Filed 10/24/19 P. v. Williams CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KERRY WILLIAMS et al., Defendants and Appellants.	B288128 (Los Angeles County Super. Ct. No. NA101416)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Meyer, Judge. Reversed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant Kerry Williams.

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

Law Offices of Timothy V. Milner and Timothy V. Milner for Defendant and Appellant Anthony Chapple.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellants Kerry Williams, Clyde Beasley, and Anthony Chapple, all alleged members or associates of a gang known as East Side Pain (ESP), were convicted of the murder of Kayon Dafney, a member of a rival gang. The evidence at trial included a recording of Williams's statements to undercover police informants, during a "*Perkins* operation," that Chapple shot Dafney, and that Williams drove a getaway car provided by Beasley, who waited at Williams's home, watching for retaliation from Dafney's gang.[1]

On the morning of the fourth day of deliberations, the jury foreperson submitted a note to the trial court accusing Juror No. 2 of various misconduct, including withdrawing his participation. The trial court questioned the foreperson,

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[1] In *Illinois v. Perkins* (1990) 496 U.S. 292, 296-300, the United States Supreme Court held that an undercover law enforcement agent whom an incarcerated suspect believes to be a fellow inmate need not give the warnings required by *Miranda v. Arizona* (1966) 384 U.S. 436 before asking questions that may elicit an incriminating response.

who alleged, inter alia, that Juror No. 2 had mentioned -- but not talked about -- a gang background. After questioning Juror No. 2 about this background, the court announced its intent to discharge him for purportedly intentional concealment, during voir dire, of his former friendship with gang members -- even though Juror No. 2 had not been asked to disclose such relationships. Rather than immediately act on this intent, the court questioned all 11 jurors other than Juror No. 2. Their responses suggested that the deliberations to that point had focused on Williams and his *Perkins* statements, which Juror No. 2 viewed as insufficient evidence of guilt. All 11 agreed that Juror No. 2 had been discussing the evidence, but they nearly universally criticized the reasoning he expressed. Five alleged that he had expressed an unwillingness to continue deliberating, while the other six stated that he had been participating in deliberations up to the time of questioning. The trial court withdrew its decision to discharge Juror No. 2 for concealing his former friendship with gang members. However, without questioning Juror No. 2, the court discharged him for refusing to deliberate, based on its belief that the 11 other jurors had at least "intonat[ed]" that he had refused.

Each appellant contends the trial court prejudicially erred by discharging Juror No. 2 for refusing to deliberate. Appellants also mount several challenges to the admission of evidence: (1) Chapple, joined by Beasley, challenges the admission of Williams's *Perkins* statements as a violation of

his rights under the confrontation clause of the Sixth Amendment; (2) Beasley challenges the admission of Williams's *Perkins* statements on the additional ground that they were inadmissible hearsay, arguing the trial court erred in applying the exception for declarations against penal interest; (3) Williams, joined by Beasley, challenges the admission of an investigating officer's testimony interpreting coded language Williams and Beasley used during intercepted phone calls; and (4) Beasley challenges, on due process grounds, the admission of a gang expert's opinion that gang members are typically truthful when identifying other people as members of their gang. Williams, joined by Beasley, alleges additional errors at trial, contending (1) the prosecutor committed misconduct by referring to Dafney's killing as a "murder" when questioning witnesses; and (2) the trial court exhibited bias by allowing the prosecutor to make these references and by coaching the prosecutor on the use of hypothetical questions to elicit an opinion from the gang expert. Finally, Williams and Beasley separately allege errors at sentencing: (1) Williams contends the trial court acted in excess of its jurisdiction by ordering each appellant to pay restitution for Dafney's funeral expenses without making their liability joint and several; and (2) Beasley contends the trial court violated his rights under several constitutional provisions by imposing assessments and a restitution fine without finding him able to pay.

We reverse, concluding that Juror No. 2's inability to perform his duty does not appear in the record as a

"demonstrable reality." (*People v. Armstrong* (2016) 1 Cal.5th 432, 451 (*Armstrong*).) The evidence on which the court actually relied -- the representations of jurors other than Juror No. 2 -- did not manifestly support its conclusion that Juror No. 2 refused to deliberate. (See *id.* at p. 451.) Because the erroneous discharge of Juror No. 2 requires reversal, we discuss appellants' additional contentions only to provide guidance for retrial.

STATEMENT OF THE CASE

The state charged each appellant with Dafney's murder (Pen. Code, § 187, subd. (a)) and alleged, in addition to firearm-related allegations, that appellants committed the murder for the benefit of, at the direction of, and in association with a criminal street gang (*id.*, § 186.22, subd. (b)(1)(C)). The jury convicted each appellant and found the gang allegation true. The court sentenced Williams and Chapple to prison terms of 50 years to life, and Beasley to a prison term of 25 years to life. The court ordered each appellant to pay the California Victim Compensation Board $4,864.73 in restitution for Dafney's funeral expenses, a figure requested by the Board in a document submitted by the prosecution. The court ordered Beasley to pay a $10,000 restitution fine, a $30 criminal conviction assessment, and a $40 court operations assessment. Appellants timely appealed.

PROCEEDINGS BELOW

A. *Voir Dire*

When addressing the prospective jurors during voir dire, the trial court repeatedly referenced a childhood experience involving split pea soup to illustrate the distinction between experiences that arouse passions -- like those the court felt at the sight of split pea soup -- rendering a juror unable to be fair and impartial, and experiences a juror could set aside during deliberations. After informing the prospective jurors of the gang allegation, the court acknowledged that some or all of them might have issues with gangs, adding, "[B]ut we're going to talk about whether your issues with gangs, in any way, is your split pea soup -- whether it overcomes the presumption of innocence just because you've heard that word now." Later, after cautioning the prospective jurors not to rely on stereotypes about gangs, the court said, "Now, if it is your split pea soup, though, if you've been the victim or something involving gangs, we're going to need to know about it . . . ." Neither the court nor any counsel asked Juror No. 2 if he had experience with gangs or gang members, and he did not mention any.

B. *Prosecution Case*

1. *Dafney's Killing and the Shooting at Williams's Home*

Long Beach Police Department Officer Jeremy Boshnack, testifying as an expert on local gangs, testified that ESP was at war with the Naughty Nasty Crips in 2014. The gang war involved numerous shootings, including the June 27, 2014 killing of ESP member Marcel Johns (Williams's cousin and Beasley's nephew) and the killing, one week later, of Naughty Nasty Crips member Kayon Dafney.[2]

Johns's mother, Maretha Moore, testified that shortly after her son's death, Beasley told her, "'We're going to handle this.'" Although she claimed not to know what Beasley meant, the court allowed the jury to hear a recording of a prior interview she had given to detectives, during which she told them Beasley was "[o]bviously" referring to Johns's death.

Jill Ridgers, an ex-girlfriend of Beasley's, testified that she owned a white, two-door Mitsubishi Eclipse, which Beasley borrowed between July 3 and July 6, 2014.

Dafney's minor sister testified that on the day of his death (July 4, 2014), she saw him enter an alley near a white, two-door car. She saw two people inside the car, one of whom -- a man who appeared around the same age as

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[2] Johns's mother and wife confirmed his membership in ESP and his relationship to Williams and Beasley.

