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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DAVID BROWN, Defendant and Appellant.	B247767 (Los Angeles County Super. Ct. No. PA059232)

APPEAL from a judgment of the Superior Court of Los Angeles County, Harvey Giss, Judge. Reversed.

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Where a trial judge creates the impression he or she is allying with the prosecution, the judge commits misconduct. Here, the trial judge acted as a second prosecutor by examining witnesses, including defendant and appellant Michael David Brown. Because the judge's examination focused on issues relevant to whether defendant aided and abetted the murder of the victim, which was the People's theory of the case, and because that examination conveyed to the jury the judge's disbelief in defendant's theory of the case, we conclude that this was prejudicial misconduct. We therefore must reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *The prosecution's case-in-chief.*

On May 4, 2007, Frederick Thomas and defendant were at a house on Danube Street, where defendant's acquaintance Edward Arch lived. Arch was on the porch. Thomas and defendant were outside, near Thomas's car, a purple Cutlass Supreme.

Alexandra Cano and Dennys Pacheco drove up in a white Camaro. Cano was dropping off shoes at her cousin's nearby house. When defendant asked if they were lost, an argument ensued between defendant and Pacheco. Cano testified that Pacheco told the man he argued with, " 'Don't worry about it.' "[1] According to Thomas's testimony, Pacheco, as he drove away, made a gun gesture with his hands and said something about coming back and shooting them.[2]

Defendant told Thomas to follow Pacheco, and they got into their respective cars: Thomas got into his purple Cutlass, and defendant got into his Altima. Cano noticed the purple Cutlass following them, but she lost sight of it at some point. Thomas got a "chirp" on his walkie-talkie from defendant, who asked for Thomas's location. Thomas

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[1] Cano was unable to identify the man.

[2] Cano did not testify that Pacheco made any such gesture.

told him where he was, and Thomas received two more "chirps" from defendant, who asked if he was still following Pacheco. Defendant told Thomas, " 'We're gonna knock him,' " which meant they would kill Pacheco. Thomas, however, drove home.

Pacheco parked on Rayen Street, where Cano lived. Pacheco and Cano sat in the car, talking. Cano testified that a tan Altima pulled alongside them, and its passenger appeared to be angry. Pacheco got out of his car, and the Altima's passenger got out of the car holding a gun.[3] Pacheco and the passenger talked for about 10 seconds, and then the passenger shot Pacheco five times, killing him.

Two or three days after Pacheco was murdered, defendant told Thomas they needed to lay low, paint Thomas's car, and get out of town. Defendant told Thomas, " 'We knocked the little white car that was following, the dude that was in the white car.' "

From three photographic six-packs, Cano identified Thomas, defendant, and Arch. She said that all three resembled the shooter.

B. *The defense case.*

Eric Moton has known defendant for about 20 years and considers him to be like a little brother. Believing Thomas to be a bad influence on defendant, Moton tried to keep defendant from Thomas. But, on the day Pacheco was killed, Moton saw defendant and Thomas together. Moton told defendant to make Thomas leave, but this angered defendant, who drove away in his car while Thomas left in his purple Cutlass.

A few days later, Thomas asked Moton to bring to him items Thomas had left in defendant's car. Moton agreed, but he asked for gas money. When Moton delivered the items, Thomas confessed to Moton that he shot Pacheco because Thomas thought Pacheco was pulling a gun on him.

Defendant testified. On the day Pacheco was killed, defendant and Thomas were talking outside a friend's house. Defendant asked the driver of a white Camaro if he was lost. The driver yelled at defendant and made a shooting gesture with his hand. Thomas

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[3] Cano did not know whether the passenger was one of the two men Cano saw near the purple Cutlass on Danube.

got into his car and followed the Camaro, but defendant went home. Thomas "chirped" defendant to say he was following the Camaro.

About five minutes after defendant got home, Thomas arrived and asked defendant to drive him to the location where he'd followed the Camaro. Thinking that Thomas wanted to fight the Camaro's driver, defendant drove Thomas to Rayen Street. Thomas got out of the passenger side of the car. Pacheco got out of the Camaro, and Thomas shot him. Defendant did not know that Thomas had a gun or was going to shoot Pacheco.

