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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO ROMERO et al., Defendants and Appellants.	B232533 (Los Angeles County Super. Ct. No. YA074783)

APPEAL from judgments of the Superior Court of Los Angeles County, James R. Brandlin, Judge. Affirmed.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant Fernando Romero.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant Eric De La Cruz.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants, Fernando Romero and Eric De La Cruz, appeal their convictions for first degree murder and conspiracy to commit murder, with a principal-armed firearm enhancement (Pen. Code, §§ 187, 182, 12022).[1] They were each sentenced to prison terms of 26 years to life.

The judgments are affirmed.

BACKGROUND

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

1. *Overview*.

Sonia Rios Riskin married Earl Bourdeau, a U.S. Naval officer serving in the Philippines, and they moved to Lomita, California. When Bourdeau later said he wanted a divorce, Sonia asked him to go to the Philippines and talk to her family. Bourdeau went to the Philippines in 1987 and he was shot dead while visiting Sonia's family. Sonia subsequently married Larry Riskin, another U.S. Naval officer. When Riskin later said he wanted a divorce, Sonia asked him to go to the Philippines and talk to her family. Riskin did so in 2006 and he, too, was shot dead while visiting Sonia's family. Although Sonia was suspected of involvement in both murders, she was never charged. The media referred to her as The Black Widow of Lomita.

Sonia operated a beauty salon in Lomita. In April 2007, a man tried to force his way into her salon. Two days after that, the man returned and shot at her, but the gun apparently misfired. A week later Sonia's body was discovered by her son, John Bourdeau, inside in her Lomita home. She had been shot once in the head. Bourdeau was initially the prime suspect, but police then discovered that defendant De La Cruz, Sonia's great nephew, had been trying to extort money from Larry Riskin's family. Investigators eventually theorized De La Cruz and codefendant Romero, a fellow Navy sailor, had murdered Sonia in the hope of benefitting from her will.

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

The evidence against the defendants was entirely circumstantial, but very powerful. Highlights included the following. A bank account intended for the deposit of money extorted from Riskin's family belonged to De La Cruz's girlfriend, Maria Perez. The cell phone used to call Sonia just before the man tried to force his way into her salon belonged to Romero. De La Cruz and Romero were on leave from the aircraft carrier U.S.S. Ronald Reagan when Sonia was killed, and cell phone records showed they made numerous calls to each other the night of her death from locations very close to her house. Both defendants lied to investigators on numerous occasions and De La Cruz tried to provide a false alibi for Romero.

2. *The extortion attempt.*

Following Larry Riskin's death in April 2006, his sister, Sherry Jackson, tried to have his ashes returned to the United States for burial. She was told by the embassy that Riskin's ashes were in the possession of Sonia's family in the Philippines. Riskin's family tried, without success, to obtain his remains. Then, on January 6, 2007, Jackson received an e-mail purporting to be from Sonia's son, John Bourdeau, offering to help arrange a return of Riskin's remains. This initial offer of help evolved into a request for $35,000 to be deposited into an account at Washington Mutual bank. There followed other e-mails, ranging from an offer to assist in the return of Riskin's Navy plaques and awards, to a proposal that Sonia's murder could be arranged and paid for on credit.[2] Jackson forwarded all these e-mails to the FBI.

A few weeks before Sonia's death, Jackson received an e-mail from the same source saying Sonia had a nephew in the Navy and providing the nephew's e-mail address. Jackson was instructed to contact the nephew, but not to mention Bourdeau's name. It turned out this e-mail address was associated with De La Cruz's Navy e-mail account. After Sonia's murder, Jackson began receiving e-mails from De La Cruz himself. The first said, "Are you responsible for the death of Sonia? My name is Eric,

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[2] This last e-mail stated: "I have a friend in L.A. and he can find a way to kill Sonia Rios Riskin. All I need is your permission. You don't have to pay him right now. He will kill her first, and then you can pay him later."

and I need to know." Subsequent e-mails asserted that: John Bourdeau was responsible for Sonia's death; Bourdeau could not help with the return of Riskin's remains; the remains could be obtained if Riskin's family paid a judge in the Philippines $180,000; and, the sum could be reduced to $52,300 because De La Cruz had now raised most of the money himself. Jackson never sent him any money.

3. *Sonia's death*.

On April 19, 2007, Los Angeles County Deputy Sheriff Jeffrey Farmar responded to a 911 call from Sonia's beauty salon. Sonia reported that at 9:00 a.m. a clean-cut, light-skinned Hispanic man with a military-style haircut, who was five eight or nine, 140-150 pounds and 24-26 years old, had walked into the salon and pointed a gun at her face. She ducked under her desk, began screaming and heard a gunshot. The man said, "I will get you," and ran out. Sonia's description turned out to generally match Romero's physical appearance.

Sonia told Farmar she recognized this man from an incident on the day before. (It was subsequently established the first incident had actually taken place two days earlier, on April 17.) Sonia received a phone call at the salon from a man who said his name was Frank and that he had been referred to her shop for a haircut. Sonia told him the shop was closed. A few minutes later a man arrived at the salon, pulled on the locked door and pounded on the glass. Sonia did not open the door and the man left. She thought it was suspicious this person wanted a haircut because his hair "looked freshly cut and he was clean-shaven," so she retrieved his number from her telephone's caller-I.D. function. She had written the number down on a piece of cardboard and she gave this to Farmar, who looked at Sonia's phone himself and confirmed the number she had given him. This phone number turned out to be Romero's cell phone number.

