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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SHANKER PATEL, Defendant and Appellant.	B281294 (Los Angeles County Super. Ct. No. KA100865)

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Affirmed as modified.

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven Mercer and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Twenty-one years after the 1991 murder of Usha Patel,[1] her husband, defendant Shanker Patel, was arrested for the crime. Defendant was prosecuted on a murder-for-hire theory. The jury did not reach a verdict in defendant's first trial. In the second, the jury convicted him of first degree murder (Pen. Code, § 187, subd. (a))[2] and found lying-in-wait special circumstances to be true (§ 190.2, subd. (a)(15)).[3] The trial court sentenced defendant to life in prison without the possibility of parole.

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[1] For clarity, we respectfully refer to the victim and all witnesses with the last name of "Patel" by their first names.

[2] All subsequent undesignated statutory references refer to the Penal Code.

[3] The jury did not find the special circumstance allegation of murder for financial gain to be true. Evidence established Usha and defendant each had a $500,000 life insurance policy, doubled for accidental death. Usha's policy named defendant as the primary beneficiary and her elder daughter as the secondary beneficiary. Defendant submitted a claim for the insurance proceeds one month after Usha's death. The insurance company initiated an interpleader action, depositing $1 million, plus interest, with the federal court. The insurance company witness testified the insurer's procedure was to file an interpleader action "if the insured was murdered, and the investigation is still open, and the primary beneficiary is a suspect in that murder, we will interplead the funds to the State, even if the secondary beneficiary has not applied for them."

The federal action settled, with one-half the insurance proceeds going to defendant, and the remainder divided into three trust accounts, one for each of the victim's three children.

Defendant raises a host of issues on appeal. The Attorney General concedes only that a probation revocation fine was improperly opposed. Finding a number of issues forfeited and no prejudicial error except for the conceded one, we modify the judgment and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Overview

Defendant reported his wife missing shortly after 8:00 p.m. on November 19, 1991. A few hours later, the victim's bound body was found in the trunk of her car in the parking lot of her eldest child's school. The victim still wore her jewelry, the vehicle was undamaged, and the keys were in the ignition. There was very little blood inside the car. A pair of bloody yellow gloves and a single black glove were on the front passenger seat.

After discovering the victim's body, Los Angeles Sheriff's Department (LASD) Sergeant Donald Garcia went to the victim's home. Before the sergeant could ask defendant a single question, defendant launched into a 10-to 15-minute description of his activities the previous day. Sgt. Garcia was surprised and somewhat suspicious because defendant's account was "in a chronological order in great detail, and include[d] addresses and locations and times and paperwork to document times." The sergeant also described defendant's statement as "unnatural" and "unusual" because it sounded like a detailed, memorized "script."

Sgt. Garcia took defendant's formal statement at the police station later the same morning; it was substantially the same as the account defendant gave hours earlier. Defendant consented to a search of his home.

Sgt. Garcia arrived at the Patel residence shortly thereafter and opened the garage door. A large pool of blood that had not

yet dried was inside the garage. Drag marks and footprints went through and around the pool. Sgt. Garcia determined the victim was killed in the garage. According to defendant's timeline, he parked his car in the garage at least once after his wife's murder; but denied seeing the blood. Sgt. Garcia's search also revealed a walk-through side door into the garage was unlocked. Defendant and/or the Patel nanny indicated that door was normally locked.

The autopsy revealed more than 20 stab wounds, most to the victim's chest and neck area, inflicted by a long, thin instrument. The victim had defensive wounds on a wrist and arm. Eight wounds were fatal and would have caused death in fewer than 10 minutes. Petechia indicated the victim also had been choked.

Defendant initially cooperated with Sgt. Garcia's investigation and voluntarily provided records. In January 1992, within two months of Usha's murder, Sgt. Garcia told defendant he believed defendant was involved in the crime. Defendant denied involvement, stopped cooperating, and said he would hire his own investigator.

On February 7, 1992, Usha's father, P.J. Patel, received a threatening phone call. The male caller stated he had killed one of P.J.'s daughters and would kill his other two daughters unless P.J. paid $50,000. The caller told P.J. there was a bomb in a bag outside. P.J. and his wife walked outside and did see a brown paper bag in the planter. As they were outside, defendant called on the telephone and asked why PJ. looked so nervous. P.J. asked how would defendant know if he was nervous. Defendant hung up.

P.J. called the police, and the bomb squad arrived. The bag contained road flares with wires sticking out of them. A note in the bag said, " 'You better pay[,] P.J.' "

Sometime after February 1992, defendant and the three young Patel children moved to Florida. Defendant later relocated to Alabama.

Sgt. Garcia retired in 2002, Usha's murder still unsolved. In 2010, the case was re-opened and assigned to Sergeant Joseph Purcell of the LASD cold case squad. He and the detective now assigned to the case, Steven Davis, sent the gloves to the crime laboratory for analysis. Recovered DNA was matched in a national database to Michael (Miguel) Garcia.

Garcia was located, interviewed, and initially denied any involvement in Usha's death. After their contact with Garcia, Sgt. Purcell and Detective Davis interviewed defendant in Alabama. They showed defendant a photo of Garcia; defendant denied knowing him and again denied any involvement in Usha's murder. Defendant suggested his wife's death was related to Usha's father's business dealings. In that interview, defendant also said he did not see any blood in the garage until he returned home from his November 20 interview with Sgt. Garcia. On the night of November 19, 1991, he parked his car almost in the middle of the garage.

Garcia was arrested in June 2012 and placed in a jail cell with an undercover police officer, who recorded their conversation. Garcia stated he had been arrested for a 21-year-old murder based on DNA found on some gloves. Garcia doubted he left gloves at the scene, but admitted a middleman paid him to kill a man's "old lady." He never met the man who paid for the contract killing.

Garcia agreed to testify for the prosecution in exchange for dismissal of the special circumstance allegations against him. He identified Stanley Medina as the middleman.

Defendant was arrested in Atlanta in February 2013. He and Medina were tried together for Usha's murder. The jury could not reach a verdict. Medina then pled guilty to a reduced charge of solicitation of murder in exchange for testifying as a prosecution witness at defendant's retrial.

II. Defendant's Second Trial

A. Prosecution Case

Usha and defendant entered into an arranged marriage in 1980, while Usha was still in college. Usha's parents helped the couple purchase the Glendora Motel, where they also lived.

The couple's first daughter was born in 1984. Usha began law school in 1986. As early as 1987, Usha began telling her sister she would divorce defendant once she passed the bar examination and found a job. The following year, defendant overheard one of the sisters' conversations and told the sister's husband he knew Usha was thinking of leaving him. Defendant told his brother-in-law that having another child would keep Usha from leaving him. The couple's son was born in 1989, and the family moved into a new home.

Usha graduated from law school in May 1990. She did not pass the July 1990 or February 1991 bar examinations. Her third child was born in March 1991. She continued to confide in her sister and also the sister's spouse that she planned to leave defendant. She took the July 1991 bar examination; the results were due to be released in late November.[4]

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[4] A representative from the State Bar testified at defendant's trial. Usha did not pass in her third attempt to become a lawyer.