Two or three days later, Thomas asked defendant to bring clothes Thomas had left in defendant's car. Not wanting to be around Thomas, defendant asked Moton to take Thomas's clothes to him.

When the police questioned defendant, he told them that Arch killed Pacheco, but he said this because he thought that Arch had implicated him as the shooter.

II. Procedural background.

On December 11, 2012, a jury found defendant guilty of count 1, first degree murder (Pen. Code, § 187, subd. (a)).[4] The jury found true the allegation that a principal was armed with a handgun (§ 12022, subd. (a)(1)).[5]

On January 24, 2013, the trial court sentenced defendant to 25 years to life plus one year for the gun enhancement, for a total of 26 years to life in prison.

DISCUSSION

I. Judicial misconduct.

The People's theory of the case was that Arch shot Pacheco, and defendant aided and abetted Arch. Defendant's theory of the case was that Thomas shot Pacheco, and, although defendant drove Thomas to Pacheco, defendant did not know that Thomas had a gun and intended to kill Pacheco. Defendant contends that the trial judge, in his

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

[5] At a separate trial, Arch was acquitted for insufficiency of the evidence under section 1118.1. The same trial judge presided over Arch's trial. Thomas was also named as a defendant in this case, but he pled guilty to voluntary manslaughter and was to receive 12 years in prison in exchange for his testimony at defendant's trial.

examination of witnesses, conveyed his support for the prosecution's theory and disbelief in his. After detailing the trial judge's examination of witnesses, we conclude that prejudicial misconduct occurred.

A. *The trial court actively examined witnesses.*

1. Cano.

Cano was with Pacheco during the relevant events, including when he was shot. Defense counsel elicited from Cano that she did not remember seeing defendant at any time or location the day Pacheco was killed. The court asked:

"So that goes for the time that you had the shoe exchange and it goes for the time when the shooting occurred?"

"[Cano]: Correct.

"The Court: Are you saying he wasn't there or you just don't recognize he wasn't there?

"[Cano]: I don't recognize him being there. [¶] . . . [¶]

"The Court: Are you saying whoever was there wasn't the defendant?

"[Cano]: That's not what I'm saying.

"The Court: That's what I want to know. Tell us what you mean by your answer.

"[Cano]: I'm not sure if he wasn't there, but I just don't remember really.

"The Court: Are you saying there was someone or more than one person there; you just could never identify them, or is it something different?

"[Cano]: Today I can't, no."

2. Thomas.

Thomas was the prosecution's main witness against defendant. Through his cross-examination, defense counsel tried to establish that Thomas was the shooter. When counsel asked, "Do you have any reason to believe that [defendant] should be afraid of you for any reason?" the trial court sustained its own objection of "[c]alls for speculation and conjecture."

3. Moton.

Moton testified that Thomas confessed to shooting Pacheco. The prosecutor and trial court examined Moton about his failure to tell the police about this confession. Moton denied that the police questioned him about the shooting. The court, however, asked whether Moton "ever c[a]me forward" and volunteered information. Moton said he hadn't because he didn't want to get involved, even though he dated defendant's mother after Pacheco was killed. The prosecutor then cross-examined Moton about his failure to come forward, in light of his brotherly feelings toward defendant. When Moton said that the first time he talked to someone about Thomas's confession was four months before trial, the judge interrupted, "During this time frame did you ever call the defendant's mother who you had dated and asked her 'by the way, what's going on in that case? What is your son's status in connection with that case? ' " Moton answered, "No."

The prosecutor then examined Moton's story that Thomas's confession occurred when Moton delivered Thomas's things to him. The court took over the examination:

"The Court: You never looked in the bags, did you?

"[Moton]: No.

"The Court: Did you ever think you might be transporting contraband for somebody else and take a rap for what was in those bags?

"[Moton]: I didn't think—at that time I didn't know that something had happened.