Dafney (22) -- exited the car and approached Dafney in the alley.[3] She turned away in fear, heard gunshots, and saw the man run back into the car, which drove away. Surveillance video captured a white car driving from the scene.

At the time, Williams was living in Long Beach with his mother, Kim Gobert, in an apartment building on Elm Street. Another resident of the building testified that around 1:30 p.m. on July 4, 2014 (about an hour after Dafney's killing), someone shot at the building. He saw a man leave the building from the direction of Williams's unit and enter a white, two-door car, which someone else was driving.

Johns's wife, Tanya Martinez, testified that on the evening of Dafney's murder, she attended a gathering of Johns's family. After Martinez failed to recall many details, the trial court allowed the prosecutor to attempt to refresh Martinez's recollection by playing a recording of a prior interview Martinez had given to detectives. During the interview, Martinez said that Williams, Beasley, and Chapple were all present at the gathering. She thought Williams seemed shaken and more reserved than usual. Beasley said that he had been present at Williams's residence when shots were fired earlier that day, and that he had returned fire.

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[3] Chapple was 24 years old at the time of Dafney's killing (as was Williams).

Long Beach police searched Williams's home shortly after the shooting there and retrieved a cell phone and a magazine partially filled with .45 caliber ammunition.[4] At the scene of Dafney's death, police retrieved cartridge casings designed to hold .45 caliber bullets. A Long Beach Police Department ballistics expert opined that one of the cartridges found in Williams's home had been cycled in the same firearm that discharged the cartridge cases found in the alley where Dafney was killed.

2. *The Wiretap*

Long Beach Police Department Detective Teryl Hubert, the lead investigator on the case, testified that she obtained a wiretap on phones belonging to Williams and Beasley, among others, between December 2014 and March 2015. The wiretap intercepted approximately 28,300 communications, all of which she had reviewed. The recorded calls described below (among other, less material calls) were played for the jury. Intermittently, Detective Hubert testified regarding her interpretation of coded language used by Williams and Beasley on the calls; for example, she opined that "the killalla's rizace behind the

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[4] An investigating officer opined that the cell phone found in Williams's home belonged to Chapple, relying in part on knowledge that the phone's subscriber was Chapple's sister. Chapple's sister, testifying as a defense witness, confirmed on cross-examination that Chapple had a phone under her name.

inside of the kizzar" meant the race of the killer inside of the car, and that "*hiz-et*" meant "hot," which in turn meant wiretapped.

In late December 2014, the police told Moore (Johns's mother) they believed Dafney was killed in retaliation for her son's death, and distributed a flyer in the suspects' neighborhood presenting the same theory. On December 30, 2014, Williams told Beasley that Moore had been informed in advance of the flyer. Beasley said, "[I]f we go man, . . . it's behind her punk ass y'all. . . . She talk to[o] much man."

On January 1, 2015, Beasley told Williams the police wanted to talk to Ridgers (Beasley's ex-girlfriend who had loaned him her white, two-door car). Williams said the police did not know "who to place" and that "they say they got a car, but they don't have [Beasley] in the car."

On January 9, 2015, the detectives distributed to Moore and to press outlets a flyer showing both Ridgers's car and another car seen driving near the scene of Dafney's killing. On January 10, 2015, Williams asked Beasley whether he had received a text about a picture of a car in a newspaper. After viewing the text, Beasley recalled that Ridgers had insisted that Beasley had been in possession of her car on July 4 (the day of Dafney's death), and that he "didn't say nothing about [he] did or didn't . . . ." In response to Williams's wondering why the police released the picture of the car, Beasley said, "They need . . . somebody to say, the killalla was in the kizzar. . . . They need to know the killalla's rizace behind the inside of the kizzar."

On January 12, 2015, Detective Hubert told Billie Gobert (Beasley's mother and Williams's grandmother) that the police had found ammunition at the Elm Street apartment and wanted to speak with Kim Gobert (Williams's mother, who lived there with him). The same day, Williams informed Beasley of the detective's apparent desire to know how "all them bullets" came to be in the apartment. Beasley asserted Billie Gobert's phone was "*hiz-et*" and she talked too much. The next day, Beasley reported that he had argued with Billie Gobert, who told him she had received a call from Moore about the "*kizzar*." Gobert asked him, "'Why you guys hide this shit from me?'" Beasley told her it was none of her business and tried to explain to her that she was being used as a "pond" (meaning "pawn," according to Detective Hubert).

On January 15, 2015, the police distributed another flyer, which included a sketch of Donovan Shipman (also known as D-boy), whom the flyer identified as the suspected driver involved in Dafney's killing. Two days later, Williams told Beasley the police had distributed a sketch that looked like "D Bizz" next to pictures of a white car and a silver car. He commented that "D Bizz" had "alla bizz zite" and, apparently referring to the cars, observed that no "plizzates" were visible.

On January 30, 2015, the detectives distributed another flyer, which included sketches of four suspects: Williams, Beasley, Shipman, and Terell Washington. This flyer identified Beasley as the suspected driver and Williams

as the suspected passenger. Later that day, Beasley received a call from Kim Gobert (his sister), who reported that during an argument with Moore (Johns's mother) about whether Moore was "'telling on everybody,'" Moore had said, "'Your brother told me that they did -- killed somebody after my son got . . . killed.'" Beasley had Gobert confirm what Moore claimed to have heard and where the flyer was posted, then ended the call. Several minutes later, Beasley discussed the flyer with Williams and said he was "bedroom whispering" because "this shit starting to add up now dog."

On February 6, 2015, Detective Hubert interviewed Ridgers and showed her a photograph of Chapple. The same day, Ridgers called Beasley and asked if he knew somebody named Kaos or K1 (monikers used by Chapple), after which Beasley immediately told her to hang up.[5] Beasley promptly called her back on a different line and claimed not to recognize the names. Ridgers and Beasley argued about whether Ridgers's car had been used in a crime. Beasley disputed whether he had been in possession of her car on July 4 and instructed her not to "put that shit over the phone . . . ." Ridgers insisted the car had been in Beasley's possession.

Shortly after his calls with Ridgers, Beasley called Williams's father and asked him to tell "Little-K" to come to

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[5] Martinez (Johns's wife) testified that she knew Chapple by the name Kaos. Chapple identified himself as K1 on phone calls he made while incarcerated, recordings of which were played for the jury.

Beasley's home. Williams's father agreed to do so. Beasley then called Williams and summarized his conversation with Ridgers. He said, "I defended myself throughout the whole duration. . . . Cause I, I ain't dumb." He indicated he was thinking of initiating contact with the police because "the cat [was] out the bag . . . ."

