree.

A. *Prosecutorial misconduct in general*

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial

---

[14] We address each claim of misconduct on the merits, thereby obviating the need to consider whether defendants forfeited the claims by failing to object below and whether defense counsel provided ineffective assistance by failing to object.

misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] . . . Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

We now turn to the multiple, specific instances of alleged prosecutorial misconduct.

B. *Shifting the burden of proof*

It is improper for a prosecutor to misstate the law generally, and in particular, to attempt to lower or to shift the burden of proof. (*People v. Hill* (1998) 17 Cal.4th 800, 829, 831-832; *People v. Williams* (2009) 170 Cal.App.4th 587, 635.) However, "[a] distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340; see, e.g., *People v. Weaver* (2012) 53 Cal.4th 1056, 1077.)

Here, defendants claim that the prosecutor twice tried to shift the burden of proof, first, by referring to a contact letter sent by Detective Zaun and, second, by suggesting there were two ways to view the case.

1. The contact letter

During his opening statement, the prosecutor represented that defendants did not respond to Detective Zaun's letter asking them to contact him. Cardenas's counsel objected on Fifth

Amendment grounds. The prosecutor responded that the letter was a mere invitation to talk and that no statement was otherwise coming in. The trial court told the prosecutor to move on and they would deal with it later. The court did not return to the issue until the prosecutor asked the detective about the letter during his trial testimony. Jazmin's counsel renewed the objection, and Cardenas's counsel added that the evidence was prejudicial. In response, the prosecutor argued that there was no Fifth Amendment issue because there was no custodial interrogation. The court overruled the objection. The detective then testified that he mailed letters to each defendant asking they contact him " 'regarding an investigation that concerns you.' " Only Najarro responded: She called the detective but when he wouldn't get into the details of the investigation over the phone and asked that she meet with him, she declined. The detective also testified it was not uncommon for people to ignore such letters.

We do not agree that Detective Zaun's testimony suggested that defendants had an obligation to talk to him to demonstrate their innocence. Rather, the danger in the evidence was it could have been perceived as substantive evidence of guilt. Although the United States Supreme Court has held that the government may comment on a defendant's pre-arrest silence for impeachment purposes (*Jenkins v. Anderson* (1980) 447 U.S. 231), it has yet to decide on the constitutionality of using pre-arrest, pre-*Miranda* silence as substantive evidence of guilt (*People v. Waldie* (2009) 173 Cal.App.4th 358, 364). *Waldie*, however, concluded that evidence of a detective's pre-arrest, repeated phone calls to the defendant and of the defendant's apparent evasion was "constitutionally infirm." (*Id.* at p. 366.)

Waldie also concluded that any error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24.

The totality of the record here similarly shows that any error was harmless beyond a reasonable doubt. The prosecutor's comments were brief and he did not thereafter argue that defendants' failure to respond to the letter was evidence of their guilt. In fact, Detective Zaun testified that many people ignored contact letters. And, to the extent the prosecutor's comments were in error, they were not a part of a pattern of misconduct, as we demonstrate below.

2. Two theories of the case

Defendants also argue that the prosecutor lowered the burden of proof by suggesting there were only two ways to view the case, one being that defendants took advantage of Azteca's lax protocols and Cardenas intentionally diverted money to her friends without recording it in Millennium. The prosecutor offered an alternative, explaining:

> Or it happened exactly Ms. Cardenas'[s] way. That Azteca authorized every single one of these transactions. And she inputted every one of them into the Millen[n]ium system, except for some strange reason when Azteca would tell her in writing not to do it. [¶] There is no middle ground here. It happened her way or Azteca's way. [¶] I suggest to you that makes your job a lot easier. . . . [¶] I argue that, don't muddle the two theories. There is usually a prosecution theory and there is a defense theory.

> Don't mix and match them when you analyze them. Analyze each case on both theories.

Defense counsel objected that the prosecutor was "[s]hifting the burden" and "[i]mproper argument," but the trial court overruled the objections and stated it "is clear the burden is on the People to prove their case. That is not what he is saying." After agreeing that "is not what I am saying," the prosecutor elaborated on Cardenas's theory of the case and asked why would Azteca go through the trouble of framing innocent people. He then reminded the jury that "[t]he defense does not need to put on any case. They have no obligation to present evidence," and that "the burden of proof is on me."