A little more than one week before her November 19, 1991 death, Usha was attacked in the parking lot of the ice-skating rink where her daughter took lessons. The assailant threw her to the ground and tried to drag her into a car. Her screaming and the arrival of other customers caused the kidnapper to flee. Usha described the attacker as a Hispanic male.

Usha spent most of the day of her murder at home with her youngest child and the live-in nanny. According to the nanny, defendant came home sometime between 2:00 p.m. and 2:30 p.m., made a phone call to Usha's brother, and left within a half-hour to meet the brother-in-law about a business opportunity.[5] Before he left, defendant arranged for Usha to pick their daughter up from school.

The nanny testified Usha went into the garage after defendant left. Five to eight minutes later, the nanny heard the garage door open, the car leave, and the garage door close. The nanny did not hear any voices or noises in the garage, and did not go into the garage. She never saw or heard from Usha again.

In the meantime, defendant spent the balance of the afternoon with Usha's brother and the man who had recently purchased the Glendora Motel. According to the new motel owner, later in the day, the daughter's school paged defendant to

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[5] Usha's brother was also a trial witness. He characterized defendant's demeanor on the telephone and at their later meeting as odd and out of the ordinary. As one example, when the two were on the telephone, defendant made a point of talking about a television program, "General Hospital," that was on during the call. Defendant insisted on coming over even though there was no urgency for them to meet that afternoon and the brother-in-law had other plans.

advise his child had not been picked up. Defendant left to pick up their son from daycare and their daughter from school.

When Usha was still not home by 6:00 p.m., defendant alerted her family, and they came to defendant's residence and drove around to look for her car. Defendant called the LASD and reported Usha missing. Sheriff's Deputy Carlton Russell went to the Patel residence at 8:15 p.m. Although LASD's policy was to wait 24 hours before taking a missing person's report on an adult, defendant insisted on making a report. Defendant said he had last seen Usha at 2:45 p.m. When defendant returned home with the couple's son, he called the school and learned Usha had not picked up their eldest child.

Adriana Camarena, a housekeeper and manager at the Glendora Motel when it was owned by the Patels, also testified. She and defendant had a longterm affair. Defendant gave her money to return to Mexico, and she was there when Usha was murdered.

Camarena testified on direct examination that defendant once asked her if she knew someone who would come from Mexico and do a job for him for $5,000 or $10,000. Camarena told the cold case investigators in 2011 that she and defendant " 'used to joke around . . . . He just told me, "Do you know anybody that I could hire' . . . . But he didn't tell me . . . he wanted to do it for Usha. I thought he just . . . I don't know.' " When asked why she did not tell investigators about this conversation right after the murder, she said she was afraid of getting into trouble. On cross-examination, Camarena added the conversation occurred several years before Usha's murder and she understood the question to refer to construction work for his businesses.

Medina, a convicted felon, testified a man approached him at a Narcotics Anonymous meeting in the fall of 1991 looking for someone to "do a job" for an "Indian guy." Medina later met defendant in a parked car and agreed to find somebody to kill defendant's wife. Defendant said his wife had had an affair and that was a killing offense.

Medina contacted Garcia. Medina was Garcia's heroin supplier. Garcia agreed to kill defendant's wife in exchange for money and heroin.

According to Medina, defendant gave him information about Usha's whereabouts on four different occasions. First, defendant told Medina that Usha would be at a theater, but Garcia did not act on this information. Next defendant told Medina that Usha would be at an ice-skating rink with their daughter. Garcia did attack Usha there, but it was a busy location and he did not succeed in killing her. Defendant's third suggestion of a location was the Capri Motel, where Usha helped her parents. Garcia did not attempt anything at that location because police were in the area. Finally, defendant suggested to Medina that he kill Usha in the garage of the family home. Defendant told Medina his wife would go to the garage around 3:00 p.m. to leave to pick up one of their children. Defendant would leave a side door open.

Medina denied he executed the murder with Garcia. Garcia called Medina after he killed Usha.

Medina later tried to get more money from defendant. Instead of paying more, defendant suggested Medina call defendant's father-in-law and make a threat. Medina called and stated, " 'You better pay up . . . or . . . you will lose another daughter.' " Defendant paid Medina for making the call.

B. Defense Case

Several witnesses testified the Patel marriage was happy. A former business partner, Pete Patel (no relation) testified he and defendant co-owned a Subway restaurant in the early 1990's. The partners hired a bookkeeper who failed to timely file their business tax returns and then kept their accounting documents and stole some checks. Pete and defendant discussed paying someone to beat up the bookkeeper to get their records back.

Defendant testified on his own behalf. He and Usha had a "good marriage." He was proud of her accomplishments. He characterized the affair with Camarena as purely sexual.

Defendant admitted speaking with Camarena about finding someone in Mexico to do so some work for him, but claimed the work involved construction. Defendant "vaguely remembered" asking his brother-in-law Shirish in 1991 if he knew a Mexican gang member who could scare someone. At that time, defendant wanted to frighten the bookkeeper.

Defendant had never heard of Stanley Medina and maintained he had no involvement in Usha's murder. He did not solicit anyone to kill his wife and had nothing to do with the ice-skating rink attack.

Defendant's account of his activities on the day of the murder was consistent with the one he gave two decades earlier, but included more detail about his movements after leaving the Glendora Motel. Defendant parked in the garage after picking up his son from daycare. It was dark outside. He clicked the garage door opener, and pulled into the garage with his car headlights on. The light in the garage automatically came on when the garage door opened. He did not see any blood. He left the garage door open. Defendant backed out of the garage when he left later

to pick up his eldest child from school. As the garage door was still open, the overhead light did not come back on. When he backed out of the garage, he did not see the blood on the garage floor. When he returned with his daughter, he pulled into the driveway and did not go back into the garage. When defendant drove to the sheriff's office for an interview on the morning of November 20, 1991, he did not see the blood in the garage.

C. Rebuttal Witnesses

Sgt. Purcell impeached defendant's testimony concerning the Camarena discussion. In an interview with the sergeant, defendant denied ever talking to Camarena about finding someone for any purpose.

Natalie Johnson, a former manager of the Subway restaurant defendant and Pete owned, testified defendant, who knew she associated with Hispanic gang members, asked on three occasions if she knew anyone who could hurt somebody. Defendant's first approach was in March 1991, when he and Pete were mad at the recalcitrant bookkeeper. Johnson asked, " 'if [defendant] meant like a hit person.' " Defendant replied, "Yes." The second conversation was in April 1991; the third in September 1991.

Johnson in fact knew someone: "Jerry," a former gang member, had worked at another Subway location with her; it was not a Subway restaurant defendant owned. The prosecutor asked Johnson if Jerry was the person who "had tied . . . up and stabbed [his wife]?" Johnson answered "yes," and defense counsel objected based on lack of foundation. The trial court sustained the objection, struck the testimony, and advised the jurors the objection was sustained and they were to disregard the testimony. Johnson was cross-examined by defense counsel. The

prosecution revisited the topic on redirect examination and elicited the testimony again, but this time without objection. The jury heard Johnson unsuccessfully tried to contact the individual who had been to prison for tying up and stabbing his wife. Johnson described the crime as an attempted murder and indicated Jerry was no longer in prison. There was no testimony defendant knew anything about Jerry.