3. *Williams's Fabrication of Alibi Evidence*

Arielle Bingley, Williams's ex-girlfriend and the mother of his children, testified that shortly after the police distributed a sketch of Williams, she took photographs with him, their kids, and other members of his family, at his request. She identified the photographs and confirmed that they were falsely marked as having been taken on July 4, 2014, the day of Dafney's killing. Similarly, a pastor testified that photographs of Williams taken at a church in early 2015 were falsely marked as having been taken on July 4, 2014. Detectives retrieved a camera during a search of Williams's father's home and, through analysis of metadata, determined that it had been used to falsely mark photographs as having been taken on that date.[6]

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[6] In a question to the detective who retrieved the camera, the prosecutor referred to this case as "the murder case." Beasley's counsel objected to the prosecutor's use of the word "murder" on the ground that the prosecutor was asking for a legal opinion. The court overruled the objection, stating, "I think somebody shot to death is a murder. The issue is whether it's these gentlemen that did it or not. So

4. *The* Perkins *Operation and Related Phone Calls*

On March 12, 2015, the police arrested Williams (along with his father, grandmother, and ex-girlfriend) and conducted a "*Perkins* operation," during which two paid informants, identified as "S" and "J," posed as Williams's cellmates. Over defense objection, the court allowed the prosecutor to play a recording of the *Perkins* operation. Near the beginning of the recording, Detective Hubert entered Williams's cell and told him that his relatives had lied about his whereabouts on July 4, that the police had wiretapped his phone, and that extractor marks on the bullets found at his home matched casings from the weapon used to kill Dafney.

After Detective Hubert left, S told Williams that it was possible for police to match extractor marks in the manner that Detective Hubert had described, and said, "[T]hey are gonna hit you with the murder." Williams responded, "Even without the gun?" After further conversation, S discussed best practices for disposing of guns and said that if the police found the gun, they would have the murder weapon. Williams responded, "It wasn't me, they really don't -- [unintelligible]." Soon thereafter, J asked Williams how the police knew where to look for the "burner" (meaning "gun,"

I'm okay with the terminology for this case." The prosecutor had made previous references to Dafney's killing as a "murder," without objection, and made additional references after the overruling of Beasley's objection.

according to Detective Hubert). Williams responded, "Cuz, when the shit happen, they came, mother fuckers came right back to my spot and shot my shit up." S suggested that Williams "play a role," recalling that S himself had fabricated a defense to a conspiracy charge.

Later, S claimed to be defending himself in his own homicide case by falsely claiming that he had merely been passing by when the victim was shot. He told Williams that if he was not the shooter, then there were a lot of ways to defend his case. Williams said he was not the shooter, and S asked him who was. Williams responded that the shooter was one of his homies. Shortly thereafter, Williams stated the police "got the puzzle" by identifying the victim as his cousin's killer, seeing a two-door car on video near the crime scene, and hearing from his uncle's ex-girlfriend that she had loaned her two-door Eclipse to his uncle. S predicted the prosecution would claim Williams's uncle was the driver and he "took somebody there to do something," commenting that "[t]o prove that is really hard but he is not going to get away from that one. As the driver."

In response to further questions, Williams explained he drove the car, his "homeboy" shot the victim, and his uncle waited for him at home. Williams further explained that his uncle kept an eye out through the window because they knew "they would gonna try to come through . . . ." S asked why Williams and the others had not waited longer after his cousin's death to retaliate. Williams responded, "I don't know cuz we caught him slippin." Williams observed that

the police were investigating the shooter (at least by showing pictures of him to Williams's relatives) because the shooter had left his cell phone at Williams's home during the shooting there. When asked for the shooter's name, Williams identified him as "K1" (one of Chapple's monikers).[7]

The jury heard recordings of two phone calls between Williams and his father that took place later that month (on a recorded jail phone line). On the first call, in response to suspicions voiced by Williams, his father confirmed that Williams's cellmates had likely been police informants. Williams noted that one of the men had been asking him "everything," and expressed regret for telling him "a lot." On the second call, Williams told his father he was frustrated because, in light of "all the damn questions," he "should have known . . . ."

5. *Additional Gang Evidence*

The prosecution recalled gang expert Boshnack, who testified that Williams and Chapple were members of ESP. After the prosecutor asked if Beasley was also an ESP member, the court held a sidebar on Beasley's counsel's

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[7] The police arrested Beasley and Chapple the day after the *Perkins* operation. The jury heard recordings of phone calls that took place between Williams's and Chapple's arrest, during which Chapple was informed that Williams had been arrested and subsequently told others that he was moving around and staying off the radar.

objection. Relying on *People v. Sanchez* (2016) 63 Cal.4th 665, the court ruled that the prosecutor could not ask Boshnack to identify Beasley as a gang member, suggesting that the prosecutor instead ask for Boshnack's opinion in the form of a hypothetical.

Boshnack opined that gang members are usually truthful when identifying other people as members of their gang. The prosecutor asked if Boshnack's opinion on Beasley's gang affiliation would be affected if he knew an ESP member had identified Beasley as a fellow member.[8] The court sustained Beasley's counsel's objection. The court held another sidebar, during which the prosecutor indicated she may have misunderstood the court's prior ruling. The court said, "Now you can also ask this person, hypothetically, if one gang member sitting there talking to known other gang members all about a car that might be involved in a case, things like that you know, etc., does that show, would that show a person's affiliation with a gang."

The prosecutor then described for Boshnack, at length, a hypothetical murder matching the prosecution's theory of the case, in which Beasley's role was played by an individual she named "provider," and asked Boshnack whether the hypothetical murder was committed for the benefit of, in association with, or at the direction of ESP. He opined that

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[8] During the *Perkins* operation, Williams told the informants he and his uncle were from the same "hood," which he had previously identified as ESP.

it was. The prosecutor asked for Boshnack's opinion on the "provider's" gang affiliation. Boshnack opined that the "provider" was a gang member.

C. *Defense Witnesses and Arguments*

No appellant testified, and only Chapple called witnesses. Chapple called several of his family members, who testified about his hairstyle around the time of Dafney's killing (relevant to contesting Chapple's identity as the shooter seen by Dafney's sister). He also called a photographer, who testified about photographs he had taken around the crime scene.

In their closing arguments, each appellant's counsel disputed that his client was involved in Dafney's killing, relying in part on challenges to the *Perkins* evidence. Williams's counsel argued Williams's statements during the *Perkins* operation were not reliable because he might have been lying or exaggerating to convince the informants he was not a snitch. He further argued S's questions were leading and Williams might have been repeating what he had heard "through the police filter," rather than answering from personal knowledge. Chapple's counsel argued the prosecution theory hinged on a one-word comment by Williams -- viz., his identification of the shooter as "K1" -- made during a lengthy, convoluted conversation that included speeches and soliloquies by S. Beasley's counsel reminded the jury that S had spoken about how to defend oneself against charges, and argued the prosecution had

been "[e]diting a story, like a movie." None of the defense attorneys suggested Dafney's killing was anything but murder, or argued that Detective Hubert had misinterpreted the coded language Williams and Beasley used during the intercepted phone calls.

D. *Discharge of Juror No. 2*

1. *Initial Decision to Discharge Juror No. 2*

The jury started deliberating at 11:30 a.m. on June 29, 2017, ending deliberations at 4:00 p.m. that day. It continued deliberating on June 30, starting at 9:30 a.m. and ending at 3:50 p.m. It resumed deliberating on July 3, starting at 9:32 a.m. and ending at 2:50 p.m., when it submitted a jury note reading, "What can be done if some jurors feel other jurors may not be deliberating in good faith (emotions rather than evidence)[?]" Although a minute order indicates the court briefly questioned the foreperson about the note on the morning of July 5, the record includes no transcript of this questioning. The jury resumed deliberating at 9:45 a.m. and about 50 minutes later (at 10:34 a.m.), submitted a note reading, "One of our jurors is not following the instructions. 1) The juror focuses outside of the evidence presented in trial -- he refuses to review all evidence. 2) The juror uses bias and sympathy [and] personal experience to sway his opinion. 3) The juror has withdrawn his active participation. Please <u>assist</u> in resolving this situation."