Even if we ignored the prosecutor's clarification that he had the burden of proof, we would not find any error in his statements. He was simply describing the two theories of the case: the defense theory and the prosecution theory. He was not talking about the burden of proof at all or otherwise suggesting that the jury, to satisfy the reasonable doubt burden of proof, merely had to decide which theory made more sense or was simply "reasonable." This contrasts with the improper argument in *People v. Centeno* (2014) 60 Cal.4th 659, on which defendants rely. The prosecutor in *Centeno* implied that the People's burden could be met if its theory was "reasonable" in light of the facts supporting it and suggested that the jury could find the defendant guilty based on a reasonable account of the evidence. (*Id.* at pp. 671, 673.) The prosecutor here made no such statement. Moreover, *Centeno* said it was permissible to tell the jury it could reject impossible or unreasonable interpretations of the evidence. That is all the prosecutor here was saying.

C. *Misconduct during closing argument*

Castaneda contends that the prosecutor committed misconduct during his closing statement by (1) misstating the evidence about Castenada's bank account, (2) misleading the jury, (3) downplaying Azteca's fraud, (4) appealing to the jury's sympathy, (5) misstating what happened in "the conference room," and (6) misstating evidence concerning Najarro.

1. Castaneda's bank account information

Castaneda contends that the prosecutor misstated the evidence when he said:

> Our theory is that Ms. Cardenas had Ms. Castaneda's account number and [Alberto's] account number, whoever .worked there, because they gave it to her. Because they wanted the money. These people lived together at various times. Friends. Siblings. They are all in it together. [¶] How would Ms. Cardenas get these account numbers unless it was provided by defendants?

The trial court overruled Castaneda's counsel's objection and reminded the jury that it was to decide the facts.

Although it is misconduct for a prosecutor to misstate the evidence (*People v. Hill*, *supra*, 17 Cal.4th at pp. 827-828), we fail to see how this comment even approaches misconduct. A reasonable inference from the evidence was that Castaneda, who had not been an Azteca employee for over a year, gave her account number to Cardenas. A prosecutor has wide latitude during argument, which can include reasonable inferences or deductions to be drawn from the evidence. (*People v. Thomas* (2012) 53 Cal.4th 771, 822.)

2. Misleading the jury about defense access to records

During rebuttal, the prosecutor commented on the defense's discussion about bank records: "This is what I want you to consider about the records. We do know that the defense lawyers had access to the records. We also know that whenever they want to prove any transaction that they want to prove, those records are attached to those exhibits. They have no problem pulling up a record[.]" Castaneda argues that this comment was improper because the prosecutor knew that Azteca had "intentionally" destroyed emails and files and failed to turn over Millennium records.

First, the prosecutor knew no such thing. Who deleted emails and files was an open issue, with the prosecution introducing evidence that Cardenas could have deleted the files. And, as we have said, the prosecution did not fail to turn over Millennium records. Second, defendants read too much into the prosecutor's comment. He was clearly talking about bank records, not all of the records produced or not produced during discovery. No misconduct occurred.

3. Downplaying Azteca's tax fraud

Castaneda claims it was misconduct for the prosecutor to ask the trial court to exclude evidence Azteca had a motive to defraud and then to turn around during closing argument and downplay evidence that Azteca committed tax fraud. This claim suggests that the prosecutor was successful in excluding all evidence of Azteca's corrupt business practices. The prosecutor never tried to exclude, wholesale, evidence of Azteca's business practices. Nor were those practices a mere sideshow at trial.

Azteca's tax fraud was a major theme. Extensive evidence of Azteca's tax fraud having been admitted, of course the prosecutor tried to downplay it. We fail to see how the prosecutor's attempts to refocus the matter on defendants were anything but appropriate, vigorous argument. (See generally *People v. Wharton* (1991) 53 Cal.3d 522, 567-568 (*Wharton*).)