"The Court: But you knew Thomas was bad news. You told us that.

"[Moton]: Yeah.

"The Court: And you didn't want the defendant around him.

"[Moton]: Yes.

"The Court: But you were willing to transport stuff unknown to his house.

"[Moton]: Clothes.

"The Court: You weren't even paid for your time. You were just paid for gas.

"[Moton]: I was actually doing a favor for [defendant] to get the stuff over there."

Out of the jury's presence, defense counsel objected "to the manner in which the court is taking to questioning the witness. I believe the court is taking the position of being a prosecutor and not a judge." The court noted the objection and said the jury would be instructed not to infer anything from the court's questions.

4. Defendant.

Despite the objection, the trial court's questions continued during defendant's testimony in his defense. During the prosecutor's cross-examination of defendant, she asked what he thought was going to happen when Thomas asked him to drive to Pacheco. Defendant said he thought that Thomas and Pacheco would fight. When the prosecutor asked if defendant knew that Thomas was a gang member and that gang members usually have guns, the court again took over questioning the witness:

"The Court: . . . Did you think Freddie [Thomas] had a gun?

"[Defendant]: No.

"The Court: Did you ask him if he had a gun?

"[Defendant]: No.

"The Court: Did you ask him what his intentions were?

"[Defendant]: No.

"The Court: So you were going to drive blind into this incident?

"[Defendant]: I did.

"The Court: And take your chances.

"[Defendant]: Yeah.

"The Court: Is that it?

"[Defendant]: Yeah."

"[The Prosecutor]: So you were going to take your chances with whatever was going down, right?

"[Defendant]: Yeah.

"[Prosecutor]: So you were down to go with Freddie for whatever was going to happen?

"[Defendant]: I wasn't down to do anything to the victim.

"[Prosecutor]: But you said you thought there was at least going to be a fight, right?

"[Defendant]: Between them two.

"The Court: What if Freddie were getting the worst—did you think whether or not maybe Freddie would get harmed and you might . . . have [to] come to his assistance?

"[Defendant]: No."

Then, when the prosecutor asked if Pacheco's hand motion upset defendant, the court changed the subject and asked why Thomas, after following Pacheco, returned for defendant. Defendant answered that Thomas probably "knew his car, the car that he was in." The court asked, "So you didn't mind letting the world know that your car was going to be where whatever was going to happen happen?" Defendant answered he wasn't thinking "like that at the time." When the prosecutor asked if Thomas wanted defendant to back him up, the court again took over questioning, wanting to know if defendant asked Thomas what Thomas intended to do. When defendant said he didn't ask Thomas any questions, the court responded, "Were you concerned about getting into a problem yourself without knowing what was in his mind?" Defendant answered, "No."

The prosecutor continued to ask defendant what he thought was going to happen when he took Thomas to Pacheco. The court joined in and asked if defendant tried to "pin" Thomas "down as to what his intentions were going to be." After the court established that Pacheco was only six or seven blocks from defendant's house, the court asked why Thomas "didn't take care of business when he went there the first time?"

After the prosecutor asked defendant if he told Thomas to drive himself or to find somebody else to drive him, the prosecutor said she had no more questions. The court, however, was not done with defendant. It queried: Had defendant asked Moton to deliver something to Thomas? What was it? Why did defendant want Moton to deliver it to Thomas? Did defendant tell Moton he was involved in the shooting? Did Moton tell defendant about Thomas's confession? Did Moton ever ask whether defendant was involved in the shooting?

Although the prosecutor had ended her cross-examination, the trial court asked if there was "further cross?" The prosecutor picked up where the trial court left off, suggesting that defendant didn't want to deliver the items himself, in order to keep his car off the streets in case it was identified. When the prosecutor again ended her cross-examination, the court asked if defendant saw the gun before and/or after Pacheco was shot. Defendant said he never saw the gun. This exchange then occurred:

"The Court: Did you ask the person [Thomas] why he did what he did?

"[Defendant]: I was in shock. I didn't ask him anything.