The court questioned the foreperson, Juror No. 1, about what each allegation in the jury note meant. Juror No. 1 alleged that Juror No. 2 had said, "'You guys -- if we come back, I will bring a book and just sit in the corner. I will not say another thing.'" Juror No. 1 confirmed that Juror No. 2 had been participating, but criticized him for "construct[ing] other cases or scenarios . . . ." Juror No. 1 indicated that Juror No. 2 had questioned whether Williams had been truthful with the police informants during the *Perkins* operation, or whether he had been "coerced" or "coached." When asked to address the accusation that Juror No. 2 was relying on bias, Juror No. 1 said, "Yeah. Let's talk about the -- the bias. 'That defendant Williams is actually innocent, and that he is feigning guilt to -- for some other reason.'" Juror No. 1 continued, "He feels that the evidence, as presented -- and this is my word – 'Isn't perfect.'" Juror No. 1 further alleged, "The juror says he has a gang background, and it didn't come out at the -- the prescreening." The court asked, "So has he shared some of the gang background that did not come out during voir dire?" Juror No. 1 responded, "He -- he didn't talk about the gang background, but he did talk about an instance where he -- where he lied to cover up something . . . ." The trial court again asked if Juror No. 2 had been participating up to that point. Juror No. 1 responded, "Yes."

The court then questioned Juror No. 2, but only about his alleged gang background and failure to disclose it during voir dire. Juror No. 2 confirmed that he had been friends

with gang members when he was young, but stated, "[W]e all grew up -- eventually, grew up and got out of it . . . ." He denied ever being a gang member himself. When asked why he had not shared this information when the court and counsel discussed "the fact that this case involved gangs," Juror No. 2 responded, "There was nothing that would -- you know, that -- that life has been long forgotten, and -- but yeah, I have experience in it, but I didn't feel that it would be important to -- for me --." After being interrupted by the court, he confirmed his belief that his experience with gang members had played no role in the deliberations. The court asked no follow-up questions.

Without hearing argument, the court announced its intent to discharge Juror No. 2 for intentionally concealing material information during voir dire. The court reasoned that Juror No. 2 should have disclosed his "gang experiences" in response to (1) a written question asking whether he had "any particular feeling about this particular offense that would make it difficult[] for [him] to be a fair and impartial juror"; (2) a written question asking whether he knew "any reason why [he] would not be a completely fair and impartial juror on this case;" or (3) a purported implication "throughout the entire voir dire process" that jurors should disclose any experiences with gangs. Expressing a belief that Juror No. 2 was bringing his gang experience into deliberations, the court found that Juror No. 2 had been insincere when explaining why he had not disclosed it. The court indicated that its adverse credibility

finding was also based in part on Juror No. 2's demeanor, noting he had been "chomping on gum," which the court deemed "personally disrespectful . . . ." The court clarified that it found no misconduct other than the alleged concealment, noting that it agreed Juror No. 2 had been deliberating.

Williams's counsel objected to the discharge of Juror No. 2, arguing, inter alia, that the court's failure to question other jurors rendered its inquiry inadequate. The court decided to question the remaining jurors.

2. *Questioning of all Jurors Except Juror No. 2*

The court informed Juror No. 3 that the foreperson had submitted a note related to possible difficulties with Juror No. 2, and asked whether Juror No. 2 had been actively participating in discussions of evidence. Juror No. 3 responded, "Kind of, yes." Juror No. 3 complained that Juror No. 2 relied on "feelings and things that aren't in the evidence," and that the other jurors could not "push" him to explain his vote because he did not "want to hear anything further" and wanted "to be, like, shut down completely." The court asked, "So once he expresses his own point of view, are you saying he's not willing to listen to other people's point of view on the evidence?" Juror No. 3 responded, "As of now, yes." When asked if he had been listening previously, Juror No. 3 said "[s]ort of," and proceeded to complain that Juror No. 2 brought up matters not in evidence and wanted everything put in order for him "like a TV show, basically."

Juror No. 3 stated that after the jury had finished reviewing the *Perkins* evidence, Juror No. 2 wanted to be done and did not want to hear the intercepted phone calls. When asked if Juror No. 2 was willing to look at other evidence, Juror No. 3 responded, "He says he is, but when we try to figure out what to look at, he's completely blocked. He doesn't know what to look at, so he doesn't know where to go from there." The court said that it had "heard comments about gang experiences" and asked if Juror No. 3 believed Juror No. 2 was bringing such experiences into the deliberations. Juror No. 3 said he did not know.

The court informed Juror No. 4 that it had heard Juror No. 2 had withdrawn his active participation, and asked if "up until this point" Juror No. 2 had been participating. Juror No. 4 responded, "He's very active." However, Juror No. 4 criticized Juror No. 2 for relying on personal experiences and emotion and opined that Juror No. 2 was biased, complaining that when other jurors focused on one piece of evidence, "he would question that all the time." Juror No. 4 twice denied that Juror No. 2 had said anything about gang experience.

The court informed Juror No. 5 that it had received a note alleging Juror No. 2 had withdrawn his active participation, and asked if Juror No. 2 had been participating "[u]p to this point . . . ." Juror No. 5 responded affirmatively, further observing that the jury had carefully reviewed the *Perkins* evidence and that Juror No. 2 had been "very engaged." When asked for comment on the allegation

that Juror No. 2 was refusing to view all of the evidence, Juror No. 5 responded that she thought Juror No. 2 had decided at that point and saw no point in further review. Juror No. 5 then volunteered that she believed Juror No. 2 was biased, explaining that Juror No. 2 had injected "what if" questions such as whether Williams "might have been contacted by somebody and given this information . . . ." Juror No. 5 denied that Juror No. 2 had brought up any gang background.

The court asked Juror No. 6 if Juror No. 2 had been actively participating "[u]p to this point . . . ." Juror No. 6 confirmed that Juror No. 2 had been actively participating, but criticized him for "explaining things that make no sense to anybody else in the room . . . ." Juror No. 6 further complained that Juror No. 2 was "trying to put his mindset into the defendant's," opining that this was a sign of bias or sympathy. When asked if Juror No. 2 had brought up gang history, Juror No. 6 responded, "No. That has not been discussed at all in there."

The court informed Juror No. 7 that it had received a note accusing Juror No. 2 of withdrawing his participation, and asked if he had been participating "up until this point . . . ." Juror No. 7 confirmed that Juror No. 2 had been participating. However, Juror No. 7 complained that Juror No. 2 made arguments based on his "personal feelings about the way the evidence was gathered," comparing Juror No. 2 to a person who expects every case to have a confession or piece of physical evidence tying everything together, as in

cases shown on television. When asked if Juror No. 2 had shared any gang history, Juror No. 7 responded that he could not recall anything specific.

The court asked Juror No. 8 if Juror No. 2 had been actively engaged "[u]p until this point," even if "maybe he's shut down now . . . ." Juror No. 8 responded, "Yeah." Juror No. 8 complained that Juror No. 2 relied on beliefs about what he would have done in a given situation, rather than on "rational argument." The court asked if Juror No. 2 had mentioned any gang background. Juror No. 8 responded that he had not used the word "gang," but had made multiple references to his background.

