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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. PEDRO O. BALTAZAR et al., Defendants and Appellants.	B231943 (Los Angeles County Super. Ct. No. KA088929)

APPEALS from judgments of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant Noe O. Baltazar.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant Pedro O. Baltazar.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General for Plaintiff and Respondent.

Defendants and appellants Pedro Olguin Baltazar (Pedro) and Noe Olguin Baltazar (Noe) appeal from their murder convictions. Noe contends that the trial court erred in instructing the jury with the version of CALJIC No. 3.00 which defined principals as "equally guilty." Both defendants contend that the trial court erred in admitting evidence that a witness knew of threats against her; Noe contends that the evidence was inadmissible hearsay, and both defendants contend that it was admitted in violation of their constitutional rights to confront and cross-examine witnesses. In addition, Pedro contends that the threat evidence was irrelevant, more prejudicial than probative, and resulted in a violation of his constitutional right to due process. Finally, Pedro contends that he was denied due process by the introduction of his two prior felony convictions because they were more than 20 years old. As we find no merit to defendants' contentions, we affirm the judgments.

BACKGROUND

1. Procedural history

Defendants were charged in count 1 of an amended information with the murder of Billy Howell (Howell), in violation of Penal Code section 187, subdivision (a).[1] Pedro was charged in count 2 and Noe was charged in count 3 with possession of a firearm by a felon, in violation of section 12021, subdivision (a)(1). It was also alleged in count 1 that Pedro personally and intentionally discharged a firearm which caused great bodily injury and death, that he personally and intentionally discharged a firearm, and that he personally used a firearm, within the meaning of section 12022.53, subdivisions (b), (c), and (d).

It was alleged that Pedro and Noe had each suffered one prior serious or violent felony conviction within the meaning of the "Three Strikes" law (§§ 1170.12, subds. (a)-

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

(d), 667, subds. (b)-(i)), and within the meaning of section 667, subdivision (a)(1), and that Pedro had served four prior prison terms and Noe had served five prior prison terms, within the meaning of section 667.5, subdivision (b).[2]

After a jury trial, both defendants were found guilty of first degree murder and possession of a firearm by a felon, as charged. The jury also found true the firearm allegations against Pedro. Defendants admitted their prior convictions.

The trial court sentenced Pedro to a total of 80 years to life in prison, comprised of the following terms: 25 years to life as to count 1, doubled as a second strike to 50 years to life; 25 years to life for the firearm enhancement of section 12022.53, subdivision (d), with the enhancements charged under section 12022.53, subdivisions (b) and (c), stayed; and five years for the prior serious felony conviction. The trial court struck the four prison prior enhancements, sentenced Pedro to the upper term of two years in prison as to count 2, and stayed the term under section 654.

The trial court sentenced Noe to a total term of 55 years to life in prison, comprised of 25 years to life as to count 1, doubled to 50 years to life as a second strike, plus five years due to a prior serious felony conviction. The court struck the five prison prior enhancements, sentenced Noe to the upper
term of two years in prison as to count 3, and stayed the term under section 654.

The court imposed on each defendant a total of $80 in court security fees and $60 in criminal conviction assessments, a $10,000 restitution fine, and a $10,000 parole revocation fine which it stayed. Both defendants were ordered to pay $10,940 plus interest in victim restitution as a joint and several liability, payable to the Victim

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[2] The amended information named a third codefendant, Armando Ochoa. We refer to him as Armando, and after first mention, we refer to the other members of the Ochoa family by their first names to avoid confusion. Armando was charged with dissuading a witness in violation of section 136.1, with the special allegation that the crime was gang related within the definition of section 186.22, subdivision (b)(4). Armando entered into a plea agreement, invoked his Fifth Amendment privilege against self-incrimination, and did not take part in the trial.

Compensation Board, and each was ordered to provide mandatory DNA samples. Each defendant received 475 days of actual custody credit.

Defendants filed timely notices of appeal.

2. Prosecution Evidence

Howell was shot to death near 2:30 a.m. on November 22, 2009, at the home of his friend Jennifer Pokrzywinski (Pokrzywinski) and her daughter, Victoria Green (Green). Howell, also known as Bear, was staying at Pokrzywinski's home and had invited a small group of friends to the house to help him celebrate his birthday. The guests included Armando, his wife Martha Ochoa (Martha), and his nephew Alex Ochoa (Alex). Defendants arrived at the party together sometime after 11:30 p.m., accompanied by 14-year-old Jessica Martinez (Jessica).[3]

Within an hour after their arrival, defendants -- mostly Pedro -- began arguing with Howell. Evidence was presented that suggested the fighting had to do with gang loyalty.