"The Court: Did you ask him where the gun was?

"[Defendant]: No.

"The Court: You knew you were driving someone away from a murder scene who had—maybe had a gun in his possession, right?

"[Defendant]: Yeah.

"The Court: When you got back to wherever you went and let the shooter out, did you see the gun?

"[Defendant]: When he got out of the car?

"The Court: Yes.

"[Defendant]: I wasn't really looking at the shooter, but I knew he had a gun. He shot him.

"The Court: When you say you knew he had a gun—

"[Defendant]: Because he shot him.

"The Court: Okay. You didn't see the gun in the hand while the shooting took place?

"[Defendant]: I wasn't really looking.

"The Court: You never saw a gun on your way to the Camaro?

"[Defendant]: No.

"The Court: What was the shooter wearing when you took him to the Camaro?

"[Defendant]: Like he still had on his work clothes, like a tan shirt or something.

"The Court: What kind of shoes?

"[Defendant]: Boots.

"The Court: Did he have a jacket on?

"[Defendant]: No.

"The Court: Was he wearing jeans?

"[Defendant]: Yeah, I think.

"The Court: You never saw a gun on a person that was wearing a shirt and jeans?

"[Defendant]: No.

"The Court: You never saw a bulge that looked like a gun either?

"[Defendant]: No."

On redirect examination, defense counsel established that defendant didn't tell the police Thomas was the shooter because defendant was afraid of him. At this point, the court stated, "So you're going to frame an innocent man, Edward Arch?" On recross, the prosecutor picked up that theme and asked why defendant said Arch was the shooter when Thomas was the shooter.

The prosecutor finished her recross, but the court resumed questioning defendant. The court established that Moton did not like Thomas and that defendant knew of Moton's feelings. Why, then, the court asked, would Moton deliver items to Thomas:

"The Court: So he [Moton] was willing to be a delivery guy for stuff in a bag that he didn't even know what it was and take it to Freddie Thomas?

"[Defense Counsel]: Objection, Your Honor. That's asking the witness to make a conclusion about the mindset of Eric Moton.

"The Court: All right. He didn't protest, did he, when you asked him to take some stuff to Freddie Thomas?

"[Defendant]: I mean he didn't really want to do it, but he ended up doing it.

"The Court: Did he really do it? Did he really take stuff to your knowledge to Freddie Thomas?

"[Defendant]: I mean I wasn't with him when he took it."

5. The trial court's instructions.

When instructing the jury at the conclusion of evidence, the trial court gave CALCRIM No. 3550: "Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses or what your verdict should be."

B. *The trial judge committed prejudicial misconduct in its questioning of defense witnesses.*[6]

It is a trial court's duty to "see that the evidence is fully developed before the trier of fact and to assure that ambiguities and conflicts in the evidence are resolved insofar as possible." (*People v. Carlucci* (1979) 23 Cal.3d 249, 255; see also *People v. Abel* (2012) 53 Cal.4th 891, 917; *People v. Raviart* (2001) 93 Cal.App.4th 258, 269; *People v. Santana* (2000) 80 Cal.App.4th 1194, 1206 (*Santana*); § 1044 [a trial judge has a statutory duty to control trial proceedings].) To that end, " '[a] trial judge may examine witnesses to elicit or clarify testimony [citations omitted]. Indeed, "it is the right and duty of a judge to conduct a trial in such a manner that the truth will be established in accordance with the rules of evidence." ' [Citation.]" (*Carlucci*, at p. 255; see also Evid. Code, § 775;[7] *People v. Sturm, supra,* 37 Cal.4th at p. 1237.) If questions remain in the

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[6] We reject the People's contention that the claim of judicial misconduct was forfeited. Claims of judicial misconduct are forfeited if no objections were made at trial. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237.) But review is not precluded when an objection and admonition would not cure the prejudice caused by misconduct or when objection would be futile. (*Ibid.* [where hostility between trial judge and defense counsel was evident, it would have been futile for defense counsel to object].) When the trial court questioned Moton during the defense case, defense counsel objected "to the manner in which the court is taking to questioning the witness. I believe the court is taking the position of being a prosecutor and not a judge." The court "noted" the objection and said it would give CALCRIM No. 3550. Defense counsel did not thereafter renew the objection. Having interposed an objection and the specific ground for it, defense counsel, when the court continued to examine defense witnesses, could have determined that renewed objections would be futile.

