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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAMION THOMPSON et al., Defendants and Appellants.	B226776 (Los Angeles County Super. Ct. No. PA060413)

APPEAL from judgments of the Superior Court of Los Angeles County, Burt Pines, Judge. Affirmed as modified.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Damion Thompson.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Charles Nero.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants Charles Nero, Damion Thompson, and Duane Cornelius Palm of conspiracy to commit murder, first degree murder with special circumstance and firearm findings, and attempted premeditated murder. Thompson and Palm were also convicted of drug offenses. The trial court imposed terms of life without the possibility of parole (LWOP) on all three defendants for special circumstance murder, plus consecutive terms on the remaining counts. We affirm all of the convictions and the LWOP sentences, modify certain other sentencing terms as noted in this opinion, and remand for imposition of sentence as modified.

FACTS

The Drug Conspiracy

From late 2004 to early 2005, the Federal Bureau of Investigation (FBI) conducted a narcotics-trafficking investigation of Mauro Galindo (the murder victim) in cooperation with local police authorities.[1] FBI Special Agent Michael Harris supervised the narcotics investigation. In the course of their investigatory activities, FBI agents targeted three cellular telephone numbers linked to Galindo for wiretaps. In late February 2005, FBI agents intercepted telephone calls and messages in which Galindo and defendant Palm spoke in "code language" to discuss drug sales. On March 7, 2005, FBI agents intercepted a telephone call in which Galindo and Palm discussed a drug sale involving more than a dozen kilograms of cocaine. Based on this conversation, the investigation began surveillance of Palm.

At approximately 11:45 p.m. on March 7, 2005, Los Angeles Police Department (LAPD) Detective Joseph Anzallo observed defendant Palm exit the front of a residence on Saticoy Street in Van Nuys. Palm carried what appeared to be a heavy, dark-colored trash bag. Palm put the bag in a Dodge Ram pickup truck, got in the truck and drove off.

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[1] The investigation did not learn victim Galindo's full identity until after his death. During the investigation, FBI agents came to know Galindo as "David," "Viejon," "Migo" and "Amigo."

In the early morning hours of March 8, 2005, LAPD Officer Thomas Holzer initiated a traffic stop of Palm's truck. Palm initially stopped the truck at the curb, but raced away when Officer Holzer got out of his police vehicle. During an ensuing high speed pursuit, Palm threw several items out of the windows of his truck. The tossed items were retrieved by officers; the items appeared to be kilograms of packaged cocaine. Eventually, Palm crashed his truck and was taken into custody. LAPD Detective Ramon Alvarez inspected the inside of Palm's truck after the crash and found four more packages of what appeared to be cocaine. Detective Alvarez ultimately took 14 packages connected to Palm's truck into evidence; subsequent tests confirmed that each of the packages contained a kilogram of cocaine.

On March 10, 2005, FBI agents intercepted a telephone call in which Galindo and defendant Thompson discussed the vehicle chase involving defendant Palm, the cocaine that was lost in the chase, and a delivery of additional cocaine. On March 12, 2005, FBI agents recorded a call in which defendant Palm explained to Galindo that he (Palm) had been pulled over for no reason, that the police did not have a search warrant, and he "got out on a technicality."[2]

The Murder Conspiracy

Jesse Hayes and Natashia Friday were involved in drug trafficking with defendant Palm. Shortly after being released from LAPD custody in March 2005, Palm met up with Friday. Palm said that he had been arrested for some drugs, that he had lost the drugs, and that he "had to somehow pay back [some Mexicans] for the [lost] drugs." Palm said "something about eliminating the middle man," but Friday was not sure what he meant.

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[2] In actuality, defendant Palm had been released from LAPD's custody at the request of the FBI agents so that they could continue their investigation. If Palm had been prosecuted at the time of his arrest, the existence of the wiretaps on Galindo's telephone lines would have been required to be disclosed.

Hayes also met up with Palm shortly after he was released from custody. Palm said that he and "Ed Bone" had gotten into a chase with police that ended in an accident. Palm said that he threw cocaine out the window during the chase, and that he was afraid "about the fact that the lost cocaine had to be paid off." Palm said that he was going to have to talk to "Amigo" or "Migo" to "work something out how . . . it was going to get paid back."

At some point in the weeks leading up to March 31, 2005, Hayes and defendants Thompson and Palm had a conversation about how Palm would repay Galindo. During this conversation, Thompson and Palm both made comments to the effect that Galindo "might have to go" because Palm could not pay Galindo for the cocaine that Palm lost during his chase with police. Hayes understood Thompson and Palm to be talking about killing Galindo.

On March 29, 2005, Hayes rented a room in his name at a Ramada Inn located in Burbank. Defendant Palm was with Hayes, and provided the money for the room. Hayes understood that they had gotten the room "just to party with some girls," but matters later went further. On March 30, 2005, Hayes rented a second room at the Ramada Inn, again in his name and again paid for by defendant Palm.

On the morning of March 31, 2005, Hayes and defendants Thompson, Palm, and Nero had a discussion at the Ramada Inn, the general gist of which was to this effect: "This is the day; like, they can't pay [Galindo] the money, so, you know, he has to go." Thompson and Palm told Hayes and Nero to find a place where Galindo could be killed. They told Hayes to go with Nero because Galindo knew Hayes's face. Thompson and Palm both said that defendant Nero would be the shooter. Thompson and Palm said that they could not go because Galindo thought they were out of town. Thompson said they would give Nero a kilogram of cocaine as compensation for doing the shooting. Palm

said they should use Vance Zelaya's car.[3] Natashia Friday was also present at the Ramada Inn during the discussions about killing Galindo.[4]

After discussing the murder, Hayes and Nero left in Zelaya's car to meet Galindo. Hayes called Galindo and gave him directions to a place that he (Hayes) said was his mother's house, but really was "just some apartments we had found and it looked like a cool little spot to kill Galindo." Hayes told Galindo that he would call back when Hayes's mother had left. Hayes had a series of phone calls with Galindo thereafter in which Hayes "stalled" Galindo by saying they needed to delay the meeting because someone was following Hayes. While Hayes was stalling Galindo, defendant Thompson called Hayes and told him to hurry up with killing Galindo.

Hayes and Nero finally met Galindo at about 7:30 p.m. Galindo arrived for the meeting in an SUV with Rosa Galaviz, his wife, and with their young son and daughter. When Hayes got out of his car, he carried a duffel bag full of clothes to pretend it was full of money. Hayes and Nero got into Galindo's SUV.[5] Hayes and Nero told Galindo to drive to a nearby building where Galindo parked, then Hayes, Nero and Galindo exited Galindo's vehicle.

Immediately after the men exited Galindo's vehicle, his cellular telephone was taken from him, and he was shot three times, including a fatal shot to his head. The shooter then went back to Galindo's SUV and fired three gunshots at Galaviz. The duffel bag that Hayes had carried into Galindo's SUV was retrieved, and Hayes and Nero fled in

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[3] Zelaya testified and described his relationship with Jesse Hayes as "like a brother," although they were not actually related. They lived together for five years, including a period of time between March 2005 and mid-April 2005. On March 31, 2005, Zelaya owned a white Ford Expedition with dark-tinted windows. Zelaya allowed Hayes to borrow this vehicle on March 31, 2005.

[4] At trial, Jesse Hayes and Natashia Friday were the prosecution witnesses regarding the conspiracy and planning discussions at the Ramada Inn leading to Galindo's murder.

[5] At trial, there was some discrepancy between Hayes's testimony and Galaviz's testimony regarding where people were seated in Galindo's SUV.

Zelaya's car.[6] After the shootings, Galaviz was able to drive away in Galindo's SUV. Police quickly stopped her.

Hayes and Nero dropped Zelaya's car at his house, then returned to the Ramada Inn in Burbank. When they arrived at the hotel, Hayes and Nero said that "Migo got domed and the wife got shot," meaning that Galindo was shot in the head and his wife was also shot. Hayes gave Galindo's cellular telephone to defendant Palm who destroyed the phone's Sim card. Defendant Palm then destroyed his own phone and Hayes's phone. Friday was at the Ramada Inn when Hayes and Nero returned. According to Friday's trial testimony, Hayes appeared "real hyped up." She saw someone hand a cellular phone to defendant Palm. Palm asked if any children had been harmed, and both Nero and Hayes replied no. When they were asked what happened, Hayes made a gesture with his right hand, and pointed his index and middle finger towards his head with his thumb pointing up, as if to simulate the shooting a gun.

The Criminal Case

In November 2008, the People filed an information charging defendants Nero, Thompson and Palm as follows:

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[6] At trial, Hayes testified that Nero was the shooter. According to Hayes, as soon as the group got out of Galindo's SUV, defendant Nero pulled out a revolver and told Hayes to get Galindo's cellular telephones. Hayes told Galindo to hand over his telephones, and Nero then shot Galindo several times with the revolver. Hayes testified that he grabbed the duffel bag out of Galindo's SUV and ran towards Zelaya's car. As he ran, Hayes heard more gunshots. Hayes got in the driver's seat. An instant later, Nero entered the vehicle. After fleeing the scene, they drove to Zelaya's house, where they dropped off the car. Galaviz's testimony was less definitive as to the identity of the shooter. Galaviz testified that the two assailants took Galindo's cellular telephone, then she heard gunshots and saw Galindo fall to the ground. The shooter then walked back to the SUV, and fired three gunshots at Galaviz. At trial, the jury could not reach a unanimous decision on allegations that Nero had personally used and discharged a firearm during the crimes.

Nero

- Count 1: conspiracy to commit murder (Pen. Code, §§ 182, subd. (a)(1), 187, subd. (a)),[7] with allegations that a principal was armed with a firearm in the commission of the offense (§ 12022, subd. (a)(1)); and that Nero personally used a firearm, personally discharged a firearm, and personally discharged a firearm causing death (§ 12022.53, subds. (b), (c), (d));
- Count 2: first degree murder of Galindo (§ 187, subd. (a)), with special circumstance allegations that the murder was carried out for financial gain and by means of lying in wait (§ 190.2, subd. (a) & (15)), and with allegations that a principal was armed with a firearm in the commission of the offense (§ 12022, subd. (a)(1)); and that Nero personally used a firearm, personally discharged a firearm, and personally discharged a firearm causing death (§ 12022.53, subds. (b), (c), (d));
- Count 3: attempted premeditated murder (§§ 664, 187, subd. (a)), with allegations that Nero personally inflicted great bodily injury (§ 12022.7, subd. (a)), and that Nero personally used a firearm, personally discharged a firearm, and personally discharged a firearm causing great bodily injury (§ 12022.53, subds. (b), (c), (d)).

Thompson

- Count 1: conspiracy to commit murder (§§ 182, subd. (a)(1), 187, subd. (a)), with an allegation that a principal was armed with a firearm during the commission of the offense (§ 12022, subd. (a)(1));
- Count 2: first degree murder (§ 187, subd. (a)), with a special circumstance allegations that the murder was carried out for financial gain and by means of lying in wait (§ 190.2, subd. (a)(1) & (15)), and an allegation that a principal was armed with a firearm during the commission of the offense (§ 12022, subd. (a)(1));
- Count 3: attempted premeditated murder (§§ 664, 187, subd. (a));

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[7] All further section references are to the Penal Code except as otherwise noted.

- Count 4: conspiracy to possess a controlled substance for sale (§ 182, subd. (a)(1); Health & Saf. Code, § 11351), with an allegation that the substance exceeded 20 kilograms of cocaine by weight (Health & Saf. Code, § 11370.4, subd. (a)(4)); and
- Count 5: conspiracy to transport a controlled substance (§ 182, subd. (a)(1); Health & Saf. Code, § 11352), with an allegation that the substance exceeded 10 and 20 kilograms of cocaine by weight (Health & Saf. Code, § 11370.4, subd. (a)(3) & (4)).

The information further alleged that Thompson had a prior strike conviction in 1997 for robbery, which also qualified as a prior serious felony. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667, subd. (a)(1).)

Palm

- Count 1: conspiracy to commit murder (§§ 182, subd. (a)(1); 187, subd. (a)), with an allegation that a principal was armed with a firearm during the commission of the offense (§ 12022, subd. (a)(1));
- Count 2: first degree murder (§ 187, subd. (a)), with special circumstance allegations that the murder was carried out for financial gain and by means of lying in wait (§ 190.2, subd. (a)(1) & (15)), and an allegation that a principal was armed with a firearm during the commission of the offense (§ 12022, subd. (a)(1));
- Count 3: attempted premeditated murder (§§ 664, 187, subd. (a));
- Count 4: conspiracy to possess a controlled substance for sale (§ 182, subd. (a)(1); Health & Saf. Code, § 11351), with an allegation that the substance exceeded 20 kilograms of cocaine by weight (Health & Saf. Code, § 11370.4, subd. (a)(4));
- Count 5: conspiracy to transport a controlled substance (§ 182, subd. (a)(1); Health & Saf. Code, § 11352), with an allegation that the substance exceeded 10 and 20 kilograms of cocaine by weight (Health & Saf. Code, § 11370.4, subd. (a)(3) & (4));

- Count 6: possession of a controlled substance for sale (Health & Saf. Code, § 11351), with an allegation the substance exceeded 10 kilograms by weight (§ 11370.4, subd. (a)(3));
- Count 7: transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a)), with an allegation the substance exceeded 10 kilograms by weight (§ 11370.4, subd. (a)(3)); and
- Count 8: felony evading a police officer (Veh. Code, § 2800.2, subd. (a)).

The information further alleged that Palm had a prior strike conviction in 1995 for assault with a firearm, which also qualified as a prior serious felony. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667, subd. (a)(1).)

The charges were tried to a single jury in May 2010. As noted above, Jesse Hayes and Natashia Friday testified for the prosecution. Friday entered into a plea agreement under which she pleaded guilty in federal court to drug charges in exchange for testifying in the current state murder case; Hayes also pleaded guilty in federal court in exchange for testifying in the murder case. The trial court instructed the jury that Hayes was an accomplice of the defendants as to all charges; the court instructed the jury that Friday was an accomplice as to the drug-related charges. On May 17, 2010, the jury returned verdicts finding all three defendants guilty as charged, except that the jury could not reach a decision on the allegations that defendant Nero personally used a firearm, personally discharged a firearm, personally discharged a firearm causing Galindo's death, and personally discharged a firearm causing great bodily injury to Galaviz. Thompson and Palm thereafter admitted the prior strike and prior serious felony conviction allegations.