Although the argument between Howell and the defendants grew quiet for about 20 minutes it became loud again as the three men moved from the kitchen to the living room toward the front door, apparently intending to settle the argument outside. Alex described the ensuing events to detectives in two interviews given within hours after the shooting. He reported that while in the living room, Noe lifted his shirt and removed a black, short-barreled, .38-caliber revolver from his waistband. Pedro took the gun from Noe, said, "No, no, no," and ushered him out the front door. Howell, who was unarmed, took off his shirt and started to follow them outside. A second or two after defendants were outside, Pedro reached back through the door and fired the revolver three times, hitting Howell in the head and abdomen.

Green testified that due to the fighting, she and her boyfriend, Ian D'Oyen (D'Oyen) had retreated to her bedroom. After awhile, D'Oyen went to the bathroom.

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[3] Jessica was a runaway and AWOL from foster care at the time of the party. She was in custody as a flight risk at the time of trial, due to her previous failures to appear.

While he was there, the argument became loud again so Green went to the bathroom to find D'Oyen. As she knocked on the bathroom door, she could see through a hole in the wall, a forearm and a hand holding a gun belonging to someone standing just outside the front door. The gunman's clothing appeared to be what Pedro had worn that evening. Green saw the hand enter the house and fire the gun toward Howell as he stood inside near the front door.

D'Oyen testified that when he opened the bathroom door, he saw flashes inside the house coming from outside, near the front door. A few minutes later, he saw Howell lying near the front door, obviously shot and bleeding.

Nora Ochoa (Alex's mother and Armando's sister-in-law) lived across the street from the Pokrzywinski house. When she heard the gunshots she looked out her window and saw a girl crying and a white van speeding away from the Pokrzywinski house.

Nora testified alternately that the vehicle that sped away was a white van, was not a white van, that she did not know the make of vehicle, and that she told the police what kind of vehicle she saw. WCPD Officer Nicholas Franco testified that Nora told him she saw a man wearing a long-sleeved black shirt running westbound and then a white, older model van with windows on the side, being driven away at a high rate of speed.

Jessica testified that she had known defendants for about a month before the shooting, having met them through "Brown Neighborhood" gang members with whom she associated. She saw more of Pedro than Noe, and denied that Pedro was a gang member. She knew Pedro as "Rusty" and Noe as "Lefty." Jessica also knew Armando by his nickname, "Nite Owl."

Jessica went to the party with defendants in Pedro's white van. She was in the kitchen when Pedro and Howell started arguing, but when it became loud, she went into the hallway and struck up a conversation with another guest, a young man she knew only as "the guy with the tattoo on his head." After about 15 minutes she could no longer hear the argument, and although she could see into the living room, she did not notice when defendants and Howell entered and moved toward the front door. Jessica then heard gunshots, turned, and saw Howell on the floor. The young man she had been speaking

with held her protectively for a few moments. She then left through the front door and went to the spot where Pedro had parked his van, and saw that it was gone. Jessica looked for Pedro and Noe, but could not find them so returned to the house.

Armando drove Jessica home before the police and paramedics arrived. Also in the car were Martha and the young man with the tattoo on his head. All the way home Jessica was in shock and cried hysterically. As the young man held her and tried to comfort her, Armando told her to calm down, stop crying, and not to tell anyone what had happened. When they arrived at her residence they saw defendants there in the white van. Armando and defendants conversed outside their vehicles while Jessica and Martha went into the house.

Jessica testified that a couple of days later, Pedro called to see whether she was all right and asked to see her. She did not meet with him because her roommate had told her to avoid him. The word "going around" was that Pedro wanted to find out what Jessica knew and what she would say. Jessica denied that either Pedro or Noe had threatened her and denied that she was frightened. Jessica testified that no one had threatened her directly, but she had heard that "people involved in the gang, other gang members" had made a threat involving her. Jessica acknowledged that she had told the prosecutor she was aware that "they" were trying to take her out. She clarified that she meant Rusty, not Noe.

