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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HORACIO CAMBEROS, Defendant and Appellant.	B258188 (Los Angeles County Super. Ct. No. NA083670)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark C. Kim, Judge. Affirmed.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Horacio Camberos appeals from the judgment entered following a jury trial that resulted in his conviction of first degree murder (Pen. Code, § 187, subd. (a))[1] and true findings on allegations of special circumstance of murder for financial gain (§ 190.2, subd. (a)(1)) and of a principal armed with a firearm during the commission of the murder (§ 12022, subd. (a)(1)). He was sentenced to prison to life without the possibility of parole, plus a consecutive one-year term for the firearm enhancement.

Defendant contends the judgment must be reversed in light of the trial court's errors, claiming the errors were prejudicial, individually or cumulatively. He assigns as error: (1) the court's admission of defendant's statements during his police interview, because they were obtained in violation of his privilege against self-incrimination (U.S. Const., 5th Amend.; *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*); (2) the court's denial of his mistrial motion, because his right to a fair trial (U.S. Const., 14th Amend.) was violated when the jury learned the victim's wife suffered a miscarriage due to the stress of what happened; (3) the court's admission of evidence that Emil Vassilev, who hired the murder, had invoked his privilege against self-incrimination in a civil case, which error abridged defendant's rights to due process and a fair trial (U.S. Const., 14th Amend.) and his right to confront witnesses (U.S. Const., 6th Amend.); (4) the court's exclusion of evidence that Vassilev was arrested and then released from custody after such invocation, which violated defendant's right to due process and present a defense (U.S. Const., 14th Amend.); (5) the court's admission of the entirety of the police interview of codefendant Lucio Pelayo[2] and his statements made at his proffer session, which error violated defendant's rights to due process and a fair trial; and (6) the court's limitation of defense cross-examination of Pelayo regarding his understanding of his proffer agreement, which error violated defendant's rights to due process, a fair trial, to present a defense, and to cross-examine witnesses.

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1 All further section references are to the Penal Code unless otherwise indicated.

2 Pelayo pleaded guilty to attempted murder.

We affirm the judgment. Substantial evidence supports the trial court's finding that no *Miranda* violation transpired. Denial of the mistrial motion was not error, because the jury is presumed to have followed the trial court's admonition to disregard the brief reference to the wife's miscarriage. The court did not abuse its discretion in admitting evidence that Vassilev invoked his privilege against self-incrimination in a separate, civil action based on the finding its probative value outweighed any prejudice from its admission. Exclusion of evidence that Vassilev was arrested and released in this case after invoking his Fifth Amendment privilege in the civil case was not an abuse of discretion. The court did not abuse its discretion in admitting Pelayo's entire police interview transcript and his proffer statements as prior consistent statements, because the defense attacked Pelayo's credibility and implied his statements were coerced and motivated by his desire to avoid the death penalty. The court did not improperly curtail the defense's cross-examination of Pelayo, because his understanding of the proffer agreement was not relevant in view of his stated understanding he could be prosecuted for perjury if he lied. Further, in view of the absence of error, the cumulative effect of the assigned errors is nil.

BACKGROUND

The evidence established[3] that on November 9, 2004, about 5:00 a.m., Jose Perez was targeted and shot dead, because he and three other employees of Van Elk, a welding company owned by Vassilev, had sued Van Elk and Vassilev[4] in 2003 for labor fraud arising from alleged payment of wages substantially less than that to which they were entitled on a project involving public funds. The relief sought included estimated

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3 We recount the evidence pursuant to the usual standard of review. (*People v. Elliott* (2012) 53 Cal.4th 535, 585.)

4 Van Elk was the named defendant, and there were various "Doe" defendants. Subsequently, Vassilev was added as a Doe defendant to avoid his escaping personal liability if Van Elk became bankrupt. On November 5, 2004, a copy of this Doe amendment was faxed to Vassilev's attorneys.

damages of $800,000 to $900,000 and barring Van Elk from receiving future public works projects. Vassilev, who was defendant's boss at Van Elk, told defendant he wanted Perez and the other three killed before an upcoming court date. Defendant asked Pelayo, his brother-in-law and former employee of Van Elk, if he knew anyone who would commit murder for pay. Pelayo relayed defendant's proposition to Oscar Esparza,[5] whose mother lived down the street from Pelayo. Esparza and defendant agreed on $100,000 as the amount for the murders.

Two weeks prior to Perez's murder, defendant, Pelayo, and Esparza drove to a parking lot near the courthouse. Defendant pointed to Perez and another man as the targets and insisted the killings be done soon. A few days later, defendant provided Pelayo with Perez's work address and a description of his car, a Honda, which information Pelayo provided Esparza.

On November 9, 2004, while driving his green Tahoe truck, Pelayo picked up Esparza. Esparza placed a revolver under the seat and directed Pelayo where to drive. Pelayo pulled into a driveway to wait. Esparza indicated a passing Honda was the one and exited the truck with the revolver. About 30 seconds later, Pelayo heard three or four gunshots, and Esparza ran back to the truck. Pelayo called defendant and gave the prearranged signal: "The eagle has landed," meaning the job was done.