4. Appealing to the jury's sympathy

Next, Castaneda argues that the prosecutor improperly appealed to the sympathy and passions of the jury by saying it had just seen "a hatchet job of the first order" designed to make "you hate Azteca. Making you hate them so much you lose your reason. You lose your fairness. You lose your sense of justice." Along that same theme, the prosecutor said he did not dispute that defendants deserved a fair trial with all its accoutrements "and I would not have it any other way." But "[t]hey want you to convict Azteca without the benefit of their jury trial, without the benefit of a charging document. Without the benefit of discovery." "And why are they being hypocritical that we are here to give a fair trial to the defendants, which they deserve, but those same principles don't apply to Azteca? Why?"[15]

We do not agree that this was an improper appeal to the jury's passions or prejudice (*People v. Fields* (1983) 35 Cal.3d 329, 362) as opposed to a fair, albeit vigorous, reminder that Azteca was not on trial. " 'It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn

---

[15] At this point, counsel for Najarro objected and the court told the prosecutor to move on.

therefrom. [Citations.] . . . 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets . . . ." ' " (*Wharton*, *supra*, 53 Cal.3d at pp. 567-568; *People v. Thomas*, *supra*, 53 Cal.4th at p. 822.)

5. The conference room

During the defense case, Cardenas testified that on November 12, 2008, executives from Mexico were in a conference room with, among others, Steckel, Medal, Garcia, and Breidsprecher. Cardenas heard Steckel yell, " 'It's either Melanie's head or your heads.' " Defense counsel highlighted this evidence during their closing arguments. The prosecutor then addressed the issue during his rebuttal, telling the jury there were two ways this case could play out. If, as Cardenas claimed, the transactions were authorized, then why would the CEO want to proceed with filing a police report and prosecuting innocent people, and, moreover, open up Azteca employees to perjury?[16] But, if "you adopt the true version of what happened," then Steckel was upset that the CFO had failed to catch the theft, so either "[w]e bring these people to account for stealing from our company or it's your head or hers." The prosecutor argued that, "[f]rom the evidence, you can infer that is what happened. To infer otherwise, that Steckel would get so upset about lawful transactions and direct his people to falsely accuse these defendants doesn't make any sense."

The prosecutor was not misstating the evidence. He was asking the jury to draw a reasonable inference from the evidence. This was proper. (*Wharton*, *supra*, 53 Cal.3d at pp. 567-568.)

---

[16] Defense counsel for Najarro objected to this argument.

6. Misstating the evidence

During his closing statement, the prosecutor suggested that the timing and amounts of deposits showed they were not authorized. As to Najarro, for example, $24,315.42 was disbursed to her in a six-month period: "For someone who made about $5,000 a month or about $60,000 a year. Six months. All that money." Najarro's counsel objected that the prosecutor had misstated the evidence and confused the dates. The trial court overruled the objection but instructed the jury that it was to decide the facts.

On appeal, the People concede that the prosecutor had his facts mixed up, because the money was disbursed to Najarro over an approximate 14-month period, not a six-month one.[17] We fail to see how this mistake amounts either to federal or state constitutional error, especially when the trial court immediately instructed the jury that the facts were for them to decide and the jury was thereafter instructed with CALCRIM Nos. 200 (jury is arbiter of facts) and 222 (nothing attorneys say is evidence). Moreover, in the course of making this argument, the prosecutor told jurors to look at People's exhibit 78, which showed that the distributions to Najarro took place from January 2007 through March 2008. It is therefore unlikely the jury relied to Najarro's detriment on any misstatement.

D. *Maligning defense counsel*

Castaneda also argues that the prosecutor maligned defense counsel by (1) suggesting that counsel gave biased information to defense expert Wall, (2) suggesting that defense

---

[17] The prosecutor also understated the total amount disbursed to Najarro: it was $28,079.69, not $24,315.42.

counsel failed to give Millennium records to Wall, and (3) by referring to the defense's "hatchet job" and calling Garcia "smarmy."

1. Wall

Wall testified for the defense that, based on his review of the documentary evidence, Azteca's "books and records" were "unreliable" and its accounting information should be viewed with extreme skepticism. He also testified that at least four of the challenged transactions involving Najarro were authorized. On cross, the prosecutor asked Wall whether Najarro's defense counsel provided the information on which Wall based his opinion and whether it was Wall's job to review source materials. Wall answered yes to both questions. The prosecutor then asked whether it had occurred to Wall that defense counsel "as the lawyer of the defendant, might be biased in the defendant's favor?" Wall answered that he believed he could rely "on her to represent what was stated in court before the jury." Najarro's counsel objected on relevance grounds and under Evidence Code section 352, and the court overruled the objections. The prosecutor then asked why Wall believed he could rely on defense counsel's lack of bias and accuracy, but counsel interjected with objections, which the court overruled.