On August 10, 2010, the trial court sentenced defendants Thompson and Nero to LWOP terms for the special circumstances murder (count 2), plus consecutive terms as to the remaining counts as reflected in the abstracts of judgment. On October 26, 2010, the court imposed an LWOP sentence on defendant Palm, plus additional terms as reflected in the abstract of judgment.

DISCUSSION

Defendant Nero's Appeal

I. The Jury Issue

Nero contends all of his convictions must be reversed because the trial court's denial of his two *Batson*/*Wheeler* motions[8] resulted in a violation his federal and state constitutional right to trial by a jury selected from a representative cross-section of the community. We disagree.

The Governing Law

No party may use a peremptory challenge to remove a prospective juror based on race. (*Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; *Batson*, *supra*, 476 U.S. at pp. 84-89.) The usual remedy for a violation of *Batson*/*Wheeler* is to dismiss the jury venire and start jury selection anew. (*Wheeler*, *supra*, at p. 282; but see also *People v. Willis* (2002) 27 Cal.4th 811, 818-824 [a court may invoke alternative remedies with the consent of the complaining party].) When a defendant makes a *Batson*/*Wheeler* motion, he or she has the initial burden to establish a prima facie case that the prosecutor based a peremptory challenge on a prospective juror's race; a prima facie case is established by a showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*).) When the defendant makes a prima facie case, the burden shifts to the prosecutor to offer permissible race-neutral justifications for the peremptory challenge. (*Ibid.*) When a race-neutral explanation is tendered, the trial court must decide whether the defendant has proved purposeful racial discrimination; i.e., the court must decide whether the prosecutor's stated reasons for a peremptory challenge are the "real" reasons the prosecutor challenged the juror. (*People v. Phillips* (2007) 147 Cal.App.4th 810, 818.)

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[8] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

A prosecutor's explanation of reasons for a peremptory challenge need not justify a challenge for cause because a juror may properly be excused based on hunches, or even arbitrary disfavor and trivialities. For this reason, a trial court may accept any explanation provided it is not based on impermissible group bias and the court is satisfied that the explanation is not a pretext to cover over what is, in fact, actual bias. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122; see also *People v. Reynoso* (2003) 31 Cal.4th 903, 917.) In the end, the *Batson*/*Wheeler* inquiry focuses on the subjective genuineness of a race-neutral reason given for a peremptory challenge, not on the objective reasonableness of those reasons. (*Reynoso, supra*, 31 Cal.4th at p. 924.) Accordingly, it is not relevant whether another prosecutor would have chosen to leave the prospective juror on the jury. (*Ibid.*) In short, a "legitimate reason" for a challenge within the meaning of the *Batson*/*Wheeler* inquiry does not mean "a reason that makes sense;" it means "a reason that does not deny equal protection." (*Ibid*.)

On appeal, a trial court's decision on the race-neutrality of a prosecutor's stated reasons for a peremptory challenge is reviewed with "restraint" and "deference." (*People v. Ward* (2005) 36 Cal.4th 186, 200 (*Ward*).) Determining the genuineness of stated race-neutral reasons for a peremptory challenge often depends upon viewing demeanor and assessing the credibility of the attorney who offers the reasons, and a determination of an attorney's "state of mind" based on such factors is best left to the direct observer, i.e., the trial judge. (*People v. Stevens* (2007) 41 Cal.4th 182, 198; see also *Hernandez v. New York* (1991) 500 U.S. 352, 365.) Thus, a trial court's conclusion that a race-neutral reason is "genuine" will be upheld on appeal when it is supported by substantial evidence in the record. (*Ward, supra*, at p. 200.) Stated from another angle, with the same standard of review in mind, a trial court's ruling on race-neutrality will be upheld unless the record shows it to have been "clearly erroneous." (*People v. Hamilton* (2009) 45 Cal.4th 863, 901, 903.)

The Voir Dire and the* Batson/Wheeler *Motions

The trial court's practice in voir dire was to seat 18 prospective jurors, conduct voir dire of those jurors, and then allow peremptory challenges. Initial voir dire consisted of responding to a questionnaire that had been passed out to all the prospective jurors, and, when called from the venire, answering questions on a board.

1. Juror No. 6386

Juror No. 6386 was the first prospective juror in seat 3. During the initial questioning, Juror No. 6386 stated she worked as a mail carrier and was married; her husband worked as a "body man" for an auto shop. She had a relative who worked in a prison. She had relatives with both negative and positive contacts with law enforcement. The juror questionnaire apparently asked the jurors whether they or anyone in their immediate family had ever been arrested. When asked generally whether she had any "yes" answers to the questionnaire, Juror No. 6386 answered, "no."

The next day, Juror No. 6386 raised her hand when the prospective jurors were asked collectively by the trial court if anyone had relatives who had been *victims of crime*. At a sidebar discussion outside the presence of the other jurors, Juror No. 6386 told the court that she had a brother who had been convicted of cocaine sales over 20 years earlier and went to federal prison. She had other brothers who had been "in and out of the system." She further disclosed that two of her brothers had been murdered, stating that one had been "murdered" by a deputy at the "Twin Towers" jail facility. She further disclosed that her parents had filed a lawsuit, and that "somebody" got "some money," possibly her brother's girlfriend for their child. When asked whether she had any feeling about the fairness of the outcome, Juror No. 6386 answered she did not know if it was fair because it was a very "involved" matter. Juror No. 6386 explained that she had not disclosed the information discussed earlier because she had not seen questions on the back of pages of the juror questionnaire. After Juror No. 6386's disclosures, voir dire continued.

When peremptory challenges were later exercised on the original 18 prospective jurors in the box, the prosecutor exercised her second peremptory challenge to excuse Juror No. 6386.

2. Juror No. 0181

Juror No. 0181 was originally placed in seat 17, and then took seat 2 when that juror was excused. Juror No. 0181 was a divorced, retired insurance agent. In responding to the questionnaire, she said that she had a negative experience with law enforcement about 20 years earlier, in a traffic stop. She said it happened in the City of Montclair, and that it might have involved a deputy sheriff. Juror No. 0181's first comment was that it was "just [the officer's] demeanor when he stopped me." Then, she said: "Actually, it was more than that," and offered her view that the area where she was stopped was predominantly white, and that the officer had asked her why she was in Montclair. When the trial court asked: "Do you think there was some [racial] profiling going on?" Juror No. 0181 answered: "Yeah. He actually unholstered his gun." In later comments, Juror No. 0181 agreed that it was the type of incident that "would leave a bad taste in [anyone's] mouth." When asked if the incident had left a bad taste in her mouth, she replied, "Yes, absolutely." In other responses to the questionnaire, Juror No. 0181 stated that her ex-husband had been convicted of several crimes.

Later during voir dire, the prosecutor noted that the questionnaire asked whether the prospective jurors had "any immediate" family members who had been arrested, but she now wanted to know about "any" family members or friends. At that point, Juror No. 0181 again mentioned her ex-husband and said that thinking about him had reminded her of her brother. Juror No. 0181 explained that, over 40 years ago, her brother had been "arrested on a murder charge and was — due to probable cause, but because what was done as far as ballistics was concerned, it was never brought to trial. He was exonerated."

The prosecutor exercised her fourth peremptory challenge to excuse Juror No. 0181. At that point, defendant Palm's trial counsel made a *Batson*/*Wheeler* motion. Counsel for defendants Thompson and Nero joined the motion.

3. The First Batson/Wheeler Motion

At a sidebar discussion, the trial court explained that it found it to be a "better practice" to ask for the prosecutor's reasons, and that, for this reason, it would "assume" a prima facie case had been shown. The prosecutor then gave her reasons for using peremptory challenges against Juror Nos. 6386 and 0181.

The prosecutor said she had excused Juror No. 6386 because she had family members who had been in and out of jail and because she had a brother who had been killed by law enforcement. The prosecutor also cited Juror No. 6386's belated disclosure of these facts, in the process, citing *People v. Rodriguez* (1999) 76 Cal.App.4th 1093. The prosecutor said she had excused Juror No. 0181 because she had a bad experience with a police officer and because she had a brother who had been wrongly charged with a crime. The prosecutor also cited Juror No. 0181's statement that she had initially forgotten about her brother who had been wrongly accused.

The trial court stated it had reviewed the prosecutor's reasons, considered her demeanor and the voir dire record. The court stated that it was "satisfied" the prosecutor had offered permissible race-neutral justifications and concluded: "[T]he prosecution's reasons for each of these challenges are credible, sincere, and legitimate, and I believe and accept each of these reasons." The court found the challenges had not been based on racial discrimination and that the defense had failed to show purposeful discrimination, and denied the *Batson*/*Wheeler* motion.

4. Juror No. 0950

When called from the venire, Juror No. 0950 originally sat in seat 17, where she gave her initial, background answers on voir dire. When the prospective juror in seat 14 was excused by stipulation, the jurors in seats 15 through 18 moved up one seat, putting

Juror No. 0950 in seat 16. When Thompson's counsel used a peremptory challenge to excuse the prospective juror in seat 7, Juror No. 0950, moved into seat 7.[9]

Juror No. 0950 worked as a human resources recruiter for financial institutions; she would "provide [clients] with anyone from the tellers to vice-presidents." Juror No. 0950 was married; her husband was a retired engineer. Her daughter worked as a customer service representative. Juror No. 0950 had prior civil jury experience, and verdicts were reached. She had "neighbors -- close friends that are detectives with LAPD," but agreed that she would treat the police officer witnesses in Nero's case "like any other witness."

During individual questioning by the lawyers, the prosecutor asked Juror No. 0950 (then in Seat 16) whether she remembered the first day of voir dire, before jurors' names were called, when the court introduced the parties, and Juror No. 0950 answered that she did. The prosecutor then asked: "And do you remember when [defendant] Thompson, stood up -- I saw that you looked at him just with a very gentle, nice, almost motherly smile. Do you recall that?" Juror No. 0950 answered, "No." The prosecutor apologized for prying, but said that she wanted to know whether Juror No. 0950 had "any kind of sympathy for [defendant Thompson] or [was] feeling sorry for him." In reply, Juror

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[9] Citing Nero's opening brief at page 39, the Attorney General suggests that Nero has misidentified the prospective juror who was the object of the prosecutor's challenge leading to the second *Batson/Wheeler* motion. According to the Attorney General, Nero has incorrectly focused on the voir dire surrounding "Juror No. 7547," rather than Juror No. 0950. The Attorney General's observation about Nero's opening brief is generally correct. But, based upon the full text of Nero's opening brief, and upon his reply brief, we understand him to be contesting the genuineness of the prosecutor's peremptory challenge as to Juror No. 0950, who was seated in seat 7 when excused. As noted above, Jurors Nos. 7547 and 0950 were originally placed in seats 16 and 17, respectively. When the juror in seat 14 was excused, all the jurors moved up one space, putting Jurors No. 7547 into seat 15 and Juror No. 0950 into seat 16. When Thompson's counsel excused the juror in seat 7, Juror No. 0950 moved into seat 7. When the prosecutor exercised a peremptory challenge to Juror No. 0950, Nero made his second *Batson*/*Wheeler* motion. The trial court later referred to the juror as Juror No. "0590," but this appears to have been either a vocal slip or a mistaken transcription of Juror No. 0950.

No. 0950 explained: "I greet everyone that way, with a smile and caring face. I'm very open-minded, if that says anything to you; and I have to be in the job that I'm in. And I judge people all the time."[10]

5. The Second *Batson*/*Wheeler* Motion

A few moments after the exchange summarized above (another 10 pages in the reporter's transcript), there was another round of peremptory challenges. During this round, the prosecutor excused the jurors in seat 11, and in seat 9. Thompson's counsel excused the juror in seat 7. At that point, jurors were moved up again, and Juror No. 0950 went into seat 7. As the round of peremptory challenges continued, the prosecutor excused the juror in seat 3. All three defendants then accepted the panel. The prosecutor then excused Juror No. 0950 (seat 7). At that point, the court on its own accord stated, "Juror [No. 0950], could you just remain a minute here? I just want to talk to counsel. Just remain a minute."

When the lawyers got to the bench, the court stated, "I assume there's going to be another *Wheeler* motion," and defendant Nero's counsel answered, "Yes, Your Honor. Systematic exclusion of Black jurors. [¶] This is the third Black juror that's been excused by the prosecutor based on peremptory challenge. There is no basis for this juror being excused." In response, the prosecutor said she excused Juror No. 0950 because she had repeatedly failed to make eye contact with the prosecutor, but had smiled when defendant Thompson was introduced and said that she was friendly with everyone. At this point in the conversation, the court day was almost at its end, and the court continued the matter for further discussion the following day.

The next day, the prosecutor filed a brief in support of her peremptory challenges. During the lawyers' discussion with the court regarding the *Batson*/*Wheeler* motion, the court noted that the prosecutor had exercised 13 peremptory challenges, of which

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[10] Juror No. 0950's explanation implicitly concedes that she may well have smiled at defendant Thompson.

three were against Black jurors, and that no Black jurors then remained in the jury box.[11] The court also noted that all three defendants were Black. The court found a prima facie case of jury selection bias based on race and asked the prosecutor for her reasons.

The prosecutor again noted that Juror No. 0950 had smiled at defendant Thompson in a warm or motherly manner. The court noted it had not observed such a gesture and expressed its view that it might want to consider "any corroboration" for the prosecutor's explanation. The prosecutor said she had been so disturbed by the prospective juror's reaction to defendant Thompson that she had mentioned it to her investigating officer. A moment later, two of the investigating officers, LAPD Detectives Jay Moberly and Maria Perez, both testified under oath that the prosecutor had voiced concern to them that a juror had smiled at defendant Thompson.

In further argument to the court, the prosecutor reviewed her reasons again. She explained that, based on her observations, she believed Juror No. 0950 was sympathetic to defendant Thompson. Defense counsel again argued that the offered explanation was a pretext for race-based juror selection.