That night, defendant went to Pelayo's house with $100,000 cash. Pelayo and Esparza each got $50,000. Pelayo gave defendant $5,000 after the latter asked for money because he would not be paid anything.

Pelayo used his share for a house down payment, furniture, items for his children, and he "blew away" the rest. Esparza used his share to buy vehicles, a watercraft, and other items. At some point in 2003 or 2004, Esparza's girlfriend saw him with a large amount of cash. He explained the money was for doing "some shit" with a guy down the street, whom she knew drove a green Tahoe.

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5 Esparza was charged with Perez's murder in a separate case.

Defendant subsequently bragged about being able to "do things," referring to his arranging the murder, and tried to bully Pelayo. While in custody after his arrest, he apologized to Pelayo. When Pelayo asked why he was protecting Vassilev, defendant explained he was being paid as if he still worked for Vassilev and Vassilev was supporting defendant's wife and paying for their children's schooling.

At trial, defense counsel challenged Pelayo's credibility in testifying about defendant's involvement in Perez's murder. He attacked defendant's interview statements as coerced through police lies and the physical setting. He also elicited evidence that the total civil settlement award was $350,000 and no deposits to defendant's account from Van Elk exceeded $5,000.

DISCUSSION

1. *Defendant's Statements Not Product of* Miranda *Violation*

Defendant contends the trial court erred in denying his pretrial suppression motion, because his interview statements to police were obtained in violation of *Miranda*. The motion was properly denied. Substantial evidence supports the trial court's finding that no *Miranda* violation transpired, because defendant was not in custody at the time the incriminating statements were elicited and the statements were not the product of an impermissible two-step interview process.

a. *Evidence Presented at Subject* Miranda *Hearing*

Defendant made two *Miranda* motions to suppress his statements to law enforcement. The first was made during the preliminary hearing. The court denied the motion, finding the police had been friendly; defendant was present voluntarily; and a reasonable person would have thought he was free to go. At the hearing on his pretrial second motion, transcripts of the relevant pre-*Miranda* law enforcement proceedings were admitted,[6] and testimony from the first motion hearing was incorporated into the record.

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[6] Attached to the motion and opposition as exhibits A through D, respectively, are copies of the transcripts of the initial police interview; defendant's polygraph exam; the

At the first suppression motion hearing, Los Angeles Police Department Detective David Alvarez testified that in September 2009, he and his partner, Detective David Cortez, drove to the last known address for defendant, which was on the report of a 2006 robbery of defendant at a metal shop. At the time, Alvarez was aware a robbery suspect had been arrested and had learned defendant was never interviewed about Perez's murder. Defendant was not home. Alvarez asked defendant's wife to have defendant call. When defendant telephoned later that day, Alvarez stated he had information on the robbery and related no one had interviewed him on the 2004 murder. Defendant agreed to a meeting for October 20, 2009, at 2:00 p.m.

At about 2:00 p.m., Alvarez and Cortez met defendant in the lobby of Parker Center.[7] They introduced themselves and walked up to an interview room on the third floor.[8] At this initial interview, Alvarez began by telling defendant: "We're here to talk to you a little bit about the robbery, but most importantly, I need to talk to you about this murder that occurred." He then gave defendant "the time, the year, where it happened, [and] the victim's name." Defendant indicated he recalled knowing the victim and denied "he had any idea of who might have wanted him killed." When Alvarez asked what he had to say if he "was to tell [defendant] that . . . witnesses are saying that he might have [been] involved with the murder." Defendant denied this was true and said, "No." Defendant agreed when Alvarez asked if he would take a polygraph exam. The initial interview ended, and the three of them walked to the polygraph exam room on another floor, where Alvarez asked to hold onto defendant's cell phone "so that he can concentrate on his interview" with the examiner. After obtaining the phone, Alvarez and Cortez left.

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postexam interview between examiner Robert Chavez and defendant; and the postexam, pre-*Miranda* defendant interview.

7 This was an "official police building" and had "a lockup and a jail."

8 This room was about "6 x 8."

Alvarez testified that during that interview, he never told defendant he was under arrest, and defendant was not in handcuffs. Although the room door was closed, it was not locked.[9] Defendant did not ask to leave, nor did he ask for a lawyer.[10]

Robert Chavez testified he was a civilian polygraph examiner employed by the Los Angeles Police Department and the one who administered the polygraph exam on defendant. Defendant was not handcuffed, and anyone could have left the room, which was not locked. Beforehand, Chavez conducted a pretest interview, which involved obtaining background information and discussing the exam procedure. He told defendant, "[Y]ou know that you can leave this interview at any time because this is voluntary." "Numerous times during the pretest, [he] asked [defendant] if he needed water. [He also] asked him . . . if he needed to use the bathroom." When asked if he was present voluntarily, defendant responded that "he was." The exam took about two to two and a half hours. Afterward, according to the routine procedure, Chavez spoke with defendant about the exam results. He advised defendant that he had failed the exam because "he wasn't truthful about the questions [Chavez] asked him regarding" the murder. Defendant never attempted to terminate the interview nor did he ask Chavez to do so. He also never asked for an attorney.