Later, Najarro's counsel charged the prosecutor with suggesting she fabricated evidence and asked for an instruction that the prosecutor's questions were improper. The trial court, however, said that the questions were typical cross of an expert: "[D]id you talk to the attorney? What did he tell you to say? What did you look at? How many hours did you meet with him?" The prosecutor added that his questions drove at the expert's obligation to do an independent investigation using source

documents and not rely on a summary from a defense lawyer. The court said that "is the way it came across and also keep in mind that the records were there to back up the claims. There is no harm done, even if you did perceive it that way."

It is improper for a prosecutor to suggest that the defense fabricated evidence or otherwise to portray defense counsel as the villain in the case. (*People v. Sandoval* (1992) 4 Cal.4th 155, 183.) By his comments, the prosecutor was suggesting that the expert had inadequate information to render an opinion, not that defense counsel had fabricated or otherwise misstated the evidence. As the trial court noted, experts are usually cross-examined about the materials they relied on to form their opinion. The prosecutor thus clarified during his rebuttal argument that he "never meant to imply . . . that [Najarro's counsel] was guilty of any wrong-doing by giving a summary of this case to her expert. So, to imply that I was questioning her ethics is completely wrong. What I was implying and what I think, is that this expert, Mr. Wall, is supposed to go to the source. . . . [¶] And I am critical [of] him for accepting a summary from the lawyer of his client." No misconduct occurred.

2. Wall and Millennium

While cross-examining Wall, the prosecutor asked whether the witness understood the prosecutor's position that the challenged transactions reflected in People's exhibits 1 through 75 were not recorded in Millennium and whether Wall thought it important to request Millennium records from defense counsel. Wall said he had asked for them but they were not provided. On redirect, counsel for Najarro established that Wall in fact had seen Millennium records. But, when counsel then asked whether Azteca had provided the "full, entire records to the defense,"

Wall's answer—"As far as I know, they have not"—was stricken on the prosecutor's objection. When counsel for Cardenas similarly asked Wall whether the prosecution had provided Millennium records, the court sustained the prosecutor's speculation objection. Najarro's counsel thereafter complained that the prosecutor had suggested that the defense fabricated or hid evidence, when the prosecutor knew that Azteca had refused to turn over records. After a long discussion regarding pretrial discovery, which we summarized in connection with the *Brady* issue, the court said it would instruct the jury that Azteca did not provide copies of Millennium records and provided limited access to review some records. The court thereafter instructed the jury: "Azteca did not provide copies of the Millen[n]ium records referenced in this case. Azteca provided limited access to review some of the Millen[n]ium records to the attorneys in this case."

To the extent the prosecutor's questions could be interpreted to suggest the defense failed to give Millennium records to its expert, the trial court's instruction cured any prejudice. (*People v. Navarrete* (2010) 181 Cal.App.4th 828, 834 [ordinarily, curative instruction to disregard improper testimony is sufficient to protect defendant from injury of such testimony, and we presume jury followed instruction].) In any event, Azteca did give the defense access to Millennium, albeit a limited one, and the defense did not then challenge the access it was given until the issue came up during Wall's testimony. The prosecutor's questions were therefore not misconduct.

3. "Hatchet job" and "smarmy"

Defendants also contend that the prosecutor attacked defense counsel's integrity and cast aspersions (see generally *People v. Hill*, *supra*, 17 Cal.4th at p. 832) on them when he