DISCUSSION

I. Accomplice Issues

No physical evidence connected defendant to Usha's murder. Evidence of defendant's guilt beyond a reasonable doubt was supplied by circumstantial evidence and the trial testimony of accomplice Medina and out-of-court statements by accomplice Garcia. Defendant raises a number of issues related to the accomplices.

A. Medina

1. Exclusion of Potential Impeachment Evidence

Medina testified he would not personally kill someone. Defendant sought to impeach this statement, as well as cast general doubt on Medina's credibility, with evidence the accomplice admitted his involvement in one or two murders other than this one. Medina made the statements to his son in a series of telephone calls recorded by law enforcement in 2013.[6]

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[6] Law enforcement enlisted the assistance of Medina's son to obtain the information. During several conversations, Medina indicated he was involved in the 1991 murders of a victim and perhaps a witness. The parties agree the statements did not refer to Usha's murder. There is a suggestion that Medina's descriptions might match two 1991 unsolved homicides in Ontario, but the record on appeal does not include additional information.

Pretrial, the trial court and counsel discussed the potential impeachment of Medina, without resolution. Defense counsel raised the issue of the admissibility of the other murders during cross-examination of Medina. The trial court deferred its ruling. When the trial court again considered the issue, defense counsel argued that in addition to impeaching Medina's credibility, the evidence would support the defense theories that Usha's murder was a kidnapping for ransom gone wrong and Medina was an actual participant in the killing, not just the middleman.

The trial court excluded the testimony pursuant to Evidence Code section 352. The trial court found Medina repeatedly lied and claimed he was not involved in Usha's murder "and only admits it . . . and gives all the information [now] when he's given leniency." The jury heard Medina was a convicted felon (bank robbery and residential burglary), appeared to be affiliated with the Mexican Mafia, beat up and robbed drug dealers, beat up people at Narcotics Anonymous meetings, did not hesitate to agree to kill Usha for money, kept Garcia on heroin so that he would feel obligated to commit the murder, and made a phone call to terrorize Usha's parents after Usha's murder.

In sum, the trial court took the view that Medina's credibility had been thoroughly called into question and his statements concerning the commission of one or more other murders "doesn't add anything to the picture of him; and, therefore, the probative value [was] very, very slight" when compared with the potential to confuse the jury or cause them to speculate. No evidence supported the inference that Medina was involved in the physical attack on Usha. To suggest otherwise would only confuse the jury.

Defendant asserts the ruling violated his federal constitutional rights of confrontation and to present a complete defense. Evidence Code section 352 gives the trial court broad discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." We do not disturb that discretion unless it was exercised in " 'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

As the California Supreme Court has held, this discretion " 'prevent[s] criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' " (*People v. Ayala* (2000) 23 Cal.4th 225, 301.) Additionally, " 'not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance.' " (*Id.* at pp. 301-302.) And in *People v. Whisenhunt* (2008) 44 Cal.4th 174 (*Whisenhunt*), the Supreme Court acknowledged precisely the point made by the trial judge: " '[A] trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted.' " (*Id.* at p. 208.) This is particularly so when "the additional impeachment value of the excluded evidence [is] minimal in relation to the major areas of impeachment already

raised by the admitted evidence, and a reasonable jury would not have received a significantly different impression of the [witness's] credibility even if the excluded evidence had been admitted." (*Ibid*.) A criminal defendant's " 'constitutional right to present all relevant evidence of *significant* probative value in his favor . . . "does not mean that an unlimited inquiry may be made into collateral matters; the proffered evidence must have more than 'slight-relevancy' to the issues presented." ' " (*People v. Homick* (2012) 55 Cal.4th 816, 865 (*Homick*).)

We agree with the trial court that Medina had been so impeached by his own contradictory statements and behavior that the probative value of the out-of-court statements concerning other murders was greatly outweighed by the potential to confuse the jury. We are not persuaded by defendant's argument that Medina's admission to having committed one or two other murders would have created "a significantly different impression" of Medina or had a greater impact on his credibility than the impeaching evidence that was admitted. (*Whisenhunt, supra,* 44 Cal.4th at p. 208.)

Defendant also contends Medina's recorded statements were "highly relevant to the defense theory" that Medina was actually one of the killers and falsely portrayed himself as a middleman to obtain a plea deal. This contention is essentially a restatement of the claim that the other murders would have given the jury a different impression of Medina's credibility, and as such has no merit. Medina's out-of-court statements about other murders were conclusory and did not include any facts to support an inference he killed in any particular manner. (See Evid. Code, § 1101, subd. (a) [evidence of a specific incident of a person's conduct is not admissible to prove his conduct on a

specified occasion]; *People v. Prince* (2007) 40 Cal.4th 1179, 1271 [uncharged crimes which share "*distinctive* common marks" with charged crime may support an inference that the same person was involved in both instances; a somewhat lesser degree of similarity is required to show a common plan or scheme].) Finally, excluding evidence from the telephone calls did not diminish the defense theory that Medina was the mastermind of a kidnapping and extortion plot gone wrong.

2. Trial Testimony Corroboration

The trial testimony of an accomplice must be corroborated. (§ 1111.) Evidence that " ' "tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth" ' " provides sufficient corroboration. (*People v. Williams* (2013) 56 Cal.4th 630, 679 (*Williams*).) "[D]efendant's own testimony and inferences therefrom, as well as the inferences from the circumstances surrounding the entire transaction, may be sufficient corroborative testimony." (*People v. Ruscoe* (1976) 54 Cal.App.3d 1005, 1012 (*Ruscoe*).) Accomplices cannot corroborate each other's testimony. (*People v. Boyce* (1980) 110 Cal.App.3d 726, 737.)

As the Supreme Court has held, "corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime." (*People v. McDermott* (2002) 28 Cal.4th 946, 986; see also *People v. Romero and Self* (2015) 62 Cal.4th 1, 32.)

Sufficient corroboration may be found in evidence of the defendant's motive (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1022); demeanor after the crime is committed (*People v. Manibusan* (2013) 58 Cal.4th 40, 95; *People v. Hayes* (1999) 21 Cal.4th 1211, 1272); and attempts to fabricate an alibi (*Williams, supra,* 56 Cal.4th at p. 679). The prosecution presented such evidence in its case-in-chief.[7]

Motive evidence was introduced through the testimony of Usha's sister and brother-in-law. Usha was unhappy in the marriage and defendant knew of her plan to leave him. Usha was murdered shortly before the most recent bar examination results were released.

Defendant's behavior on the day of Usha's murder strongly supported the inference he was attempting to create an alibi. Defendant established a timeline through telephone calls; the deliberate, but otherwise irrelevant, reference to a television program then on the air; and visits to his brother-in-law, the purchaser of the family motel, and a store. He made sure he was out of the house, but with other people, when Usha was murdered. Defendant's announcement of the need to leave the house guaranteed the victim would be in the garage during a specific window of time.