Cortez testified that prior to the polygraph exam, he had no information about any involvement of defendant in Perez's murder other than knowing a witness reported that, at one time, defendant approached Perez and his wife and asked that the lawsuit against his employer be dropped and another witness reported defendant may be a weak link for providing new information regarding Perez's murder. After the exam, he and Alvarez interviewed defendant in the same room. This interview lasted one hour. Defendant

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9 The exam room was about "5 x 10."

10 Regarding the initial interview, Cortez testified defendant arrived about 2:05 p.m. and he, Alvarez, and defendant were together for about half an hour before the polygraph exam. During that interview, defendant did not ask to leave or for Cortez to exit the room so that he could leave.

acknowledged he was present voluntarily. Defendant initially expressed his concern someone might harm his family. Cortez assured him his family was safe.

During this interview, defendant acknowledged Cortez never told him he was under arrest. The room door was closed but not locked, and defendant was not in handcuffs. At no point during the interview did defendant ask for an attorney or ask to leave. Defendant acknowledged he knew he was free to leave. Cortez asked if defendant "ever felt like [they] tricked him or trapped him." He responded, "No." When asked if they treated him fairly and if he felt forced, defendant responded he felt they treated him fairly, as had the polygraph examiner. He added he felt "no pressure, nothing that's going to make him talk in a way that's wrong."

About 50 minutes into the interview, defendant spoke about his involvement in Perez's murder. He then asked what was going to happen to him. Cortez advised he would be taken to Harbor Station and arrested. Cortez read defendant his *Miranda* advisements. Defendant acknowledged he understood his rights and agreed to continue speaking, which he did for about 10 to 20 minutes more.

Defendant was arrested at 9:00 p.m. on October 20, 2009.

b. *Hearing on Second Suppression Motion*

Defense counsel argued that, although defendant voluntarily agreed to speak to police, his interview turned into a custodial interrogation after the polygraph exam. Chavez then told defendant he failed the exam and should come clean, at which point "the questioning becomes accusatory" because Chavez went on "for a good 25 to 20 minutes." He urged that defendant should have been given his *Miranda* advisements and therefore his statements to police in the second interview should be excluded. He added, "when the detectives come in, [defendant] is in custody and that is interrogation. There are questions designed to elicit incriminating responses. And at that point there is no advisement" under *Miranda*. He pointed out there were two detectives in a small room. Further, he argued defendant's statements after the *Miranda* advisements were given also must be excluded, because they "overlap with the earlier statements," and thus were tainted.

His cocounsel argued that with respect to the totality of the circumstances pointing to custodial interrogation, "defendant came there voluntarily, thinking that he was going to be questioned about this robbery" but that purpose was simply a ruse. Also, "[a]t some point during his contact with police," defendant's cell phone is taken away, which was his "only source" to "communicat[e] with the outside world." Additionally, a reasonable person under the circumstances would not "really feel free to leave," because defendant was moved from one room to another and "he is sitting in the room, the door is blocked by a table and two detectives in front of him, [and] he has got no access to the rest of the world." He argued that defendant's statements "to the polygrapher and then subsequently . . . to the arresting officers" should be suppressed, because "he should have received his *Miranda* rights well in advance of when the police gave its own."

The prosecutor disagreed defendant was subjected to custodial interrogation prior to his *Miranda* advisements. She argued that taking defendant's cell phone away did not turn "the situation from voluntary to a detention or custodial setting," because at the preliminary hearing, Chavez indicated typically he would ask the subject to leave the phone outside the room or with the detectives or turn off the phone, because "having a cell phone go off and interrupt the interview could . . . affect any type of results or graphing on the polygraph." She denied that Chavez's questioning after the exam was accusatory and characterized it as "more of a philosophical discussion regarding telling the truth" and "giving [defendant] the ramifications of or the results of what happened with the test." Defendant knew he was free to leave and never asked to leave the room. She acknowledged the room was "relatively small," but stated "all of the [about 10 different interview] rooms are the same size." She argued the room size, which was not "contrived for the purpose of making somebody feel in custody," was "the only factor that may tend to lead to a custodial setting." She pointed out defendant was not handcuffed; the door was not locked; and "from the git-go," he was told he was free to leave; and he never asked for his phone back. Also, Chavez "offers him a restroom break"; "offers him water, and asks him how he feels, 'Are you comfortable?'" She further argued, "there is nothing accusatory in his questioning, and . . . really all he says

is, 'I am after the truth.'" He does not "specifically ask him questions about the murder, what happened, were you there, other than as a portion of the test." Defendant gave "[s]imple no answers" in response to the only two exam questions regarding the murder: "'Were you present when the victim was killed?' and 'Were you involved in the death of the victim?'"