John Bourdeau testified he found Sonia in her home, lying face down on the living room floor in a pool of blood. Homicide Detective Michael Rodriguez examined the crime scene. There were no signs of burglary or forced entry. Sonia had been shot once in the back of the head. There was a nine-millimeter shell casing on the living room rug and a nine-millimeter bullet in a door. The house was neat and nothing seemed to have

been disturbed. Sonia was wearing jewelry and there was $1,700 in her purse. On a shelf in the bedroom was an empty gun case for a nine-millimeter semiautomatic Beretta. The parties stipulated Sonia had been killed on the evening of April 26.

Robert Stone was Sonia's estate planning attorney. She had initially employed him to collect on Riskin's life insurance policy. When Stone arrived to open his office the Monday morning following the Thursday night on which Sonia had been killed, De La Cruz and Maria Perez were waiting outside in the hall. De La Cruz asked if Sonia had a will and if she had left anything to him. When Stone said he did not think Sonia had a will, De La Cruz appeared to be "surprised" and "disappointed." De La Cruz said he believed John Bourdeau had something to do with Sonia's death.

4. *The investigation*.

The Los Angeles County Sheriff's Department and the United States Navy Criminal Investigation Service (NCIS) worked together to investigate Sonia's murder. Their investigation revealed the following.

The account used to send the e-mails to Jackson beginning on January 6, 2007, had been created by De La Cruz in the name of John Bourdeau. These e-mails were sent by someone onboard a Navy ship that was part of the Pacific Fleet, and the U.S.S. Ronald Reagan was operating in the Pacific Fleet at the time. On multiple occasions De La Cruz's Navy e-mail account was used to access the Yahoo e-mail account he had created in John Bourdeau's name.

The bank account at Washington Mutual, into which Larry Riskin's sister was supposed to deposit $35,000 to obtain his remains, belonged to Maria Perez, De La Cruz's then-girlfriend whom he subsequently married.

Cell phones cannot be used on Navy ships in the middle of the ocean because there is no reception, so the Navy provides onboard pay phones which can be used with calling cards. From April 13 until April 20, 2007, De La Cruz was at sea. On April 20, the U.S.S. Ronald Reagan returned to San Diego. On April 19, a military calling card was used on the U.S.S. Ronald Reagan to call Romero's cell phone. The same calling card was subsequently used to place calls from De La Cruz's cell phone once he was in

port. There were many calls from De La Cruz's cell phone to Romero's cell phone on April 17 and 19.

On the morning of April 17, a call was made from Romero's cell phone to Sonia's salon in Lomita. This call was placed from a location less than one mile from the salon, and it was made shortly before the man showed up and banged on the window. On the morning of April 26, a call was made from Romero's cell phone in San Bernardino to De La Cruz's cell phone in San Diego County. On the night of April 26, multiple calls were made from Romero's cell phone to De La Cruz's cell phone. At 9:00 p.m., *both* defendants' cell phones were transmitting through the same cell phone tower, which was located just 0.3 miles from Sonia's Lomita house. At 9:21 p.m., there was a call from De La Cruz's cell phone in Harbor City to Romero's cell phone in Downey. The pattern of these phone calls showed Romero and De La Cruz heading toward Sonia's house before 9 p.m. on the night she was murdered, and then moving away from her house shortly thereafter.

5. *Police interviews with De La Cruz and Romero.*

When detectives first interviewed De La Cruz on May 2, 2007, John Bourdeau was the prime suspect in Sonia's death and they considered De La Cruz to be merely a family member who might provide helpful background information. De La Cruz said Sonia owned a nine-millimeter Beretta. He said Sonia and John Bourdeau argued about Bourdeau using drugs and that Sonia did not trust him. De La Cruz had arrived in Los Angeles a few days before Sonia was killed, but he did not see her before she died. On the following Sunday, Bourdeau and De La Cruz went to her house. Bourdeau took off his shoes and borrowed De La Cruz's slippers to walk through the house. Later that day, Bourdeau asked De La Cruz if he knew the password to Sonia's computer, where her will was located, or the identity of her attorney. That night, Bourdeau called De La Cruz and said Sonia had given him her nine-millimeter gun. He asked De La Cruz to take the gun to San Diego, but he later called back and said he was going to keep it.

On July 3, 2007, detectives interviewed De La Cruz again. He was now a suspect, but they pretended otherwise. De La Cruz said he believed Bourdeau had sent the e-mails to Riskin's sister and that Bourdeau's friends had killed Sonia. De La Cruz said he had spoken to Sonia when he was in Hawaii about the salon shooting incident, but the detectives knew this was impossible.[3]

De La Cruz was interviewed for a third time on May 14, 2008. Detectives showed him a photograph of Romero and said they believed this man had been involved in Sonia's death. De La Cruz looked shocked and became very nervous. He said Sonia had given him the phone number of the person who shot at her in the salon. De La Cruz said he called the number and discovered it belonged to Romero, a friend of his from the Navy. Romero told De La Cruz he had called the salon because he wanted a haircut and because he was looking for De La Cruz. De La Cruz told the detectives Romero could not have been the person who tried to shoot Sonia at the salon because Romero had been on a ship with him in Hawaii at the time. In fact, however, Romero was on shore leave at the time of the salon incidents and had flown from Hawaii to Los Angeles on April 10.