Defendant's demeanor after the discovery of the victim's body also provided independent corroboration for Medina's testimony. Defendant's detailed and seemingly rehearsed description of the previous day's activities was in unerring

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[7] Although we will not discuss the testimony here, we note additional corroborating and circumstantial evidence was admitted in the defense and rebuttal phases of the trial.

chronological order and included "addresses and locations and times and paperwork to document times," something one would not expect from an individual whose spouse had just been brutally murdered.

For all that detail, however, defendant never mentioned the blood on the garage floor, though by his own account he had parked in the garage after the murder, but before the discovery of the victim's body. In a recorded interview with the police during the cold case investigation, defendant stated he returned home after picking up one of his children, before his wife's body was discovered, and parked " 'almost in the middle' " of the garage. Other evidence established this was a deviation from his usual routine and would have meant his wife, when she returned, would not be able to park in her usual spot in the garage. Parking there, however, would have obscured from view the pool of blood on the garage floor. The deviation from defendant's routine suggests defendant knew his wife was already deceased.[8]

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[8] Defendant's trial testimony contradicted this statement. At trial, he testified he parked on the right side of the garage, as was his habit. Defendant made a number of other contradictory statements about how many times he parked his car inside the garage on the night of the murder and about how he got into and out of the car.

On appeal, defendant argues it was equally likely that he deviated from his normal practice because he was upset, and the jury was required to accept this innocent explanation. We do not view this explanation as equally likely with the other possible explanations. Generally, evidence of a person's habit or custom is proof that the person acted in conformity with that habit on a specified occasion. (Evid. Code, § 1105.) A custom or habit involves a "semiautomatic response to a repeated situation." (*Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 926.)

B. Garcia

1. Out-of-Court Statement Corroboration

Defendant contends the trial court prejudicially erred in admitting Garcia's June 5, 2012 recorded jailhouse statements and his June 12, 2012 proffer to the prosecutor, arguing they were not against Garcia's penal interest and not reliable, but were made under "suspect circumstances," rendering them inadmissible.[9] Although Garcia was an accomplice as a matter of law, he refused to testify at defendant's second trial. Instead, the jury heard his recorded jail cell conversation with the undercover officer.[10] We hold those statements constituted non-testimonial hearsay that did not implicate defendant's right to confront the witnesses against him and did not require corroboration.

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[9] Defendant uses the specific phrase "lacked any internal indicia of reliability," but does not explain what he means by that phrase and does not cite any cases using that phrase. Accordingly, we do not consider the specific claim that Garcia's statements lacks such "internal" indicia. We do consider his more general claim that the statements were unreliable.

[10] Garcia's meeting with the prosecutor where he described the crime was videotaped. Defendant makes no specific arguments concerning the proffer and does not provide record citations indicating the statement was admitted into evidence at trial. The video was not played for the jury. We have reviewed the record, and Medina was the only witness to address the proffer. Over a defense objection, Medina testified defendant's private investigator played it for him in an interview. Medina agreed Garcia truthfully stated on the video that Medina hired him to kill Usha. Without relevant legal argument or record citations, we deem this claim forfeited.

Out-of-court statements by a non-testifying accomplice require corroboration only if " ' "made under questioning by police or under other suspect circumstances." ' " (*People v. Rangel* (2016) 62 Cal.4th 1192, 1229.) Otherwise, an accomplice's declarations against interest are considered sufficiently trustworthy to be admitted without corroboration. (*People v. Brown* (2003) 31 Cal.4th 518, 555-556.) Out-of-court statements are admissible as exceptions to the hearsay rule when made by a "declarant [who] is unavailable as a witness and the statement, when made . . . subjected him to the risk of . . . criminal liability . . . [to the point] that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.)

A trial court has discretion to admit out-of-court statements after considering "the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry." *(People v. Greenberger* (1997) 58 Cal.App.4th 298, 334.) Statements made after an arrest are "the least reliable," as the declarant may be "attempt[ing] to improve his situation with the police by deflecting criminal responsibility onto others[, while] the most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures." (*Id.* at p. 334.)

Even if a statement is admissible pursuant to section 1230, the confrontation clause of the federal Constitution requires courts to determine whether it is testimonial or non-testimonial. (See *Crawford v. Washington* (2004) 541 U.S. 36, 52-53.) Non-testimonial statements, which include those "made unwittingly to

a Government informant" and those "from one prisoner to another" do not implicate a defendant's Sixth Amendment right to confrontation. (*Davis v. Washington* (2006) 547 U.S. 813, 825.)

Defendant launches a multi-prong challenge to the admissibility of the statements he made to the undercover officer. He first argues the statements were not against his penal interest because they "shifted or spread the blame to the person he asserted had contracted for the murder of his wife." The California Supreme Court rejected the same argument in *People v. Samuels* (2005) 36 Cal.4th 96: "This admission, volunteered to an acquaintance, was specifically disserving to [the declarant's] interests in that it intimated he had participated in a contract killing—a particularly heinous type of murder—and in a conspiracy to commit murder." (*Id.* at p. 121.) We reject it as well.

Defendant next contends Garcia knew the man in the cell with him was a police officer and admitted the killing only to secure a favorable deal in exchange for a plea. This contention is based in large part on Garcia's testimony at defendant's preliminary hearing that he believed his cellmate was a police officer when he made the inculpating statements. In a police interview subsequent to the recorded jail cell conversation, however, Garcia asked if the man in the cell with him was a "cop" and then said, " 'I think I may have hurt myself.' " The court found Garcia's statements indicated "after the fact" he put "two and two together." We agree with that assessment.

Garcia eventually repudiated his jail cell statement that the murder was a contract killing, his proffer statement naming Medina as the middleman, and his own confession. Defendant argues the repudiations indicate the statements were unreliable.

We are not persuaded. Repudiation of an earlier statement does not prove the statement was untrue. Nor does Garcia's subsequent refusal to honor his obligation to testify at defendant's trial. Taken as a whole and in context, Garcia's repudiations reasonably suggest he came to regret his plea agreement, but do not cast doubt on the reliability in his out-of-court statements.

Finally, defendant argues Garcia's statements were unreliable because they parroted what police investigators must have told Garcia about the crime when they first interviewed him. Without more, this factor alone does not establish unreliability, particularly where the only DNA evidence recovered at the scene linked Garcia to the murder.

2. Jury Instructions

Defendant contends the trial court had a sua sponte duty to instruct the jury that Garcia was an accomplice as a matter of law, Garcia's testimony required corroboration, and Garcia's testimony could not be used as corroboration for Medina's testimony. We agree in part that the trial court erred, but do not find the error prejudicial.

As previously discussed, Garcia's statements did not need to be corroborated, so the trial court did not err in failing to instruct on that point.