The court asked Juror No. 9 if Juror No. 2 had been actively participating and listening "[u]p to this point in time . . . ." Juror No. 9 responded, "For the most part, yes." The court did not ask for clarification or elaboration, instead proceeding to ask if Juror No. 2 was (1) focusing on matters outside of the evidence, and (2) exhibiting bias or sympathy. Juror No. 9 responded affirmatively to both questions, complaining that Juror No. 2 was "using a lot more outside experience" in his arguments. The court asked if Juror No. 2 had brought up gang experience or anything from his background suggesting "he has a pre-agenda . . . ." Juror No. 9 responded, "No, not necessarily."

The court informed Juror No. 10 that the foreperson had submitted a note alleging that Juror No. 2 had withdrawn his participation, and asked if Juror No. 2 had been participating "up until this point . . . ." Juror No. 10's

response was ambiguous as transcribed but apparently negative, as the court then asked Juror No. 10 to explain what she meant by indicating that Juror No. 2 was not participating. Juror No. 10 responded by complaining that when the other jurors asked Juror No. 2 questions "to try to help him understand" the evidence, Juror No. 2 would respond by putting himself in the situation and asking "what if." The court asked if Juror No. 2 had commented about any gang background. Juror No. 10 responded that Juror No. 2 had commented on his personal background, but not about gangs. Juror No. 10 also said the jury had been discussing only one defendant, and when it tried to transition to another defendant that morning, Juror No. 2 had said, "'No. I just checked out. I'm done.'" The court asked if Juror No. 2 was, at that point, refusing to discuss Beasley and Chapple, and Juror No. 10 said yes. The court asked if Juror No. 2 had actually said so. Juror No. 10 responded, "[T]hose were his words, and then since then, we just haven't discussed anything."

The court asked Juror No. 11 if Juror No. 2 had been actively discussing the evidence "in regards to, at least, defendant Williams." Juror No. 11 responded that Juror No. 2 had been discussing the evidence "a small amount," indicating that he had only been discussing the *Perkins* evidence. The court asked if Juror No. 2 had been willing to look at any other evidence. Juror No. 11 responded that Juror No. 2, when asked by other jurors whether he wanted to see additional evidence, had said no. According to Juror

No. 11, the jury had devoted 90% of its discussion to Williams, and Juror No. 2 had said he was unwilling to discuss Beasley and Chapple because he had already reached an opinion for all three defendants. The court asked if Juror No. 2 had brought up gang experience. Juror No. 11 responded, "Yes, he did mention that. That was a reason he had a certain opinion -- because of his past experience -- with gang activity."

The court asked Juror No. 12 if Juror No. 2 had been actively discussing "at least the evidence in regards to Mr. Williams." Juror No. 12 responded, "I feel like he was participating, yeah." The court asked if the jury had been discussing the other defendants, and Juror No. 12 indicated that the jury had mostly focused on Williams but had been "branching off" to some extent. The court asked if Juror No. 2 had "expressed any kind of -- sort of emphatic opinion of continuous deliberations in regards to defendant No. 2 or No. 3?" After Juror No. 12 asked what "emphatic" meant, the court responded, "Meaning, he refuses -- is he refusing to deliberate any further back there?" Juror No. 12 responded, "He has stated that, yes." Asked for comment on the allegation that Juror No. 2 was relying on bias, sympathy, and personal experience, Juror No. 12 complained that even though Juror No. 2 had apologized to other jurors in response to their criticism that he was putting himself in Williams's shoes, he had proceeded to do the same thing again. The court asked if Juror No. 2 had brought up gang experience. Juror No. 12 responded that Juror No. 2 had

mentioned it "a couple minutes ago" but had not mentioned it before.

The court brought Juror No. 1 (the foreperson) into court again and had him confirm that the jury had mainly discussed Williams, without discussing Beasley or Chapple "as a consolidated group . . . ." Stating that it had already asked this question and only wanted to confirm his response, the court asked, "[H]as [Juror] No. 2 made any definitive statement about deliberating on Mr. Beasley and Mr. Chapple?" Juror No. 1 alleged that Juror No. 2 had said, "'I don't have to hear anymore -- I don't want to talk about this anymore. I can't reach a verdict.'"

3. *The Court's Record of Reasons for Discharging Juror No. 2*

All three defense attorneys objected to Juror No. 2's discharge. Williams's counsel pointed out that the court had not asked Juror No. 2 if he was willing to continue deliberating, and Beasley's and Chapple's counsel asked the court to re-question Juror No. 2. The court then reconsidered its prior decision to discharge Juror No. 2 on the basis of his failure to disclose his background with gang members during voir dire, and declined to discharge him on that basis. The court further declined to discharge Juror No. 2 on the basis of the other jurors' descriptions of the manner in which he had been deliberating, concluding they did not support a finding of bias.

However, the court decided to discharge Juror No. 2 for refusing to deliberate. It declined to question Juror No. 2, explaining, "I've got, what I feel, is 11 other jurors intonating -- a couple directly saying and quoting, 'Juror No. 2 -- that he will not deliberate.' I don't need to ask Juror No. 2 in that scenario." The court found the jury had not yet deliberated regarding Beasley and Chapple, and further explained, "The deciding factor for me is that once you talk about [Beasley and Chapple], that could very well change your mind on [Williams]." The court did not dispute that "the strength of the evidence might come from Mr. Williams's *Perkins* operation," but explained that Juror No. 2 remained obligated to discuss other evidence. It found Juror No. 2 was unwilling to listen to the intercepted phone calls, mentioning it appeared the jury had not yet discussed the prosecution theory that Beasley had made adoptive admissions during the calls.[9] It observed the jury had not submitted a note reporting it was deadlocked.

The court called Juror No. 2 into court, discharged him, and replaced him with an alternate juror. The next day, the

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[9] Both during trial (outside the presence of the jury) and during its hearing on Beasley's motion for a new trial, which it denied, the trial court expressed its view that the evidence of Beasley's adoptive admissions was the strongest evidence against him. Indeed, the court implied that absent the intercepted phone calls, it might have granted a motion challenging the sufficiency of the evidence to sustain Beasley's conviction.

reconstituted jury returned its verdict convicting Williams. On its second day of deliberations thereafter, the jury returned its verdicts convicting Beasley and Chapple.

DISCUSSION

Each appellant contends the trial court prejudicially erred by discharging Juror No. 2 for refusing to deliberate. We agree, and therefore discuss appellants' additional contentions only to provide guidance for retrial.

A. *Discharge of Juror No. 2*

1. *Governing Principles*

Under Penal Code section 1089, a trial court may discharge a juror if the juror "dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty . . . ." Courts have held that a juror whose mind is fixed prior to deliberations and who thereafter refuses to deliberate may be discharged, as this conduct demonstrates an inability to deliberate. (See *Armstrong*, *supra*, 1 Cal.5th at p. 450; *People v. Cleveland* (2001) 25 Cal.4th 466, 485 (*Cleveland*).) However, the use of faulty logic, a refusal to agree with other jurors' reasoning, or disagreement with other jurors on the strength of the government's case is not a refusal to deliberate. (*Armstrong*, *supra*, 1 Cal.5th at pp. 452-453; *Cleveland*, *supra*, 25 Cal.4th at p. 485.)