Regarding the second police interview, the prosecutor noted defendant agreed the two detectives needed to talk with him about what happened and acknowledged he was present voluntarily. Defendant denied being told he was under arrest, threatened, and pressured to speak in any way. He agreed the detectives had treated him fairly, adding, as did the polygraph examiner. He did not ask for a lawyer. She argued that after the interview became a custodial interrogation, defendant was given his *Miranda* advisements, i.e., "[o]nce he comes clean and says, Yeah, I set it all up." She noted after the advisements, defendant did not say he did not want to talk anymore; rather, he continued to speak with the detectives.

Defense cocounsel responded that the door was closed during the entire interviews. When he argued Chavez's questioning was accusatory, the court noted Chavez never asked defendant directly what happened regarding the incident. He admitted this was the case. In response to the court's inquiry, he acknowledged that the use of a ruse by police did not turn the interview into a custodial interrogation.

At the conclusion of this hearing, the trial court denied the motion, finding that based on the totality of the circumstances, *Miranda* had not been violated, because there was no custodial interrogation and defendant's statements were not coerced.

c. Miranda*'s Custodial Interrogation Threshold Requirement*

"As a prophylactic safeguard to protect a suspect's Fifth Amendment privilege against self-incrimination, the United States Supreme Court, in *Miranda*, required law enforcement agencies to advise a suspect, before any custodial law enforcement questioning, that 'he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if

he so desires.' [Citations.] If the suspect knowingly and intelligently waives these rights, law enforcement may interrogate, but if at any point in the interview he invokes the right to remain silent or the right to counsel, 'the interrogation must cease.' [Citation.]" (*People v. Martinez* (2010) 47 Cal.4th 911, 947.)

"Because these measures protect the individual against the coercive nature of custodial interrogation, they are required '"only where there has been such a restriction on a person's freedom as to render him 'in custody.'"' [Citation.] As [the United States Supreme Court has] repeatedly emphasized, whether a suspect is 'in custody' is an objective inquiry. [¶] 'Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.' [Citations.] [¶] . . . Rather than demarcate a limited set of relevant circumstances, [the Court has] required police officers and courts to 'examine all of the circumstances surrounding the interrogation' [citation], including any circumstance that 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave,' [citation]. On the other hand, the 'subjective views harbored by either the interrogating officers or the person being questioned' are irrelevant. [Citation.] The test, in other words, involves no consideration of the 'actual mindset' of the particular suspect subjected to police questioning." (*J.D.B. v. North Carolina* (2011) 564 U.S. 261, ___ [131 S.Ct. 2394, 2402].)

"Courts have identified a variety of relevant circumstances. Among them are whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was

free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation. [Citations.] [¶] No one factor is dispositive. Rather, we look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest. [Citation.]" (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.) "Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] When reviewing a trial court's determination that a defendant did not undergo custodial interrogation, an appellate court must 'apply a deferential substantial evidence standard' [citation] to the trial court's factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, 'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave' [citation]." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400.)

d. *Denial of Second* Miranda *Motion Not Error*

In view of the totality of the circumstances, we conclude that defendant was not subjected to custodial interrogation before his *Miranda* advisements nor were his statements the product of an impermissible two-step interrogation procedure. The trial court therefore properly denied his second suppression motion.

(1) *No Pre-*Miranda *Custodial Interrogation of Defendant*

The record does not support defendant's claim that prior to his *Miranda* advisements, he was in custody during the initial interview. His presence at the police station concerned both an armed robbery in which defendant was the victim and the Perez

murder. When asked about Perez's murder, he denied any involvement and volunteered to undergo a polygraph exam. Although Chavez advised defendant he had failed the exam, he did not accuse defendant of murder, nor did he ask defendant any questions regarding his involvement.

In the second interview, Cortez asked defendant questions regarding the circumstances surrounding Perez's murder. Defendant admitted to Cortez he was not threatened and was treated fairly. Defendant admitting giving Pelayo information about Perez's work address and that after Pelayo indicated Perez had been killed, defendant relayed this information to Vassilev. Defendant stated Vassilev wanted to kill Perez in order to avoid paying him off. He admitted Vassilev told him to find someone to kill Perez but stated he "[n]ever receive[d] a single penny." Rather, defendant paid Pelayo and the shooter with the cash Vassilev had given defendant. Once defendant admitted that, at his request, Vassilev gave defendant a no interest loan for defendant's house, Cortez advised defendant he would read him his rights.

With this latter admission, the interview focused on defendant as a participant in Perez's murder and *Miranda* advisements were triggered. After these advisements and in response to Cortez's inquiry, defendant admitted he was there voluntarily; he had been treated fairly; and he felt free to leave. Defendant did not indicate he did not want to speak to the police and wanted an attorney, nor did he indicate by words or actions that he considered himself not free to leave.