[7] Evidence Code section 775 provides: "The court, on its own motion or on the motion of any party, may call witnesses and interrogate them the same as if they had been produced by a party to the action, and the parties may object to the questions asked and

trial judge's mind after witnesses make their statements, then the judge should "affirmatively clarify matters." (*Carlucci*, at p. 256.) But in questioning witnesses, trial judges " 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.' [Citation.]" (*Sturm*, at pp. 1237-1238.) The trial judge's examination must be temperate, nonargumentative and scrupulously fair. (*People v. Harris* (2005) 37 Cal.4th 310, 350.) A trial court commits misconduct if it creates the impression that it is allying itself with the prosecution. (*Sturm*, at p. 1233; see also *People v. Boyette* (2002) 29 Cal.4th 381, 460 [trial judge may not make comments from which the jury may plainly perceive the judge does not believe the testimony of the witnesses or in other ways discredit the cause of the defense]; *People v. Clark* (1992) 3 Cal.4th 41, 143, disapproval on another ground recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704-705; *Santana, supra,* 80 Cal.App.4th at pp. 1206-1207.)

We evaluate judicial conduct on a " 'case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury.' " (*People v. Sanders* (1995) 11 Cal.4th 475, 531-532.) A particular comment's propriety and prejudicial effect are judged by its content and by the circumstances in which it was made. (*Id.* at p. 532.) "The role of a reviewing court 'is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial. [Citation.]' " (*People v. Harris, supra*, 37 Cal.4th at p. 347.)

In *Santana, supra,* 80 Cal.App.4th 1194, this division concluded that a trial judge's examination of witnesses denied the defendant a fair trial. The defendant was found by police in an apartment which was the scene of an anticipated sale of methamphetamine. A later search of the defendant's home uncovered a triple beam Ohaus scale and cash. (*Id.* at pp. 1196-1197.) To substantiate her husband's defense he

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the evidence adduced the same as if such witnesses were called and examined by an adverse party. . . ."

was not involved in selling methamphetamine, Santana's wife testified that she used the scale to bake bread. The judge grilled her about how many loaves she baked at a time; what was her bread recipe; how much flour and butter she needed; and why she needed a precise scale to measure approximate quantities. (*Id.* at p. 1202.)

A second defense witness, Ramirez, testified that he and the defendant ran a business. (*Santana, supra*, 80 Cal.App.4th at pp. 1202-1203.) The court calculated how much Ramirez made from the business in a year and queried why he would spend " 'three, four, five days a week at this business to make $50 a week?' " (*Id.* at p. 1202.) The judge continued to question why Ramirez would put so much time into a business that returned so little.

The judge then cross-examined Santana, the defendant, about why his identification card and tax refund check were on the counter in the apartment where the methamphetamine sale was going to take place and where a gun was in plain view. (*Santana, supra*, 80 Cal.App.4th at pp. 1204-1205.) Santana explained he put his identification and check on the counter because he was going to the bank later and didn't want the check to get ruined in his pocket. (*Id.* at p. 1204.) The judge asked repeated and pointed questions about why Santana would take the identification card out of his pocket before it was necessary to do so. (*Ibid.*)

Santana found that the judge's examination of these defense witnesses was misconduct. "By belaboring points of evidence that clearly were adverse to Santana, the trial court took on the role of prosecutor rather than that of an impartial judge. By continuing this adversarial questioning for page after page of reporter's transcript, the trial court created the unmistakable impression it had allied itself with the prosecution in the effort to convict Santana." (*Santana, supra*, 80 Cal.App.4th at p. 1207.)