The trial court did err in failing to instruct that Garcia was an accomplice as a matter of law and his statements could not be used to corroborate Medina's testimony. (*People v. Houston* (2012) 54 Cal.4th 1186, 1223 [sua sponte duty]; *Ruscoe*, *supra*, 54 Cal.App.3d at p. 1011 [testimony of one accomplice cannot corroborate the testimony of another accomplice]; CALJIC No. 3.13.) A harmless error analysis applies; and the error is

harmless if the record contains sufficient evidence that corroborates Medina's testimony independent of Garcia's out-of-court statements. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 303 (*Gonzales and Soliz*).) As discussed above, sufficient evidence corroborated Medina's testimony apart from Garcia's statements. We conclude the trial court's error was harmless.[11]

Even were we to assume Garcia's jail cell statements did require corroboration, the same evidence that corroborated Medina's testimony would also be sufficient to corroborate Garcia's testimony. The omission of the corroboration instruction also would be harmless as to Garcia.

Defendant asserts the failure to give accomplice instructions violated his state and federal constitutional rights to trial by jury and due process and argues the error is not harmless beyond a reasonable doubt. Defendant has not cited any state or federal authority holding the failure to give accomplice instructions is an error of constitutional dimension; and the federal cases defendant cites do not involve accomplice testimony. Our Supreme Court has explained: "Our analysis of harmless error in the omission of accomplice instructions reflects the idea that sufficient corroboration allays the concerns regarding unreliability embodied in section 1111 [concerning the reliability of accomplice testimony]. Thus, even in cases where the full

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[11] Arguments by counsel did not cure the error, but we note the prosecutor did tell the jury Garcia was "obviously" an accomplice and explained: "There's plenty of evidence that you can use to corroborate the testimony of Stan Medina. Don't use what Mike Garcia said to [the undercover officer] to corroborate Stanley Medina. Use other evidence. One accomplice can't corroborate another accomplice."

complement of accomplice instructions . . . was erroneously omitted, we have found that sufficient corroborating evidence of the accomplice testimony rendered the omission harmless." (*Gonzales and Soliz, supra,* 52 Cal.4th at pp. 303-304.) Appellate courts turn to the *Watson*[12] standard only if there is insufficient corroboration in the record. (*Id*. at p. 304.) Having found sufficient corroboration for Medina's testimony independent of Garcia's statements, we do not engage in a *Watson* analysis.

C. No Ineffective Assistance of Counsel Based on Failure to Seek Acquittal Pursuant to Section 1118.1

Defendant contends his counsel's failure to move for acquittal pursuant to section 1118.1 at the close of the prosecution's case-in-chief, on the ground of insufficient corroboration of accomplice testimony, constituted ineffective assistance of counsel requiring reversal. The argument has no merit.

No corroboration was required for Garcia's out-of-court statements. The prosecution presented sufficient evidence in its case-in-chief to corroborate Medina's trial testimony (see also fn. 7, *ante*). Accordingly, there was no basis for a section 1118.1 dismissal, and defense counsel's decision not to so move could not have prejudiced defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 670 (*Strickland*) [It is not necessary to determine "whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed"].)

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12 *People v. Watson* (1956) 46 Cal.2d 818, 836.

II. Rebuttal Witness Johnson

Defendant next contends testimony by former Subway manager Johnson concerning the crime Jerry committed was improperly admitted and prejudicial. When the testimony was first elicited, the trial court and counsel engaged in a sidebar discussion, and defense counsel argued the prosecutor had not laid any foundation to establish that defendant knew Jerry or what he had done. The trial court and counsel conducted an impromptu Evidence Code section 402 hearing, followed by argument, a second Evidence Code section 402 hearing, and more argument. Finally, the trial court advised the prosecutor he had not laid a sufficient foundation for this testimony. The prosecutor indicated he would not seek to introduce testimony concerning Jerry's crime unless Johnson testified she at some point told defendant about Jerry's offenses.

As noted, the trial court struck the testimony and advised the jurors the objection was sustained and they were to disregard the testimony. Johnson was cross-examined by defense counsel. The prosecution revisited the topic on redirect examination and elicited the testimony again, but this time without objection.[13]

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[13] The prosecutor first asked Johnson if she testified in a different lawsuit (the federal civil action concerning the victim's life insurance policy). Johnson admitted she did, and the prosecutor read without objection an excerpt from Johnson's testimony: "Question, 'Is it at that time you told [defendant] that you knew of a person who had been in prison. That he might know somebody who could do this?' Answer, 'Correct.' "

The prosecutor then asked Johnson the following questions: The testimony proceeded: "Q. Were you referring to Jerry. [¶] A. Yes. [¶] Q. [And you had an interview with Sgt. Purcell and Detective Davis and] you indicated that Jerry had been to prison

Defendant maintains an objection to the redirect testimony would have been futile because the trial court had previously ruled this testimony lacked foundation and then failed to enforce that ruling.[14] But the trial court's ruling was in defendant's favor, and there is no reason to believe an objection would have been futile. Accordingly, defendant has forfeited this claim. (*People v. Cage* (2015) 62 Cal.4th 256, 282.)

Defendant contends if this claim is forfeited, he received constitutionally ineffective assistance of counsel. Again, relying on *Strickland, supra,* 466 U.S. at page 697, we resolve this issue by examining whether the admission of that evidence constituted harmless error.

Evidence that defendant spoke with Johnson, who confirmed defendant was looking for a "hit man," was relevant to defendant's preparation and planning for Usha's murder.[15] This

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for attempting to kill his wife; is that correct. [¶] A. Correct. [¶] Q. And now that we have a foundation laid pursuant to your question and answer in federal court, [Jerry] tied his wife up and stabbed her; is that correct? [¶] A. Correct. [¶] Q. And you indicated to [defendant] you might know somebody; is that correct?" Johnson replied, "Correct."

[14] Defendant cites two cases to support this proposition: *People v. Turner* (1990) 50 Cal.3d 668 and *People v. Ogunmola* (1985) 39 Cal.3d 120, overruled by *People v Ewoldt* (1994) 7 Cal.4th 380, 401. In both cases, defense counsel's objection would have been futile due to then-existing law. That is not remotely the situation here.

[15] It could also have been evidence that defendant and Pete wanted to find someone to rough up the bookkeeper. Such an effort might qualify as an uncharged crime, but the jury was instructed that evidence of "uncharged acts" was offered for the

evidence was not, as defendant contends, impermissible evidence of his "criminal propensity." Preparation for a crime is not propensity evidence.

Johnson's testimony concerning Jerry specifically was relevant only if evidence were first introduced that defendant was aware of Jerry's criminal behavior. That relevant foundation, i.e., defendant knew who Jerry was and what he had done, was never elicited. Nonetheless, the prosecution presented irrelevant evidence Johnson knew someone who attempted to kill his wife, but did not succeed.

Defendant contends the admission of the evidence was prejudicial and led to the inference defendant knew Johnson was trying to contact someone who had tied up and stabbed his wife in order to have Usha killed in the same manner. That is not a reasonable inference from the evidence, however. As we have noted, there was no evidence defendant either knew Jerry or knew Jerry was the individual Johnson was trying to find. Nothing in the record suggested defendant sought to have the victim killed in any particular manner.