A video of Jessica's police interview was played for the jury. In it, Jessica told detectives: '"They called my home girl I was staying with and she told me that the reason he's been watching the house is because they'd been trying to take me out. That I was there, I know too much, I heard too much, I seen too much and everything. So they thought I would freak . . . ."' When asked who "They" were, she replied, "Rusty and Lefty. 'Cause they say that [unintelligible] Rusty, Lefty and his *primo* [cousin], they all had a gun." After the video was played, Jessica admitted she made the statements to the police, but explained that none of this information came from defendants, rather it was just talk in the neighborhood -- the "rumor mill."

Pedro's telephone calls in jail were monitored over a 12-month period before trial. Recordings of two calls between Pedro and the mother of his child, Genevieve Avina (Avina), were played for the jury. In the first call, in March 2010, Pedro told Avina she needed to understand that he "[was] not getting out" and that he was going to "be in here at anywhere from 10 to 15." In their conversation on April 6, 2010, Pedro instructed Avina to ask a lawyer "how much does our case improve if only one witness shows up?"

Bell Gardens Police Detective Sergeant Paul Weinrich testified as a gang expert that Howell was a member of the Brown Neighborhood gang, a gang with 50 to 100 members primarily based in the City of Commerce. Armando was also a member of the Brown Neighborhood gang. Noe had "Winter Gardens," "WG," and "13" tattooed on his body, signifying membership in Winter Gardens, another gang based in Commerce with 50 to 100 members. Detective Weinrich testified that members of the Winter Gardens gang and the Brown Neighborhood gang ordinarily got along with one another.

In response to a hypothetical question consistent with the evidence in this case, Detective Weinrich opined that accusing another gang member of not doing enough for the neighborhood was a sign of disrespect in the gang culture, and disrespect would be met with a violent reaction. In gang culture, respect and fear were synonymous and hugely important to gangs and gang members. For a gang member not to react to disrespect would make him appear weak to other gang members. Showing disrespect toward a gang member's brother would also call for a violent response.

3. Stipulations

The parties stipulated that Noe had been convicted of a felony in 1996, and that Pedro had been convicted of a felony in 1994. The parties also stipulated that: (1) On November 22, 2009, Green told detectives that she heard a commotion and saw the side view of a black revolver in the right hand of the shooter; and (2) on November 28, 2009, Jessica told detectives that after the shooting, she saw Pedro, Armando, and other men meeting in East Los Angeles.

4. Defense evidence

Pedro's testimony

Pedro testified that he was 41 years old and his brother Noe was 40. Pedro had been friends with Armando and Martha for many years and had met Jessica through Armando and Oscar, Jessica's boyfriend. On the evening of November 21, 2009, he and Noe had been drinking with his friends Tasha and her husband at their home, where Jessica was then living. Pedro admitted that he associated with members of the Brown Neighborhood gang, and that Tasha and Armando were both members of that gang.

Armando told Pedro about the party and sometime after midnight they decided to attend, bringing Jessica along. Pedro claimed he did not know that Jessica was a minor. They went to Pokrzywinski's house in Pedro's white van and parked about 80 feet from the front door. As they approached they saw Armando and Howell outside and there Pedro met Howell for the first time. They then all went inside where Pedro got into a discussion with Howell, which Pedro denied was an argument. Howell was trying to get Pedro into a "confrontation" about a fight Pedro had about 15 years earlier when he had beaten Howell's friend. Pedro responded that he was not aware that the person was Howell's friend and that the incident had nothing to do with him. During the discussion, which lasted 15 or 20 minutes, Howell raised his voice and became aggressive. Pedro denied raising his voice or using profanity, although Howell did both, accusing Pedro of not doing anything for his neighborhood, meaning the Brown Neighborhood gang. Pedro, who denied membership in any gang, replied that he was not required to do anything for Howell's neighborhood as he was not a member of Howell's gang or from his neighborhood.

When Armando intervened, Howell argued with him as well, so Pedro decided to leave because he did not want to fight. On their way out, Pedro and Noe passed Jessica without saying anything to her because she was "making out" with someone Pedro did not know. Pedro and Noe then drove off in his van. Pedro claimed that he did not hear gunshots at any time that night. Pedro acknowledged that he wore a black T-shirt that

night, but denied that either he or his brother had a gun, that he took a gun from Noe, fired a gun, or shot Howell.