Like the trial judge in *Santana*, the judge here actively examined witnesses, especially defense witnesses. We do not find fault with all of that examination. Some of it properly resolved ambiguities in the evidence. When, for example, Cano testified she did not remember seeing defendant the day Pacheco was killed, the court asked her to clarify whether she was saying defendant was not there or she could not identify who was

there, whether or not it was defendant. (See, e.g., *People v. Raviart*, *supra*, 93 Cal.App.4th at pp. 270-271 [trial court's questions regarding whether the way the defendant held a bag over his hand led the witness to believe he had a gun were asked to clarify testimony and to develop pertinent facts].) The court also asked Los Angeles Police Department Detective John Macchiarella, who investigated Pacheco's murder, about video surveillance from a gas station near the shooting. Questions about the video's "time aspect" concerned the accuracy of the date and time stamp, an issue potentially favorable to the defense. Also, the trial judge sustained its own objections to questions about whether Thomas knew if defendant had a reason to be afraid of him and about Moton's frame of mind. These were attempts to control the trial proceedings. (See, e.g., *People v. Harris* (2013) 57 Cal.4th 804, 852 [trial court may interpose and sustain its own objections]; *People v. Clark*, *supra*, 3 Cal.4th at pp. 143-144 [same].) These questions therefore are not ones from which we can discern misconduct.

But, as in *Santana*, the trial judge's active examination of defense witnesses Moton and defendant is more troubling. To substantiate the defense theory that Thomas was the shooter and that defendant had no idea Thomas intended to kill Pacheco, Moton testified that when he dropped off Thomas's belongings, Thomas confessed he was the shooter. Defendant also testified that although he drove Thomas to Pacheco, defendant did not know that Thomas was going to shoot Pacheco. The judge asked questions pertaining to this testimony. He asked Moton, for example, why, if Moton did not like Thomas and thought he was "bad news," would he deliver Thomas's things to him? Then, when Moton said he transported clothes to Thomas, the court implied it was not credible Moton would take Thomas's things to him when Moton was not "even paid" for his time but was "just paid for gas." The trial judge asked similar questions of defendant, for example, why would Moton deliver items to Thomas, a person Moton disliked? By these questions, the trial judge signaled his disbelief in defendant's and Moton's stories.

The trial judge also examined defendant closely about defendant's knowledge of the gun; for example, did defendant ask Thomas if Thomas had a gun before driving him to Pacheco's location or ask what Thomas intended to do? Did defendant see the gun

before or after the shooting? In fact, the prosecutor had ended her cross-examination of defendant when the judge returned to the topic of the gun and asked when, if ever, defendant saw the gun. When defendant denied seeing a gun before or after the shooting because he "wasn't really looking," the judge asked what type of clothes Thomas wore. After defendant said that Thomas wore a shirt, boots, and jeans but no jacket, the judge asked, "You never saw a gun on a person that was wearing a shirt and jeans" and "[y]ou never saw a bulge that looked like a gun either?"

The judge also focused on defendant's testimony that Thomas, after following Pacheco, drove back to defendant's house and asked him to drive to Pacheco's location in defendant's car. The judge asked why Thomas came back for defendant. When defendant said Thomas probably didn't want to use his purple Cutlass, the judge asked, "So you didn't mind letting the world know that your car was going to be where whatever was going to . . . happen?"

On redirect examination, defense counsel established that defendant didn't tell police that Thomas was the shooter because he was afraid of Thomas. The judge interjected, "So you're going to frame an innocent man, Edward Arch?" The prosecutor then picked up that theme on recross and asked why defendant implicated Arch.

The Attorney General argues that the judge's questions properly went to the key issue of whether defendant was an aider and abettor. Defendant's state of mind and what he knew, saw, and did before Pacheco shot were relevant to that theory of liability. The trial judge's questions on these topics thus were, the Attorney General argues, merely "clarifying," not misconduct. Moreover, that the judge's questions elicited answers unfavorable to the defense is not definitive on the question of misconduct. (See *People v. Cooper* (1963) 221 Cal.App.2d 448, 454.)