(2) *No Impermissible Two-Step Interrogation Procedure Involved*

Also unsupported by the record is defendant's claim that his incriminating statements were the tainted product of a deliberate two-step interrogation process. The first interview involved Alvarez providing defendant with descriptive information regarding the victim's name and when and where the murder occurred. Defendant denied knowing who might want to kill the victim, whom he acknowledged knowing. When Alvarez indicated witnesses were saying defendant might have been involved in the murder, defendant denied this was true. The interview ended when defendant agreed to take the polygraph exam. In contrast, the second interview was comprehensive and

involved specific questioning of defendant regarding the circumstances leading to and after Perez's death. Initially, defendant made statements regarding why and how Perez was murdered. Once the interview focused on defendant as a suspect, however, he was given his *Miranda* advisements. Defendant does not point to any evidence that Cortez intentionally withheld *Miranda* advisements to obtain inculpatory statements; that Cortez made threats or promises to elicit such statements; or that the police department's policy was to interview first and provide *Miranda* advisements afterward. (Cf. *People v. Camino* (2010) 188 Cal.App.4th 1359, 1374-1376.)

2. ***Mistrial Motion Properly Denied***

Defendant contends the trial court erred in denying his motion for a mistrial based on the prejudicial impact of the jury's learning Perez's wife had lost her baby due to the stress of what happened. The motion was properly denied, because the jury is presumed to have understood and adhered to the court's admonition to disregard the comments.

In a pretrial discussion, the trial court ruled Pelayo's police interview was admissible except the comments about Perez's wife losing her baby due to the stress of what had happened. Such comments were inadmissible as prejudicial.

During trial, the excluded comments inadvertently were presented to the jury. Defense cocounsel moved for a mistrial, identifying page 38 of the interview transcript as reflecting the miscarriage incident. The prosecutor stated she did not know the incident was in the transcript. The trial court noted the tape began with page 38, at line 2, of the transcript that read "just so you know" and after that, the remainder of the incident comments were deleted from the tape. The transcript, however, resumed: Perez's "wife at the time was pregnant and after this happened, just the stress from it all, she lost her baby. That's the truth." The court pointed out that previously, it had indicated these comments were unduly prejudicial and should be deleted.

Defense cocounsel argued that the jurors would have continued reading the transcript and cocounsel had heard the comments on the tape. The prosecutor stated the part with the comments was deleted as the court instructed but admitted she had not reviewed the tape before playing it. She explained that upon reading ahead and noting

what was coming up, "I deleted [the part] after [the detective] said [Perez's] wife at the time was pregnant."

The trial court denied the mistrial motion. After indicating to counsel its belief that the part about the miscarriage comments was deleted from the tape, the court instructed the jury that the tape, not the transcript, was evidence.

Shortly thereafter, defendant requested the court to instruct the jury that the prosecution failed to follow the court's order. The court denied the request, finding there was no evidence the prosecutor willfully disobeyed its order. After denying the defense's renewed mistrial motion, the court suggested each juror be polled to determine if the juror was aware of the comments about Perez's wife losing her baby and if the juror could still be impartial. Defense cocounsel agreed.

Subsequently, the trial court announced it would ask each juror if the comments were heard or read; whether the juror was affected; and if the juror could follow the court's order to disregard the evidence. Juror Nos. 2, 4, 5, and 11 did not recall hearing or reading anything about Perez's wife. The remaining jurors promised to follow the court's instruction to disregard the comments.

Defense cocounsel again moved for a mistrial. The trial court denied the motion. The court explained it had taken "some extensive time because [the court] wanted to make clear that we have exactly what, if anything, each of jurors heard. So we have that on the record. So we know which ones actually heard or read about it, about . . . Perez's wife. All of them indicated they can basically disregard it and form their conclusion based on evidence and the law. Many of them indicated that it would have minimum impact on them. So based on their promise, [the court] will take their words at it, therefore, mistrial based on that objection, is denied."

A motion for mistrial "should be granted only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Ayala* (2000) 23 Cal.4th 225, 283; accord, *People v. Avila* (2006) 38 Cal.4th 491, 573 (*Avila*).) In short, """[a] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.]""" (*People v. Harris* (1994) 22 Cal.App.4th 1575,

1581.) "'A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith. [Citations.] It is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions." [Citation.]'" (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.) "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) "Although most cases involve prosecutorial or juror misconduct as the basis for [a mistrial] motion, a witness's volunteered statement can also provide the basis for a finding of incurable prejudice. [Citations.]" (*Harris*, at p. 1581.) A trial court's ruling denying a mistrial is reviewed for an abuse of discretion. (*Ayala*, at p. 283.)