reminded the jury that the defense had no burden of proof, but "I want to direct your attention to how the defense presented their case and into what area. [¶] I am going to be very blunt here. This—you just saw a hatchet job of the first order. This case from the defense perspective was about making you hate Azteca. Making you hate them so much you lose your reason. You lose your fairness. You lose your sense of justice. [¶] Because how much of [Cardenas's counsel's] examination was about Mr. Medal's law school career or which bar exam he took?" Najarro's counsel's objection was overruled, so the prosecutor continued to point out that there had been "endless questions about Azteca paying employees from Mexico off the books. They may have done that. If it is wrong, they will pay a consequence. But it shouldn't be in this case." The prosecutor returned to that theme in his rebuttal argument, saying that he was just alerting the jury to the defense strategy of "attacking Azteca. Attack. Attack. Insult. Disparage. Just show utter contempt for Azteca. [¶] And the reason they are doing that is because they want that energy to transfer to you. They want you to share that hatred or that contempt for Azteca so you can't fairly evaluate the evidence. [¶] Now, this is the part where I was wrong. I thought by calling them out, they would stop doing that when they made their argument and focus on the evidence, which shows overwhelming guilt of their clients. [¶] They didn't. How many times did you hear [Cardenas's counsel] call Mr. Garcia smarmy? I counted three times, at least. Why does he have to insult the witnesses from Azteca? If you perceived Mr. Garcia as just an accountant testifying in a different language, trying to do the best he can, with some long, often compound, complex questions, fine. Either

he answered well or he didn't. [¶] But why, why have to insult someone who is just here under subpoena and testifying?"

In addition to the contention that this argument was an appeal to the jury's sympathies, which we rejected above, defendants also contend it maligned defense counsel. Not so. The prosecutor was pointing out that the defense was trying to distract the jury from defendants' guilt by highlighting Azteca's wrongdoing, even though Azteca was not on trial. He therefore was attacking the defense case and argument, not counsel. (See, e.g., *People v. Smith* (2003) 30 Cal.4th 581, 635; *People v. Cunningham* (2001) 25 Cal.4th 926, 1002-1003 [prosecutor's comments that defense job was to create " 'straw men' " and " 'to put up smoke, red herrings' " would be understood as admonition not to be misled by defense interpretation of evidence].) Finally, the prosecutor's "smarmy" comment accurately characterized what defense counsel had said in closing, that is, that Garcia was "kind of smarmy." We fail to see how quoting the defense could be misconduct.

V. Sufficiency of the evidence

All defendants moved for acquittal under section 1118.1 at the close of the People's case-in-chief. All defendants except Cardenas now contend that their motion should have been granted because there was insufficient evidence to support their convictions for grand theft or for receiving stolen property.

A. *Standard of review*

Where a defendant makes a section 1118.1 motion for judgment of acquittal at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point. (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213.)

When determining whether the evidence was sufficient to sustain a criminal conviction, " ' "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104.) We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) " 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; see also *Jackson v. Virginia* (1979) 443 U.S. 307.) Testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to establish a fact and support a conviction. (*People v. Allen* (1985) 165 Cal.App.3d 616, 623; Evid. Code, § 411.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Brown* (2014) 59 Cal.4th 86, 106.) If the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the

circumstances might also reasonably be reconciled with a contrary finding. (*Ibid.*)

A conviction of receiving stolen property requires proof (1) the property was stolen, (2) the defendant knew it was stolen, and (3) the defendant had possession of it. (*In re Anthony J.* (2004) 117 Cal.App.4th 718, 728.) The knowledge requirement requires conscious presence of the items; it is not enough that someone else placed the items in, for example, the defendant's home or car and the defendant never became aware he had the items in the first place. (*People v. Speaks* (1981) 120 Cal.App.3d 36, 39.) Knowledge and intent are "rarely susceptible of direct proof and generally must be established by circumstantial evidence and the reasonable inferences to which it gives rise." (*People v. Buckley* (1986) 183 Cal.App.3d 489, 494-495; see also *People v. Thomas* (2011) 52 Cal.4th 336, 355.)

B. *Castaneda*

Castaneda contends there was insufficient evidence that the money was stolen, that she knew it was stolen, and that she knowingly possessed it. We disagree.

Castaneda cursorily acknowledges Garcia's testimony that the five direct deposits totaling $11,432.65 into her account were not authorized. Notwithstanding that our review is based on the record as it stood when the motion for acquittal was made, Castaneda then focuses on Cardenas's testimony that the deposits *were* authorized. Although resolution of this type of conflict is a classic example of a question for the trier of fact, Castaneda adds that Cardenas explained that the money was put into Castaneda's account so that Jazmin could take it to Mexico to pay for Retador, the boxing show. This explanation, Castaneda asserts, was more "believable," given Azteca's practice

of paying one person in another's name and that Azteca destroyed evidence through which defendants could have proved their innocence.