The detectives also interviewed Romero on May 14, 2008. They told him there had been a shooting in Lomita and that his phone number had been recorded by the caller-I.D. system at the shooting location. Romero said he had never been to Lomita.

Luis Marquez was in the Navy with the defendants and was close friends with De La Cruz. While at sea with De La Cruz in early 2007, Marquez mentioned he hated his ex-wife and sometimes wished she would die. De La Cruz said he could arrange to have her killed, he knew someone who could kill her, and he would even loan Marquez the money to pay for it. Marquez declined the offer. When Marquez made similar remarks on another occasion, De La Cruz repeated the offer. Marquez did not believe De La Cruz was joking because he had a very serious look on his face.

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[3] At trial, the parties stipulated the U.S.S. Ronald Reagan departed Hawaii on April 13 and arrived in San Diego on April 20. Hence, the two incidents at Sonia's salon happened after De La Cruz had already left Hawaii.

On May 16, detectives interviewed Romero a second time. They told him phone records showed he had been in Lomita on April 17, 19 and 26. Romero denied it. Detectives showed him a police sketch based on his own driver's license photograph and falsely told him it had been prepared from Sonia's description of the suspect. Romero denied he was the person depicted in the sketch. In an interview with Naval investigators, Romero falsely said he had been at sea between April 13 and 20, 2007.

On February 3, 2009, De La Cruz was interviewed a final time. Detectives said they knew he had sent the e-mails to Riskin's sister and that one of the e-mails had referenced Perez's Washington Mutual account. De La Cruz denied sending the e-mails. He denied having killed Sonia, but he also said he could not tell detectives the truth because he was concerned about his family.

6. *Perez's statements and prior testimony*.

Detectives interviewed Perez on two occasions and she testified at the preliminary hearing. She did not testify at trial, but her preliminary hearing testimony was admitted into evidence.

Perez said that when Sonia died, De La Cruz and Perez were living in Carson with De La Cruz's grandmother, Celestina. De La Cruz and Sonia were very close; he saw her every weekend and "treated [her] like his real grandma." On the night she died, De La Cruz and Perez were staying at Sonia's second house in Apple Valley. They had arrived about 11:00 p.m. and they left early the next morning. They went to the salon and then to Sonia's house in Lomita, looking for her. There were police cars outside when they arrived at the house, and De La Cruz started crying before the police informed them Sonia had been shot in the head.

De La Cruz and Perez then drove to Celestina's house in Carson. During Perez's police interview, detectives asked her what De La Cruz had told Celestina happened at Sonia's house, and Perez responded: "Like he kill somebody." At the preliminary hearing, Perez denied she had meant De La Cruz was confessing to Sonia's murder; rather, De La Cruz was just informing Celestina that the police considered him a suspect in her death.

Regarding the Washington Mutual bank account referenced in the e-mails sent to Larry Riskin's family, Perez said someone at the salon must have gotten their hands on her account information and used it in the e-mails.

The defendants did not put on any evidence.

CONTENTIONS

1. There was insufficient evidence to sustain Romero's convictions.

2. The trial court erred by admitting a portion of De La Cruz's police statement relating to Sonia's account of the salon incidents.

3. The trial court gave an erroneous accomplice liability instruction.

4. The prosecutor committed misconduct during closing argument.

5. The trial court gave an erroneous reasonable doubt instruction.

6. There was cumulative error.

DISCUSSION

1. *Sufficient evidence to sustain Romero's convictions.*

Romero contends there was insufficient evidence for the jury to have found him guilty in this case. This claim is meritless.

a. *Legal principles.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, 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. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds

that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

The reviewing court is to presume the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Ochoa, supra,* 6 Cal.4th at p. 1206.) Even if the reviewing court believes the circumstantial evidence might be reasonably reconciled with the defendant's innocence, this alone does not warrant interference with the jury's verdict. (*People v. Towler* (1982) 31 Cal.3d 105, 118.) As our Supreme Court said in *People v. Rodriguez, supra,* 20 Cal.4th 1, while reversing an insufficient evidence finding because the reviewing court had rejected contrary, but equally logical, inferences the jury might have drawn: "The [Court of Appeal] majority's reasoning . . . amounted to nothing more than a different weighing of the evidence, one the jury might well have considered and rejected. The Attorney General's inferences from the evidence were *no more inherently speculative* than the majority's; consequently, the majority erred in substituting its own assessment of the evidence for that of the jury." (*Id.* at p. 12, italics added.)

b. *Discussion.*

Romero argues there was insufficient evidence he entered into an agreement with De La Cruz to murder Sonia. He argues the evidence showed no real motive for his involvement because "he had no relation to the family whatsoever and certainly gained nothing from the killing." We disagree. There was compelling circumstantial evidence the defendants planned to murder Sonia in the hope De La Cruz would inherent from her estate, and Romero obviously expected to be compensated for his part in this plot.