The trial court admonished the jury to disregard the comments. "We presume the jury followed the court's instructions." (*Avila, supra,* 38 Cal.4th at p. 574.) Defendant contends that "although the jurors did not tell the trial court they would not follow the instructions, jurors sometimes do not follow admonitions by the trial court. It is sheer speculation on the part of defendant that the jurors did not adhere to the court's instruction. He offers no evidence to support his claim. (*People v. Dennis* (1998) 17 Cal.4th 468, 508 [speculation "'not evidence, less still substantial evidence'"].) The trial court therefore did not abuse its discretion in denying defendant's mistrial motion.

3. ***Admission of Vassilev's Self-Incrimination Invocation Not Abuse***

Defendant contends the trial court committed prejudicial error in admitting hearsay evidence that Vassilev invoked his privilege against self-incrimination (U.S. Const., 5th Amend.) in Perez's civil action for damages. No error transpired.

The prosecutor asked Richard Donahoo, an attorney for Perez and the other three plaintiffs in the Van Elk civil lawsuit, if Vassilev had been deposed in the civil action. Donahoo testified Vassilev appeared at the deposition but refused to testify under the

Fifth Amendment. Defense counsel objected and moved to strike the testimony. The trial court overruled the objection.[11]

Initially, we note that allowing a witness's invocation of his or her Fifth Amendment privilege against self-incrimination may support a claim of evidentiary error but not necessarily of constitutional infirmity. (See *Namet v. United States* (1963) 373 U.S. 179, 185, 187; see also *Carmell v. Texas* (2000) 529 U.S. 513, 533, fn. 23 ["by simply permitting evidence to be admitted at trial, [evidentiary rules] do not at all subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption"].)

"[A]n appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion. Specifically, it scrutinizes a decision on a motion to bar the introduction of evidence as inadmissible hearsay for such abuse: it does so because it so examines the underlying determination whether the evidence was indeed hearsay. [Citation.] It follows that it gives the same level of scrutiny for the same reason to the passing on a hearsay objection." (*People v. Alvarez* (1996) 14 Cal.4th 155, 203.) "The trial court has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 132 .) "Relevant evidence may be excluded under Evidence Code section 352 if it creates a substantial danger of undue consumption of time or of prejudicing, confusing, or misleading the jury. [Citation.]" (*Avila*, *supra*, 38 Cal.4th at p. 578.) In short, "[w]e review for abuse of discretion a trial court's rulings on relevance and the exclusion of evidence under Evidence Code section 352. [Citation.]" (*Ibid*.)

No abuse transpired. We point out Vassilev did not invoke his privilege against self-incrimination in this criminal case nor did he do so in front of a jury in the separate, civil case. (Cf. *People v. Mincey* (1992) 2 Cal.4th 408, 442 ["speculative, factually unfounded inference" as to substance of witness's anticipated testimony where invocation

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11 The court also denied a motion for mistrial based on the evidence Vassilev had invoked his Fifth Amendment privilege in the civil lawsuit.

before the jury].) Rather, Vassilev's invocation of such privilege took place at the inception of his deposition in that civil case, and thus was isolated from the factual context of any questioning. (Cf. *People v. Williams* (2008) 43 Cal.4th 584, 614 ["'privilege is properly invoked whenever the witness's answers "would furnish a link in the chain of evidence needed to prosecute" the witness for a criminal offense'"].) No evidence was presented in this case explaining why Vassilev invoked his privilege to remain silent prior to any questioning in the civil action. Accordingly, no reasonable inference could be drawn that Vassilev's premature invocation of his privilege to remain silent prior to any questioning in his civil deposition had any bearing on defendant's criminal culpability.

In contrast, that Vassilev invoked his privilege against self-incrimination was relevant to motive, namely, to show Vassilev had a motive to initiate the murder-for-hire scheme culminating in Perez's murder.[12] (See *People v. Daniels* (1991) 52 Cal.3d 815, 858 [evidence "highly probative on the issues of motive and intent—and, indeed, . . . crucial to the prosecution's theory of the case" and "admitted only for the limited purpose of proving motive or intent for the crimes charged"].) Absent more, however, admission of such evidence did not, by itself, serve to inculpate defendant in Perez's murder.[13] Additionally, such evidence was not hearsay, because it was admitted on the issue of motive, not for the truth of the matter asserted. (Cf. Evid. Code, § 1200 [hearsay defined as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated"].)

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12 During a pretrial discussion, after noting the defense sought to exclude evidence of Perez's civil lawsuit against Van Elk, which Vassilev owned, the trial court asked, "Doesn't that go to motive, the whole motive? In fact, defendant talks about that [Vassilev] didn't want to pay out." Defense counsel acknowledged, "Right. I understand that."

13 The court instructed the jury on how to consider evidence of motive and absence of such evidence and admonished the jury not to speculate why a third party was prosecuted or would be prosecuted in this case; rather, the jury's sole duty was to determine if the People had proved defendant guilty.