This distinction -- difficult enough for courts -- "may be even more difficult for jurors who, confident of their own good faith and understanding of the evidence and the court's instructions . . ., mistakenly may believe that those individuals who steadfastly disagree with them are refusing to deliberate . . . ." (*Shanks v. Department of Transportation* (2017) 9 Cal.App.5th 543, 556 (*Shanks*), quoting *People v. Engelman* (2002) 28 Cal.4th 436, 446.) Thus, a trial court should be wary of jurors' opinions on the participation of another juror with whom they disagree. (See *Shanks*, *supra*, at p. 555 [trial court conducted inadequate inquiry into juror's alleged refusal to deliberate by considering views of only two jurors, both of whom disagreed with challenged juror's opinion on liability and were therefore more likely to harbor resentment against her]; cf. *People v. Allen and Johnson* (2011) 53 Cal.4th 60, 75 (*Allen*) [trial court "cannot substitute the opinions of jurors for its own findings of fact"].)

The facts of *Cleveland* and *Armstrong* illustrate the "great care" a trial court must exercise before discharging a juror for refusing to deliberate. (*Armstrong*, *supra*, 1 Cal.5th at p. 454.) In *Cleveland*, after questioning the foreperson about a jury note submitted on the second day of deliberations, the trial court asked the jurors, as a group, whether they felt any juror was not deliberating. (*Cleveland*, *supra*, 25 Cal.4th at pp. 470-471.) Ten jurors raised their hands. (*Id.* at p. 471.) The court questioned each juror. (*Id.* at pp. 470-473.) Although Juror No. 1

claimed he had been participating in deliberations, five jurors testified that Juror No. 1 did not participate when the other jurors discussed the elements of the charges, or that he refused to answer questions. (See *id.* at pp. 472-473 (maj. opn.); *id.* at p. 487, fn. 1 (conc. opn. of Werdegar, J.).) Additionally, each juror other than Juror No. 1 criticized his reasoning, complaining that he discussed matters that they considered irrelevant and expressed what they considered an unreasonably critical view of the prosecution evidence. (See *id.* at pp. 470-473, 486 (maj. opn.).) The trial court discharged Juror No. 1, finding he was "'not functionally deliberating . . . .'" (*Id.* at p. 473.) The Court of Appeal reversed the judgment of conviction, and our Supreme Court affirmed, holding that the record did not establish as a "'demonstrable reality'" that Juror No. 1 refused to deliberate. (*Id.* at pp. 473-474, 485-486.) The jurors' answers revealed they took issue with Juror No. 1's view of the evidence, rather than any failure on his part to explain his view or to listen to theirs. (*Id.* at p. 486.) In a concurring opinion, Justice Werdegar noted the presence of "substantial evidence . . . that Juror No. 1 was not functionally deliberating," but emphasized that the demonstrable reality standard required more. (*Id.* at pp. 487-488 (conc. opn. of Werdegar, J.).)

The Court cited Justice Werdegar's concurring opinion with approval in *Armstrong*, where it similarly found reversible error in a juror's discharge for refusal to deliberate. (See *Armstrong*, *supra*, 1 Cal.5th at pp. 437,

450.) There, after two days of deliberations, the jury submitted notes accusing Juror No. 5 of refusing to listen to other jurors' views. (*Id.* at p. 444.) The court questioned the foreperson and Juror No. 6, both of whom testified that Juror No. 5 had been deliberating. (*Id.* at p. 452.) However, they both accused Juror No. 5 of briefly looking at a book and cell phone during deliberations (although the foreperson admitted he was relying on secondhand knowledge), and of withdrawing her participation. (*Id.* at pp. 446-448, 452-453.) The foreperson also criticized Juror No. 5's reasoning, and implied other jurors shared his frustrations with Juror No. 5's view of the evidence. (See *id.* at pp. 446-447, 453.) Juror No. 5 denied refusing to deliberate, but the court found her not credible. (*Id.* at pp. 448-449, 451.) Relying on the testimony of the foreperson and Juror No. 6, the court discharged Juror No. 5 for refusing to deliberate. (*Id.* at pp. 449, 451-453.) Our Supreme Court reversed, despite acknowledging the deference it owed to the trial court's credibility findings. (*Id.* at pp. 451-454.) Juror No. 6's "de minimis references to a book and cell phone" (and the foreperson's similar, hearsay references) did not establish a refusal to deliberate. (See *id.* at p. 452.) Nor did the two jurors' accusations "[t]hat Juror No. 5 was not willing to engage in further discussion," as that unwillingness, "by itself, [did] not show as a demonstrable reality that she was failing to deliberate." (*Id.* at p. 453.) Instead, "Juror No. 5 reached a conclusion regarding the strength of the

prosecution's case and refused to change her mind," as she was entitled to do. (*Id.* a pp. 453-454.)

2. *Analysis*

The jurors' accounts did not establish that Juror No. 2 was unable or unwilling to deliberate. Ten jurors -- all but No. 2 himself (who was not asked) and No. 10 -- represented that Juror No. 2 had been deliberating up to the point when they were questioned. Indeed, Jurors Nos. 4 and 5 described Juror No. 2 as "very active" and "very engaged," respectively. Although Juror No. 10 indicated Juror No. 2 had not been participating, she explained her allegation by complaining about the reasoning Juror No. 2 expressed when responding to other jurors' questions. All but one of the remaining jurors, too, criticized Juror No. 2's reasoning, complaining primarily that he relied on personal experience and feeling when evaluating the evidence, and that he posed too many "what if" scenarios. Juror No. 1 further criticized Juror No. 2 for expressing views on Williams's innocence and on imperfections in the prosecution evidence, and implied that Juror No. 2 was a holdout against the other jurors' unified front.[10] The record thus shows that the jurors' complaints

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[10] Juror No. 1 (the foreperson) implied that the remaining jurors shared his own views, informing the court, "I instructed the rest of the jurors -- I said, 'Hey, guys, we're not there to try and change [Juror No. 2's] mind.'" Other jurors similarly implied a collective disagreement with Juror No. 2. Juror No. 4 complained, "[I]f we present something,

arose from Juror No. 2's refusal to accept what he considered insufficient evidence. (See *Armstrong*, *supra*, 1 Cal.5th at pp. 446-447, 453 [foreperson's complaints that juror failed to weigh evidence objectively and raised "'possibilities'" with insufficient concern for their probability "amounted to complaints, first, that she was not weighing the evidence in the way that he and the other jurors thought to be objective and, second, that her assessment of the evidence was different from theirs"].) This is not a refusal to deliberate justifying discharge. (See *ibid.*)

To the extent any of the jurors' answers suggested a refusal to participate in deliberations, questioning of Juror No. 2 could have resolved that question. Had the court questioned him, it would have been in a position to determine whether he was genuinely unwilling to participate in deliberations or simply unwilling to change his assessment of the evidence with which his fellow jurors disagreed. (See *Shanks*, *supra*, 9 Cal.App.5th at pp. 551-552, 555-556 [discharged juror's refusal to deliberate was not shown as demonstrable reality, where trial court's

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like, on one -- one point of evidence, he would say -- he would question that all the time." Juror No. 6 criticized Juror No. 2 for "explaining things that make no sense to anybody else in the room . . . ." Juror No. 10 complained of the manner in which Juror No. 2 responded "[w]hen we try to ask questions . . . to try to help him understand any part -- of any of the evidence . . . ." Similarly, Juror No. 12 complained of the manner in which Juror No. 2 responded "every time we would tell him, like, to -- to just base it on the facts . . . ."

questioning of only two jurors, both of whom disagreed with discharged juror on liability, resulted in factual findings "'derived from a stacked evidentiary deck'"]; *People v. Castorena* (1996) 47 Cal.App.4th 1051, 1061-1062, 1066-1067 [trial court abused its discretion by failing to question discharged juror about alleged refusal to deliberate, where evidence corroborated discharged juror's written note explaining she deliberated until deadlock]; cf. *Allen*, *supra*, 53 Cal.4th at pp. 72-76 [discharged juror's prejudgment was not shown as demonstrable reality, in part because trial court impermissibly relied on other jurors' opinions about what discharged juror's comment meant, without asking him].) On the record before it, however, there was little to suggest -- much less a demonstrable reality -- that the juror was unable or unwilling to deliberate. (See *Armstrong*, *supra*, 1 Cal.5th at pp. 446-447, 451-454; *Cleveland*, *supra*, 25 Cal.4th at pp. 471-473, 485-486.)