Pedro further testified that as he was on his way to drop off Noe, he called Armando to make sure Jessica got home. Armando said they needed to talk so Pedro went to Armando's. Noe was asleep and remained in the van. Armando told Pedro that Howell had just been shot and asked whether Pedro had seen anyone as he was leaving. Pedro replied that he had not, and that was the extent of their conversation. Pedro did not ask about Howell's condition, did not see or talk to Jessica, did not try to call Jessica, and did not talk to Martha, because he was in shock.

After Pedro dropped off Noe, he went home. The next day he called Armando to check on Howell's condition. Pedro also called Jessica, asked about her and told her to call him if she found out any more about the shooting. Pedro talked to her three more times, twice when she called him. Pedro described them as friendly conversations and denied threatening Jessica or telling her not to talk about what had happened. He denied ever trying to scare Jessica or having others scare or intimidate her, and he denied telling others to hurt her.

Pedro was in jail for more than a year before trial, and had many telephone conversations, which he knew were monitored. In the April 2010 call with Avina he asked her to consult a lawyer about the possible benefit of one less witness because he had heard that Jessica had run away and could not be found. He explained: "I'm fighting a murder case. You know. It's -- she's a part of this. So if they can't find her, wouldn't that be better for me[?]" Pedro explained the context of the March 2010 call as "trying to get my wife to understand that . . . we got to expect the worst and hope for the best . . . and leave it up in God's hands."

Pedro acknowledged that when he was interviewed by Detective Clements he said that he went to the party only with his brother and that he stayed about 10 minutes because people were arguing, and that other than Armando and Martha, he knew no one there. Pedro did not tell Detective Clements about Jessica because he did not "want to

implicate anybody" or "snitch on somebody." A recording of the interview was played for the jury.

Noe's testimony

Noe testified that he had been drinking beer all day before the party. Pedro picked him up at his "homeboy's" house. Noe had met Jessica and Armando just once before that evening. Noe admitted that he had been a member of the Winter Gardens gang since the age of 14, but claimed that he was no longer an active gang member. Noe denied that the Winter Gardens gang was located near Brown Neighborhood territory or that he had ever had problems with the Brown Neighborhood gang.

Noe testified that when they arrived at the party, Armando, Howell, and other gang members were in front of the house. One of them asked Noe where he was from, meaning to which gang did he belong. Howell was loud and drunk, and spoke aggressively toward Pedro and screamed about him not doing things for his neighborhood. Noe testified that Pedro screamed back, but only because the music was loud, whereas Howell was being obnoxious and appeared to be angry. Noe paid no attention, but Pedro grew tired of arguing and wanted to leave.

Noe admitted that he also lied to Detective Clements by saying he did not know Jessica and that she did not go to the party with them. He lied to protect himself and he did not want to get Jessica involved. Under "the law of gangs," getting others involved could result in his being stabbed while in custody.

Noe denied having a gun that night, seeing his brother with a gun, shooting Howell, or hearing gunshots. He also denied that his brother shot Howell. Noe acknowledged that respect was "a huge thing" in gang culture and that any gang member would punish disrespect toward a fellow gang member with a beating, stabbing or shooting, depending on the circumstances. Noe denied however, that Howell had shown disrespect toward him or his brother.

DISCUSSION

I. No instructional error

Noe contends that the trial court erred in instructing the jury with CALJIC No. 3.00, defining "principals" as follows: "Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include one, those who directly and actively commit or attempt to commit the act constituting the crime, or two, those who aid and abet the commission or attempted commission of the crime."

Noe relies on *People v. McCoy* (2001) 25 Cal.4th 1111, 1117, 1122, which held that an aider and abettor may be found guilty of a different crime or degree of crime than the perpetrator if the aider and abettor and the perpetrator do not have the same mental state. Noe contends that it was error to instruct the jury that principals were "equally guilty" '"regardless of the extent or manner of participation"' because it could lead jurors to believe that once it found Pedro guilty of first degree murder, the instruction required the jury to find him guilty of first degree murder as well, regardless of whether he premeditated or deliberated the killing.

CALJIC No. 3.00 is an accurate statement of the law; however the instruction may be misleading in some cases and thus subject to modification or clarification upon request. (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 (*Samaniego*).) The "failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal. [Citations.]" (*People v. Lee* (2011) 51 Cal.4th 620, 638.)