4. ***Evidence of Vassilev Arrest and Release After Invocation Irrelevant***

Defendant contends the trial court committed prejudicial error and violated his right to present a defense (U.S. Const., 14th Amend.) by excluding evidence that Vassilev was arrested regarding Perez's death and then released after invoking his Fifth Amendment privilege in the civil case. No error transpired.[14]

During trial, defense counsel moved to introduce evidence that Vassilev was arrested and released after his invocation of his Fifth Amendment privilege in the civil case. He argued such invocation left the jury with the improper impression that Vassilev was guilty of Perez's murder. The trial court excluded such evidence, finding, "This is precisely why we have that jury instruction that says it doesn't matter what happened to other codefendants," and this instruction was "precisely designed to make sure that individuals are not convicted by groupings or not found guilty by groupings."

"Any relevant evidence that raises a reasonable doubt as to a defendant's guilt, 'including evidence tending to show that a party other than the defendant committed the offense charged,' is admissible. [Citations.] But 'evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.' [Citation.]" (*Avila*, *supra*, 38 Cal.4th 491, 577-578.)

"'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.] . . . [T]his principle applies perforce to evidence of third-party culpability . . . .' [Citation.] [¶] It follows, for the most part, that the mere erroneous exercise of discretion under such

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14 Later, defense counsel moved for a mistrial, because the defense was not allowed to elicit testimony that Vassilev was arrested but not charged for Perez's murder. The court denied the motion.

'normal' rules does not implicate the federal Constitution." (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) "Nonetheless, the trial court's discretion is not without limits, particularly if it operates to hamper defense counsel's ability to present evidence. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 945, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "[W]hen a trial court misapplies Evidence Code section 352 to exclude defense evidence, including third-party-culpability evidence, the applicable standard of prejudice is that for state law error, as set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (error harmless if it does not appear reasonably probable verdict was affected). [Citations.]" (*Cudjo*, at p. 611.)

The trial court did not abuse its discretion in its ruling on the relevance of the offered evidence and in excluding the evidence under Evidence Code section 352. The defense challenged Pelayo's credibility, specifically his testimony that defendant arranged for Perez's murder at Vassilev's directive. Defendant contends evidence that Vassilev "was arrested but released would have supported the inference that Pelayo was wrong; [Vassilev] had nothing to do with the [murder] and thus [defendant] likely had no role either." Defendant fails to point to any evidence that the prosecution's belief that Vassilev was not guilty motivated Vassilev's release.[15] Such belief would be unlikely in the face of Vassilev's invocation of his privilege against self-incrimination in the civil case. Further, at most, that Vassilev's release signified Vassilev's innocence is simply a speculative inference, which is not evidence and cannot raise a reasonable doubt about defendant's guilt of Perez's murder. (*Avila*, *supra*, 38 Cal.4th at p. 578; see also *People v. Mendoza* (2000) 24 Cal.4th 130, 174 [speculation not evidence]; *People v. Kraft* (2000) 23 Cal.4th 978, 1035 ["evidence leading only to speculative inferences is irrelevant"].) In contrast, admission of such evidence would have been prejudicial, i.e.,

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15 During a pretrial discussion, the prosecutor indicated to the court and defense counsel that the "goal" was "to accumulate whatever evidence we can in hopes of filing charges against [Vassilev]."

undue consumption of time on a collateral issue and confusing the jury regarding the issues in this case.

5. ***Pelayo's Police Interview Transcript and Proffer Statements Admissible***

Defendant contends the trial court prejudicially erred in admitting the entirety of Pelayo's police interview and his statements at the proffer session.[16] There was no error.

Defense cocounsel objected to the jury's hearing the tape of Pelayo's police interview on the day of his arrest on the grounds of hearsay and unreliability. He argued Pelayo's statements did not qualify as prior consistent statements; the statements were inadmissible under Evidence Code section 352; and admission of the statements would violate defendant's right to due process (U.S. Const., 14th Amend.). The prosecutor argued during cross-examination that the defense implied Pelayo was coerced to give a statement and that his statements were motivated by his desire to avoid the death penalty, although his statements were made before Peyalo's knowledge of his punishment. The statements therefore were admissible as prior consistent statements. The court ruled, "I don't think it's hearsay. It is a prior consistent statement. . . . Under Evidence Code section 352, I will allow it." Peyalo's police interview tape was then played for the jury.

Cortez testified that during the proffer session, Pelayo stated defendant told Pelayo that Vassilev wanted two persons killed; he asked Pelayo to find someone to do the job; and he gave him Perez's work address. Pelayo also spoke about the courthouse visit prior to the murder and what happened on the day of the murder.

Defense counsel moved for a mistrial. He argued certain interview statements were hearsay and did not qualify as prior consistent statements, i.e., the statements in which Cortez vouched for Pelayo and told him he was being a man and taking responsibility. The trial court denied the motion, explaining the jury should know what Pelayo said both when not promised anything and after the promise. Defense counsel then objected to the jury's being presented with Pelayo's proffer session statements as not

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16 The "proffer session" was the meeting at which Pelayo volunteered to speak with the prosecutor about Perez's murder.

prior consistent statements. The trial court ruled the statements were admissible.