To the extent the court declined counsel's request to interview Juror No. 2 based on its prior assessment of his credibility during its questioning of him about voir dire, this was error, as that assessment itself was based on a misreading of the record. [11] Indeed, the court itself properly

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[11] The court found Juror No. 2 had intentionally concealed his experience with gang members, finding Juror No. 2's explanation to the contrary not credible because Juror No. 2 had been asked to identify facts he believed would impair his ability to be fair and impartial. Without evidence that Juror No. 2 believed himself biased by his

realized, after questioning additional jurors, that the record did not support discharge on the grounds upon which it had originally relied.[12]

The juror discharge cases on which respondent relies are distinguishable. (See *People v. Williams* (2015) 61 Cal.4th 1244, 1260-1263 [affirming discharge of juror, prior

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former association with gang members, his failure to respond affirmatively to these questions was an inappropriate basis for a finding of intentional concealment. Nor was it appropriate for the court to rely on a purported implication that all prospective jurors should volunteer any background with gang members, without evidence that Juror No. 2 actually perceived such an implication. He was more likely to have inferred he need only volunteer especially passionate feelings about gangs, given the court's emphasis on such feelings through analogy to the court's own feelings about split pea soup.

[12] The court initially relied only on Juror No. 1's answers to find, contrary to Juror No. 2's denial of the allegation, that Juror No. 2 was "bringing his experience of gangs" into the deliberations. Even the evidence on which the court relied did not support this finding; although Juror No. 1 alleged Juror No. 2 had, at an unspecified time, mentioned a gang background, Juror No. 1 then said that Juror No. 2 "didn't talk about the gang background . . . ." The lack of support for the court's finding was confirmed by the court's subsequent questioning of the remaining ten jurors. Only one claimed that Juror No. 2 had discussed gang experience during deliberations, and several unambiguously denied that he had done so.

to deliberations, for improperly expressing opinion during trial, where trial court found discharged juror lied when denying she expressed opinion]; *People v. Fuiava* (2012) 53 Cal.4th 622, 713-716 [affirming discharge of juror who agreed he should be discharged due to inability to follow the law]; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1049, 1053 [affirming discharge of juror for bias, where trial court implicitly found discharged juror's denial of bias not credible, nine of remaining 11 jurors alleged discharged juror "had expressed or exhibited a general bias against law enforcement officers," and testimony of remaining two jurors was "inconclusive"].)

Other cases cited by respondent do not address the discharge of a deliberating juror and, to the extent they are relevant to that subject, actually undermine respondent's position. In *People v. Stewart* (2004) 33 Cal.4th 425, 447-452, our Supreme Court held the trial court erred by excusing prospective jurors based solely upon written voir dire responses suggesting opposition to the death penalty, without conducting oral follow-up questioning to clarify the meaning of their written statements. Here, the trial court gave Juror No. 2 no opportunity to express whether he had been or was willing to continue deliberating, and did not question him about the statements other jurors attributed to him. In *People v. Alexander* (2010) 49 Cal.4th 846, 923-924, 927, although the foreperson alleged another juror had become noncooperative 30 minutes into the deliberations and had refused to discuss certain topics, the trial court

declined to discharge the juror or inquire further into the allegations, instead reasonably determining that further instruction might disabuse the accused juror of any misconceptions and "obviate the need to discharge him." (*Id.* at p. 927; see also *People v. Russell* (2010) 50 Cal.4th 1228, 1248-1249 [trial court questioned and reinstructed juror accused of withdrawing participation, who then completed deliberations].) Here, the trial court's failure to question Juror No. 2 about his alleged refusal to deliberate prevented it from making a fully informed decision about whether reinstruction might have facilitated continued deliberations. (Cf. *Cleveland*, *supra*, 25 Cal.4th at p. 480 ["it often is appropriate for a trial court that questions whether all of the jurors are participating in deliberations to reinstruct the jurors regarding their duty to deliberate . . ."].)

The trial court's error in discharging Juror No. 2 was prejudicial. (See *Armstrong*, *supra*, 1 Cal.5th at p. 454.) Indeed, respondent does not argue the discharge, if erroneous, was harmless. Although we must reverse the judgment, there is no double jeopardy bar to retrial. (See *ibid.*)

B. *Guidance for Retrial*

We address appellants' remaining contentions to provide guidance for retrial. (See *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 286; Code Civ. Proc., § 43.)

1. *Admission of* Perkins *Evidence*

Chapple contends his rights under the confrontation clause of the Sixth Amendment were violated by the admission against him of Williams's statements to undercover informants S and J during the *Perkins* operation. However, "statements unwittingly made to an informant are not 'testimonial' within the meaning of the confrontation clause." (*People v. Arauz* (2012) 210 Cal.App.4th 1394, 1402 (*Arauz*); accord *People v. Gallardo* (2017) 18 Cal.App.5th 51, 67-68 (*Gallardo*).) "Nontestimonial hearsay is subject only to 'traditional limitations upon hearsay evidence' and does not implicate the Sixth Amendment right of confrontation. [Citation.]" (*Arauz*, *supra*, 210 Cal.App.4th at pp. 1401-1402.) Here, the evidence showed Williams was unaware he was speaking to informants; indeed, after his father confirmed they probably were informants, Williams chided himself for not realizing it earlier. Thus, the trial court properly deemed Williams's statements to the informants nontestimonial and therefore not barred by the confrontation clause. (See *Arauz*, *supra*, 210 Cal.App.4th at p. 1402; *Gallardo*, *supra*, 18 Cal.App.5th at pp. 67-68.)

Beasley contends the trial court prejudicially erred in admitting Williams's *Perkins* statements against him under the hearsay exception for declarations against penal interest. We review the trial court's application of that exception for abuse of discretion. (*People v. Grimes* (2016) 1 Cal.5th 698, 711-712.) The exception applies to an unavailable declarant's out-of-court statement if the party

seeking to introduce the statement shows that it was "'against the declarant's penal interest when made'" and "'sufficiently reliable to warrant admission despite its hearsay character.' [Citation.]" (*Id.* at p. 711.)