All of this evidence, however, was before the jury, which clearly rejected Cardenas's explanation for why money intended for Jazmin/Retador would be in Castaneda's account. Indeed, the jury could have found the explanation particularly unbelievable given that all of the deposits into Castaneda's account in 2008 occurred when she was no longer an Azteca employee, having left its employ in December 2006. This, therefore, was not an instance where one employee was paid in the name of another employee. Also, around the time the deposits were made, from April 18 to June 30, 2008, Castaneda withdrew almost that same amount, $11,948.03, which shows that she did knowingly possess the stolen money. Possession of stolen property, "accompanied by no explanation or unsatisfactory explanation, or by suspicious circumstances, will justify an inference that the goods were received with knowledge that they had been stolen." (*People v. Myles* (1975) 50 Cal.App.3d 423, 428.)

C. *Alberto*

Alberto challenges the second and third elements of the crime of receiving stolen property: that he knew the money was stolen and that he possessed it. (*In re Anthony J.*, *supra*, 117 Cal.App.4th at p. 728.) Stated otherwise, he contends the mere fact that the money was in his bank account does not show he knew it was there or he possessed it.

Alberto likens his case to *People v. Jolley* (1939) 35 Cal.App.2d 159. The *Jolley* defendant was convicted of receiving stolen car tires. The defendant was in the business of refurbishing tires, which he stored in his home garage. (*Id.* at

p. 161.) His brother left stolen tires in the defendant's garage, but the brother and the defendant denied that the defendant was complicit in any crime. The court found that, although the "circumstances undoubtedly appear to be suspicious," proof "that stolen property is brought upon one's property by a thief does not establish possession thereof by the [property] owner." (*Id.* at p. 163; see also *People v. Zyduck* (1969) 270 Cal.App.2d 334, 335-336 [defendant's mere presence in car owned and driven by another in which stolen property was visible insufficient to show possession].) Thus, "[d]ominion and control are essentials of possession, and they cannot be inferred from mere presence or access. Something more must be shown to support inferring of these elements. Of course, the necessary additional circumstances may, in some fact contexts, be rather slight." (*Zyduck*, at p. 336.)

Such additional circumstances are present here. First, a bank account is different than, for example, the garage in *Jolley* and the car in *Zyduck* in which the defendant was merely a passenger. A bank account number is a confidential matter that is usually known just to the account holder and perhaps select others. Cardenas and Azteca had no reason to know that account number, because Alberto was never employed by Azteca. Thus, someone gave that account number to Cardenas. The jury was entitled to infer that it was Alberto, especially since there was evidence he knew Cardenas.

Second, although Alberto never worked for Azteca, three deposits, which corresponded to Qqest forms, were made into his account: (1) February 28, 2008, $1,538.47; (2) March 3, 2008, $4,689.43; and (3) April 18, 2008, $2,546.44. Around the time the monies were deposited, a total similar amount was withdrawn.

On February 28, 2008, a check in the amount of $1,520 was made out to Castaneda. Five other checks totaling $7,600, four to "cash" and one to Jazmin, were written on March 1, 2008 and April 18, 2008. All checks bore the signature, "Alberto Garcia." Certainly, there was evidence Alberto was in Mexico on the dates of the checks, which the jury could have believed showed that Alberto did not sign them.[18] However, the jury also could have found that even if Alberto was in Mexico, he could have, for example, signed a series of checks before leaving the United States. Indeed, the jury could have further found that Alberto's bank account activity suggested that he was not in Mexico throughout the entirety of February through April 2008. Also, although the checks bore what appeared to be the handwriting of different people, all were consistently signed by "Alberto Garcia" in what the jury could have determined was the same hand. Indeed, People's exhibit 87, Alberto's bank records, contained two additional checks, both written in February 2008, to an entity and person not associated with this case. The jury could have determined that the signatures on those checks were the same as the signature on the challenged checks, that is, Alberto's signature.

Finally, the jury could have found Cardenas's explanation for the deposits odd. She explained that Jazmin gave bank account numbers to her and she, Cardenas, deposited money into those accounts, which included Alberto's, for Retador's production costs. Jazmin then withdrew the money out of the accounts and took the cash to Mexico to pay for Retador. Why deposit money

---

[18] Adam Gonzalez, a contestant on Retador, testified that during the filming period from late December 2007 to about May 2008, "when I was there, I remember [Alberto] being there."

into Alberto's account instead of Jazmin's? Why carry large amounts of cash into Mexico? The jury was entitled to resolve such questions against Alberto.