"[A]dmission of a prior consistent statement" is allowed "when there is a charge that the testimony given is fabricated or biased, not just when a particular statement at trial is challenged." (*People v. Kennedy* (2005) 36 Cal.4th 595, 614, overruled on a different point in *People v. Williams* (2010) 49 Cal.4th 405, 458-459; Evid. Code, § 791, subd. (b).) Further, where one party presents part of a conversation, "the whole on the same subject may be inquired into by an adverse party." (Evid. Code, § 356.)

The trial court did not abuse its discretion in admitting Pelayo's entire police interview and his proffer agreement statements, because in cross-examining Pelayo, the defense accused Pelayo of fabricating his story in order to get a better deal and the evidence established Pelayo had given his statements prior to his proffer session. (*People v. Jones* (2003) 30 Cal.4th 1084, 1106-1107 [consistent statement properly admitted where "made before the plea bargain was struck" and thus, before existence of reason for fabrication or bias]; *People v. Gurule* (2002) 28 Cal.4th 557, 621 [prior consistent statement admissible "to rebut suggestion he recently had fabricated his story"].)

Defendant contends Pelayo's motive to fabricate arose when the plea negotiations began. The record, however, discloses Pelayo gave his police statement on October 21 and 22, 2009, well before his proffer to the district attorney's office on April 6, 2011. Also, contrary to defendant's claim, Pelayo's statement was not the falsified product of any promise of leniency. The proffer agreement was conditioned on Pelayo's truthful testimony and cooperation. At trial, Pelayo testified he hoped to get a better deal than the death penalty in signing the proffer agreement but he was not given "any type of information or promises of a reduced sentence" before he spoke with police on April 6, 2011.

6. ***Defense Cross-Examination of Pelayo Not Improperly Curtailed***

Defendant contends his rights to a fair trial, to present a defense, and to confront witnesses were violated when the trial court prevented him from cross-examining Pelayo about his understanding of the proffer agreement. Exclusion of such evidence was not an abuse of discretion.

During cross-examination, defense counsel asked Pelayo about the proffer agreement and if he understood the general concept that someone could be prosecuted for lying. Pelayo responded, "Yes." Counsel then asked, "Who decides that?" The trial court sustained the prosecutor's relevance objection. When counsel repeated the question, the court sustained the same objection. The court also sustained the prosecutor's objection to defense counsel's question if Pelayo's lawyer was the one who decided whether he would be prosecuted for perjury.

When defense counsel asked about paragraph 4 of the agreement, a sidebar was held. The trial court inquired as to what he was trying to ask. He explained he sought Pelayo's understanding of the agreement. The court paraphrased paragraph 4 as "saying that if they don't reach a plea agreement, he has use immunity, however, if he decides to testify in trial in his case and he testifies inconsistently, then what he had proffered, that particular statement can be used against him." When the court stated, "That's what it means," defense counsel responded, "Right. Okay. All right." He submitted at that point.

"To be relevant, evidence must have some 'tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' (Evid. Code, § 210.) This definition includes evidence 'relevant to the credibility of a witness.' [Citations.]" (*People v. Contreras* (2013) 58 Cal.4th 123, 152.) "Conversely, a matter is 'collateral' if it has no logical bearing on any material, disputed issue. [Citation.] A fact may bear on the credibility of a witness and still be collateral to the case. [Citations.]" (*Ibid*.) "[T]he trial court has wide latitude . . . to exclude evidence offered for impeachment that is collateral and has no relevance to the action. [Citations.] This exercise of discretion necessarily encompasses a determination that the probative value of such evidence is 'substantially outweighed' by its prejudicial, 'confusing,' or time-consuming nature. [Citations.]" (*Ibid*.) Moreover, "as long as the excluded evidence would not have produced a """"'significantly different impression'""" of the witness's credibility, the confrontation clause and related constitutional guarantees do not limit the trial court's discretion in this regard. [Citations.]" (*Ibid*.)

The trial court did not abuse its discretion in precluding the defense from cross-examining Pelayo about his understanding of the proffer agreement. Such line of inquiry would be prejudicial as time consuming and confusing to the jury. Pelayo already testified he understood he could be prosecuted for perjury if he lied during his testimony. The trial court did not improperly curtail the defense's cross-examination of Pelayo.

7. ***Cumulative Effect of Assigned Errors Nil***

Defendant contends the cumulative effect of the assigned errors was prejudicial. The cumulative effect of his claimed errors, which are meritless, is nil. [17] (*People v. Bennett* (2009) 45 Cal.4th 577, 618; *People v. Samayoa* (1997) 15 Cal.4th 795, 849.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.

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[17] In the absence of error, defendant's related claims that an assigned error violated his rights to due process, a fair trial, and to confront witnesses also are unsuccessful.