At the end of the hearing, the court denied the *Batson*/*Wheeler* motion. The court expressly recognized that its task was to judge the prosecutor's credibility, then noted that it had observed her demeanor and concluded "that she is telling me the truth." The court also found the detectives' testimony corroborated the prosecutor's proffered reasons for challenging Juror No. 0950. The court found the prosecutor's reasons were "credible, sincere, and legitimate." The court found the challenge was not based on race, and that the defendants had not proved purposeful discrimination to the court.

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11 The record does not disclose whether any Black jurors remained in the venire. On March 16, 2010, after the court accepted the prosecutor's explanation for excusing Juror No. 0950, a further seven prospective jurors were called for voir dire. Later that day, another seven prospective jurors were called for voir dire. On March 18, another seven prospective jurors were called for voir dire. On March 22 and 23, still more jurors were called at different times for voir dire. Finally on March 23, after 12 jurors were selected, an additional 18 prospective jurors were called to select 4 alternate jurors. The final cross-representational characteristics of the jury are not disclosed by the record.

Analysis

The trial court did not err in denying the first *Batson*/*Wheeler* motion. First, no reasonable person could deny that the prosecutor had legitimate, race-neutral grounds for excusing Juror No. 6386. She had relatives who had been involved in the criminal justice system. (See, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 138; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1045-1047 (*Dunn*); *People v. Barber* (1988) 200 Cal.App.3d 378, 390-399; see also *People v. Avila* (2006) 38 Cal.4th 491, 554-555 (*Avila*) [peremptory challenge did not support prima facie case where the record suggested that the reason for excusal was brother's conviction for manslaughter]; *People v. Roldan* (2005) 35 Cal.4th 646, 703-704, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [peremptory challenge did not support prima facie case where the record suggested that the reason for excusal was the juror's son being in prison].) And she said her brother was "murdered" by a law enforcement officer. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1011 [it was not improper to challenge a juror whose son had been beaten by police].) Our Supreme Court has "repeatedly" approved peremptory challenges made on the basis of a prospective juror's "negative experience" with law enforcement. (*Lenix*, *supra*, 44 Cal.4th at p. 628.) Finally, the prosecutor also properly excused Juror No. 6386 for her belated disclosure of information. (See *People v. Adanandus* (2007) 157 Cal.App.4th 496, 509 [prosecutor properly excused juror who had not been forthright in her answers on voir dire].)

Our analysis is similar regarding Juror No. 0181. The prosecutor properly excused Juror No. 0181 because she had said during voir dire that she had a negative experience with law enforcement and it had left a "bad taste in her mouth." A juror's negative experience, even if it was an event others might not consider a major incident, can be a basis for believing the juror might not be fair. (*Lenix*, *supra*, 44 Cal.4th at p. 609 [comments by prospective juror that "no one ever feels they deserve a ticket," that she agreed that an officer who ticketed her might have shaded the truth a little, and that she did not know if she "deserved" her ticket, supported a prosecutor's peremptory challenge].) In Nero's current case, Juror No. 0181 said that the officer had

"unholstered" his weapon, and she believed he had racially profiled her. This was far beyond a minor negative experience with a traffic ticket. The prosecutor also properly excused Juror No. 0181 based on a concern that she might have resentment toward the prosecution related to her brother's wrongful arrest. (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1011 [proper to excuse juror whose son had been tried for burglary but found not guilty and juror believed her son was innocent].) The prosecutor's stated reasons for excusing Juror No. 0181 were plausible and permissible, and we will not overturn the trial court's conclusion that the prosecutor's true mental state in expressing her reasons was sincere.

Turning to Nero's second *Batson*/*Wheeler* motion, we again find no reversible error. The prosecutor could properly rely on Juror No. 0950's act of "smiling" at defendant Thompson. A prospective juror may be excused based upon facial expressions, gestures, body language, a hunch, and even for arbitrary or idiosyncratic reasons. (*Lenix*, *supra*, 44 Cal.4th at pp. 613, 622; *Ward*, *supra*, 36 Cal.4th at p. 202; *People v. Trevino* (1997) 55 Cal.App.4th 396, 409; *Dunn*, *supra*, 40 Cal.App.4th at p. 1047 [juror "frowning"].) The prosecutor's concern that Juror No. 0950 might be favorably sympathetic to a defendant, a perception which the trial court found to be corroborated and honestly held, was proper reason to support the peremptory challenge. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1217; see also *People v. Stanley* (2006) 39 Cal.4th 913, 939 [proper to excuse jurors based on perceived sympathy for defendant]; cf. *People v. Ledesma* (2006) 39 Cal.4th 641, 679 (*Ledesma*) [proper to excuse juror who appeared to be predisposed to defense attorney].)

Nero's assertion that the prosecutor's response to the second *Batson*/*Wheeler* motion shows "[t]he lady doth protest too much" (Nero's quotation) must be viewed for what it is, namely, a request that we reweigh the evidence in the record and reach a different conclusion than the trial court. And it was not error for the trial court to credit the prosecutor's stated gesture-based reason even though the court did not personally observe the conduct. (See *Thaler v. Haynes* (2010) __ U.S. __ [130 S.Ct. 1171, 1174] [rejecting a bright-line rule that a demeanor-based explanation for a peremptory

challenge must be rejected unless the trial judge personally observed and recalls the relevant aspect of the prospective juror's demeanor].)

Finally, we reject Nero's reliance on *People v. Long* (2010) 189 Cal.App.4th 826 (*Long*), for a different result. There, the defendant made a *Batson*/*Wheeler* motion based on the prosecutor's peremptory challenges against three Vietnamese jurors. The prosecutor explained his challenges to one of the jurors (T.N.) as being based on the juror's failure to answer any questions during voir dire and his body language and failure to make eye contact. The trial court's only statement regarding the prosecutor's reasons was that they were "legitimate." (*Long*, at pp. 839-840.) On review, the Sixth District Court of Appeal found the trial court should not have accepted a failure-to-answer questions explanation because the record showed that the juror had answered questions. (*Id.* at p. 843.) Based on this, and based on the trial court's terse "legitimate" finding, the Court of Appeal found that the trial court's implied finding as to the juror's demeanor, which was not shown by the record, could not sustain the decision to deny the defendant's *Batson*/*Wheeler* motion. (*Long*, at pp. 845-848.) The very good lesson to be taken from *Long* is that prosecutors must show, and trial courts must find, race-neutral reasons in a thoughtful and record-supported fashion, and reviewing courts will not simply affirm showings and rulings because race-neutral language is found in the record.

Here, unlike in *Long*, the prosecutor's demeanor-based reasons are not contradicted by the record, and the trial court carefully examined the prosecutor's stated reasons, including requiring a showing of corroboration, and making explicit findings as to the prosecutor's credibility. This is not a case where the trial court simply found the prosecutor's stated reasons were "legitimate." We agree with Nero that the trial court's ruling was based on its assessment of the truth of the prosecutor's stated reasons. But this is not error; it is a proper basis for a ruling on a *Batson*/*Wheeler* motion. And where, as here, the record discloses an evidentiary foundation supporting the reasonableness of the trial court's decision to believe a prosecutor's stated reasons, we will not reverse.

II. Prosecutorial Misconduct Involving Questions at Trial

Nero contends his convictions must be reversed because the prosecutor engaged in misconduct by "repeatedly ask[ing] third parties whether prosecution witnesses feared the defendants." We are not persuaded that reversal is warranted.

During witness Natashia Friday's testimony, defendant Palm's trial counsel asked her whether she had been accepting rides to and from court from one of the investigating officers, LAPD Detective Jay Moberly, and Friday answered yes. By further questions, defendant Palm's trial counsel suggested that the detective was coaching Friday in her testimony. On redirect examination, the prosecutor brought out that Friday was afraid to testify.

Later during trial, on direct examination of Detective Moberly, the prosecutor asked the detective why he had transported witness Natashia Friday to and from court, and the detective answered, "For her safety." Defendant Nero's counsel objected. The trial court sustained the objection, struck the detective's answer, and called the lawyers to sidebar for a discussion. At the bench, the court noted that it was proper to delve into a witness's fear to testify, but that the prosecutor could not to bring in such evidence by way of the testimony of another witness. The court agreed that the issue of whether the detective had discussed the case with Friday was a subject properly open to inquiry.

When the lawyers returned to their places, the prosecutor stated that she would move on to another subject, and then asked Detective Moberly whether witness Vance Zelaya had ever told the detective that he was "scared to testify." Nero's trial counsel objected again. There was another sidebar discussion, this one more extensive, concerning whether the prosecutor's line of questioning went against what the court had just said, or whether it was proper impeachment in that Zelaya had, during his earlier testimony, offered that he was not afraid to testify. The trial court ruled that the prosecutor could pursue an inquiry into statements made by Zelaya to Detective Moberly which were inconsistent with Zelaya's testimony at trial.

We find no misconduct warranting reversal. It is proper to question a witness about his or her fear of testifying where such an inquiry tends to affect the credibility of the witness's testimony. (See, e.g., *People v. Valencia* (2008) 43 Cal.4th 268, 301-302 (*Valencia*).) Assuming without deciding that the prosecutor's questions to Detective Moberly were an improper path to the proper end of developing a "fear of testifying" showing on the part of other witnesses, we are not persuaded that the questions warrant reversal of Nero's convictions. The issue of witnesses Friday's and Zelaya's fear of testifying was properly developed during their own testimony. Under any standard, any taint from the prosecutor's isolated questions to Detective Moberly on the matter that was otherwise properly developed in front of the jury does not support reversal of his convictions for prosecutorial misconduct. (Compare *People v. Morales* (2001) 25 Cal.4th 34, 44 [where misconduct so infected trial with unfairness it makes the defendant's resulting conviction a denial of due process, the misconduct will constitute an error of constitutional magnitude], with *People v. Frye* (1998) 18 Cal.4th 894, 976 [where misconduct merely exposes jurors to some improper factual matter, the error is tested to determine whether there is a reasonable probability the jury's verdict was affected by the extraneous evidence].) The prosecutor's questions to Detective Moberly were a minor element, if an element at all, in the overall picture of trial.

III. Prosecutorial Misconduct Involving Discovery

Nero contends his convictions must be reversed because the prosecutor concealed information he learned the day before until after the defense witness involved had already been cross-examined by the defense. We disagree.

The Trial Setting

Witness Natashia Friday began testifying on Monday, April 19, 2010; she testified on direct, was cross-examined by all three defendants' trial counsel and gave further testimony on redirect examination. On Tuesday, April 20, 2010, during further recross-examination by defendant Nero's trial counsel, Friday testified about looking at "six-packs" of photographs during a police interview in July 2005. During this testimony, Friday basically conceded that she had failed to positively identify defendant Nero from a

six-pack during a July 2005 interview, and that she only marked a photograph with the word, "familiar," by which she had meant "someone that you may have seen somewhere before; someone that you may know, but you're not quite sure . . . ." On further redirect examination, the prosecutor asked Friday if she had recently listened to her July 2005 interview with the police, and Friday stated she had listened to the interview "yesterday" (i.e., on Monday, April 19, 2010). At this point, Nero's counsel asked to approach the bench, "[b]ased on the answer" given by Friday.

During the ensuing sidebar discussion, Nero's counsel objected: "It appears . . . that there was an interview of this witness [yesterday] on a tremendously significant fact, and I know nothing about it. So I don't know where this is going, and I . . . have a right to know." The prosecutor explained that the previous day, she had played the tape of the July 2005 interview to witness Friday, in Detective Moberly's presence, and had "asked her if she recognized the voices, and she said she recognized her voice, [and another detective]'s voice, and Detective Moberly's voice. . . . [¶] . . . [¶] . . . I think with regard to the six-packs, I asked if she had any independent recollection of seeing those six-packs, and her answer was no." Nero's counsel continued to insist that he "had a right to know [about the meeting between the prosecutor and Friday]." Nero asked the court for "an instruction to the jury on a discovery violation." The prosecutor explained that the defense always had the tape of the July 2005 interview of Friday, that nothing "new" had been developed from the event the day before, and that, consequently, there was nothing to provide vis-à-vis discovery. Nero's counsel countered that the very existence of the meeting was important information, that the prosecutor did not get to decide what was and was not important to the defense, and that he had gone into his recross-examination "not knowing that. [And his] cross would have been different [with information about the meeting]." The trial court deferred a ruling when the prosecutor agreed to move onto other areas of inquiry with Friday, apart from anything concerning the meeting/interview held the previous day.

A moment later, outside the presence of the jury, the trial court, the prosecutor, and Nero's counsel revisited the issue of what had been or had not been required to be told to the defense about the previous day's meeting with witness Friday. The prosecutor restated her position that there had been no "new information" to disclose. Nero's counsel restated his position that Friday's pretrial identification "or lack thereof" was a "critical matter," and the prosecutor should have disclosed that an interview related to that matter had occurred. As a remedy, Nero's counsel suggested that the prosecutor not be allowed to ask any questions "about anything that took place during this interview." At a minimum, suggested Nero's counsel, there should be a hearing to determine "what took place during that interview." The prosecutor implicitly agreed to a hearing (commenting, "whatever").

At an ensuing hearing pursuant to Evidence Code section 402, witness Friday testified that it had taken about 5 minutes to find a part of the interview of July 2005 on the cassette tape that the prosecutor wanted to discuss, and that Friday had then listened to about 10 minutes of the tape. The prosecutor had then asked Friday if she recognized the voices, and if she could remember having looked at six-packs as the tape indicated she had done. Friday told the prosecutor she did not remember having looked at the six-packs. During subsequent argument to the court, the prosecutor agreed not to ask any questions about the meeting the previous day, and that she would only use the tape of Friday's police interview in July 2005 in the event it was useful for impeaching any in-court testimony by Friday. At the end of the hearing, the trial court ruled in accord with the remedy suggested by Nero's counsel and with the prosecutor's agreement: "[A]t this point, I'm precluding any questioning about the fact that Ms. Friday had a chance to go over it yesterday, or go over the . . . recording [of her July 2005 interview with police] yesterday. We'll just have her come in and identify whatever needs to be played."