Noe contends that although he did not object to the instruction or request a clarification at trial, he has not forfeited the issue. He points out that the forfeiture rule does not apply when the instruction is an incorrect statement of the law. (See *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) Relying on *People v. Nero* (2010) 181 Cal.App.4th 504 (*Nero*), Noe claims that because that court found the instruction misleading "even in unexceptional circumstances" and "should be modified," it

necessarily held that CALJIC No. 3.00 was an incorrect statement of law and thus reviewable without an objection. (*Nero*, at p. 518.) Noe's contention is without merit. *Nero* did not change the rule of forfeiture or find the instruction to be an incorrect statement of law. The appellate court found, under the circumstances of that case, that there was no forfeiture because the trial court's error consisted of incorrectly answering the jury's note in which it expressly asked whether the accomplice could be guilty of a lesser degree of homicide. (See *id*. at pp. 517-518 & fn. 13.) As no such circumstances existed here, *Nero* does not compel us to overlook Noe's failure to request clarification of the instruction.

Noe also contends that the misleading language of CALJIC No. 3.00 had the effect of omitting an element of aiding and abetting. "[N]o objection is required to preserve a claim for appellate review that the jury instructions omitted an essential element of the charge. [Citations.]" (*People v. Mil* (2012) 53 Cal.4th 400, 409.) Here, the trial court's instructions omitted no essential element of the definition of aiding and abetting, but thoroughly explained the concept by reading CALJIC No. 3.01.[4]

Moreover, we agree with respondent that had the trial court erred, any such error would be harmless beyond a reasonable doubt, under the test of *Chapman v. California* (1967) 386 U.S. 18, 24. Instructional error is harmless beyond a reasonable doubt when the jury necessarily resolved the issue of the aider and abettor's mental state against the defendant under other instructions. (*Samaniego, supra*, 172 Cal.App.4th at p. 1165,

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4 The trial court read CALJIC No. 3.01 as follows: "A person aids and abets the commission or attempted commission of a crime when he or she [1], with knowledge of the unlawful purpose of the perpetrator, [2], with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, and [3] by act or advice or by failing to act in a situation where a person has a legal duty to act, aids, promotes, encourages or instigates the commission of the crime. A person who aids and abets the commission or attempted commission of a crime need not be present at the scene of the crime. Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. Mere knowledge that a crime is being committed, and in the absence of a legal duty to take every step reasonably possible to prevent the crime, the failure to prevent it does not amount to aiding and abetting."

citing *People v. Stewart* (1976) 16 Cal.3d 133, 141.) Here the jury necessarily found under other correct and clear instructions that Noe was guilty of first degree murder. The trial court instructed with CALJIC No. 3.31 that murder required "a certain specific intent in the mind of the perpetrator" and for first degree murder, the required mental states were express malice, deliberation, and premeditation. (CALJIC No. 8.20.) CALJIC No. 3.01 instructed the jury that to prove a person aided and abetted the commission of the crime, the evidence must demonstrate that the defendant acted "with knowledge of the unlawful purpose of the perpetrator [and] with the intent or purpose of committing, encouraging, or facilitating the commission of the crime."

"It would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required. [Citation.]" (*Samaniego, supra,* 172 Cal.App.4th at p. 1166.) The jury was thus well informed of the requirement that to be equally guilty as Pedro, Noe must have shared his state of mind. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Noe argues that the record nevertheless demonstrates that the jury doubted that he shared Pedro's state of mind, in that the jury sent a note during deliberations, asking the court to define deliberation and premeditation in layman's terms and to differentiate between the two terms. Noe also points to evidence from which the jury could have found that he acted rashly under a sudden impulse, rather than with premeditation or deliberation, and that he intended only to assault Howell with his firearm.

We agree with respondent that the jury's note does not suggest doubt about Noe's mental state or that it was the same or different from Pedro's. Noe never claimed at trial that he acted rashly or that his mental state was any different from that of his brother. Rather he claimed that he had not been armed and that he and his brother left the party before the shooting. Further, nowhere in the record is there an indication that the jury was dissatisfied with the trial court's response to its question, referring the jury again to CALJIC No. 8.20, which correctly defined the deliberation and premeditation. (See

People v. Castaneda (2011) 51 Cal.4th 1292, 1320.) CALJIC No. 8.20 also explained to the jury that "a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder in the first degree." We presume the jury understood and followed the court's instructions. (*People v. Sanchez*, *supra*, 26 Cal.4th at p. 852.)