D. *Jazmin*

Jazmin argues that "only speculation" and conjecture supported the conclusion she knew the funds deposited into her account were stolen. She thus recites evidence that, for example, Azteca did not require all nonsalary payments to be recorded in Millennium; Azteca had sloppy accounting methods, advances and reimbursements were sometimes adjusted directly in the payroll register but not recorded in Millennium; and that a person would not notice any accounting discrepancy because of the odd way in which Azteca did business.[19] To be sure, there was abundant such evidence. But, the jury clearly rejected it in favor of Jazmin's guilt. Jazmin's argument amounts to an improper request we reweigh the evidence and evaluate witness's credibility. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 357.)

E. *Najarro*

The jury found Najarro guilty of grand theft and of receiving stolen property. She challenges the sufficiency of the evidence to support her convictions of both counts.

As to the grand theft charge, the People's theory was that Najarro aided and abetted that crime because her job was to

---

[19] One allegedly fraudulent transaction, for example, showed that $1,270.55 was deposited into Jazmin's account on January 23, 2007, but that adjustments were made to Jazmin's work account amounting to $1,270.55.

reconcile the accounts every month.[20] Grand theft requires taking property without the owner's consent and asporting it with the specific intent to deprive the owner of that property permanently. (*People v. Whitmer* (2014) 230 Cal.App.4th 906, 922; CALCRIM No. 1800.) A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime. (*People v. Delgado* (2013) 56 Cal.4th 480, 486; *People v. Prettyman* (1996) 14 Cal.4th 248, 259; § 31.) Among the factors that may be taken into account when determining whether a defendant was an aider and abettor are presence at the crime scene, companionship, and conduct before and after the offense. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5; *People v. Battle* (2011) 198 Cal.App.4th 50, 84-85.) However, mere presence at the scene of a crime, knowledge of the perpetrator's criminal purpose, or the failure to prevent the crime do not amount to aiding and abetting, although these factors may be taken into account in determining criminal responsibility. (*People v. Garcia* (2008) 168 Cal.App.4th 261, 272-273; *People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530.)

Najarro worked at Azteca from May 2006 through March 2008 as a junior accountant. Her main responsibility was, on a monthly basis, to reconcile Azteca's payroll with its bank accounts. If, for example, $100,000 was issued in payroll, then a

---

[20] The prosecutor argued: "And if she was not involved in this crime, she would have known that these transactions were occurring and they were not registered in Millennium, which is the way Azteca would have found out about them."

corresponding amount should be deducted from Azteca's payroll account. She had to investigate discrepancies and to issue a report by the fifth of every month. She was also supposed to forward account balances of Azteca's bank records to a supervisor. Cortez reviewed "bank statements for the reports" Najarro submitted, and she regularly noted discrepancies in payments that were going out of Azteca versus what should have been anticipated.

Hence, Najarro was present at the scene of the crime. She and Cardenas worked at Azteca during the relevant time period, 2006 through 2008. Najarro's job was to reconcile payments from Azteca's bank account with the payroll register or Millennium or in some other fashion. Thus, Najarro was uniquely situated to know of the theft and either to cover it up or to look the other way. Najarro's receipt of the stolen property also buttresses the aiding and abetting theory, because it shows that she knew of the theft. Finally, Cardenas and Najarro had some kind of financial relationship outside of work, because Najarro wrote checks or transferred money to Cardenas from 2006 to 2008. Thus, all factors supporting aiding and abetting are present.

We are also not persuaded that there was insufficient evidence to support Najarro's conviction of receiving stolen property. Over a 15-month period, 15 direct deposits went into Najarro's bank account, the first on January 16, 2007 and the last on March 11, 2008, totaling $28,079.69. Also during this time, Najarro transferred $5,627.66 to Cardenas. Similar to Jazmin's argument, Najarro states there was nothing inherently suspicious about these payments, given that Azteca regularly issued bonuses and expense reimbursements, for example, by separate direct deposits. Najarro also points out that there was

evidence that at least two of the suspected transactions were in fact authorized and that others may have been as well. That may be, but all this evidence was before the jury, which nonetheless found Najarro guilty of receiving stolen money. We may not reweigh the evidence.