But the situation before us is not one in which the witnesses' testimony was unclear and the prosecutor was unable to elicit unambiguous testimony or one where the trial judge's neutral question led to an answer damaging to the defense. The trial judge here trod close to the line of neutrality and, in its questioning of Moton and defendant, crossed it. The judge belabored points that had already been established; for example,

why Moton did not come forward sooner with Thomas's incriminating statement and whether defendant saw that Thomas had a gun. As to that latter point, the judge's comments that defendant "never saw a gun on a person that was wearing a shirt and jeans" and "you never saw a bulge that looked like a gun either?" can only be interpreted as statements conveying incredulity and doubt as to defendant's story he did not see a gun. By doing so, the judge allied himself with the prosecution, especially when the judge's active examination of defense witnesses is contrasted with his limited examination of prosecution witnesses.

The question therefore becomes whether the judge's behavior was so prejudicial that it denied defendant a fair, as opposed to a perfect, trial. (*People v. Harris, supra,* 37 Cal.4th at p. 347 [some of trial judge's examination of defendant, questioning his story, was "inappropriate," albeit not prejudicial because evidence of guilt was strong]; *People v. Raviart, supra,* 93 Cal.App.4th at p. 270 [judge who questioned half the prosecution witnesses but did so impartially did not commit misconduct].) Under the standard in *Chapman v. California* (1967) 386 U.S. 18, 24, reversal is required unless we can determine it was harmless beyond a reasonable doubt. Under the standard in *People v. Watson* (1956) 46 Cal.2d 818, 836, reversal is required if it is reasonably probable a different outcome would have resulted in the absence of the misconduct. (See, e.g., *Harris,* at pp. 350-351.)[8]

In *Santana,* we found the misconduct to be prejudicial. We said that because a jury views circumstantial evidence differently than direct evidence of guilt, the jury might have found Santana's explanation of the suspicious circumstances adequate to avoid the conclusion the People had proved the case beyond a reasonable doubt, absent the trial court's intervention. (*Santana, supra,* 80 Cal.App.4th at p. 1208.) *Santana* also found that the trial court's repeated admonitions not to take any cue from its questioning

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[8] It is unclear which standard applies. *Harris* applied *Watson*, but *Sturm* cited both *Watson* and *Chapman* in finding that the judge's comments required a reversal of the defendant's death sentence (*People v. Sturm, supra,* 37 Cal.4th at p. 1244). The outcome here is the same under either standard of review.

of witnesses "could not dispel the inference, which appears on the face of the cold record," that the court found the prosecution's case strong and the defendant's "questionable, at best." (*Id.* at p. 1207.)

The trial court here did give CALCRIM No. 3550, which instructed the jury not to take "anything I said or did during the trial as an indication of what I think about the facts, the witnesses or what your verdict should be." Generally, we presume that the jury followed instructions. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) But, as in *Santana*, we conclude that the sole admonition the trial judge gave was insufficient to dispel the inference he disbelieved the defense witnesses.

Nor can we agree with the Attorney General's argument that any misconduct was harmless because there was overwhelming evidence defendant aided and abetted Pacheco's murder. The jury was instructed on direct aider and abettor liability and on aiding and abetting an assault, the natural and probable consequences of which was murder. (CALCRIM Nos. 400, 401, and 403.)[9] Direct aiding and abetting requires, among other things, that the aider and abettor know of the direct perpetrator's unlawful intent and have the intent to assist in achieving those unlawful ends. (*People v. Perez* (2005) 35 Cal.4th 1219, 1225; *People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1117; *People v. Prettyman* (1996) 14 Cal.4th 248, 259; § 31.) Under the natural and probable consequences doctrine, a jury "must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime[;] . . . (4) the defendant's confederate committed an offense *other than* the target crime; and

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9 After this case was briefed, our California Supreme Court decided *People v. Chiu* (2014) 59 Cal.4th 155. *Chiu* held that first degree premeditated murder cannot be the natural and probable consequence of a target offense. The jury here was instructed that it could find defendant guilty of murder if murder was a natural and probable consequence of assault. Because we find that the judicial misconduct by itself was sufficiently prejudicial to warrant reversal, we do not consider whether, if there was instructional error, it contributed to the prejudice.

(5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Prettyman*, at p. 262, fn. omitted.)

The Attorney General relies on defendant's admission he drove the shooter to Pacheco. That fact is certainly an important one in analyzing defendant's liability as an aider and abettor. Defendant's admission, however, does not conclusively establish his liability as an aider and abettor to first degree murder. Rather, whether defendant knew that Thomas had a gun was also important in evaluating his liability as an aider and abettor, as well as the degree of murder, first or second. If the jury believed defendant's story that he thought Thomas intended only to fight Pacheco and did not know about the gun, the jury might have concluded that defendant did not know of or share the shooter's intent. Or they might have concluded that murder was not a natural and probable consequence of the assault— a fight without weapons—that defendant aided and abetted.

But if the jurors found that defendant knew about the gun, then they might have more easily concluded the opposite. This makes the judge's focus on whether defendant knew that Thomas had a gun problematic. The judge repeatedly asked questions about the subject, even though defendant had already denied knowledge of the weapon. The judge, for example, repeatedly asked whether defendant thought Thomas had a gun, whether he asked Thomas if he had a gun, and whether defendant ever saw a gun. When defendant denied having any knowledge of the gun, the court said, "So you were going to drive blind into this incident" and "take your chances." The judge also methodically established that Thomas merely wore a shirt and jeans with no jacket. Despite Thomas's attire, defendant "never saw a gun on a person that was wearing a shirt and jeans" or a "bulge that looked like a gun either." This examination very effectively cast doubt on defendant's story. That is the problem. These questions would have been proper, had the prosecutor asked them. When asked by the trial judge, they conveyed the court's belief that defendant's story about the gun was not credible, thereby tipping the scales in favor of the prosecution.

This is also true regarding Moton, whom the judge questioned about delivery of the items to Thomas and his failure to inform the police of Thomas's confession. The Attorney General suggests that the judge's examination of this witness made no difference because Moton's story was incredible. That Moton would deliver items to Thomas, whom he disliked, and that Thomas would confess to Moton, may have been a suspicious story. But the judge's questions about why Moton would deliver items to a man he disliked when he wasn't "even paid for [his] time" and was "just paid for gas" conveyed to the jury that the *judge* found the story incredible. This undermined the judge's impartiality.

Defendant's version of events could be viewed as unlikely. But neither we nor a trial judge can absolutely determine what a jury might believe, what piece of evidence it might find crucial or who it will find credible. This is particularly true where, as here, the case against defendant was not overwhelming. Cano, the sole independent witness to Pacheco's murder, did not positively identify Thomas or Arch as the shooter. Rather, based on photographic six-packs, she identified Thomas, Arch, and defendant as looking similar to the shooter. Moreover, the prosecution's main witness against defendant was Thomas. Thomas was with defendant during the earlier confrontation with Pacheco. Thomas also admitted that he followed Pacheco and told defendant where to find Pacheco. Thomas pled guilty to voluntary manslaughter and was to receive 12 years in prison for his crime. Therefore, Thomas had a possible motive to implicate defendant in the crime. Thomas thus had serious credibility issues of his own.

While it is crucial for trial judges to control the proceedings and evidence, it is likewise imperative for them to do so in a neutral manner, giving no hint as to the judge's state of mind about the believability of any witness or the conclusions the jury should draw from the evidence. (See *People v. Carlucci, supra,* 23 Cal.3d at p. 258 [even at an infraction hearing where there is no prosecuting attorney or jury, the trial court "must not undertake the role of either prosecutor or defense counsel"].) Where that neutrality is

lost, the defendant faces two prosecutors and loses a judge. Because that happened here, we reverse the judgment.[10]

DISPOSITION

The judgment is reversed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.

[10] Because we reverse the judgment on this ground, we need not reach defendant's additional contentions that the jury should have been instructed on voluntary manslaughter and on provocation.