The trial court did not abuse its discretion by finding Williams's statements to the undercover informants sufficiently reliable to be admitted against Beasley and Chapple under this hearsay exception. When expressing remorse to his father about how much he had told the informants, Williams made no suggestion that he had given them false information. Beasley challenges the statements' reliability by pointing out that S encouraged Williams to lie, but fails to acknowledge that S was encouraging Williams to lie to the police and in court, not to him. There is no evidence that Williams believed the informants could reward him if he falsely implicated Beasley or Chapple.

Further, to the extent Williams's statements did implicate Beasley and Chapple, the trial court did not abuse its discretion by finding them contrary to Williams's own penal interest. Despite denying that he shot Dafney himself, Williams implicated himself in Dafney's murder by describing how he assisted the shooter as a getaway driver while sharing in the shooter's purpose to kill Dafney in retaliation for Johns's death. (See *People v. Smith* (2017) 12 Cal.App.5th 766, 792-794 [affirming admission against defendant, as declarations against penal interest, of codefendant's statements that she witnessed and helped defendant commit crimes; codefendant's statements were

sufficiently self-inculpatory despite assigning herself more passive role]; *Arauz*, *supra*, 210 Cal.App.4th at pp. 1400-1401 [affirming admission against defendants, as declarations against penal interest, of declarant's statements that he drove defendants to scene where they shot and killed victims].) Moreover, Williams implicated himself by identifying K1 (Chapple) as the shooter and his uncle (Beasley) as both the provider of the car and the person who waited at his home for retaliation from Dafney's gang; because Williams knew the police were investigating Beasley and Chapple, he had reason to believe that identifying them would increase the likelihood that evidence found in those investigations would be used against him as well. (See *People v. Cortez* (2016) 63 Cal.4th 101, 126-127 [affirming admission against defendant, as declaration against penal interest, of codefendant's identification of defendant by name as driver in drive-by shooting, where codefendant knew defendant and her car were in police custody and thus knew identifying her increased likelihood of police finding evidence connecting him to shooting].)

2. *Admission of Testimony Interpreting Coded Language*

Williams contends the trial court prejudicially erred by admitting Detective Hubert's testimony interpreting coded language Williams and Beasley used on their intercepted phone calls. We disagree. The trial court did not abuse its discretion in finding Detective Hubert qualified, as a result

of leading the investigation of Dafney's killing and reviewing each of the intercepted communications, to interpret the coded speech in a manner potentially useful to the jury. (Cf. *United States v. Gadson* (9th Cir. 2014) 763 F.3d 1189, 1206-1211 [trial court did not plainly err in admitting, under federal rule governing lay opinion, investigating officer's interpretations of intercepted phone calls, which were based on officer's review of calls in context of his knowledge of facts in evidence he learned during investigation]; *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1165-1166, 1193-1194 [affirming admission of detective's testimony, as gang expert, interpreting meaning of language used during intercepted phone calls]; *People v. Champion* (1995) 9 Cal.4th 879, 924-925 [affirming admission of deputy sheriff's testimony, as gang expert, interpreting gang terminology used during recorded conversation], overruled on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860.)

3. *Admission of Expert Opinion on Claims of Gang Membership*

Beasley contends the trial court prejudicially erred by admitting gang expert Boshnack's opinion that gang members are typically truthful when identifying other people as members of their gang. He argues admission of the opinion unfairly prejudiced his defense in a manner violating his federal due process rights, reasoning the jury must have relied on the opinion to conclude that Beasley, having been identified by Williams as a fellow gang member

during the *Perkins* operation, actually was a gang member. However, despite the prejudicial potential of gang evidence, "'nothing bars evidence of gang affiliation that is directly relevant to a material issue.' [Citation.]" (*People v. Montes* (2014) 58 Cal.4th 809, 859; cf. *People v. Gonzalez* (2006) 38 Cal.4th 932, 945-946 [gang expert's opinion that gang members intimidate witnesses against their own or rival gang was "quite typical of the kind of expert testimony regarding gang culture and psychology that a court has discretion to admit" as relevant].) Here, evidence of Beasley's membership in ESP was relevant to the issue of his alleged motive to kill Dafney -- revenge against Dafney's gang for killing fellow ESP member Johns. His alleged motive was material to determining whether he acted with the requisite intent to aid and abet Dafney's killing. Accordingly, admission of Boshnack's opinion did not unfairly prejudice Beasley in a manner constituting an abuse of discretion or a due process violation.

4. *Prosecutorial Misconduct*

Williams contends the prosecutor committed misconduct by referring to Dafney's killing as a "murder" when questioning witnesses. In *People v. Price* (1991) 1 Cal.4th 324, 480, our Supreme Court held that the prosecutor should not have suggested, prior to closing argument, that an unadjudicated killing could only have been murder. As in *Price*, the prosecutor's reference to "murder" could not have been prejudicial, given that no

appellant argued that Dafney's killing was anything but a murder. (See *ibid.* [no prejudice where testimony supported finding of murder and defendant presented no affirmative evidence that killing was self-defense or manslaughter]; cf. *People v. Hines* (1997) 15 Cal.4th 997, 1045 [defense counsel's performance was not deficient for failure to object to prosecutor's repeated characterizations of killings as "murders," where defendant did not argue killings were anything but murder and evidence precluded such argument].)

5. *Judicial Bias*

We reject Williams's contention that the trial court exhibited bias against him by allowing the prosecutor to refer to Dafney's killing as a "murder." Although defense counsel's objection was well taken, the court's failure to sustain it does not come close to establishing bias. (See *People v. Harris* (2005) 37 Cal.4th 310, 347 [reviewing court will find trial court manifested bias in presentation of evidence only where trial court usurped prosecutorial duties and thereby created impression it was allied with prosecution].)

Nor did the trial court exhibit bias by suggesting the prosecutor could use hypothetical questions to elicit opinion testimony from gang expert Boshnack. Although the court arguably helped the prosecutor by explaining how she could use hypothetical questions, it did so in the context of explaining the scope of its rulings prohibiting the prosecutor from asking other questions. Further, the discussion

occurred outside the presence of the jury. The court's explanation could not have given the jury the impression that the court was acting as the prosecutor's ally. (See *People v. Williams* (2017) 7 Cal.App.5th 644, 694 [trial court's interventions and questioning were not misconduct because they were not "so extreme and one-sided as to convey to the jury that the court was partial to the prosecution"].)

6. *Sentencing Issues*

Williams contends the trial court acted in excess of its jurisdiction by ordering each appellant to pay restitution for Dafney's funeral expenses without making their liability joint and several. Williams concedes, however, that whether to make restitution liability joint and several is a discretionary decision. Given the nature of his contention -- a challenge to the trial court's purported failure to make or articulate a discretionary sentencing decision -- Williams forfeited it by failing to object to the restitution order below. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 881; *People v. Smith* (2001) 24 Cal.4th 849, 852.)

Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1164, Beasley contends the trial court violated his rights under various constitutional provisions by imposing assessments and a restitution fine without finding him able to pay. However, Beasley forfeited this contention by failing to object to the imposition of the maximum restitution fine ($10,000) on the ground of his purported inability to pay.

(See *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155.)

Williams and Beasley will have an opportunity to object on these grounds after retrial, preserving the issues for appeal, if convicted again. Resolution of the merits of any future objection on the basis of inability to pay should account for earning potential while incarcerated. (See *People v. Johnson* (2019) 35 Cal.App.5th 134, 139.)

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED IN THE OFFICAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.