We conclude that under clear and correct instructions other than CALJIC No. 3.00, the jury necessarily found that Noe did not act rashly, but with premeditation and deliberation. Thus any error resulting from confusion caused by CALJIC No. 3.00 was harmless beyond a reasonable doubt. (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1165.)

II. Threat evidence

Defendants contend that the trial court erred in admitting evidence of threats relayed to Jessica by an unnamed roommate and people from the neighborhood. Noe contends that the evidence was inadmissible hearsay, and both defendants claim that its admission violated their rights to confront and cross-examine the roommate. In addition, Pedro contends that the prejudicial effect of the evidence so outweighed its probative value that it violated his right to due process.

A. Not hearsay

Relying on the general definition of hearsay in Evidence Code section 1200, subdivision (a), Noe contends that Jessica's testimony regarding her roommate's warning constituted double hearsay because it was offered to prove that the roommate made the statement. Noe also relies on *People v. Alexander* (2010) 49 Cal.4th 846, 876, which held that the double hearsay in that case required an additional exception to be admissible.

Noe misapplies the definition of hearsay. An out-of-court statement is hearsay only if offered to prove the truth of the matter stated. (See Evid. Code, § 1200, subd. (a).) Jessica's testimony was not offered to prove that threats were made or that it was the roommate who told her about the threats. The trial court limited the evidence by instructing the jury: "Ladies and gentlemen, this is only admissible and you should only consider it in determining this witness' state of mind in terms of being in fear or not

being in fear and whether or not it is affecting her other testimony in other particulars." The testimony was thus admitted to explain Jessica's state of mind and was not hearsay. (*People v. Sapp* (2003) 31 Cal.4th 240, 281 (*Sapp*).)

Noe contends that the trial court's limiting instruction was inadequate, because it was not as detailed or pointed as the instruction in *People v. Myles* (2012) 53 Cal.4th 1181 (*Myles*), where the trial court instructed the jury that a threatening telephone call to the witness could be considered in evaluating her credibility, but that neither defendant had made that call and "'unless there was evidence to indicate they told someone to do that, which at this point there is not, it cannot be considered against either [of them].'" (*Id*. at pp. 1211-1212.) The issue in *Myles* was not hearsay, but the prejudicial effect of such evidence, and the court did not enunciate standards to measure the adequacy of cautionary instructions. (See *ibid*.) In fact, a trial court was not required to give a limiting instruction at all without a request. (*Sapp, supra,* 31 Cal.4th at p. 301.) Here, there was no request to the trial court for a more detailed instruction and therefore there was no error in failing to give one.

B. No confrontation violation

Defendants both contend that the roommate's statements were testimonial hearsay that violated the confrontation clause of the Sixth Amendment. (See generally, *Crawford v. Washington* (2004) 541 U.S. 36.) Defendants' contention is without merit. Regardless of whether Jessica's description of the roommate's statements was testimonial, it was not hearsay as it was not offered for the truth of what the roommate said but to show the effect of those words on Jessica's state of mind. (See *People v. Mendoza* (2007) 42 Cal.4th 686, 698-699.) The admission of nonhearsay, even if testimonial, does not violate the confrontation clause. (*Crawford v. Washington*, *supra*, at p. 59, fn. 9; *People v. Thomas* (2012) 53 Cal.4th 771, 803-804.)

C. Not an abuse of discretion

Pedro contends that evidence of threats made to Jessica should have been excluded as irrelevant. He also contends that the prejudicial effect of such evidence so outweighed any relevance that its admission resulted in a denial of due process.

At trial Pedro did not object on any ground other than hearsay regarding Jessica's statement. A challenge to the admissibility of evidence is generally not cognizable on appeal in the absence of a specific and timely objection in the trial court on the ground urged on appeal. (Evid. Code, § 353.) An objection on one ground does not preserve a challenge based upon a different ground. (*People v. Partida* (2005) 37 Cal.4th 428, 434-435 (*Partida*).)

The trial court nevertheless made a finding of relevance, and because the trial court apparently understood the hearsay objection as calling for an assessment of the relevance of the threat evidence, we discuss the issue. (See *People v. Scott* (1978) 21 Cal.3d 284, 290.) The trial court expressly did not apply Evidence Code section 352 nor did defendants request the court to balance the probative value of the evidence against its potentially prejudicial effect. Pedro has thus forfeited his challenge on that ground. (*People v. Valdez* (2012) 55 Cal.4th 82, 138-139.) Further, as Pedro did not make a constitutional argument below, we do not reach his due process claim unless and until he establishes error under state law. (*People v. Thornton* (2007) 41 Cal.4th 391, 443-444; *Partida*, *supra*, 37 Cal.4th at pp. 435-439.)