Analysis

A criminal defendant's right to discovery is an outgrowth of his or her right to a fair trial, including the right to prepare and present an intelligent defense in light of all relevant and reasonably accessible information. (*People v. Luttenberger* (1990) 50

Cal.3d 1, 17.) To this end, section 1054.1 requires a prosecutor to disclose certain evidence to a defendant, including statements given by witnesses. On his current appeal, Nero expressly acknowledges that he is claiming a violation of the prosecutor's statutory discovery obligation only. A trial court's finding that a prosecutor did not violate his or her statutory discovery obligation is reviewed for an abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) Further, a trial court is vested with broad discretion in determining the appropriate remedy for a discovery violation. (*People v. Jenkins* (2000) 22 Cal.4th 900, 951.) A trial court abuses judicial discretion when its ruling is arbitrary, capricious or patently absurd. (*Ledesma, supra,* 39 Cal.4th at p. 705.) Finally, to obtain reversal of a conviction based on statutory discovery violation, a defendant must show that he was prejudiced by the denial of discovery. (See *People v. Gaines* (2009) 46 Cal.4th 172, 181.)

The trial court did not abuse its discretion. The cases cited by Nero do not support his implicit proposition that the prosecutor was required, during the course of trial, to provide a calendar of her daily activities to the defense, including any meeting with a witness to go over his or her trial testimony. The issue was not, as Nero has phrased it in his opening brief, whether the prosecutor "ever" failed to disclose information to the defense regarding Friday's pretrial identifications of Nero from six-packs. The prosecutor provided discovery of the tape of Friday's July 2005 police interview to the defense during discovery. Nero's counsel himself used information from that interview in his own cross-examination of Friday. Absent a showing that some new material was developed as a result of the prosecutor's meeting with Friday on Monday, April 19, 2010, we do not see an abuse of discretion in the trial court's ruling that no discovery violation occurred. In any event, the trial court demonstrated an overabundance of caution and largely provided the remedy that Nero's counsel proposed. By no means was that decision beyond the bounds of reason.

Finally, we see no possibility of prejudice. As noted, the trial court precluded the prosecution from asking Friday any questions about listening to the recording the previous day — the very remedy proposed by Nero's counsel. While Nero complains on

appeal that his trial counsel "could not do his job without receipt of full and complete discovery," we see nothing in the trial record, or in Nero's opening brief on appeal, which explains just what his trial counsel was not able to do. The assertion by his trial counsel went no further than to say that his cross-examination "would have been different," but he did not explain how it would have been different. The record does not show prejudice.

IV. Prosecutorial Misconduct Involving "Jeffrey Dahmer" Comments at Trial

Nero contends his convictions must be reversed because the prosecutor engaged in misconduct by comparing him to mass murderer Jeffrey Dahmer. We disagree.

The Trial Setting

During trial, defendant Nero presented evidence from a variety of sources to show that he wore glasses.[12] Among this evidence was Defense Exhibit J — a school picture of defendant Nero in which he was wearing glasses. During the prosecutor's argument to the jury, she commented on Defense Exhibit J, asking why the defense had used such a photograph when at least two witnesses had testified that Nero wore glasses from the time he was a "little kid." The prosecutor then continued in this vein with this language:

"[THE PROSECUTOR]: Ladies and Gentlemen, the fact that he was a cute child has nothing to do with anything other than sympathy. [¶] I know a lot of people who were cute children, one in particular who were cute children --

"[PALM'S COUNSEL]: Objection

"[THOMPSON'S COUNSEL]: Objection

"[NERO'S COUNSEL]: Objection

"THE COURT: Sustained.

"[THE PROSECUTOR]: I know a lot of people –

"[PALM'S COUNSEL]: Objection

"[THOMPSON'S COUNSEL]: Objection to 'I know a lot of people.'

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[12] The prosecution witnesses were asked whether the shooter, identified by the prosecution evidence as being Nero, had been wearing glasses. The answer had been no, the shooter had not been wearing glasses.

"THE COURT: Sustained. [¶] Let's not speak through your own knowledge. Just argue the evidence.

"[THE PROSECUTOR]: There are lots of situations where adult criminals used to be great, cute children. [¶] Jeffrey Dahmer --

"[THOMPSON'S COUNSEL]: Objection.

"THE COURT: Sustained.

"[THE PROSECUTOR]: And grew up to be criminals. [¶] So my only point is, Defense [Exhibit] J: the instruction is not to be biased or sympathetic because defendant Nero was a cute child."

Analysis

We disagree with Nero that the prosecutor's reference to "Jeffrey Dahmer" was improper argument. A prosecutor is afforded "wide latitude" in closing argument, including the grace to refer to matters which are not in evidence but which are common knowledge. (*People v. Williams* (1997) 16 Cal.4th 153, 221.) The prosecutor's reference to a long since forgotten mass murderer was made solely to rebut any sympathy the defense may have engendered by showing a youthful picture of Nero. She made the reason for her comment explicit; the jury would have understood it in that framework.

Even if the prosecutor's actions were considered misconduct, the isolated statement was harmless under any standard of review. The prosecutor's reference to Jeffrey Dahmer was a trivial part of a lengthy and complex argument, and, without doubt would have been understood by the jury as an advocate's hyperbole. (*People v. Sandoval* (1992) 4 Cal.4th 155, 184.) The trial court instructed the jurors that comments by the lawyers were not evidence. In light of the context, the court's instructions, and the strength of the evidence of guilt, we find no possibility that the prosecutor's isolated and fleeting "Jeffrey Dahmer" comment tainted Nero's trial, not even under the most strident standard of review. (See *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

V. Prosecutorial Misconduct Involving "Gunner" Comments at Trial

Nero contends his convictions must be reversed because the prosecutor engaged in misconduct by referring to him as a "gunner." Again, we disagree.

The Trial Setting

As noted above, Jesse Hayes was a significant prosecution witness at trial. During a break in Hayes's testimony, defendant Nero's counsel expressed a concern to the trial court that Hayes might testify that he understood Nero to be a "gunner," and that Hayes's "interpretation of [the term gunner]" would "be something to the effect that [Nero had] shot people in the past." Nero's counsel said that it would be a defense objection that such testimony would "lack foundation" because it would be "based on hearsay." The trial court held a 402 hearing on the issue, and Hayes testified that defendant Palm had said that Nero was going with Hayes to meet the victim because Nero was a "gunner." Hayes understood "gunner" to mean that Nero would do the shooting. Defendants Thompson and Nero were present during the discussion. The trial court ruled that Hayes's "gunner" testimony was admissible.

Later, in front of the jury, the prosecutor asked Hayes, "And how was it decided that [defendant Nero] should go with you?" and Hayes answered, "Uhm, well, like I said before, [defendant Nero] was known as a gunner, so." Before Hayes finished with his answer, Nero's counsel objected on the basis of lack of foundation, and the court ruled: "I'm sustaining the objection for now. [¶] He's referring to a discussion he had earlier, so you'll have to lay the foundation." The prosecutor, in turn, asked Hayes whether defendant Palm had said anything about why Nero was going with Hayes, and Hayes said yes. The prosecutor then asked Hayes what defendant Palm had said, and Hayes answered that defendant Palm had said that Nero was to go with Hayes so that Nero knew who Galindo was. Hayes testified that defendants Palm and Thompson said that Nero was going to shoot. At this point, the prosecutor asked if either defendant Palm or defendant Thompson had used the word "gunner," and Nero's counsel objected as leading, and the trial court sustained the objection. The prosecutor then asked Hayes what defendant Palm had said about why appellant Nero was to be the shooter, and Hayes answered: "[Palm] said that [Nero] was going to be the shooter because that I never shot nobody and I'm not that type of person, like I'm not a gunner, I don't shoot people." Shortly thereafter, testimony for the day concluded with Hayes still on the stand.

At the beginning of the next trial day, defendant Nero's counsel moved for a mistrial on the basis of the prosecutor's leading question using the term "gunner." The trial court denied the motion for a mistrial, finding no misconduct or ethical violation. The court said that Hayes initially did not give the same answers he had in the 402 hearing and that it was proper to use the word gunner given the difficulties the prosecutor was having with the witness. The court found the prosecutor had asked a "proper question" and that that it was not a "leading question given this context." The court added: "I trust that we're not going to be referring to Nero as [a] gunner during this trial," and the prosecutor said, "No."

Later, during her opening argument, the prosecutor made a statement that Hayes had testified that defendant Nero "was brought in because he was the gunner." At this point, Nero's counsel objected that the prosecutor had misstated the evidence, and the trial court admonished the jury that what counsel said in argument was not evidence and to be guided by the record. Not satisfied, Nero's counsel asked for a sidebar conference. During the ensuing discussion, the parties reviewed Hayes's testimony. The court accurately recalled that Hayes had testified that defendant Palm had said that Nero was going to be the shooter because Hayes had never shot anyone and he was not that type of person, a "gunner." The prosecutor had then recalled that she had asked if defendants Palm or Thompson had used the word "gunner," but an objection to the question was sustained. The court said it had sustained the objection because it "was in connection with the use of that name as a moniker." The court suggested that the prosecutor instead use the word "shooter." The prosecutor said she would like to quote Hayes's testimony, and the court said that she could. When Nero's counsel said he thought his objection to the "gunner" argument should be sustained, the court said it would sustain it.

Back in front of the jury, the court announced that it had sustained the objection and instructed the jury to disregard the prosecutor's earlier comment. The prosecutor then read Hayes's testimony to the jury, telling the jury that defendant Palm had said that Nero was going to be the shooter because Hayes "never shot nobody" and was not that "type of person -- like I'm not a gunner. I don't shoot."

Analysis

We see no misconduct involved in either the prosecutor's "gunner" questioning or comments. The "gunner" evidence was properly developed through a witness who was involved in the events surrounding the murder proved up at trial, and the prosecutor's argument was a fair comment on the properly developed evidence. (See *Valencia*, *supra,* 43 Cal.4th at p. 284.) In any event, Hayes's testimony in front of the jury was that he (Hayes) was "not a gunner." The prosecutor's comment that Hayes had testified that "Nero was brought in because he was a gunner" amounted to nothing more than a fair comment on the evidence. And the trial court instructed the jurors that the lawyers' comments were not evidence. To the extent the prosecutor used the word "gunner" in connection with Nero, the term was not unduly inflammatory because the evidence showed that Nero was the shooter. Nero's stated fear that the jurors would have understood Nero to be something of a "hit man" is more speculation than founded on the record. Thus, even assuming there was misconduct in the use of the term "gunner," it was harmless under even the most strident standard of review. (See *Chapman, supra,* 386 U.S. at p. 24.)

VI. Accomplice Testimony

Nero contends all of his convictions must be reversed because the prosecution's case against him depended entirely upon the testimony of witness Jesse Hayes, who was an accomplice, and because "there is insufficient evidence to corroborate Hayes' tale to sustain [any of Nero's] convictions." In other words, Nero contends there is insufficient evidence corroborating Hayes's testimony that Nero was involved in the planning of the murder at the Ramada Inn, and that Nero was the second person involved in the shooting of Galindo and Galaviz.[13] We are satisfied there is sufficient independent evidence in the record to corroborate Hayes's accomplice testimony, and thus to support all of Nero's convictions.

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[13] Because the jury did not return "true" findings on the personal firearm use allegations as to Nero, the issue is not whether there was sufficient corroboration for Hayes's testimony that Nero was the actual shooter.

The Governing Law

An accomplice's testimony is not sufficient to support a conviction unless it is corroborated by other evidence connecting the defendant with the offense. (§ 1111; *People v. Najera* (2008) 43 Cal.4th 1132, 1137.) "To corroborate the testimony of an accomplice, the prosecution must present 'independent evidence,' that is, evidence that 'tends to connect the defendant with the crime charged' without aid or assistance from the accomplice's testimony. [Citation.] Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime. [Citations.] ' "[T]he corroborative evidence may be slight and entitled to little consideration when standing alone." [Citation.]' [Citation.]" (*Avila*, *supra*, 38 Cal.4th at pp. 562-563.) The parties' conduct, relationships, and acts during and after the crime may be taken into consideration by the jury in determining the sufficiency of the corroboration of an accomplice's testimony. (*People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1305.) On appeal, a jury's determination on the issue of corroboration (as implicit in its verdict) is binding unless the corroborating evidence " 'should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime.' [Citation.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 505.)

Analysis

The evidence corroborating Hayes's testimony was sufficient to support Nero's convictions. Hayes's testimony that Nero was involved in the planning activity at the Ramada Inn, and that he was an actor in the shooting of Galindo and Galaviz, was amply corroborated by independent evidence in the form of the testimony from the FBI agents who were investigating Galindo for drug trafficking, the wiretap evidence, and testimony from Natashia Friday and from Rosa Galaviz.

The drug-investigation evidence, including tape recorded cell phone conversations between Galindo and defendants Palm and Thompson, generally established that Galindo was supplying cocaine, and corroborated Hayes's testimony about how Galindo came to be the object of the murder. The wiretapped phone conversations in March 2005, before and after Palm's arrest, corroborated Hayes's testimony about why the conspiracy was

hatched — because Palm could not repay Galindo for the loss of drugs when he was chased by police. The police officers' testimony about the chase, and about Palm discarding the cocaine, further buttressed the foundational picture painted by Hayes's testimony. The evidence that the cocaine was valued at over $200,000 was consistent with Hayes's testimony that Palm owed a great deal of money to Galindo, which supported his testimony that there was a strong motive to kill him. (See *People v. McDermott* (2002) 28 Cal.4th 946, 986 [accomplice testimony corroborated in part by evidence of defendant's financial motive for murder]; *People v. Szeto* (1981) 29 Cal.3d 20, 28 [accomplice testimony corroborated in part by evidence of defendant's revenge motive to assist murderers].) That Nero did not owe Galindo for the lost drugs does not mean the overall setting for the murder was not corroborated.