III. Sgt. Garcia's Testimony Concerning Defendant's Guilt

The trial court deferred ruling on defendant's motion in limine (MIL) to exclude Sgt. Garcia's statement that he told defendant he "believed [defendant] was involved in his wife's murder." Defense counsel did not press for a ruling and did not

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limited purpose of showing a common plan or scheme. Such a purpose is proper. (See, e.g., *People v. Prince, supra,* 40 Cal.4th at pp. 1271-1272 [evidence that defendant stalked witness in a particular manner was sufficiently similar to defendant's stalking of victims of charged crimes to show a common scheme or plan].)

object during trial when the prosecutor elicited the detective's statement.[16]

Preliminarily, we note an objection to this testimony would have been well taken.[17] We are not persuaded that posing the question in terms of relaying the sergeant's conversation with defendant, as opposed to eliciting the sergeant's opinion, made the testimony admissible. But we also are not persuaded by defendant's argument that the failure to object was excused on the basis any objection would have been futile. The trial court did not rule against defendant in the pretrial MIL hearing; and

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[16] The direct examination included the following: "Q. Now, sir, at some point in time in early January of 1992, did you sit down and have a conversation with [defendant]? [¶] A. Yes, sir. [¶] Q. And at that point in time, did you tell him that you believed he was involved in his wife's murder? [¶] A. Yes, sir. [¶] Q. And did [defendant] deny any involvement? [¶] A. Yes, sir. [¶] Q. Did [defendant] tell you what he was going to do when you sat him down in early January of 1992 and advised him that you believed he was involved in his wife's murder? [¶] A. Yes, sir. [¶] Q. What did he tell you he was going to do? [¶] A. He indicated that he wanted to hire a private investigator to pursue the investigation. And I advised him he had every right to do that."

[17] "A witness may not express an opinion on a defendant's guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] 'Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.' " (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77.)

the trial court was in a better position to rule on the motion during the trial itself, when the challenged evidence was offered. (*People v. Karis* (1988) 46 Cal.3d 612, 634, fn. 16.)

Nonetheless, defendant forfeited the issue by failing to obtain a ruling on his motion or object when the testimony was offered. (*Homick, supra*, 55 Cal.4th at p. 871 [failure to press for ruling]; *People v. Braxton* (2004) 34 Cal.4th 798, 813-814; *People v. Jennings* (1988) 46 Cal.3d 963, 975 fn. 3.)

Anticipating this conclusion, defendant asserts trial counsel's failure to object constituted ineffective assistance of counsel. On appeal, we presume trial counsel's conduct was trial strategy, not trial error. (*People v. Thomas* (1992) 2 Cal.4th 489, 530-531; *People v. Holt* (1997) 15 Cal.4th 619, 703.) To prevail on an ineffective assistance of counsel claim, defendant must establish his counsel's representation fell below an objective standard of reasonableness and it is probable that, but for counsel's error, he would have achieved a more favorable result. (*Strickland, supra,* 466 U.S. at pp. 690, 694; *Holt, supra,* at p. 703.) Appellate courts " 'should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.' " (*People v. Weaver* (2001) 26 Cal.4th 876, 926.) "Whether to object to arguably inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference, failure to object seldom establishes counsel's incompetence." (*People v. Maury* (2003) 30 Cal.4th 342, 415–416.) In order to resolve this claim on direct appeal, we examine the record to determine whether it suggests a strategic reason for the defense not to object. It does.

Defense counsel's opening statement highlighted defendant's cooperation with the investigation in his wife's

murder. Counsel told the jury defendant gave Sgt. Garcia "phone records. Gave him financial records. Gave him everything that he needed. He was an open book. There was nothing to hide." The defense theory was that the investigating officers were so determined to convict defendant for Usha's murder that they supplied Garcia with details about the crime to ensure Garcia's confession would implicate defendant and the prosecutor offered Medina a very favorable plea deal on the sole condition that he identify defendant.

Sgt. Garcia's testimony concerning his conversation with defendant set the stage for defense counsel's cross-examination. Defense counsel elicited the same response from the police officer ("We had an amicable relationship until I told him in January of '92 that I felt he was involved in the case and that my investigation indicated that he was involved in the case"). Then, under further questioning, Sgt. Garcia admitted, "I don't recall anything that I asked [for] that [defendant] didn't give me." Sgt. Garcia added that defendant's interactions with him were always voluntary and defendant was never accompanied by, or asked for, an attorney. Furthermore, once Sgt Garcia's articulated suspicions were in evidence, defense counsel elicited testimony that Usha's family was "pushing" Sgt. Garcia in the direction of defendant.

Defense counsel reiterated the theme in closing argument, suggesting the investigators' focus on defendant was natural, but caused them to fail to properly investigate the crime: "You know, wife dies. Husband is always the suspect. Okay. We get that. But to allow you to shirk your responsibility to investigate . . . ."

The record sufficiently supports the conclusion that defendant had a strategic reason not to object to the challenged

testimony. Defendant's claim of ineffective assistance of counsel fails. (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

IV. Prosecutorial Misconduct

Defendant claims the prosecutor engaged in a pattern of misconduct during the evidentiary portion of the trial and closing arguments in violation of defendant's federal constitutional right to due process, evidencing a "reprehensible means of obtaining a conviction under state law." Generally, defendant has forfeited these claims by failing to object to the specific instances of alleged misconduct he argues comprise the pattern. Even if we assumed the claims were not forfeited, we would not find either a pattern of misconduct or ineffective assistance of counsel.

A. Accomplice Corroboration

Defendant contends the following remarks by the prosecutor during closing argument misstated the law of accomplice corroboration: "There's plenty of evidence that you can use to corroborate the testimony of . . . Medina. Don't use what . . . Garcia said to [the undercover officer] to corroborate . . . Medina. Use other evidence. One accomplice can't corroborate another accomplice . . . use . . . Garcia's statement to . . . show exactly how this murder went down. You can use it in any way you want as to [defendant]. But . . . don't use it to corroborate the testimony of . . . Medina."

Defendant maintains the prosecutor's statement incorrectly implied that Garcia's uncorroborated statements could be used to convict defendant. Quite to the contrary, the prosecutor's argument correctly advised the jurors that Garcia was an accomplice whose testimony must be viewed with caution and could not be used to corroborate anything said by Medina.

B. Rebuttal Witness Johnson

Defendant contends the prosecutor committed misconduct in presenting testimony from this witness about her friend Jerry after the trial court sustained a defense objection based on lack of foundation. As explained in part II of the Discussion, defendant forfeited this claim by failing to object and request an admonition. Even were we to assume the claim was not forfeited, we would find no misconduct.

A prosecutor who deliberately solicits inadmissible evidence engages in misconduct. (See *People v. Bell* (1989) 49 Cal.3d 502, 531-532; *People v. Friend* (2009) 47 Cal.4th 1, 69.) Here, the trial court and counsel had a lengthy discussion concerning the lack of foundation. The prosecutor prefaced the disputed question with the words, "And now that we have a foundation . . . ." Defense counsel did not object, and the prosecutor proceeded with the question. Although we agree the prosecutor did not lay a sufficient foundation, nothing suggests he acted in bad faith on this score.