The determination whether a witness's fear is relevant to his or her credibility is a matter well within the discretion of the trial court. (*People v. Burgener* (2003) 29 Cal.4th 833, 869; Evid. Code, § 780.) Pedro acknowledges that evidence of threats as the basis of a witness's fear may be admissible without connecting the defendant to the threats. (See *Burgener*, at pp. 869-870.) However, he contends that evidence of Jessica's fear was merely a pretext used to prove his guilt with anonymous threats, which were otherwise inadmissible. (See *Myles*, *supra*, 53 Cal.4th at p. 1209.) Pedro suggests that the facts are comparable to those in *Dudley v. Duckworth* (7th. Cir. 1988) 854 F.2d 967 (*Dudley*), where the admission of evidence of anonymous threats could not be justified in the absence of evidence suggesting the witness was afraid or unduly nervous.

To explain his pretext contention, Pedro points to a pretrial discussion in which the prosecutor argued to the court that "it all goes into the issue of consciousness of guilt." To demonstrate that the prosecutor then used the threat evidence to prove Pedro's

consciousness of guilt rather than Jessica's fear, he paraphrases a portion of the prosecutor's closing argument, claiming that "the prosecutor tied Jessica's 'not showing up' to the statement made by [Pedro] to his wife and said it shows 'consciousness of guilt.'"

Pedro's characterization of the closing remarks is apparently intended to suggest that the prosecutor was referring to Jessica's reluctance to testify due to the anonymous threats. In fact, the prosecutor's argument had nothing to do with threats. Pedro testified that before the telephone conversation, he had heard that Jessica had run away and could not be found, and that is why he asked Avina to consult an attorney about the benefit of one less witness. The prosecutor argued that Pedro "knew Jessica was AWOL" and that the telephone conversation showed a consciousness of guilt because an innocent person would not hope for an eyewitness to fail to appear. This portion of the argument was made without reference to any threats and could have been made had there been no evidence of threats to Jessica. No pretext was necessary.

Additionally, Pedro's comparison to *Dudley* fails to demonstrate a pretextual intent on the part of the prosecutor in this case. In *Dudley*, evidence offered to explain the witness's '"extreme nervousness"' was found to be pretextual because there was no evidence whatsoever that the witness was unduly nervous about testifying. (*Dudley*, *supra*, 854 F.2d at pp. 970-972.) Here by contrast, it was well established that Jessica was reluctant to testify. She had failed to appear twice after being ordered to give testimony, had spent more than four months in custody as a material witness and flight risk, and admitted she did not want to be in court. Although she denied that fear was the reason for her reluctance to testify, she admitted that when she testified at the preliminary hearing she was very resistant to answering the prosecutor's questions. We conclude that there was no pretext on the part of the prosecution to use threat evidence to prove a consciousness of guilt.

A trial court's discretion in finding the evidence relevant must be reviewed as of the time the court made its ruling. (*People v. Hernandez* (1999) 71 Cal.App.4th 417, 425.) Here the finding was made before trial, just after the jury had just been selected.

Armando was still a defendant in the case, charged with dissuading Jessica from reporting the crime and of so doing for the benefit of or in association with a criminal street gang. The prosecutor called the trial court's attention to Jessica's failure to appear and to her preliminary hearing testimony in which she recanted the statements she made to Detective Clements. Such facts reasonably suggested the possibility that Jessica's credibility would be at issue due to the threat rumors. (Cf. *People v. Valdez*, *supra*, 55 Cal.4th at p.137.) If Jessica's testimony had been different and failed to justify the trial court's pretrial finding, Pedro could have objected then on relevance or Evidence Code section 352 grounds or could have requested a more restrictive limiting instruction. As Pedro did not do so, the pretrial finding of relevance remains the only ruling on this issue subject to review. (See *People v. Holloway* (2004) 33 Cal.4th 96, 133.) We conclude that the trial court did not abuse its discretion in determining that the threats and Jessica's reluctance to testify could be helpful to the jury's assessment of her credibility.