Evidence of intercepted cellular telephone conversations corroborated Hayes's testimony about a meeting being set up with Galindo and Hayes on the day of the murder. Evidence that calls made by defendants Palm and Thompson went through a Burbank cell site and corroborated Hayes's testimony that he met with them at the Ramada Inn in Burbank before and after the murder. (See *People v. McDermott, supra,* 28 Cal.4th at p. 986 [accomplice testimony corroborated by evidence of phone calls between defendant and accomplice, including calls on day after murder]; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1013 [accomplice testimony corroborated by evidence of cell phone records establishing the conspirators were in continual contact with each other during the night when victim was murdered].) Zelaya's testimony corroborated Hayes's testimony that he borrowed Zelaya's car on the day of the shooting. Testimony by witnesses who saw a car matching Zelaya's car at the time of the shooting is also corroborative.

The more focused question presented by defendant Nero's accomplice argument on appeal is whether there was sufficient independent trial evidence corroborating Hayes's testimony that the second person involved with him in the shooting of Galindo and Galaviz was, in fact, Nero. In other words, the issue that defendant Palm argues on appeal is the sufficiency of the evidence corroborating an accomplice's identification testimony. We are satisfied the corroborating evidence was sufficient under the well-

settled standard of review. (*Avila, supra*, 38 Cal.4th at p. 563 [corroborative evidence may be slight and entitled to little weight when standing alone].) The general framework of the shooting as shown by Hayes's testimony was corroborated by testimony from LAPD Sergeant Charles Sampson and victim Galaviz, both of whom consistently testified two Black males committed the shooting, and that the assailants had a duffel bag with them. Galaviz identified Hayes as one of the assailants. Other evidence corroborated Hayes's testimony in that it showed a prior relationship between Hayes and Nero. Additional testimony showed a prior relationship between "Suga Buga" and Nero, corroborating Hayes's testimony that Suga Buga arranged for Nero to take part in the shooting.

Nathashia Friday's testimony corroborated the foundational aspect of the case that defendants Palm and Thompson were involved in a drug-trafficking operation with the murder victim Galindo, and that Palm lost cocaine and was afraid that he could not repay Galindo, all of which set up the motive for the murder. Friday's testimony was itself corroborated by the evidence in the form of the investigator's testimony and the evidence of intercepted telephone communications. Friday's testimony also corroborated Hayes's testimony about the conversations between Hayes, "Suga Buga," and all three defendants at the Ramada Inn in Burbank on the day of the murder. She identified all three defendants at trial. She corroborated Hayes's testimony that the discussion included finding a secluded area, and defendant Palm's instruction to take Galindo's cellular telephones. She testified about a duffel bag being in the room, consistent with Hayes's testimony that they used such a bag as a ruse. Friday's testimony was consistent with Hayes's testimony that Hayes and defendant Nero left and returned together.

Friday also corroborated Hayes's testimony that he and defendant Nero returned to the Ramada Inn and gave Galindo's cellular telephone to defendant Palm. Friday's testimony that Hayes and Nero made statements about the manner in which the shooting occurred corroborated Hayes's testimony about the shooting.

In sum, Friday and the investigators corroborated the general relationship between the parties, and Hayes's testimony about the meeting where the murder was planned, the people who planned it, the details of the planning, the departure of Hayes and defendant Nero, their return, their possession of Galindo's cellular telephone on return, and their report of the shooting. This is far beyond the "slight" evidence necessary to corroborate Hayes's testimony.

Nero's argument that corroboration was not sufficient because the jury did not find that defendant Nero had personally used a firearm is not persuasive. First, the jury did not — as Nero's arguments on appeal suggest — find that Nero had not been the shooter. Instead, the jurors did not reach a unanimous decision that he was the shooter. Second, even if he was not the shooter, this does not mean the corroborating evidence was insufficient to show that he was involved in the murder conspiracy and planning, or that he was not the second assailant at the scene of the shooting. The evidence was sufficient to corroborate Hayes's testimony that Nero was involved.

Nero's arguments that the corroborating trial evidence was not believable are also unpersuasive. First, the trial was not merely a situation of two accomplices, i.e., Hayes and Friday, cross-vouching for each other. The whole panoply of evidence, beginning with the investigation, the lost drugs, and motive, corroborated Hayes's testimony about the murder. Second, it was for the jury to decide the believability and weight to be given Hayes's testimony and corroborating testimony. The issue is whether there was a foundationally sufficient quantum of evidence which reasonably could be applied to give corroboration to Hayes's testimony. For the reasons explained above, we find there was such evidence.

VII. Cumulative Prejudice

Nero contends his convictions must be reversed because his trial "was fraught with prejudicial error from start to finish, from the prosecutor's [violation of *Batson*/*Wheeler*] to equating Nero with the notorious Jeffrey Dahmer." Because we have found either no error, or no misconduct, or no prejudice as to any of Nero's individual assignments of

error and prejudice, we find no prejudice when those individual parts are cumulatively reviewed and assessed.

VIII. The Section 654 Sentencing Issue

The trial court imposed a term of 25 years to life on Nero on his conviction for conspiracy to commit murder plus one year for the principal armed enhancement (count 1), and a term of LWOP on his conviction for the murder of Galindo with special circumstances plus one year for the principal armed enhancement (count 2). Nero contends his sentence must be modified because section 654 precludes the two separate punishments imposed on his conviction for conspiracy to murder Galindo (count 1) and his conviction for the murder of Galindo (count 2). The trial court imposed the two separate punishments based upon its express finding that Nero had separate intents in conspiring to murder two victims (Galindo and his wife), and in subsequently, actually committing the murder of one of those victims (Galindo). We agree with Nero that section 654 precludes the two punishments imposed on counts 1 and 2. The trial court should modify Nero's sentence as follows: impose a term of LWOP on Nero's conviction for the murder of Galindo (count 2), impose and stay the term on his conviction for conspiracy to commit murder (count 1).

Where a defendant conspires to commit several crimes, with no objective apart from the crimes, a trial court violates section 654 when it sentences a defendant for the conspiracy to commit the crimes and for each of the crimes. (*In re Cruz* (1966) 64 Cal.2d 178, 180-181.) "Thus, punishment for both conspiracy and the underlying substantive offense has been held impermissible when the conspiracy contemplated only the act performed in the substantive offense [citations], or when the substantive offenses are the means by which the conspiracy is carried out [citation]. Punishment for both conspiracy and substantive offenses has been upheld when the conspiracy has broader or different objectives from the specific substantive offenses." (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 615-616.)

The trial court expressly cited *People v. Flores* (2005) 129 Cal.App.4th 174 (*Flores*), when it sentenced Nero to two punishments. On appeal, Nero argues the trial court misplaced its reliance on *Flores*. We agree. In *Flores*, the defendant was a gang member who joined with other gang members to attack and kill two victims, Valdivia and Morales. A jury found the defendant guilty of the murder of Valdivia, not guilty of the murder and voluntary manslaughter of Morales, but guilty of the lesser offense as to Morales of conspiracy to commit battery. The Court of Appeal ruled that, because there was no conviction for a conspiracy to murder Valdivia, section 654 did not bar two punishments — one for the conspiracy to commit a battery on Morales, and a second for the murder of Valdivia. (*Flores*, at pp. 184-185.) In short, there were two victims, with a conspiracy crime directed toward one of the victims, and a separate, nonconspired crime against the second victim.

We find the *Flores* model does not fit Nero's current case. Here, for purposes of sentencing, the jury returned a conviction for conspiracy to murder Galindo which may be interpreted to be coupled with a conviction for conspiracy to murder Galindo's wife (count 1), a conviction for Galindo's murder (count 2), and a conviction for the attempted murder of Galindo's wife (count 3). That, as a matter of the verdict forms, the objects of the conspiracy were two identified victims within a single, collective count is not material in our view. There was not, as in *Flores*, a conspiracy to commit one crime directed at one victim, and a different, nonconspired substantive crime against a different victim. Thus, Nero could properly be punished upon his conviction for conspiring to murder Galindo, or his conviction for Galindo's murder, but not upon both, and he also could be properly punished upon his conviction for conspiring to murder Galindo's wife (to the extend the verdict form is interpreted as such), or his conviction for the attempted murder of Galindo's wife, but not upon both.

The People's reliance on *People v. Cooks* (1983) 141 Cal.App.3d 224 (*Cooks*) and *People v. Vargas* (2001) 91 Cal.App.4th 506 (*Vargas*), does not persuade us to come to a different conclusion. In *Cooks*, there was a conspiracy to commit random killings of "Caucasians" as part of what could fairly be described as a race-motivated terror spree,

and a shooting murder of a Caucasian victim, Frances Rose. The Court of Appeal upheld punishment for both conspiracy and murder, analyzing the "double punishment" issue as follows: "In this case the . . . conspiracy was not limited to the murder of Frances Rose but extended to the murder of a number of other people. Under these circumstances, [the defendant] could be lawfully punished for murdering Frances Rose and for conspiracy to murder." (*Cooks, supra*, at p. 317.) Nero's case is not similar; he did not conspire to engage in a murderous war against a class of persons and kill a victim in the process. Nero and his cohorts specifically targeted Galindo and his wife for murder and then carried out the murder.

In *Vargas*, a defendant conspired with fellow gang members to kill people on a "hit list," and there was a gang shooting murder of a person, Eli Rosas, who was not on the hit list. The Court of Appeal upheld punishment for both conspiracy and murder, analyzing the section 654 issue as follows: "Here, there is strong evidence that the NF [gang], of which defendant was a member, conspired to kill not only Rosas, but other persons as well, in addition to the gang's overriding conspiracy [to kill the people on the hit list]. [¶] We conclude the trial court did not err in not applying section 654, and in sentencing defendant to consecutive life terms for the Rosas murder and the conspiracy to commit murder." (*Vargas, supra*, 91 Cal.App.4th at p. 571.) Again, we find Nero's case is not similar; he did not conspire to kill one group of victims, and then kill a victim not a part of the targeted group of victims. Nero and his cohorts specifically targeted Galindo (and his wife) for murder and then carried out the murder.

IX. Custody Credits

In his reply brief, Nero has withdrawn his assignment of error concerning custody credits.

X. Joinder

Nero joins all arguments presented by defendants Thompson and Palm. Except as we have discussed regarding section 654, we deny all claims by Thompson and Palm, and for the reasons we denied those claims, they are denied as to defendant Nero as well.

Defendant Thompson's Appeal

I. The *Batson*/*Wheeler* Issue

Thompson contends his convictions must be reversed for *Batson*/*Wheeler* error. For the reasons explained above in addressing this issue on defendant Nero's appeal, we reject Thompson's contention. Thompson's assertion that this "was not a case in which other members of the suspect class were left to serve on the jury" is unavailing because the record does not disclose the cross-representational composition of the final 12 jurors who sat in judgment of the facts his case.[14] In other words, Thompson's assertion that no African-American juror served on his jury is an assertion only; it is not supported by any reference to the record. What the record does show is that the prosecutor excused three African-American prospective jurors at a fairly early stage of voir dire. It does not show whether any African-American juror or jurors ultimately sat in the jury box during trial.

In a similar factual vein, Thompson's assertion that "it is unreasonable to assume that race did not . . . enter into the prosecutor's calculations [in exercising her peremptory challenges]" is no more than a veiled request that we reweigh the record and come to a different conclusion on race-neutrality than did the trial court. Because the trial court's ruling is supported by the record, it cannot be said to be unreasonable as a matter of law, and we will not substitute our assessment of the evidence in place of the trial court.

II. The Accomplice Testimony Instructional Issue

Thompson contends his convictions for conspiracy to commit murder (count 1), first degree murder of Galindo (count 2), and attempted premeditated murder of Rosa Galaviz (count 3) must be reversed because the trial court failed to instruct the jury sua

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[14] Wrongful juror exclusion is wrongful juror exclusion at the moment it occurs, but, as Thompson recognizes in his opening brief, the presence of trial jurors of an identifiable group involved in a *Batson*/*Wheeler* motion may be an indicator of race neutrality on the prosecutor's part with respect to prospective jurors who were excused. (See, e.g., *People v. Turner* (1994) 8 Cal.4th 137, 168, clarified on a different issue in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

sponte on the law governing accomplice testimony as it related to prosecution witness Natashia Friday. We disagree.

As noted above, an accomplice's testimony is viewed with caution. For this reason, a conviction cannot be based on the testimony of an accomplice unless it has been corroborated by other evidence tending to connect the defendant to the commission of the offense. (§ 1111.) A trial court has a sua sponte duty to instruct on the law governing accomplice testimony, including the need for corroboration, when the evidence at trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice. (See *People v. Tobias* (2001) 25 Cal.4th 327, 331; see also *People v. Zapien* (1993) 4 Cal.4th 929, 982.) A trial court's failure to instruct the jury sua sponte on the law governing accomplice testimony is a harmless error where the trial record discloses sufficient evidence corroborating the defendant's guilt. (*Zapien, supra,* at p. 982.)

Here, the prosecution's primary witnesses against Thompson as a conspirator to commit murder, and as an aider and abettor to the ensuing murder and attempted murder, were Jesse Hayes and Natashia Friday. The trial court instructed the jurors on the law governing an accomplice's testimony where there is no dispute that the witness acted as an accomplice. (See CALCRIM No. 335.) In its instructions, the court explained that testimony by an accomplice was not sufficient standing alone to convict all three defendants, but was sufficient if it was supported by other evidence the jurors found believable. As to the application of the law governing accomplice testimony, the court further instructed the jurors as follows: "If the crimes of conspiracy to commit murder, murder and attempted murder [as charged in counts 1, 2 and 3] were committed, then Jesse Hayes was an accomplice to those crimes. [¶] If the crimes of conspiracy to possess cocaine for sale and conspiracy to transport cocaine [as charged in counts 4 and 5] were committed, then Jesse Hayes and Natashia Friday were accomplices to those crimes."

Thompson's argument on appeal is that, as to the homicide-related crimes alleged in counts 1, 2, and 3, the trial court should have further instructed the jury with language such as that found in CALCRIM No. 334, applicable when evidence would support, but does not require, a conclusion that a witness was an accomplice. We understand Thompson to argue that the trial court should have instructed the jurors with language something to this effect: "If the crimes of conspiracy to commit murder, murder and attempted murder [as charged in counts 1, 2 and 3] were committed, before you may consider the testimony of Natashia Friday as evidence against the defendants regarding those crimes, you must first decide whether Natashia Friday was an accomplice to those crimes. Natashia Friday was an accomplice if she was subject to prosecution for the crimes charged in counts 1, 2 and 3 against the defendants."

We find no error in the manner in which the trial court composed the accomplice testimony instructions. We see no evidence in the record that Natashia Friday was an accomplice to the murders. More specifically, we find no evidence upon which she could have been prosecuted for the homicide-related offenses. The evidence simply did not show she aided and abetted the homicide-related crimes. At most, the evidence showed she was present at the Ramada Inn when the defendants discussed killing Galindo, and when they returned and discussed having killed Galindo. None of authorities cited by Thompson supports his implicit proposition that listening to others plan a crime constitutes aiding and abetting the crime. There is no evidence that Friday performed any act to assist or promote the homicide-related crimes.

We are no more persuaded to find error by Thompson's reliance on the theory of "natural and probable consequences." In this vein, Thompson proffers that it may have been possible to prosecute Friday on the theory that Galindo's murder was a "natural and probable consequence" of Friday's undisputed participation in the illegal drug enterprise that underpinned Galindo's murder. We see no evidence in the record tending to show that a murder of the nature involved in Galindo's killing was a natural and probable consequence of drug dealing, and the generalized proposition that drug crimes are naturally connected to murder has been regularly rejected. (See, e.g., *People v. Hinton*

(2006) 37 Cal.4th 839, 880; *People v. Garceau* (1993) 6 Cal.4th 140, 183-184.) The natural and probable consequences doctrine is typically found in a murder context were one violent crime such as an assault or armed robbery leads to murder. (See, e.g., *People v. Medina* (2009) 46 Cal.4th 913, 922 [gang assault and murder]; *People v. Prettyman* (1996) 14 Cal.4th 248, 262 [robbery and murder].) Drug dealing, which is essentially "business" oriented, does not inherently lead to murder. Indeed, in the current case, it was only after an unexpected disruption in the drug operation, with defendant Palm losing a supply of cocaine, that there was any contemplation of a murder. The agreement to deal in drugs was a separate agreement, involving different actors, than the agreement to murder.

Finally, assuming the trial court's instructions on the law governing accomplice testimony were infected by omitted language addressing the concepts in CALCRIM No. 334, i.e., a factual question whether witness Friday acted as an accomplice as to the homicide-related crimes, we are not persuaded that the error requires reversal of Thompson's convictions. First, the court's accomplice instructions as given alerted the jurors to view testimony by the persons involved in this case with caution, without specifically asking the jurors to consider whether Friday was an accomplice as to the homicide-related crimes. Second, although Thompson is correct that Hayes could not cross-corroborate Friday, and vice versa, in the event they were both accomplices to the homicide-related crimes (see *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15, disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2), this rule does not compel reversal because Hayes's testimony and Friday's testimony was corroborated by other independent evidence. (*People v. Lewis* (2008) 26 Cal.4th 334, 370.) At a minimum, the evidence from the wiretaps connected all three defendants with each other, and with the murder victim. Thompson's arguments do not persuade us that the result of his trial would have been different had only the trial court given a CALCRIM No. 334-like instruction as to Friday. We are not persuaded by Thompson's argument that, while the evidence of his part in the drug-trafficking enterprise was "powerful," the evidence of his involvement in the murder conspiracy was not. Although

the murder was not a natural and probable consequence of the drug-trafficking, his part in the latter is corroborative of his participation in the former.

III. The Section 654 Sentencing Issue

The trial court imposed a term of 56 years to life on Thompson on his conviction for conspiracy to commit murder (count 1),[15] and a term of LWOP on his conviction for the murder of Galindo with special circumstances (count 2). Thompson (by joinder with Nero's claim on appeal) contends his sentence must be modified because section 654 precludes the two separate punishments imposed on his conviction for conspiracy to murder Galindo (count 1) and his conviction for the murder of Galindo (count 2). The trial court imposed the two separate punishments based upon its express finding that Thompson had separate intents in conspiring to murder Galindo and his wife, and in subsequently committing the murder of Galindo. For the reasons we discussed in addressing this issue on Nero's appeal, we agree with Thompson that section 654 precludes the two punishments imposed on counts 1 and 2. The trial court should modify Thompson's sentence as follows: impose a term of LWOP on his conviction for the murder of Galindo (count 2), and impose and stay the term for conspiracy to commit murder (count 1).

IV. The Prior Conviction Enhancement Sentencing Issue

Thompson contends the trial court erred in imposing a five-year enhancement on his conviction for conspiracy to transport cocaine (count 5) under the prior serious felony conviction statute. (§ 667, subd. (a).) Thompson argues the enhancement was not proper because conspiracy to transport cocaine is not a qualifying serious felony for purposes of the enhancement. The People concede Thompson is correct and we agree. Accordingly, Thompson's sentence must be modified to delete the five-year enhancement pursuant to section 667, subdivision (a), attached to his conviction on count 5.

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[15] The term on count 1 was calculated as follows: a term of 25 years to life, doubled to 50 years to life based on his prior strike conviction, plus 5 years for his prior serious felony conviction, plus 1 year for the principal armed enhancement.

V. The Abstract of Judgment Issue

Thompson contends the abstract of judgment erroneously indicates that he was sentenced pursuant to section 667.61, and that it also erroneously indicates that the trial court imposed and suspended a $10,000 parole revocation fine. The People concede Thompson is correct. Section 667.61 is an alternate sentencing scheme for sex offenders, which Thompson is not. Further, the trial court imposed an LWOP sentence and, correctly, did not impose a parole revocation fine. The clerical errors in the abstract of judgment may be addressed by the trial court at the time it modifies the sentence as discussed in the parts of this opinion addressing section 654 and counts 1 and 2.

VI. The Custody Credit Issue

Thompson contends his case should be remanded for a recalculation of his pre-sentence custody credits. Thompson argues the trial court erred in summarily ruling he was not entitled to any credit for the time he actually served in federal custody prior to his transfer to state custody. The People argue that Thompson has not established error because he has not shown that the time he actually served in federal custody was attributable to the same conduct underpinning his convictions in state court. (See *People v. Bruner* (1995) 9 Cal.4th 1178, 1191; see also § 2900.5, subd. (b).)

The trial court sentenced Thompson on August 10, 2010. During the sentencing hearing, the trial court indicated that it was going to calculate presentence custody from January 10, 2008, the date the probation report indicated that Thompson was arrested by LAPD. Thompson's counsel suggested there might be a factual question whether Thompson was taken into custody on January 10, 2008 (which we compute to measure out as 944 days of credit for actual time in custody), or January 7, 2008 (which we compute to measure out as 947 days of credit for actual time in custody), or perhaps even December 7, 2007 (which we compute to measure out as 978 days of credit for actual time in custody). Counsel explained that Thompson had said the December date was when he "went into federal custody first." The trial court ruled that federal custody "doesn't qualify," then selected the January 7, 2008 date and gave Thompson a total of 947 days of presentence credit for actual time in custody.

If we saw any *evidence* in the record tending to show that Thompson was actually taken into federal custody on December 7, 2007, and that he was in federal custody for the same conduct underpinning his state convictions, we might agree that Thompson should have been given an opportunity to make a showing that his time in federal custody was attributable to the same acts that led to his state court convictions. At best, however, we have a comment from Thompson's trial counsel relating a second-hand "indication" from Thompson that he had been taken into custody by federal authorities in December 2007. Given the absence of actual evidence showing a December 2007 custody date, we decline to disturb the trial court's presentence credits calculations. The record does not support Thompson's argument on appeal that the trial court would not allow Thompson to make a showing on the issue. If there is more to the credit issue, it may be developed by the appropriate factual showing through the appropriate procedural avenue.

VII. Joinder

Thompson joins the arguments of defendants Nero and Palm. Because, with the exception of the section 654 sentencing issue, we have found no reversible as to any arguments raised by Nero and Palm, we find no reversible error as to Thompson.

Defendant Palm's Appeal

I. The Motion to Suppress the Wiretap Evidence

Palm contends his convictions for conspiracy to commit murder (count 1), first degree murder (count 2), and attempted premeditated murder (count 3) must be reversed because the trial court erred in denying his motion to suppress the evidence obtained by the FBI "wiretaps," and because, absent the wiretap evidence, the only corroboration of Jesse Hayes's testimony implicating Palm in the conspiracy/murder-related crimes was the testimony of Natashia Friday, "an inherently incredible witness." We find no error in the trial court's ruling on Palm's motion to suppress.

The trial evidence in the current case established the content of several communications between the murder victim, Galindo, and defendants Palm and Thompson. Those communications were obtained by FBI agents who intercepted cellular telephone calls pursuant to authorization from a federal court during the underlying investigation of the drug-trafficking operation that precipitated the homicide-related crimes involved in the current case. In the current case, Palm moved to suppress the wiretap evidence, attacking the validity of the federal court's warrant for the wiretaps. Palm contends the trial court in the current case erred in ruling that the federal court properly authorized the wiretaps. In other words, Palm essentially argues on appeal that the trial court should have second-guessed the federal court's decision to authorize the wiretaps. We are not persuaded that Palm's conspiracy/murder-related convictions must be reversed.

Framing the Issue

Before taking up Palm's arguments on appeal, we address the People's assertion that Palm's arguments as framed "do not raise a federal constitutional claim" as to the wiretaps. The People claim Palm's only concern is whether the wiretaps were issued in violation of the federal and state statutory laws governing wiretaps. More specifically, the People claim Palm's only argument concerns the requirement that a wiretap is shown to be "necessary" to achieve the goals of a particular investigation. Although the predominant theme in Palm's opening brief concerns the statutory requirements for a wiretap, we see sufficient allusions to constitutional principles to accept that he questions the validity of the wiretaps on both constitutional and statutory grounds. We agree with the People that Palm's arguments on appeal do not raise any "probable cause" claims associated with the search warrants at issue (see, e.g., *Kentucky v. King* (2011) ___ U.S. ___ [131 S.Ct. 1849, 1856] [the Fourth Amendment precludes court authorization for a search unless probable cause is established]), but this does not mean that there can be no Fourth Amendment implications. In summary, we will examine Palm's claims on appeal under both a constitutional and statutory analysis. With this framework in place, we turn to Palm's arguments.

The Governing Law

Under the Fourth Amendment of the United States Constitution, and article 1, section 13 of the California Constitution, arrest and search warrants must be reasonably specific as to persons and things to be seized. (*People v. Robinson* (2010) 47 Cal.4th 1104, 1132.) The level of specificity required varies depending on the circumstances of the case and the type of items involved. (*Ibid.*; see also *United States v. Donovan* (1977) 429 U.S. 413, 427, fn. 15 ["It is not a constitutional requirement that all those likely to overheard engaging in incriminating conversations be named. Specification [in the wiretap context requires identification of] 'the person whose constitutionally protected area is to be invaded rather than "particularly describing" the communications, conversations, or discussions to be seized' "])

A search warrant in the form of authority to wiretap a telephone line is further subject to specific statutory requirements under title III of the Omnibus Crime Control and Safe Streets Act of 1968. (See 18 U.S.C. § 2510 et seq.) Under this federal statutory law, a judge may only authorize a wiretap upon finding that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." (*Id.*, § 2518(3)(c); see also *People v. Leon* (2007) 40 Cal.4th 376, 384-385 (*Leon*).)

Under California statutory law, a court may authorize law enforcement to wiretap a telephone line where there is probable cause to believe the target is involved in the transportation, sale, or possession of cocaine, or the conspiracy to commit those offenses. (§§ 629.50, 629.52, subd. (a)(1); see, e.g., *Leon*, *supra*, 40 Cal.4th at pp. 383-384.) As is the case under federal law, before authorizing a wiretap, the issuing judge must find that "[n]ormal investigative procedures have been tried and have failed or reasonably appear either to be unlikely to succeed if tried or to be too dangerous." (See §§ 629.50, subd. (a)(4), 629.52, subd. (d); see also *Leon*, *supra*, at pp. 384-385.) The federal and state requirements for "necessity" are phrased in the disjunctive. Accordingly, the judge may authorize a wiretap upon finding that investigative procedures have been tried and

failed *or* that they would be unlikely to succeed *or* are too dangerous. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1204.)

The "necessity" element for issuance of a wiretap is a statutory requirement; it is not necessarily a constitutional mandate, although it does serve to limit the government's use of wiretaps, which are recognized as particularly intrusive. (See *United States v. United States District Court* (1972) 407 U.S. 297, 308; *U.S. v. Bennett* (9th Cir. 2000) 219 F.3d 1117, 1121; see also § 629.72 [person may move to suppress evidence of a wire communication "obtained in violation of the Fourth Amendment of the United States Constitution *or of this chapter*" (italics added)].) The necessity requirement for a wiretap has been described as a "keystone of congressional regulations of electronic eavesdropping." (*United States v. Williams* (D.C. Cir. 1978) 580 F.2d 578, 587-588.) Accordingly, it is generally recognized that the statutory safeguards for wiretaps are subject to higher scrutiny than a traditional search warrant examined under constitutional principles. (*People v. Jackson* (2005) 129 Cal.App.4th 129, 144.)

Federal statutory law prescribes specific procedures for obtaining a wiretap. (See 18 U.S.C. § 2516 et seq.) Evidence obtained in violation of the federal wiretap statutes is not admissible against a criminal defendant. (*U.S. v. Mondragon* (10th Cir. 1995) 52 F.3d 291, 294.) California has its own comprehensive statutory scheme regulating the use of wiretaps. (See Pen. Code, § 629.50 et seq.) As a general rule, California wiretap law tracks the federal framework in a state prosecution, even where the evidence was derived from a federal wiretap. (*People v. Chavez* (1996) 44 Cal.App.4th 1144, 1158.) Basically, examined under both a federal and state perspective, evidence obtained in violation of the statutory safeguards may be subject to exclusion.