The prosecution theory was that De La Cruz wanted Romero to kill Sonia while De La Cruz was at sea so he would have an alibi and could blame the murder on John

Bourdeau. However, when the shooting at the salon went awry De La Cruz came home and, together with Romero, murdered Sonia at her house. During closing argument, the prosecutor said: "We said De La Cruz has Sonia's trust. Key to her house. Access to her firearms. . . . [¶] Crooks don't go into houses, not steal anything, find a gun that's in a closed location, then use that gun to kill somebody. [¶] But I'll tell you who does do that. Someone who is a part of the family, knows where that gun is, and then takes it with them. [¶] . . . [¶] The reasonable inference, based on the phone conversations between Mr. De La Cruz and Mr. Romero while he is at sea, [is that] Fernando Romero was supposed to get that done while Eric was at sea. When it didn't happen, Eric had to come home and do the job himself."

The circumstantial evidence of Romero's role in the conspiracy was overwhelming. He and De La Cruz were friends in the Navy and they served together on the U.S.S. Ronald Reagan. About a week before Sonia was murdered, a man entered her beauty salon, pointed a gun at her and apparently tried to shoot her. When he departed, the man uttered a death threat. The evidence showed this man was Romero. His cell phone number had been recorded on Sonia's caller-I.D. system and phone records showed his close proximity to her salon. De La Cruz made five phone calls to Romero that day from the U.S.S. Ronald Reagan. Telephone records demonstrated that, on the night Sonia was murdered, the defendants started out from different locations, traveled toward Sonia's house, came within at least 0.3 miles of it, and then traveled away from it in different directions. During the ensuing investigation, Romero lied to detectives about never having been to Lomita and he lied to Naval investigators about having been at sea during the salon incidents. De La Cruz gave detectives a false alibi for Romero regarding the salon incidents.

Romero's reliance on *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, is misplaced. In that case, the minor's brother shot the victims and there was insufficient evidence the minor intended to facilitate the shootings or even knew his brother intended to carry them out. The Ninth Circuit reasoned "the circumstantial evidence presented does no more than establish that a rational trier of fact could conclude that Juan H. knew

his brother was armed and ready to confront Magdelano and Ramirez if the family and home of Juan H. were again threatened. That Juan H. stood behind his older brother after the family home had been attacked, even if he knew his brother was armed, does not permit the rational inference that he knew his brother would, without provocation, assault or murder the victims." (*Id*. at p. 1278, fn. omitted.) As the Attorney General points out: "Unlike *Juan H.*, where the events unfolded quickly and the juvenile's brother suddenly shot the victim without provocation, the evidence in the instant case strongly suggested a preconceived plan by appellants to kill" Sonia, "including an attempt to frame a third party for [her] murder before she was killed, a prior unsuccessful attempt to kill [her], and an execution-style murder . . . in her home."

There was sufficient evidence to sustain Romero's convictions.

2. *Trial court did not err by admitting evidence of De La Cruz's police statement.*

Romero contends the trial court improperly allowed the jury to learn from De La Cruz's police statement that Sonia had given him Romero's phone number and said this was the person who tried to kill her. Romero argues this evidence was inadmissible hearsay and violated his confrontation clause rights. These claims are meritless.

a. *Background*.

Prior to trial, the prosecutor told the trial court: "[C]ounsel and I have . . . gone through the issues in the case. I'm offering the same evidence that I did at [the] preliminary hearing. [¶] I'll be bringing in both defendants' statements. Counsel and I are in agreement that because both defendants deny any involvement, we don't have an *Aranda-Bruton*[4] issue. So we won't have a need for dual juries or for edits." Neither defense attorney disagreed with the prosecutor's representations.

During the opening statements, however, Romero's attorney objected that the prosecutor was referring to hearsay statements made by De La Cruz that incriminated Romero and implicated *Aranda-Bruton*. The prosecutor pointed out the issue had already

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[4] *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620]; *People v. Aranda* (1965) 63 Cal.2d 518.

been discussed, and argued there was no *Aranda-Bruton* problem because both defendants had denied culpability when they spoke to the police, and the statements were not being offered for their truth. The trial court overruled Romero's objection and said it would give a limiting instruction if appropriate.

When the prosecutor subsequently introduced evidence of De La Cruz's police statements, Romero objected to this portion: Detectives told De La Cruz there had been a break in the case and showed him a photograph of Romero, saying this person might have been involved in the salon shooting. De La Cruz responded by saying, "No. I know him," and "I work with the guy." De La Cruz said Sonia had given him the phone number of the person who tried to shoot her at the salon, that when De La Cruz called the number he discovered it was Romero, and that Romero said he had called the salon because he was trying to get a haircut and also because he was trying to get in touch with De La Cruz. The prosecutor argued this evidence was not being offered for its truth, but rather to show De La Cruz had been lying to detectives.[5] The trial court ruled Romero's *Aranda-Bruton* objection was untimely, because it had not been made pretrial, and overruled his hearsay objection.

The trial court subsequently gave the jury this limiting instruction: "During Mr. De La Cruz's interviews with investigators, he made certain assertions regarding statements the victim had allegedly made to him. [¶] Those statements attributed to the victim were not admitted to prove the content of what she allegedly said was true, but instead, were admitted for use in determining the credibility or lack of credibility of Mr. De La Cruz."

b. *Legal principles.*

As our Supreme Court explained in *People v. Lewis* (2008) 43 Cal.4th 415: "A criminal defendant has a right, guaranteed by the confrontation clause of the Sixth Amendment to the United States Constitution, to confront adverse witnesses. The right

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[5] Because, if this story were true, it meant De La Cruz knew the gunman's identity a year before he said anything to the police.

to confrontation includes the right to cross-examination. [Citation.] A problem arises when a codefendant's confession implicating the defendant is introduced into evidence at their joint trial. If the declarant codefendant invokes the Fifth Amendment right against self-incrimination and declines to testify, the implicated defendant is unable to cross-examine the declarant codefendant regarding the content of the confession.