C. Closing Argument

It is not an overstatement to characterize closing arguments for both sides as passionate, the word the trial court used when it admonished the jury during the prosecutor's rebuttal: "[T]hese are very passionate attorneys, both of them. They firmly believe in their position, and they're putting it in your hands. They're very competent and experienced attorneys, but . . . attorneys' comments are not evidence. They invite you to take a look at a piece of evidence in a certain way, but the ultimate decision is yours and yours alone. . . . So always keep in mind as you hear argument from counsel and as you recall the

argument from counsel last week and evaluate the evidence, that it's you who must make the evaluation."

Despite this admonition, the jury instruction that nothing the attorneys say is evidence, and defense counsel's strong language in his own closing argument, defendant asserts the prosecutor crossed the line and impermissibly vouched for the credibility of himself, the cold case investigator, and even Medina; unfairly commented on the evidence; and asked the jurors to step into the "victim's shoes."

Defendant forfeited most of the claims by failing to object and request an admonition. (*People v. Tully* (2012) 54 Cal.4th 952, 1010; *People v. Bemore* (2000) 22 Cal.4th 809, 846.) Assuming those claims were not forfeited, we would find no misconduct.

Defendant challenges the following specific arguments concerning the prosecutor and the cold case investigator: "I have done a lot of cold cases, but not since 1977.[18] Counsel is dead wrong on that here. I will tell you this: and I have worked with Sgt. Purcell on a number of occasions."

"That's what I do is cold cases. That's what Sgt. Purcell does. . . . When somebody thinks they've gotten away with

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18 Defense counsel stated the prosecutor had been practicing law since 1977, when defense counsel "was barely out of high school." Defense counsel then mused that this prosecution was "inconceivable" and stated the prosecutor, who must be getting toward the end of his career, was either "bamboozled" by Medina or engaged in an "egotistical exercise in . . . [convicting] a man in a cold case. Convict regular criminals, you can't write a book about that You convict some husband who allegedly killed his wife 25 years ago, might make for some interesting read."

something for decades, and Sgt. Purcell or another investigator finally goes out and puts the handcuffs on them . . . . "

Without a defense objection, the prosecutorial misconduct claim is forfeited. Were we to address the claim on the merits, we would find no misconduct. Sgt. Purcell's assignment as a cold case investigator was in evidence. The prosecutor's experience with cold cases was not. The Supreme Court has held, "prosecutors should not purport to rely in jury argument on their outside experience or personal beliefs based on facts not in evidence." (*People v. Medina* (1995) 11 Cal.4th 694, 776.) But this was such a minor point, we do not view the argument as misconduct. (*People v. Edwards* (2013) 57 Cal.4th 658, 742.)

The prosecutor also stated, "I haven't met a finer family than those people sitting here. The humanity that they have shown. The honor they have shown. The dignity they have shown. Counsel says that Anita Patel got up here, looked at the clerk, swor[e] to tell the truth, and sat here and lied to you. Do you really believe that?"

This remark was in response to defense counsel's "point[ing] at these folks [Usha's family] many times during his presentation to you. And he says he's very proud to have represented [defendant]." What defense counsel actually said was, "I want to tell you, when my client and his daughter contacted me and asked me to help him out, you know, I get a little too old and broken down to be doing this . . . . So lucky for me at this point in my life, I get to represent who I want to represent. And it's rare when you get to represent good people doing criminal defense work. [Defendant] is good people." Again, taken in context, we find no prosecutorial misconduct.

Defendant also contends the prosecutor committed misconduct and improperly vouched for Medina's credibility when the prosecutor made the following statement about Medina's plea agreement in closing argument: "I have spent hours discussing this case with Usha's parents and her brother and her sisters with Sgt. Purcell and Detective Carrillo. And everyone agrees that this is the appropriate way to dispose of your case." Defendant contends this argument suggests everyone in the case believed Medina was telling the truth.

We do not find that to be a reasonable inference from the argument. The prosecutor began his closing argument by reminding the jury he told them in voir dire that Medina was promised leniency in exchange for his testimony. The prosecutor explained he made that decision and recognized the plea agreement meant Medina has "gotten away with something." But he reminded the jurors they had to decide whether to believe Medina, disbelieve Medina, or decide Medina's testimony was not necessary to convict defendant. At the conclusion of the prosecutor's rebuttal argument, he stressed Medina was on a "tight rope" and Medina's plea to the lesser charge had not yet been finalized, so that "if it's found that he was not honest, he can [be] recharged or retried for murder, and his testimony and that proffer can be used against him." Again, even had this issue not been forfeited, we would not find prosecutorial misconduct.

Defendant next asserts the prosecutor improperly asked jurors to put themselves in the victim's place when he argued, "If a loved one of yours died tonight, would you trust that man [sitting] there, Joe Purcell, in investigating that case? Would you be able to take to the bank what he told you?" The statement continues: "Think about that. The investigators that supposedly

did nothing. And I'm simply pointing out what they did do. Completely reinvestigated the case in 2011."

A prosecutor may not appeal to the jurors' sympathies by asking them to view the case through the victim's eyes. (*People v. Lopez* (2008) 42 Cal.4th 960, 969-970.) Here, the prosecutor was not seeking sympathy. The remark, in context, was a response to defense counsel's argument that the current investigators did not do any work on the case and instead decided to unfairly seek to convict defendant for Usha's murder. The prosecutor's argument is most reasonably understood as urging jurors to evaluate the investigator's work critically (as if it involved a juror's family member) and determine its quality. This was not improper.

Citing *People v. Kirkes* (1952) 39 Cal.2d 719, 724, defendant contends for the first time on appeal the following two statements improperly implied the existence of facts outside the record. These claims were also forfeited; were we to assume they were not, we would not find any misconduct.

The prosecutor argued, "When a homicide happens, the homicide investigators are going to interview many people. That doesn't mean the jury will hear about each person they interview." This statement was made in response to defense counsel's argument that Sgt. Garcia did not interview anyone other than defendant. As the prosecutor pointed out, "Sgt. Garcia said that he and his partner canvassed the neighborhood. Knocked on doors. That's a number of people right there." This was proper comment on the evidence.

The prosecutor also stated, "many times homicide investigators, there's only so much you can do at a given point. You interviewed everybody you can interview, and sometimes cases come to a standstill. That doesn't mean [the cases are]

closed. This case was never closed." The references to interviews in this context do not improperly imply there are facts outside the record relevant to the issues in this case.

Next, defendant complains of the brief kerfuffle surrounding the word "cockroach." He argues the prosecution impugned his integrity and personally attacked him, compelling reversal. We do not agree.

Defense counsel introduced the word "cockroach" in his closing argument. He was discussing the "stupidity" of the prosecution's premise that the victim planned to leave defendant ("And then she was planning on leaving [defendant]. This is one of the most stupid things. . . . Give me a break"). Defense counsel argued the testimony concerning the victim's waiting to pass the bar and get a job before leaving defendant just made no sense and said, "You see when you start making things up and lies, they just don't fit. . . . And you turn the light on, it's like cock roaches [*sic*] and run for cover. It is nonsense that [the witnesses] told you is like cock roaches [*sic*] with the light on."