Our state Supreme Court has summarized the law of necessity in these terms: "The requirement of necessity is designed to ensure that wiretapping is neither 'routinely employed as the initial step in criminal investigation' (*United States v. Giordano* (1974) 416 U.S. 505, 515) nor 'resorted to in situations where traditional investigative techniques would suffice to expose the crime.' (*United States v. Kahn* (1974) 415 U.S. 143, 153, fn. 12) The necessity requirement can be satisfied 'by a showing in the

application that ordinary investigative procedures, employed in good faith, would likely be ineffective in the particular case.' (*U.S. v. McGuire* (9th Cir. 2002) 307 F.3d 1192, 1196.) As numerous courts have explained, though, it is not necessary that law enforcement officials exhaust every conceivable alternative before seeking a wiretap. (*Id*. at p. 1197; see also *Twenty-seventh Annual Review of Criminal Procedure, Investigation and Police Practice: Electronic Surveillance* (1998) 86 Geo. L.J. 1289, 1294-1295, fn. 420 [collecting cases].) Instead, the adequacy of the showing of necessity ' " 'is to be tested in a practical and commonsense fashion,' that . . . does not 'hamper unduly the investigative powers of law enforcement agents.' " ' (*U.S. v. Oriakhi* (4th Cir. 1995) 57 F.3d 1290, 1298.) A determination of necessity involves ' "a consideration of all the facts and circumstances." ' (*United States v. Hyde* (5th Cir. 1978) 574 F.2d 856, 867, quoting Sen.Rep. No. 90-1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S. Code Cong. & Admin. News, pp. 2112, 2190.)" (*Leon, supra*, 40 Cal.4th at p. 385.)

A judge's finding on the "necessity" safeguard is reviewed for abuse of discretion. (See *People v. Zepeda*, *supra*, 87 Cal.App.4th at p. 1204; see also *U.S. v. Bennett*, *supra*, 219 F.3d at p. 1121; *Leon, supra*, 40 Cal.4th at p. 385 & fn. 3 [declining to declare specifically the standard of review, but observing that an issuing judge's finding of necessity "is entitled to substantial deference"].)

The Factual Setting/Affidavits

In February 2005, the United States Attorney in Los Angeles filed an application in federal court for an order authorizing the interception of wire communications to and from two specifically identified "target" cellular telephone numbers "believed to be used by 'Viejon'" (later learned to be Galindo). The application for wiretaps was supported by a 45-page declaration submitted by FBI Special Agent M. Craig Harris. Harris's declaration explained that the FBI's investigation had identified "Viejon" as a cocaine supplier, and that the investigation's goals were to identify persons and operations involved in Galindo's drug-trafficking organization, including suppliers, customers, stash locations, management of drug proceeds, and methods used to import cocaine. Harris's declaration included a section, roughly 20 pages long, explaining the "Need for

Interception." Within this part of his declaration, Harris explained why alternative methods of investigation, e.g., undercover agents, confidential informants, physical surveillance, investigations of finances, search warrants, grand jury subpoenas, grants of immunity, trash searches, and pen registers, would not achieve the goals of the FBI's investigation. Broadly summarized, the "need" part of Harris's declaration explained that alternative investigation methods had either been "exhausted" or would not work in the context of a secretive drug-trafficking operation.

In March 2005, the United States Attorney for Los Angeles filed a second application in the federal court for a wiretap. This application sought an order authorizing the FBI to continue intercepting communications to and from the two cellular telephone numbers identified in the first wiretap application, and to intercept communications to and from two additional cellular telephone numbers. The application was supported by a 69-page declaration from James Bugda, a Special Agent with the Drug Enforcement Administrative. Bugda's declaration explained that "Viejon . . . an unidentified Hispanic Male," had been identified as the user of three of the targeted telephone numbers, and that he was a "multi-kilogram" cocaine supplier. Bugda identified defendant Palm (and others) as a "customer" and as "a drug transporter in his own right." Bugda explained that Palm had been arrested on March 8, 2005, after receiving a shipment of cocaine.[16] Bugda identified the goals of the investigation as collecting direct evidence of the scope of the drug-trafficking conspiracies, including its personnel, suppliers, customers, stash locations, and management of drug proceeds. FBI Special Agent Harris submitted a declaration in which he again explained, in a roughly 20-page part of his declaration, the need for the wiretaps.

The Motion to Suppress

In February 2010, shortly before trial of the current case, Palm filed a written motion to suppress taped conversations obtained from the wiretaps. Palm's motion argued that the evidence gathered through the wiretaps should be suppressed because the

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[16] As noted at the outset of this opinion, police arrested Palm after a chase on March 8, 2005.

affidavits in support of the wiretaps failed to show the "necessity" for using wiretaps as opposed to other, more tradition investigation methods. Palm further argued that the objectives of the investigation were so broadly drawn that they could not be achieved and amounted to a fishing expedition in violation of the Fourth Amendment and the statutory law governing wiretaps. Defendant Thompson joined Palm's motion to suppress.

On March 4, 2010, the parties argued the motion to suppress the wiretap evidence to the trial court. At the conclusion of the hearing, the court denied the motion for the following stated reasons:

"THE COURT: . . . I have reviewed all of these affidavits, the court orders, all the exhibits attached to the parties' papers here, and I'm satisfied that the [federal] judge who issued these wiretap authorizations did not abuse his discretion.

"I've pointed out in a broad sense the length to which these officers went to demonstrate why these other techniques would not be productive and why the wiretap was required.

"As in the case of [*Leon, supra,* 40 Cal.4th 376], the affidavits in the case before this court list the techniques the agents had used or considered using, with an explanation as to why each was unlikely to succeed in identifying all members of the organization, and established beyond a reasonable doubt the full scope of the conspiracy. [¶] The affidavits here, contrary to what counsel for defense argues, do not simply contain bald conclusory statements without factual support. As I said, the affidavits describe with particularity the problems with these investigative techniques.

"There's also a case that was brought to my attention, *United States* [*v. Canales Gomez* (9th Cir. 2004)] 358 F.3d 1221. As in the [*Canales Gomez*] case, the agents' affidavits here more than adequately, as well as convincingly, detailed why, using their professional judgment and in their experienced opinion, traditional investigative techniques would not suffice.

"With respect to the claim that the objectives of the investigation were so broadly drawn that they were incapable of being fully achieved, I disagree with that. I do not find

that to be the case, and I . . . conclude that the court issuing the authorization for these wiretaps did not abuse its discretion in concluding that the goals were reasonable."

The Constitutional Analysis

There was no constitutional violation in the federal court's approval of the wiretaps in this case. Palm does not contest that the constitutional requirement of probable cause existed in his case. (*Kentucky v. King*, *supra*, 131 S.Ct. at p. 1856.) This leaves Palm's constitutional "specificity" or overbreadth argument. The Fourth Amendment requires that the scope of an authorized search be set out with specificity as to the persons or things to be seized. (*Kentucky v. King*, at p. 1856; see also *United States v. Donovan*, *supra*, 429 U.S. at p. 427, fn. 15.) "In the wiretap context, those requirements are satisfied by identification of the telephone line to be tapped and the particular conversations to be seized. It is not a constitutional requirement that all those likely to be overheard engaging in incriminating conversations be named." (*United States v. Donovan*, *supra*, at p. 427, fn. 15.) Specification in this context requires identification of the person whose constitutionally protected area is to be invaded rather than a particular description of the communications, conversations, or discussions to be seized. (*Ibid*.)

Here, the affidavits in support of the wiretap applications specifically identified the targeted telephone numbers to and from which calls would be intercepted. Further, the affidavits described with reasonable specificity the type of evidence sought to be obtained by the wiretaps, to wit, the names of persons involved in the drug-trafficking operation, including suppliers and customers, stash locations, the management of drug proceeds, and the methods used to import cocaine. We see nothing in Palm's arguments which persuades us that the wiretaps in this case violated constitutional requirements for specificity.

The Statutory Analysis

The trial court's decision to deny defendant Palm's motion to suppress the wire-tap evidence is not grounds for reversal because the record supports the trial court's conclusion that the federal court did not abuse its discretion in authorizing the wiretaps.

Palm cites six alternative investigation methods identified in Special Agent Harris's February 2005 application for a wiretap: (1) prior wiretap intercepts; (2) confidential sources; (3) physical surveillance; (4) financial investigation; (5) search warrants, interviews, grand jury subpoenas, immunity, and trash searches; and (6) pen registers, trap trace devices, toll analysis and subscriber information. As to each alternative investigation method, Palm challenges Harris's explanation as to why the particular method would not be workable for achieving the goals of the drug-trafficking operation. In short, he appears to challenge the sufficiency of that agent's explanations on the basis of the substantive minimum quantum of evidence that is required to support a "necessity" finding, as well as the credibility of the agent's evidence. Like the trial court, we are satisfied the federal court did not abuse its discretion in accepting Harris's affidavit on the element of "necessity."

As for prior wiretaps, Special Agent Harris explained that wiretaps had been used on telephone lines associated with "Cassillas," "Aranda" and "Jimenez," other targets of the ongoing drug-trafficking investigation. But, as Harris explained, the prior wiretaps had failed to intercept any communications involving Galindo. Palm's arguments do not say what more the investigators were required to do in order to establish that prior wiretaps had been unsuccessful and were reasonably unlikely to be so as the investigation unfolded.

Special Agent Harris's reasons for not using confidential sources were similarly sufficient. The federal court properly accepted Harris's explanations that confidential sources might assist in "buy-bust" arrests, but not in identifying the wider elements of Galindo's drug-trafficking operations (see, e.g., *United States v. Canales Gomez, supra*, 358 F.3d at p. 1226), and that the "compartmentalizing" common in drug trafficking would prevent a confidential source from being able to infiltrate to a high enough level to identify the wider elements of Galindo's operation (*Leon, supra*, 40 Cal.4th at pp. 392-393).

Special Agent Harris sufficiently explained that physical surveillance of different objects of the investigation had been undertaken, and that the limits of the method (e.g., being detected, not being able to see inside buildings) prevented investigators from obtaining any evidence against Galindo and other members of his drug operation other than those who had been observed. In short, Harris sufficiently explained that further physical surveillance could only take the investigation so far. The federal court properly accepted this explanation. (*Leon, supra*, 40 Cal.4th at p. 394.)

Agent Harris sufficiently explained that a financial investigation could not be undertaken because Galindo had not been identified. Search warrants could not be used by investigators for the same reason — no specific location connected to Galindo had been identified. The same problem existed with regard to trash searches — the officers could not identify whose trash to search or where it would be located.

Agent Harris sufficiently explained why interviews and grants of immunity would not be workable. Interviews would likely contain significant falsehoods that might divert the investigation away from those most involved in the drug-trafficking operation and/or would create a possibility of alerting the members of the operation that an investigation was focusing its attention on the members of the operation. The same problems would be present with grand jury subpoenas targeting the members of the investigation and their associates; subpoenas were further of limited value because individuals could invoke their Fifth Amendment privilege and refuse to testify. Grants of immunity posed problems because they would not assure truthful information, and would foreclose prosecution of members of the drug operation who were most culpable. These concerns, i.e., the government's interests in keeping an investigation secret, were proper bases for finding a necessity for wiretaps. (*Leon, supra*, 40 Cal.4th at pp. 394-395.)

Palm's reliance on *U.S. States v. Blackmon* (9th Cir. 2001) 273 F.3d 1204 for a different "necessity" result is not persuasive. In *Blackmon*, the Court of Appeals found that the application for a warrant contained material misstatements and omissions of fact. (*Blackmon*, at pp. 1208-1210.) When the wrongful material was not considered, the affidavit supporting "necessity" was found to be little more than boilerplate offerings

with no factual connection to the actual criminal investigation being conducted. (*Id.* at pp. 1210-1211.) We disagree with Palm that the *Blackmon* opinion supports the proposition that justification for a necessity determination is deficient when one or more alternative methods may abstractly be available. The test is not one requiring the exhaustion of alternatives, but whether practical and common sense levels of reasonableness support a necessity conclusion. (*U.S. v. Oriakhi, supra*, 57 F.3d at p. 1298.) Here, Agent Harris's affidavit contained more than mere "boilerplate" offerings in support of the element of necessity. Special Agent Harris provided a detailed description of law enforcement activities (other wiretaps, surveillance, discussions with confidential sources, and use of pen registers, trap and trace devices, and toll analysis that had been attempted to obtain evidence of Galindo and his drug-trafficking organization). Harris's affidavit shows that investigators did not simply attempt to obtain a wiretap as an initial step in the investigation because that was the easiest path.

In the final analysis, Palm's arguments essentially ask us to reweigh the credibility of Special Agent Harris's explanations for the necessity for wiretaps, and to determine on our own the actual need for wiretaps. The published cases do not permit us to take such a step; the test is abuse of discretion. We are satisfied that the safety precautions embedded in the wiretap statutes were guarded in this case in that the FBI agents did not look to use wiretaps simply because it made their investigation easier. They used certain techniques and evaluated using others, and, in the end, based on their training and experience, determined that wiretaps were a necessary tool. They explained their reasons to a federal judge, who accepted their presented reasons. We will not overturn the trial court's finding that the federal court's decision to issue authorization for wiretaps was not an abuse of discretion because the federal court's decision itself was not unreasonable.

II. Instructions Regarding Single or Multiple Conspiracies

Palm contends this convictions for conspiracy to commit murder (count 1), conspiracy to possess cocaine for sale (count 4), and conspiracy to transport cocaine (count 5) all must be reversed because the trial court did not instruct the jurors sua sponte that they had to determine unanimously whether the alleged conspiracies were "part of an

all-inclusive plan with a single objective," or multiple separate conspiracies. He suggests instructions along the line of CALJIC No. 17.05 should have been used.[17] At sentencing, the trial court dismissed Palm's conviction for conspiracy to transport cocaine (count 5), ruling that the alleged conspiracies to possess cocaine for sale (count 4) and to transport cocaine (count 5) constituted a single conspiracy. Palm contends the same vein of analysis should be extended to the alleged conspiracy to commit murder in count 1 and his (remaining) alleged conspiracy to transport cocaine for sale in count 5. As we understand his argument, Palm claims no conspiracy count may stand because there was no unanimous finding of "conspiracy liability" as to each of the alleged conspiracy counts. We are not persuaded that both Palm's conviction for conspiracy to murder (count 1) and his remaining conviction for a drug-related conspiracy count 5 must be reversed.

Published opinions by our state's intermediate appellate courts are divided on the issue whether a trial court has a sua sponte duty to specifically instruct jurors "on single versus multiple conspiracies." (See *People v. Meneses* (2008) 165 Cal.App.4th 1648, 1668-1669 [surveying cases].) One line of cases imposes such a duty on the reasoning that the existence of a conspiracy "'must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that [single] agreement which constitutes

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[17] We understand Palm to suggest that language from CALJIC No. 17.05 to this effect should have been used:

"Before you find the defendant guilty of more than one count of conspiracy, you must determine whether there was one overall conspiracy to commit multiple crimes, or whether there were separate conspiracies to commit separate crimes. Whether the object of a single agreement is to commit one or many crimes, it is in either case the agreement which constitutes the crime. One agreement cannot be taken to be several agreements and hence several conspiracies simply because it envisions committing more than one crime. However if you find beyond a reasonable doubt that there was not one overall agreement, but separate agreements, each accompanied by an overt act, then separate conspiracies have been established. If you find the defendant guilty of more than one count of conspiracy, you will then include a finding as to whether there is one overall conspiracy or separate and distinct conspiracies."

the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.'" (*People v. Jasso* (2006) 142 Cal.App.4th 1213, 1220 (*Jasso*).) A different line of published cases holds that no such duty to instruct exists because the issue whether there was a single conspiracy or multiple conspiracies to commit multiple crimes is not a question of fact for a jury. (See, e.g., *People v. Liu* (1996) 46 Cal.App.4th 1119, 1133 [two counts of conspiracy to commit murder]; *People v. McLead* (1990) 225 Cal.App.3d 906, 921 [three counts of conspiracy to commit murder].)

Assuming the question of whether there is one or more than one conspiracy is a factual question for a jury to decide under a CALJIC No. 17.05-like instruction, even the cases finding a sua sponte duty have observed that a trial court is required to instruct the jury to determine whether a single conspiracy or multiple conspiracies exist only when there is evidence to support alternative findings. (See *Jasso, supra*, 142 Cal.App.4th at p. 1220.) Here, there is no evidence to support a finding that there was only one conspiracy; the evidence did not support a conclusion that the conspirators had one general agreement encompassing all of the criminal acts that were committed. Virtually, any two offenses committed by a person or persons may be viewed in the abstract to be within a single stated objective when the objective is stated broadly enough. In making a determination whether an agreement involved one or more agreements or conspiracies, such factors as the time frame, the nature of the crimes, the motives, and location of the crimes may be considered. (*Id.* at p. 1221.) Here, none of those factors points to a single conspiracy vis-à-vis the drug offenses and the murder. Accordingly, the trial court had no sua sponte duty to instruct the jury that it had to decide whether there was one conspiracy or multiple conspiracies. There simply is no substantial evidence that the conspiracy to commit murder was an integral part of the conspiracy to deal in drugs. Indeed, by conspiring to kill Galindo to avoid a debt, Palm, Nero, Thompson and Hayes were effectively ending their earlier conspiracy to deal in drugs.

Assuming the trial court had a sua sponte to instruct on the jurors on the single conspiracy or multiple conspiracies issue, we find no possibility, let alone a reasonable probability, that prejudice ensued from the instructional omission at Palm's trial. There was no prejudice because the principle conveyed by a specific instruction on the single conspiracy or multiple conspiracies issue were conveyed by the instructions that were given at Palm's trial. The instructions given required the jury to find separate agreements for each of the conspiracy charges and therefore, there was no need to have a special instruction to highlight whether there was a single conspiracy or multiple conspiracies. The trial court instructed the jurors that to find conspiracy to commit murder, the jury had to find, among other elements, that "[t]he defendant intended to agree and did agree with one or more of the other defendants or with co-participant, Jesse Hayes to intentionally and unlawfully kill." The jury was separately asked to determine, on the other conspiracy charges, whether "[t]he defendant intended to agree and did agree with the other defendant[s] or with co-participant Jesse Hayes to commit the crime of possession of cocaine for sale." And the jurors were separately asked whether "[t]he defendant intended to agree and did agree with the other defendant[s] or with co-participant Jesse Hayes to commit the crime of transportation of cocaine."

In addition, the alleged overt acts, upon which the jurors were asked to return findings, were factually distinct as between the murder conspiracy and the drug conspiracies. And, the court instructed the jurors to "decide each charge for each defendant separately."

There is nothing in the record to suggest that the result of Palm's trial may have been different had only the trial court given an instruction in the vein of CALJIC No. 17.05.

III. Instructions Regarding Accomplice Testimony

For the reasons explained in addressing Thompson's appeal, we reject Palm's contention that convictions for conspiracy to commit Mauro Galindo's murder (count 1), first degree murder of Galindo (count 2), and attempted premeditated murder of Rosa Galaviz (count 3) must be reversed because the trial court failed to instruct the jury sua

sponte on the law governing accomplice testimony as it related to witness Natashia Friday.

The error, if any, in failing to instruct the jury on the law of accomplice testimony was harmless as to Palm because there was sufficient corroborating evidence showing that he committed the homicide-related offenses involved in this case.

IV. Sufficiency of the Evidence — the "Lying- in-Wait" Finding

Palm contends the jury's "lying-in-wait" special circumstance finding must be reversed because it is not supported by substantial evidence. We disagree.

" 'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, " 'we examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to . . . special circumstance allegations. [Citation.]' " (*People v. Nelson* (2011) 51 Cal.4th 198, 210.) Where the evidence reasonably supports a jury's findings, its decision may not be reversed simply because the evidence might also reasonably be reconciled with contrary findings. We may not substitute our assessment of the case in place of the jury's assessment of the case, meaning we may not reweigh the evidence or reevaluate any witness's credibility. (*Ibid*.)

The Governing Law

We begin addressing Palm's claim on appeal by foundationally noting that the "lying-in-wait" issue he raises is governed by Proposition 18, an initiative amending the lying-in-wait special-circumstances statute (§ 190.2), approved by the voters in March 2000, five years before Galindo's murder. To the extent published cases cited in the parties' briefs were decided in the context of the former law, we must consider those cases in light of the changes in the statutory scheme.

Before Proposition 18, section 190.2, subdivision (a)(15), prescribed a penalty of LWOP for a defendant convicted of first degree murder when the prosecution proved "[t]he defendant intentionally killed the victim *while lying in wait*." (See former § 190.2, subd. (a)(15), italics added.) The case law under former section 190.2, subdivision (a)(15), taught that the language "while lying in wait" meant a murder was committed under circumstances which included a concealment of purpose and a substantial period of watching and waiting for an opportune time to act, followed by a surprise attack on an unsuspecting victim from a position of advantage. (See, e.g., *People v. Morales* (1989) 48 Cal.3d 527, 557.) These factors were intended to present "a factual matrix" distinct from an "ordinary" premeditated murder to justify treating the murder as one involving a special circumstance. (*Ibid*.) Accordingly, the mere concealment of purpose was not sufficient to establish lying in wait inasmuch as many "routine" murders are accomplished by such means. In *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, the Court of Appeal interpreted the term "while lying in wait" to mean that the killing must "take place during the period of concealment and watchful waiting or the lethal acts must begin and flow continuously from the moment [the] concealment and watchful waiting ends." (*Id*. at p. 1011.) In other words, if a "cognizable interruption" separated the defendant's lying-in-wait activity from the murder, then the special circumstance did not apply. (*Ibid*.)

Proposition 18 amended section 190.2, subdivision (a)(15) to provide that a penalty for first degree murder is LWOP when the prosecution proves that "[t]he defendant intentionally killed the victim *by means of lying in wait*." (Italics added.) This change in section 190.2 was intended to eliminate the requirement that a murder does not qualify for treatment as a lying-in-wait special-circumstance murder in the event there is a cognizable period of interruption between the lying-in-wait activity and the actual killing. (*People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 307 (*Bradway*).)

Regardless of the change wrought by Proposition 18's amendment of section 190.2, none of the cases cited in the parties' briefs persuade us that a lying-in-wait special-circumstance murder today no longer contemplates a murder that is more egregious than a "routine" first degree murder involving a mere concealment of the purpose to kill. In short, a lying-in-wait special-circumstance murder is still something more than a first degree murder accomplished by the concealment of the murderer's purpose to kill. In *People v. Lewis* (2008) 43 Cal.4th 415, a case involving a number of robbery-murders committed before the voters approved Proposition 18 to amend section 190.2, the Supreme Court noted and discussed the changes in the statutory language, but did not have occasion to apply the interpretive implications of those changes. Nonetheless, we read nothing in *People v. Lewis* which suggests that a lying-in-wait circumstance murder is today, in the words of the People's arguments on this appeal, "the same as first degree murder by lying in wait" within the meaning of section 189.

The only case we see cited in the parties' briefs involving an application of the amended lying-in-wait special-circumstance statutory language is *Bradway*, *supra*, 105 Cal.App.4th 297. The issue in *Bradway*, addressed in a pretrial pleading context, was whether the language in the amended section 190.2 was unconstitutionally vague. (*Id*. at p. 300.) Division One of the Fourth District Court of Appeal ruled that the amended statutory language was not unconstitutionally vague, interpreting it to permit the finding of a lying-in-wait special circumstance "not only in a case in which a murder occurred immediately upon a confrontation between the murderer and the victim, but also in a case in which the murderer waited for the victim, captured the victim, transported the victim to another location, and then committed the murder." (*Id*. at p. 308.) *Bradway*, arising as it did in the pretrial context, does not address what quantum of evidence is sufficient to sustain a jury's lying-in-wait special-circumstance finding.[18]

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[18] We have determined that a jury subsequently convicted defendant Bradway of first degree murder and found the lying in wait special circumstance to be true. Later, Bradway's conviction was affirmed. (*People v. Bradway* (Oct. 19, 2005, D044292)

What we can state with certainty from the published cases is that the former section 190.2 made application of the special circumstance more restrictive than is true under the current statutory language. Thus, if the lying-in-wait special circumstance may be affirmed under the former more restrictive law, then it may be affirmed under the current law.

Analysis

For reasons in line with *People v. Morales*, *supra*, 48 Cal.3d 527, we conclude that the jury's lying-in-wait special-circumstance finding should be affirmed in Palm's current case. In *Morales*, the Supreme Court found there was sufficient evidence where the defendant sat behind the victim while they rode in a car, and then suddenly, without signaling any warning, strangled and beat her to death. (*Id*. at pp. 554, 558-559.) As explained in *People v. Morales*, a lying-in-wait special-circumstance finding is supported by evidence showing a concealment of the purpose to kill and surprise to the victim in the killer's attack.

Palm's reliance on cases such as *People v. Lewis*, *supra*, 43 Cal.4th 415, does not persuade us to reach a different result. There, the Supreme Court found insufficient evidence for the former lying-in-wait special circumstance where the defendant kidnapped the victims for purposes of robbery, taking them to ATM's to withdraw money, and then killing them. (*Id*. at pp. 512-514.) The evidence did not support a lying-in-wait special circumstance finding because the victims knew in advance that the defendant harbored a purpose to kill before the murderous conduct occurred.

In Palm's current case, the evidence presented at trial established that Jesse Hayes and defendant Nero got into Galindo's car on the ruse that they were meeting him to pay him money owed by defendants Palm and Thompson. Hayes and Nero took a duffel bag with them to maintain the appearance that they were transporting a large sum of cash. On meeting Galindo, Hayes and Nero directed Galindo to drive to a parking area at the back of an apartment complex. After parking, they got out of the car with Galindo.

[nonpub. opn.].) The Supreme Court denied his petition for review in January 2006. (S139188.)

Nero pulled out a gun on an unsuspecting Galindo and shot him. Like the murder in *People v. Morales*, *supra*, 48 Cal.3d 541, the killing occurred in immediate proximity with the concealment of the purpose to kill and on an unsuspecting victim. In short, the killing of Galindo amounted to a "surprise lethal attack on an unsuspecting victim from a position of advantage," supporting the jury's finding on the lying-in-wait special circumstance. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1310.)

V. Section 654

The trial court imposed a term of 56 years to life on Palm on his conviction for conspiracy to commit murder (count 1),[19] and a term of LWOP on his conviction for the murder of Galindo with special circumstances (count 2). Palm (by joinder with Nero's claim on appeal) contends his sentence must be modified because section 654 precludes the two separate punishments imposed on his conviction for conspiracy to murder Galindo (count 1) and his conviction for the murder of Galindo (count 2). For the reasons we discussed in addressing this issue on Nero's appeal, we agree with Palm that section 654 precludes the two punishments imposed on counts 1 and 2. The trial court should modify Palm's sentence as follows: impose a term of LWOP on his conviction for the murder of Galindo (count 2), and impose the stay for conspiracy to commit murder (count 1).

VI. Joinder

Palm joins the arguments of defendants Nero and Thompson. Because, with the exception of the section 654 sentencing issue, we have found no reversible as to any arguments raised by Nero and Thompson, we find no reversible error as to Palm.

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[19] The term on count 1 was calculated as follows: a term of 25 years to life, doubled to 50 years to life based on his prior strike conviction, plus 5 years for his prior serious felony conviction, plus 1 year for the principal armed enhancement.

DISPOSITION

The judgment as to defendant Damion Thompson is affirmed, except that the matter is remanded to the trial court to sentence Thompson on count 1 (conspiracy to commit murder) and count 2 (special circumstance murder) in accord with section 654 as stated in this opinion. The court is also ordered to issue a new abstract of judgment which does not include a five-year enhancement attached to his conviction for conspiracy to transport cocaine alleged in count 5, and does not indicate he was sentenced pursuant to section 667.61, and does not indicate the imposition of a $10,000 parole revocation fine.

The judgment as to defendant Charles Nero is affirmed, except that the matter is remanded to the trial court to sentence Nero on count 1 (conspiracy to commit murder) and count 2 (special circumstance murder), in accord with section 654 as stated in this opinion.

The judgment as to defendant Duane Palm is affirmed, except that the matter is remanded to the trial court to sentence Palm on count 1 (conspiracy to commit murder) and count 2 (special circumstance murder), in accord with section 654 as stated in this opinion.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.