"In *Bruton* [*v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620], the United States Supreme Court held that the admission into evidence at a joint trial of a nontestifying codefendant's confession implicating the defendant violates the defendant's right to cross-examination guaranteed by the confrontation clause, even if the jury is instructed to disregard the confession in determining the guilt or innocence of the defendant. [Citation.] The high court reasoned that although juries ordinarily can and will follow a judge's instructions to disregard inadmissible evidence, 'there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.' [Citation.] Such a context is presented when 'the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.' [Citation.]

"Three years before *Bruton*, we had come to a similar conclusion on state law grounds [in *People v. Aranda* (1965) 63 Cal.2d 518], but we also concluded that the codefendant's confession may be introduced at the joint trial if it can be edited to eliminate references to the defendant without prejudice to the confessing codefendant. [Citation.] If not, and the prosecution insists on introducing the confession, the trial court must sever the trials. [Citation.]

"The high court limited the scope of the *Bruton* rule in *Richardson v. Marsh* (1987) 481 U.S. 200 [95 L. Ed. 2d 176,107 S. Ct. 1702] . . . . There, defendant Marsh was jointly tried with one Williams for murder. Williams's confession was introduced into evidence, but it was edited to remove any reference to Marsh. The high court held that admission of Williams's confession with a limiting instruction did not violate

Marsh's confrontation rights. The court explained that *Bruton* recognized a narrow exception to the general rule that juries are presumed to follow limiting instructions, and this narrow exception should not apply to confessions that are not incriminating on their face, but become so only when linked with other evidence introduced at trial." (*People v. Lewis, supra,* 43 Cal.4th at pp. 453-454.)

"The United States Supreme Court decisions on the *Bruton* rule, and most of the state decisions on the issue, concern extrajudicial confessions by a nontestifying codefendant. And both *Bruton* and *Aranda* use the term 'confession' – i.e., a complete and express acknowledgment of intentional participation in a crime. However, both cases use the broad term 'statement' and the narrow term 'confession' interchangeably, and all statements inculpating the declarant codefendant and the other defendant appear to fall within the rationale of the rule. Accordingly, the California Supreme Court has found the rule applicable to *any statement* that incriminates a nondeclarant defendant as well as the declarant. [Citations.]" (5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crim Trial, § 432, p. 691.)

c. *Discussion*.

We conclude the trial court did not err by admitting De La Cruz's statement that Sonia gave him Romero's phone number and said this was the person who tried to shoot her. The statement did not violate *Aranda-Bruton* because it facially incriminated neither the declarant-codefendant, De La Cruz, nor the nondeclarant-codefendant, Romero, in either Sonia's murder or the conspiracy to murder her. (See *Richardson v. Marsh, supra,* 481 U.S. at p. 211 [accomplice statement that incriminates defendant only when considered in conjunction with other evidence does not violate confrontation clause].) As the Attorney General argues: "This was not a situation where appellant De La Cruz confessed to the crime and in doing so implicated appellant Romero as his partner in the crime. . . . [A]ppellant De La Cruz's statement was *not* a confession and he did *not* state that he committed criminal acts with appellant Romero." At most, the statement facially incriminated Romero in the April 19 shooting at Sonia's salon, an act which implicated

Romero in the charged conspiracy and murder only when linked to *other evidence* produced at trial.

Moreover, far from this evidence being powerfully incriminating, De La Cruz tried to exculpate his codefendant by insisting to detectives that he could not believe Romero had tried to shoot Sonia.[6] (See, e.g., *People v. Garcia* (2008) 168 Cal.App.4th 261, 282 ["The only extrajudicial statement at issue in this appeal that facially incriminates Ojito is Garcia's statement . . . that he and Ojito 'went looking for the guy that [Garcia] had a fight with.' However, we do not find this statement to be *powerfully incriminating* because it *facially* incriminates Ojito only by showing that he and Garcia were looking for Barajas; it is not *direct* evidence that Ojito intended Barajas would be assaulted or murdered when they found him."].)

As for Romero's hearsay claim, Sonia's statement to De La Cruz, and De La Cruz's statement to the police, were not offered for the truth of the matters asserted; rather, they were offered to attack De La Cruz's credibility because they showed he had been withholding information from the police. "Out-of-court statements that are not offered for their truth are not hearsay under California law [citations], nor do they run afoul of the confrontation clause." (*People v. Ervine* (2009) 47 Cal.4th 745, 775-776.)

Even assuming arguendo this evidence was inadmissible, it was cumulative and therefore harmless beyond a reasonable doubt. (See *People v. Burney* (2009) 47 Cal.4th 203, 234 ["*Aranda/Bruton* error is not reversible per se, but rather is scrutinized under the harmless-beyond-a-reasonable-doubt standard."].) The evidence was merely cumulative because Officer Farmar testified Sonia had told him the same thing, had given him a piece of cardboard with Romero's phone number on it, and had allowed Farmar to see for himself Romero's phone number on the caller-I.D. system. In these circumstances, we

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[6] Romero acknowledges De La Cruz told the police "he did not think [Romero] was involved because they worked together and [Romero] was a family man; maybe his grandmother was mistaken saying this about [Romero] to him and police."

cannot believe the jury would have convicted Romero even if this portion of De La Cruz's police statement had been withheld.[7]

In sum, we conclude there was no error in admitting this evidence, and even had there been error it would have been harmless.

3. *The trial court did not err by giving CALCRIM No. 400 on accomplice liability.*

Both defendants contend the trial court erred by instructing the jury with CALCRIM No. 400 regarding accomplice liability. This claim is meritless.

a. *Legal principles.*

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) "When the crime at issue requires a specific intent, in order to be guilty as an aider and abettor the person 'must share the specific intent of the [direct] perpetrator,' that is to say, the person must 'know[] the full extent of the [direct] perpetrator's criminal purpose and [must] give[] aid or encouragement with the intent or purpose of facilitating the [direct] perpetrator's commission of the crime.' [Citation.]" (*People v. Lee* (2003) 31 Cal.4th 613, 624.)

"Because aiders and abettors may be criminally liable for acts not their own, cases have described their liability as 'vicarious.' [Citation.] This description is accurate as far as it goes. But, as we explain, the aider and abettor's guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the direct perpetrator's

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[7] See, e.g., *People v. Arceo* (2011) 195 Cal.App.4th 556, 579 ["In any case, even if Mejorado's statement had been inadmissible, Adan's testimony on this point was cumulative and harmless beyond a reasonable doubt [citation omitted] . . . [because] the jury heard properly admitted testimony that Arceo himself told both David and Adan that he shot one of the victims, and that Sergio told both David and Adan the same story. Under these circumstances, it is inconceivable that the jury would not have convicted Arceo in the absence of Adan's additional statement that Mejorado told him the same thing."].)

acts and the aider and abettor's *own* acts and *own* mental state." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) "Aider and abettor liability is . . . vicarious only in the sense that the aider and abettor is liable for another's actions as well as that person's own actions. When a person 'chooses to become a part of the criminal activity of another, she says in essence, "your acts are my acts . . . . " ' [Citation.] But that person's *own* acts are also her acts for which she is also liable. Moreover, that person's mental state is her own; she is liable for her mens rea, not the other person's." (*Id.* at p. 1118.)

In *People v. Nero* (2010) 181 Cal.App.4th 504, this court pointed out that in *McCoy* "our California Supreme Court held that an aider and abettor may be found guilty of *greater* homicide-related offenses than those the actual perpetrator committed. Extending that holding, we conclude that an aider and abettor may be found guilty of *lesser* homicide-related offenses than those the actual perpetrator committed." (*Nero,* at p. 507.) We found error in *Nero* because the jury asked for clarification of this issue and the trial court failed to provide it: "[W]here, as here, the jury asks the specific question whether an aider and abettor may be guilty of a lesser offense, the proper answer is 'yes,' she can be. The trial court, however, by twice rereading CALJIC No. 3.00 [predecessor instruction to CALCRIM No. 400] in response to the jury's question, misinstructed the jury." (*Id.* at p. 518.)

b. *Discussion*.

In the case at bar, the trial court instructed the jury with CALCRIM No. 400, as follows: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. [¶] Two, he or she may have aided and abetted a perpetrator who directly committed the crime. [¶] A person is equally guilty of the crime whether he or she committed it personally, or aided and abetted the perpetrator who committed it."[8]

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[8] CALCRIM No. 400 has since been amended to eliminate the "equally guilty" language and the final sentence now reads: "A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator."

Defendants contend this instruction was erroneous because it failed to explain an aider and abettor could be guilty of either a greater or a lesser crime than the direct perpetrator. De La Cruz argues: "[T]he jury was mis-instructed that each principal, regardless of the extent or manner of participation is equally guilty. Applying this erroneous and misleading instruction, once the jury concluded that Romero was the killer and that he was guilty of first-degree murder, appellant was also guilty of first-degree murder, even though he may have only aided and abetted a lesser crime." Romero argues: "The prosecutor theorized appellant may have been the triggerman, but neither defendant was charged with personal use of a firearm; and in arguing aiding and abetting, the prosecutor stressed he did not have to prove which defendant 'pulled the trigger' or that both defendants were in the house."

However, it is well-recognized that CALCRIM No. 400 is, in almost all situations, a correct instruction. " 'Generally, a person who is found to have aided another person to commit a crime is "equally guilty" of that crime.' (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118 . . . , citing § 31 and 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 77, pp. 122-123.) Because it is generally true that an aider and abettor is as equally guilty as the direct perpetrator of a crime, the instruction that the court gave was generally accurate. [Citation.] Given that the instruction was generally accurate, but potentially incomplete in this case since there was evidence from which the jury could have concluded that Jeanne had a mental state different from John's with respect to Rintalan's killing, it was incumbent on Jeanne to request a modification if she thought that the general instruction would be misleading under the circumstances of this case. By failing to request a modified instruction, Jeanne has forfeited this claim. [Citation.]" (*People v. Loza* (2012) 207 Cal.App.4th 332, 349-350.) Hence, if Romero and De La Cruz believed the instruction was inappropriate to the facts of their case, they were obliged to ask for a modification.

In any event, it is clear that in the circumstances of this case CALCRIM No. 400 was not incomplete. As the Attorney General points out, the jury necessarily found the defendants possessed the requisite mental state for first degree murder under other

instructions. For example, the jury was instructed the prosecution had to prove an aider and abettor *knowingly intended* to facilitate the perpetrator's crime,[9] and that "the members of the alleged conspiracy had an agreement and intent to commit murder." By convicting defendants of first degree murder and conspiracy under these instructions, the jury necessarily found they both acted with the requisite mental state for first degree murder. This is not at all a case like *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1162, relied on by defendants, which found CALCRIM No. 400 inappropriate where the prosecution theorized the defendants had intended to kill victim No. 1, but not finding him at home killed victim No. 2 instead, and there were no eyewitnesses and thus no evidence showing which defendant had been the direct perpetrator. In the case at bar, the jury found the defendants had conspired together to murder Sonia and then carried out their plan.

The trial court did not err by giving CALCRIM No. 400.

4. *There was no prosecutorial misconduct.*

Defendants contend the prosecutor committed misconduct during closing argument by commenting on their failure to present alibi witnesses. This claim is meritless.

a. *Legal principles.*

" 'Under California law, a prosecutor commits reversible misconduct if he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights – such as a comment upon the defendant's invocation of the right to remain silent – but is otherwise worthy of condemnation, is not

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[9] The jury was instructed: "Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose, and he or she specifically intends to and does in fact aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

a constitutional violation unless the challenged action " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " ' [Citations.] In addition, ' "a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" ' [Citation.] Objection may be excused if it would have been futile or an admonition would not have cured the harm." (*People v. Dykes* (2009) 46 Cal.4th 731, 760.)

"When we review a claim of prosecutorial remarks constituting misconduct, we examine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief complained of. [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 689.)

"*Griffin* [*v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229]] forbids argument that focuses the jury's attention directly on an accused's failure to testify and urges the jury to view that failure as evidence of guilt." (*People v. Avena* (1996) 13 Cal.4th 394, 443.) "A prosecutor may not directly or indirectly comment on a defendant's failure to testify in his or her own defense. [Citation.] But the prosecutor may comment on the state of the evidence, including the failure of the defense to introduce material evidence or to call witnesses." (*People v. Mincey* (1992) 2 Cal.4th 408, 446; see, e.g., *People v. Medina* (1995) 11 Cal.4th 694, 756 [no *Griffin* violation where "prosecutor's comments were directed to the general failure of the defense to provide an innocent explanation as to why defendant was armed . . . at the time of the robberies"].)

b. *Discussion*.

Prior to closing argument, the trial court sustained a defense objection to the prosecutor's intention to address Romero's failure to call his wife as an alibi witness. The trial court reasoned this would constitute "a back-door comment on the assertion of a [marital] privilege." The prosecutor agreed "not to mention Mrs. Romero directly."

During closing argument, the prosecutor said: "[I]n the end, this is not complicated. In the end, you can walk back there, and you can say oh, my gosh,

[De La Cruz] set this up in advance. Said he was going to kill her as John Bourdeau. [¶] Set the deal up with Romero. Romero is there on all the days that count. Sonia gives them the phone number. Gives them his physical description. [¶] They match up on the night of the murder. They lie afterwards. Neither one of them has an alibi. Neither one of them presented an alibi. [¶] By the way, if they had an alibi to present, don't you think that there would have been people standing up here saying 'they were with me that night?' [¶] Maria Perez tried. You saw what happened. So in the end, don't make this more complicated than what it is."

Despite having made no objection to these remarks at trial, the defendants now contend the comments constituted prosecutorial misconduct. De La Cruz argues: "The trial court had expressly prohibited the prosecutor from arguing Romero's failure to call his wife as an alibi witness, in view of her assertion of a marital privilege," and "[w]hile the prosecutor did not mention Mrs. Romero, he did allude to Maria Perez's preliminary hearing testimony when he argued that both defendants failed to call alibi witnesses, leaving the *unmistakable implication* that the defendants failed to call their wives as alibi witnesses, and directly commenting on the failure of appellant's wife, Maria Perez, to testify at trial." (Italics added.) Romero argues the prosecutor's references "to both defendants' (plural) failure to call alibi witnesses, and the accompanying reference to coappellant's wife, *unmistakably signaled* appellant's failure to call his own wife as well; this is especially so given the prosecutor's pointed examination of the detective geared toward eliminating any alibi from appellant's wife." (Italics added.)

We are not persuaded. As the Attorney General rightly asserts, although the trial court ordered the prosecutor not to comment on the failure to call Romero's wife to testify, the court "expressly permitted the prosecutor to comment on the defense's failure to produce an alibi." "The prosecutor's comment on appellants' failure to produce alibi witnesses did not violate the trial court's order because the prosecutor never referred to appellant Romero's wife or commented on her failure to testify."

We find rather far-fetched defendants' assertion the prosecutor's reference to De La Cruz's wife "unmistakably" signaled to the jury that the prosecutor was also really talking about Romero's wife. We do not think it reasonably likely (see *People v. Osband, supra,* 13 Cal.4th at p. 689) the jury would have gleaned that meaning when the prosecutor said: "By the way, if they had an alibi to present, don't you think that there would have been people standing up here saying 'they were with me that night?' [¶] Maria Perez tried. You saw what happened. So in the end, don't make this more complicated than what it is."

As for Romero's reference to Detective Rodriguez's testimony about questioning Romero's wife, the detective merely explained he had interviewed her pursuant to his usual investigative protocol of locking potential witnesses into their statements as early as possible. There was no defense objection to this testimony, and we do not think it reasonable to conclude the jury would have made a subliminal connection between Rodriguez's testimony and the prosecutor's closing argument.

As for De La Cruz's complaint about the prosecutor directly commenting on the failure of Perez to testify at trial, De La Cruz does not even try to suggest what would have made this improper. Contrary to De La Cruz's assertion, Perez did not assert the marital privilege at trial.[10] Rather, it appears that, given the weakness of her preliminary hearing testimony, De La Cruz decided it would be counter-productive to call her at trial. There was nothing wrong with the prosecutor commenting on this.

In sum, the prosecutor here did no more than comment on defendants' failure to present logical witnesses and evidence. "The Fifth Amendment does not prohibit the prosecution from commenting on the state of the evidence presented at trial, or on the defense's failure to introduce material evidence or to call witnesses other than the defendant." (*People v. Taylor* (2010) 48 Cal.4th 574, 633.) "A prosecutor is permitted

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[10] De La Cruz's opening brief states Perez "married appellant on December 18, 2010, and asserted her marital privilege at his trial." However, it was Romero's wife who was going to assert the privilege, not De La Cruz's wife. De La Cruz does subsequently note the marital privilege issue concerned Romero's wife.

. . . to comment on a defendant's failure to introduce material evidence or call logical witnesses. [Citation.] By directing the jury's attention to the fact defendant never presented evidence that he was somewhere else when the crime was committed, the prosecutor did no more than emphasize defendant's failure to present material evidence. He did not capitalize on the fact defendant failed to testify." (*People v. Brown* (2003) 31 Cal.4th 518, 554.)

Defendants' reliance on *People v. Gaines* (1997) 54 Cal.App.4th 821, is misplaced. Contrary to De La Cruz's assertions, *Gaines* did not hold it was improper to comment on a defendant's failure to call alibi witnesses if the defendant did not put on an alibi defense. Rather, in that case comments regarding the failure to produce a particular defense witness were held improper because the prosecutor referred to matters not in evidence, essentially informing the jury what the missing witness would have said on the basis of no evidence whatsoever. (See *id.* at p. 825.) Here, the prosecutor did not refer to any matter outside the evidence when he commented on the defendants' failure to produce alibi witnesses.

There was no prosecutorial misconduct.

5. *The reasonable doubt instruction was not erroneous.*

Romero contends the trial court's reasonable doubt instruction was erroneous. This claim is meritless.

The trial court gave the jury CALCRIM No. 220: "The fact that a criminal charge has been filed against the defendants is not evidence that the charge is true. [¶] You must not be biased against the defendants just because they have been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. [¶] Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with *an abiding conviction that the charge is true*. [¶] The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt. [¶] *In deciding whether the People have proved their case beyond a*

reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. [¶] Unless the evidence proves the defendants guilty beyond a reasonable doubt, they are entitled to an acquittal, and you must find them not guilty." (Italics added.)

Romero contends this instruction was erroneous for two reasons. First, by telling "jurors reasonable doubt must arise from evidence presented at trial," the instruction ignored the fact reasonable doubt can sometimes "be based upon absence of evidence, not just the evidence presented in court." Second, the "abiding conviction" language "convey[s] an insufficient standard of proof akin to clear and convincing evidence and going only to jurors' duration of belief in guilt, not their degree of certainty."

However, both of these claims have been repeatedly rejected by other courts, with whose reasoning we agree.

The admonition to consider all the evidence received at trial "informs the jury that the People may not meet their burden of proof based on evidence other than that offered at trial. The instruction does not tell the jury that it may not consider any perceived lack of evidence in determining whether there is a reasonable doubt as to a defendant's guilt." (*People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509; accord *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1117; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1238; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1093; *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1157.)

Attacks on the "abiding conviction" language have also been repeatedly rejected. "[D]efendant's assertions on the deficiencies of the phrase 'abiding conviction' must give way to the great weight of legal authority approving that very language." (*People v. Stone* (2008) 160 Cal.App.4th 323, 334; accord, *People v. Zepeda* (2008) 167 Cal.App.4th 25, 31, fn. 4 ["Our state Supreme Court and the Courts of Appeal in every appellate district consistently rejected defendant's argument as it applied to the 'abiding conviction' phrase in CALJIC No. 2.90. [Citations.] Those rulings apply with equal force to the language of CALCRIM No. 220."]; *People v. Carillo* (2008)

163 Cal.App.4th 1028, 1039 [rejecting objection to "abiding conviction" language because "the propriety of the instruction . . . has been upheld many times"].)

Romero's instructional claims are meritless.

6. *There was no cumulative error*.

Romero contends the cumulative prejudicial effect of the various trial errors he has raised on appeal requires the reversal of his convictions. However, we have found at most a single insignificant error that was clearly harmless; hence, Romero's trial was not fundamentally unfair. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305 ["Because we identified only one harmless error . . . the claim of cumulative error is without merit."]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1056 ["Defendant contends the cumulative prejudicial effect of the various errors he has raised on appeal requires reversal of the guilt and penalty judgments. We have rejected his assignments of error, with limited exceptions in which we found the error to be nonprejudicial. Considered together, any errors were nonprejudicial. Contrary to defendant's contention, his trial was not fundamentally unfair, even if we consider the cumulative impact of the few errors that occurred."].)

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.