Although there is sufficient evidence to support Najarro's convictions of grand theft and of receiving stolen property, her conviction for the latter offense must nonetheless be stricken. From the premise that a thief cannot receive stolen property from herself flows the conclusion that commission of the theft excludes the possibility of a receiving conviction. (*People v. Ceja* (2010) 49 Cal.4th 1, 6.) Najarro therefore cannot be convicted of both crimes. There is, however, an exception—where there is a "divorcement" between the acts of theft and receiving, then a defendant may be convicted of both crimes. To establish a divorcement, "there must be a significant break in the defendant's possession and control over the stolen property." (*People v. Garza* (2005) 35 Cal.4th 866, 879.) A complete divorcement would occur when the thief disposes of the property and subsequently receives it back in a transaction separate from the original theft. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 759, fn. 8.) There is no evidence of a divorcement. Therefore, Najarro's conviction on count 3, receiving stolen property, must be reversed. (*Ceja*, at p. 9.)

And, although it is unclear whether Cardenas joins in this argument, as she has not separately briefed it, we nonetheless conclude that the argument applies to her.

VI. Notations on jury instructions

Some of the written instructions that went to the jury had notations on them. Defendants now contend that those notations

emphasized concepts favorable to the prosecution, thereby lowering the prosecution's burden of proof, violating defendants' due process rights, and constituting reversal per se. We disagree.

CALCRIM No. 220 (reasonable doubt) went to the jury as follows:

> Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. (The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.) (Underlining in original.)

In addition to the underlining and parentheses, the word abiding was circled.

CALCRIM No. 223 (direct and circumstantial evidence defined) went to the jury with the following notations:

> Facts may be proved by direct or circumstantial evidence or by a combination of both. Direct evidence can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. Circumstantial evidence also may be called indirect evidence. **(**Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question.**)** For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony

> is circumstantial evidence because it may support a conclusion that it was raining outside.
>
> Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence. (Underlining in original.)

CALCRIM No. 3550 (predeliberation instructions) went to the jury with the following notations:

> It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you.
>
> Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other. [¶] . . . [¶]

> Your verdict on each count and any special findings must be unanimous. This means that, to return a verdict, all of you must agree to it. . . . (Underlining in original.)

If we assume that these jury instructions were given to the jury with these notations, any issue regarding them was forfeited. The trial court and counsel went over the instructions during several conferences, and, before they were read to the jury, the court asked if anybody wanted to be "heard on any jury instructions?" Najarro's counsel said, "No," and no other counsel responded. Therefore, on this record, it appears that all counsel had the opportunity to review the instructions and raised no objection to them.

Otherwise, it is unclear who made the notations. The jury retired for deliberations on September 25, 2015. However, the written jury instructions were not file-stamped until September 29, 2015, the day the jury rendered its verdict. This leaves open the possibility that the instructions—if the ones in the clerk's transcript were the ones given to the jury—went into the jury room the day deliberations began and were returned to the clerk on September 29. Thus, the jury could have made the notations on the instructions. Error has not been affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Regardless of who made the challenged notations, we do not agree they lowered the prosecution's burden of proof. It would be speculation to attribute specific meaning to the notations, and some notations could just as easily be interpreted to highlight concepts favorable to the defense. (Cf. *People v. Lyons* (1956) 47 Cal.2d 311, 320-324 [judge's handwritten addition to jury instruction undermined cautionary instruction];

People v. Johnson (2004) 119 Cal.App.4th 976, 980 [court and prosecutor told jurors they could find the defendant guilty even if they had " 'some doubt' " about guilt].)

VII. Cumulative effect

Defendants contend that the cumulative effect of the purported errors deprived them of a fair trial. As we have " 'either rejected on the merits defendant[s'] claims of error or have found any assumed errors to be nonprejudicial,' " we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1235-1236; *People v. Butler* (2009) 46 Cal.4th 847, 885.)

DISPOSITION

Cardenas's and Najarro's convictions of receiving stolen property are reversed. The judgments against them and the remaining defendants are otherwise affirmed. The clerk of the superior court is directed to prepare modified abstracts of

judgment and to forward the modified abstracts of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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