In his rebuttal closing argument, the prosecutor commented, "Counsel referred to Usha's family as [cockroaches]. Think about that. There's an old saying, folks. And I have seen this many times in the cases I have tried. When the facts are on your side, you argue the facts. When the law is on your side, you argue the law. When neither is on your side, the defense screams and yells and ridicules and criticizes. Sitting here the last couple of days, that's when I realized how overpowering the evidence in this case is. Because most of the summation was ridicule and insults and attempting to humiliate people."

As defendant acknowledges on appeal, he did not object to the above remarks. Minutes later, when the prosecutor repeated

the cockroach reference, defense counsel objected, insisting he never said the victim's family were cockroaches.

The trial court overruled the objection and advised the jury, "Let me indicate to you jurors that term was used. You make your determination as to how that was used." Defense counsel appeared to interrupt and added, "not in describing the family." The trial court responded, "Well, the objection is overruled. The jurors will make that determination."

Defendant argues on appeal that his counsel was "making the analogy that when you cross-examine a witness who is not telling the truth, it is like a cock roach [*sic*] when you turn on the light." Why defense counsel made the statement is not so critical to our analysis as what the trial court did in response to defendant's trial objection. We find the trial court's response entirely appropriate. The trial court did not "take sides" and instead admonished the jurors it was up to them to decide how the term was used. The trial court's admonition was sufficient to dispel any potential prejudice.

The prosecutor also commented on defendant's cutting off a recorded interview with Sgt. Purcell by stating, " 'I don't want to talk anymore.' " Defense counsel promptly objected.

The prosecutor immediately acknowledged his error and asked the trial court to admonish the jury to disregard his argument and the statement itself (it was played for the jury during the evidentiary portion of the trial without objection). The trial court admonished the jury. Defendant does not explain how he was prejudiced by the reference or why the court's admonition was ineffective.

We see no incurable prejudice to defendant. Defendant did not state in the recorded interview that he was asserting his

Fifth Amendment rights or even that he was no longer willing to speak with the investigator. The interview transcript shows that near the end of the interview, defendant urged Sgt. Purcell to find Usha's diary because the diary contained significant information about the murder. Sgt. Purcell persisted in asking about the contents of the diary and defendant kept responding that detectives should find the diary and read it. At the point when defendant said he wanted to talk to his daughter, the two men were just going around in circles. There was nothing incriminating about defendant's decision to effectively end a fruitless conversation by stating that he wanted to speak with his daughter. The trial court's admonition to disregard the prosecutor's characterization of that termination was sufficient to cure any possible harm.

V. Jurors' Question

The jury sent a written note to the court asking, "Hypothetically, can we find the defendant guilty of murder without believing Stanley Medina's testimony?" After an extended discussion with counsel and an evening recess, the trial court reread portions of CALCRIM Nos. 220 and 226, prefaced with the following statement: "Yes, but only if other evidence presented to you in this case convinces you beyond a reasonable doubt that the defendant is guilty." Defendant objected to the preamble and contends the trial court's reply "distorted" the record in this case because without Medina's testimony the evidence was insufficient as a matter of law to convict defendant.

This argument is really a challenge to the sufficiency of the indirect/circumstantial evidence to support defendant's conviction. As the trial court remarked to counsel outside the

jurors' presence at the close of the prosecution case, Medina's testimony provided the only *direct* evidence of defendant's involvement in Usha's murder; all the other evidence was indirect/circumstantial. But a criminal conviction "may be proved by direct or circumstantial evidence or by a combination of both." (CALCRIM No. 223; see also CALCRIM No. 224.) The corroboration evidence was, by definition, independent of Medina's testimony.

The indirect/circumstantial evidence, apart from Medina's testimony, was sufficient to permit the jury to find defendant guilty beyond a reasonable doubt: Garcia killed Usha. Garcia told the undercover officer he was paid for the killing and the contract was from a husband who wanted his wife dead. Camarena, Johnson, and defendant's brother-in-law Shirish all testified defendant asked about finding someone to hurt somebody. Defendant had a motive to kill the victim and fabricated an alibi. He behaved suspiciously on the day of the murder and the day after.

VI. Lying in Wait Special Circumstance

Defendant challenges the sufficiency of the evidence to support the jury's true finding on the lying-in-wait special circumstance allegation. Our review requires us to accept the evidence in the light most favorable to the judgment. (*People v. Stevens* (2007) 41 Cal.4th 182, 201 (*Stevens*).)

At the time of Usha's murder, "the elements of the lying-in-wait special circumstance required an intentional killing, committed under circumstances that included a physical concealment or concealment of purpose; a substantial period of watching and waiting for an opportune time to act; and, immediately thereafter, a surprise attack on an unsuspecting

victim from a position of advantage." (*Stevens, supra,* 41 Cal.4th at p. 201.) "The factors of concealing murderous intent, and striking from a position of advantage and surprise, 'are the hallmark of a murder by lying in wait.' " (*Id.* at p. 202.) The watching and waiting period may be brief, as long as the duration is sufficient to show a state of mind equivalent to premeditation or deliberation. (*Ibid.*; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1073-1074.)

Trial evidence established Usha was killed in the garage. Defendant testified he drove his car out of the garage and closed the vehicle garage door when he left home around 2:00 p.m. The nanny testified Usha walked into the garage from the house within an hour of defendant's departure. The nanny heard no voices or other noises from the garage once Usha walked out of the house. Five to eight minutes elapsed between Usha's entering the garage and the sound of the garage door. A reasonable inference from this evidence is that the killer entered the garage when defendant left or through the unlocked walk-through side door and waited for Usha to appear. This evidence is sufficient to support a true finding on the lying-in-wait special circumstance.

VII. Cumulative Error

Defendant next asserts the cumulative effect of trial court errors and prosecutorial misconduct requires reversal. But a defendant is not entitled to "an error-free, perfect trial," only a fair one that affords due process. (*United States v. Hasting* (1983) 461 U.S. 499, 508.) Appellate courts "consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." (*Id.* at p. 509.)

Our review of the record revealed only one trial court error and one minor improper statement by the prosecutor: The trial court failed to instruct that Garcia's statements could not corroborate Medina's testimony; and in closing argument, the prosecutor referred to defendant's termination of a police interview.

Although most of the evidence against defendant was circumstantial, it was ample. Defendant received a fair trial. There is no reasonable probability the jury would have reached a more favorable verdict in the absence of the claimed errors. (See *People v. Carrera* (1989) 49 Cal.3d 291, 332.)

VIII. Section 1202.45 Fine

The Attorney General appropriately concedes the section 1202.45 parole revocation fine, which the trial court ordered suspended, must instead be stricken. A parole revocation fine can be imposed only on a defendant who receives a sentence of life without the possibility of parole and a determinate sentence that includes the potential for parole. (*People v. McWhorter* (2009) 47 Cal.4th 318, 380; *People v. Brasure* (2008) 42 Cal.4th 1037, 1075.) Defendant's indeterminate life sentence did not include an additional determinate term. The fine must be stricken.

DISPOSITION

The judgment is modified by striking the section 1202.45 parole revocation fine. As modified, the judgment is affirmed.

DUNNING, J.*

We concur:

GRIMES, Acting P. J.

STRATTON, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.