Moreover, we find no prejudice. Jessica testified that neither Pedro nor Noe threatened her, that no one threatened or harmed her, and that there were merely rumors in the neighborhood that gang members had made threats. She denied that Pedro was a gang member, and the prosecution did not show otherwise. Jessica denied being afraid and testified she was reluctant because she had run away from home. The trial court admonished the jury that the evidence was to be considered only for Jessica's state of mind, whether she was in fear, and whether her fear affected her testimony. Under such circumstances it was highly unlikely that the jurors inferred that Pedro was the source of the threats and thus no prejudice resulted. (See *Myles*, *supra*, 53 Cal.4th at pp. 1211-1212.)

III. Impeachment evidence

Pedro contends that the trial court abused its discretion and violated his right to due process by admitting his 1994 robbery conviction and his 1996 conviction for possession or purchase for sale of a controlled substance for impeachment purposes, because they were each almost 20 years old.

Article I, section 28, subdivision (f), of the California Constitution "authorizes the use of any felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty," subject to the trial court's discretion under Evidence Code section 352 to exclude probative evidence that "create[s] [a] substantial danger of undue prejudice." (*People v. Castro* (1985) 38 Cal.3d 301, 306.) Among other factors, the trial court should consider the prior conviction's remoteness in time. (*People v. Clark* (2011) 52 Cal.4th 856, 931; *People v. Beagle* (1972) 6 Cal.3d 441, 453.)

"Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion. [Citations.]" (*People v. Clark*, *supra*, 52 Cal.4th at p. 932.) The party claiming an abuse of discretion bears the burden to demonstrate that the trial court's decision was irrational, arbitrary, or not "'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) If he succeeds in meeting that burden, he must then demonstrate that the trial court's decision resulted in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Here, the trial court considered the age of the prior convictions after Pedro objected to their use for impeachment. Pedro's trial counsel acknowledged that the convictions were for crimes of moral turpitude, but argued that they should be excluded for impeachment purposes because they were too old to be more probative of credibility than prejudicial. The prosecutor responded that Pedro had not "lived a clean life" after those two convictions, noting that he had been subsequently convicted of felonies in 2002, 2004, and 2007. The trial court agreed with the prosecution and overruled the objection.

As respondent notes, "convictions remote in time are not automatically inadmissible for impeachment purposes." (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) "Even a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior." (*Id*. at pp. 925-926.)

Pedro had not led a crime-free life after 1996. His criminal history shows two felony drug convictions in 2001 and 2004, two misdemeanor convictions in 2005, and another felony conviction in 2007, possession of a firearm by a felon. As the trial court pointed out, several of his offenses also resulted in parole or probation violations.

As far as we are able to discern, the only reasons Pedro proffers for claiming an abuse of discretion are: (1) his counsel argued to the trial court that whether Pedro had "lived a clean life" was irrelevant to the issue of whether the priors were more probative than prejudicial; and (2) the prior convictions were too old to be probative of his credibility in 2011, and thus were more likely used to simply evoke an emotional bias against him.

A party cannot meet his burden of showing an abuse of discretion merely by arguing that the trial court could reasonably have concluded that a conviction was more prejudicial than probative due to its age. (*People v. Clair* (1992) 2 Cal.4th 629, 655.) A fact that "reveals nothing more than that a reasonable difference of opinion was possible . . . does not establish that the court . . . 'exceed[ed] the bounds of reason . . . .' [Citation.]" (*Ibid.*, quoting *People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) Pedro has done no more than this and thus failed to meet his burden to establish an abuse of discretion.

Further, Pedro has not shown that the use of the prior convictions resulted in a miscarriage of justice. (See *People v. Jordan*, *supra*, 42 Cal.3d at p. 316.) His only argument to that point is his conclusion that "[h]ad the jury not heard that [he] was a twice convicted felon, there is a reasonable probability that he would not have been convicted." However, Pedro fails to provide any analysis to support his conclusion. As respondent observes, Pedro stipulated for purposes of count 2, to possession of a firearm by a felon, that he had been convicted of a felony in 1994; thus the jury knew he was a felon. In addition, the prosecution's case was strong. Two witnesses saw Pedro shoot Howell, and a neighbor saw his white van speeding away shortly after the shots were fired.

We conclude that there is no reasonable probability that Pedro would have obtained a more favorable result had the jury known of only one felony conviction or had not known the nature of his felony convictions. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As Pedro did not object to the use of the prior convictions on due process grounds, we reject that claim as well. (See *Partida, supra,* 37 Cal.4th at pp. 435-439.)

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD