Filed 8/9/18 P. v. Duenas CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE DUENAS et al., Defendants and Appellants.	B276789 (Los Angeles County Super. Ct. No. NA093336)

APPEAL from a Judgment of the Superior Court of Los Angeles County. James D. Otto, Judge. Affirmed as modified; remanded for further proceedings.

Thomas T. Ono, under appointment by the Court of Appeal for Defendant and Appellant Jose Duenas.

John Lanahan, under appointment by the Court of Appeal for Defendant and Appellant Christopher Ramirez.

Charlotte E. Costan, under appointment by the Court of Appeal for Defendant and Appellant Rafael Portales.

Eric R. Larson, under appointment by the Court of Appeal for Defendant and Appellant Rafael Bravo.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Sean McGahey Webb and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Jose Duenas, Christopher Ramirez, Rafael Bravo, and Rafael Portales appeal their convictions for second degree murder (count 1, Pen. Code,[1] § 187, subd. (a)) and kidnapping (count 2, § 207, subd. (a)), with a true finding that a firearm was used in the commission of the offenses (§ 12022, subd. (a)(1)). On appeal, they argue (1) the prosecution's peremptory juror challenges violated *Batson/Wheeler*; (2) insufficient evidence supports an aiding and abetting theory as to Duenas and Portales; (3) the trial court erred in failing to instruct on the lesser included offense of voluntary manslaughter on a theory of sudden quarrel regarding Bravo and mistake of fact regarding Portales; (4) the prosecutor committed misconduct in rebuttal arguments; (5) the matter should be remanded for the presentation of mitigating evidence under *People v. Franklin* (2016) 63 Cal.4th 261; (6) there was cumulative error; and (7) the

---

1 All statutory references herein are to the Penal Code unless otherwise noted.

abstract of judgment requires correction. We affirm the judgment of conviction as modified to reflect defendants' convictions for second degree murder, and remand the matter to permit the defendants to make a record under *People v. Franklin, supra,* 63 Cal.4th 261.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A third amended information filed July 12, 2016, charged all four defendants with the September 7, 2012 murder and kidnapping of Hector Campos (count 1, § 187, subd. (a), count 2, § 207, subd. (a)). The information further alleged that the murder was committed willfully, deliberately and with premeditation (§ 664, subd. (a)) and that in the commission of the offense, a principal was armed with a firearm (§ 12022, subd. (a)(1)).

Based on the evidence, the prosecution theorized that after Campos threatened the safety of Bravo's family, Bravo, Ramirez, and Duenas took Campos to a shed behind Bravo's family's home in Mira Loma, attacked him with a sledgehammer and shot him. Then Ramirez and Duenas took Campos to Long Beach while Bravo disposed of Campos' car. In Long Beach, in an alley behind an apartment building, Ramirez and Duenas, joined by Portales (who lived in the apartment building), continued the attack upon Campos by strangling him with a shirt, hitting him in the back of the head, telling him he was going to die, and throwing him in the trunk of a car. Ramirez and Portales then drove the car to an alley a few blocks away, where they shot Campos again, threw the bloody shirt across his face, and abandoned him. Campos died two days later of his injuries.

1. *The Kidnap and Killing of Campos*

On September 7, 2012, according to his girlfriend Maria Barajas, the victim Hector Campos left in his white truck for Bravo's house. Campos told her he was going to collect some money Bravo owed him.

That afternoon and evening, Leobardo Arevalo, defendant Ramirez's father, was watching soccer at a relative's home in Long Beach. Defendant Bravo arrived with his wife and baby daughter in his father's Armada. Bravo had Ramirez, defendant Duenas, and Campos (referred to as "Tito") with him. Bravo and Ramirez are cousins.

Campos remained in the car while Ramirez, Bravo, and Duenas entered the residence. Arevalo said hello to Campos, who was wearing a green shirt. Campos left with Ramirez, Bravo and Duenas around 9:30 p.m. Arevalo believed Ramirez and the other defendants had been drinking. He could not tell if Campos had been drinking, but he did not believe so. Arevalo later told police, however, that Campos looked drunk.

Bravo lived with his parents in Mira Loma on Troth Street. Bridgett Owens lived nearby. The area was rural, the lots were large, and some properties had horses. At about 9:45 p.m. on September 7, 2012, one of Owens' dogs started barking, and she went to the front yard to check. Several houses down the block, she saw two men of medium build hitting a third man with their fists. The victim was lying on the ground. Owens went into her house to get her phone, and when she came out, the beating had stopped. After about 20 minutes, she called police.

The two men hitting the victim put the victim in the back seat of a car and drove past Owens. After that a white truck sped past. Owens could not see the passengers' facial characteristics clearly, but could see that they were Hispanics in their early 20s. She went down the street and could see a pool of blood where the men had been fighting.

Later that evening, around midnight, Maria Marin, who lived on the second floor of a four-unit apartment complex on 10th Street in Long Beach, heard the gate in the alleyway by the parking lot open. Marin was on the stairway smoking a cigarette with her brother-in-law. Marin saw a dark blue car pull into a parking spot. She had seen the driver, Ramirez, before and knew him as "Chris." She had seen the other man who got out of the car, Duenas, around her apartment complex.

A third man got out of the car. He was dazed and dizzy and stumbled towards the front of the car. Marin retreated to her apartment and watched the men from her bathroom window. Another man, Portales, whom Marin knew lived in another apartment in Marin's building, joined Ramirez. She had never seen the victim before.

Marin saw Duenas hit the victim in the back of the head. He said to the victim, "te vas a morir [you are going to die]." The victim was standing, and the other men started hitting him in the head with their fists. Once she got to the bathroom, Marin saw the victim on the

ground. Duenas, Portales and Ramirez kicked and hit the victim in the back of the head.[2]

The men took Marin's brother-in-law's shirt from the stairway rail. Portales was speaking to the victim. Using the shirt, Duenas choked the victim, who was sitting down, by putting his knee in the victim's back and pulling on the shirt. After the victim was choked, it appeared to Marin that the victim went limp and looked dead.

Marin heard someone tell Ramirez to get the car and back into the space. The victim was on the ground and was not moving or making any sounds. The men grabbed the victim and threw him into the trunk of the car, but his arm was hanging out of the trunk, so they threw it back in. After throwing the shirt in the trunk and closing it, Ramirez drove the car away with Portales in the passenger seat. Duenas left through the alley.

Marin called 911 and gave a description of the car's license plate. After the police arrived, Marin became aware that Duenas was at the door of a different apartment in her complex. She panicked and went into her apartment. The police left and came back. She wrote a note to tell them Duenas was there and threw it out the bathroom window.

The next day Marin overheard someone in the complex talking about a sledgehammer, and saw it near the apartment complex. It looked like it had blood on it. She believed it was connected to the

---

[2] Portales contends he was "shoeless" at the time of the attack. Marin did not testify to this fact. However, when Portales was arrested shortly after Campos was left for dead in the alley, Portales was not wearing shoes.

incident she had witnessed the night before. Marin called police, who found the sledgehammer. Leobardo Arevalo, Ramirez's father, identified the sledgehammer as one he had seen at Bravo's house.

Around midnight on the night Campos was attacked, Sam Pich, who lived near St. Louis and 10th Street in Long Beach, heard a single gunshot and a car speeding away. In addition, two 911 calls were made. The first call, at 11:59 p.m., reported a gunshot and a car driving away. The caller saw a man on the ground in the alley near 1036 St. Louis Street. The second call, at 12:16 a.m., reported a gunshot from the alley. The caller saw a dark-colored small SUV speeding down the alley.

Officer David Chamberlain of the Long Beach Police Department was responding to a call when he saw a dark colored four-door sedan make a turn from westbound 10th street and head south on Gaviota. The vehicle had a license plate number similar to one just broadcast, and Officer Chamberlain requested backup. He followed the car for several blocks without activating his lights or siren. The car turned into an alley and accelerated. As the car left the alley, Officer Chamberlain activated his overhead lights and sounded his siren. When his backup arrived, he ordered the driver, Ramirez, out of the vehicle. Portales was the passenger. Ramirez had a blood stain on his shirt, and Portales, who was not wearing shoes, had blood stains on his pants, shirt, and socks. The officers arrested both men. Officer Chamberlain noticed blood splatter in the car and trunk, and pooling of blood on the rear floorboard.

Officer Daisy Paul of the Long Beach Police Department responded to the alley off St. Louis Street with Officer George Evans. She found a person, Campos, lying on his back, breathing loudly through a bloody shirt on his face. Officer Paul removed the shirt and saw that he had been shot just above the right eye. She summoned fire personnel to treat Campos. Officer Evans found a bullet fragment near Campos, and saw a bullet hole in the right side of his shirt. Campos had $1490 cash on his person.

2. *Forensic Evidence*

Campos survived for more than 24 hours in the hospital. An autopsy disclosed that he sustained two gunshot wounds to the head. One of the bullets entered through his eyelid just above the eye and was fatal. The other bullet entered the back of his neck and damaged two vertebrae in his neck. One bullet was recovered from Campos' body.

Campos also had blunt force traumatic injuries over much of his body. The right side of his skull had been pushed into the brain tissue. The injury was an oval shape, about three inches by three and a half inches. Campos did not have any drugs or alcohol in his system.

Police recovered a bullet fragment from the alley near Campos' body. They also recovered a .38 caliber revolver in the alley. Forensic analysis determined that the bullet recovered from the alley was fired from the recovered weapon. Gunshot residue tests of the defendants were negative.

DNA testing established that the bloodstains on the ground in Long Beach and Mira Loma were from Campos. DNA on the recovered

weapon matched Campos' DNA, and blood found in the floor of a shed at the Bravo house on Troth Street did as well. Also, DNA on the head of the sledgehammer discovered by Marin, which Leobardo Arevalo had seen at Bravo's house in the past, matched Campos' DNA, and DNA on the handle of the sledgehammer matched Ramirez. Blood stains on Portales and Ramirez at the time of their arrest matched Campos' DNA.

3. *Bravo's Statements and Clean Up of the Shed*

After the attack on Campos, Bravo went to his aunt Melissa Martinez's house in Long Beach. He arrived around 3 a.m. and told her he needed a place to stay. He told Jose Ramirez, his uncle, he had shot someone. Later that morning, Bravo said he "fucked someone up" and "fucked Tito up" and shot him in the back of the neck. Bravo explained that the person had threatened his family and had threatened to "send his people" after Bravo.

Bravo asked to borrow a car, and stated he needed to go to Mira Loma to clean. Arevalo went to the Bravo residence on Troth Street and saw Bravo's stepfather cleaning the shed. Ramirez's mother Herlyn Ramirez saw that Bravo's stepfather had on latex gloves. She saw blood in the shed area, and there was a stain in the shed.

Sheriff's deputies apprehended Bravo on September 8, 2012 at the Troth Street residence after responding to an anonymous tip that someone was trying to clean something up. As Bravo backed the car out of the driveway, deputies stopped him. A search of the car yielded

cleaning supplies in the trunk. Bravo had purple paint on his hands, and the shed had purple paint on the floor.

Bravo had moved Campos' truck, and it was found at the Pomona impound yard.

The jury convicted all four defendants on count 1 of second degree murder (§ 187, subd. (a)), and on count 2 of kidnapping (§ 207, subd. (a)), and found true the firearm use enhancement on count 1 as to all four defendants (§ 12022, subd. (a)(1)). The trial court sentenced each defendant to a term of 15 years-to-life on count 1, plus one year for the firearm enhancement. The trial court imposed and stayed 8-year terms on count 2.

DISCUSSION

I. *Peremptory Challenges to Jurors*

Ramirez and Duenas, joined by Bravo and Portales, argue the prosecution improperly exercised peremptory challenges against African American and Hispanic jurors. Duenas separately requests that we conduct a comparative juror analysis.

A. *Factual Background*

1. *Juror Voir Dire*

(a) *Juror No. 17*

Juror No. 17 was an African American woman who resided in Long Beach and worked as a certified technician at Optima Rx. She was married with no children, and her husband worked as a real estate agent. She had prior juror experience in a criminal case where the jury

reached a verdict. Juror No. 17's nephew had been arrested and convicted of burglary. She thought his sentence was "a bit extreme," and did not feel he was treated fairly by law enforcement or the criminal justice system, but she stated she would not hold that against law enforcement officers testifying at trial. She understood, however, that as a juror she was not to consider punishment in any way. She asserted that she could be fair and impartial to everyone, and would vote guilty if the prosecution proved their case beyond a reasonable doubt.

In response to a question whether she could base a verdict on circumstantial evidence, Juror No. 17 stated that she would be open minded, but that "all the evidence in my nephew's case was circumstantial and I didn't agree with the end result." However, she could convict if the circumstantial evidence proved the case beyond a reasonable doubt.

(b) *Juror No. 29*

Juror No. 29, also an African American woman, resided in Signal Hill and was employed at Harbor U.C.L.A. in the Department of Mental Health as a record keeper. Her spouse was a supervisor at Harbor U.C.L.A. She had three adult children, and had never served on a jury before. About ten years ago, her nephew had been arrested and charged with a crime. She did not feel law enforcement was fair because he was not involved, yet the other offenders were let go. However, she would not hold this against the prosecution. She also had a close friend who was the victim of a home invasion who was raped and murdered. They

did not catch the perpetrator, but Juror No. 29 did not hold this against law enforcement. She felt she could be fair and impartial and vote guilty if the prosecution proved its case beyond a reasonable doubt.

When asked whether she would have difficulty sitting in judgment of others, Juror No. 29 said that she was not "able to put judgment on anyone because of my religion. Because I think that should be up to God to judge someone, not me. And it's very, you know, it's just emotional for me and I don't think I can handle that." But Juror No. 29 believed she could judge whether someone's actions broke the law, and understood that she was not being asked to "say whether [the defendants were] good or bad people."

(c) *Juror No. 49*

Juror No. 49, like Jurors 17 and 29, was an African American woman. She resided in Long Beach, was retired, and previously worked at Kaiser Foundation Hospital System as a department administrator for a medical education company. She was divorced and had two adult children. She had prior criminal jury experience on a hit and run case where they reached a verdict. About 45 years ago, she was assaulted in a home invasion. In a separate incident, another neighbor caught the perpetrator but she did not know whether the perpetrator was arrested and charged. She was sure she could be impartial to all parties in the case, although she had a nephew who was "traveling the criminal justice system" for felony discharge of a firearm. He had not been charged yet, and she believed he was being treated fairly by the criminal justice system.

Juror No. 49 claimed a hardship issue with respect to vertigo. She did not know when she was going to have an episode. Although she took medication for her condition, if she had a bad episode, she had to go to the doctor. She would bring her condition to the court's attention if she was suffering an episode. She believed she could be an impartial juror.

(d) *Juror No. 35*

Juror No. 35 was a Hispanic woman who lived in Long Beach. She was single and worked as a medical assistant. She was unemployed, and had not served on a jury before. Her mother was robbed three days earlier. About a year ago, she was the victim of a robbery. No one had been caught. She did not believe, however, it would affect her ability to be impartial. She viewed the defendants as innocent.

(e) *Juror No. 55*

Juror No. 55 was a Hispanic widow who was retired from employment at Los Angeles Unified School District. She had never served on a jury before. She had two adult sons. Her older son was once assaulted at a club by three or four men and was hospitalized. The incident was not reported to law enforcement. Rather, her son's friends found the attackers the next day and "took care of it." On the one hand, Juror No. 55 said that she might hold the incident against law enforcement because it was traumatizing to her, and she did not feel she could listen to the evidence in the instant case. However, she later

contradicted herself and said she believed she could listen to the evidence and be fair to all sides. She had two nephews who are deputy sheriffs in Riverside County.

(f) *Juror No. 62*

Juror No. 62 was Hispanic, lived in Long Beach, and worked as a recruiter for an advertising technology company. She was engaged to an attorney and had never served on a jury before. Her fiancé was a civil prosecutor for the State Department of Labor. Her sister had been arrested several times for drug possession, intent to sell, parole violation, gang affiliations. She believed her sister had been treated fairly, and she did not hold anything against the criminal justice system. She did not believe her sister's arrest would affect her ability to be fair and impartial. A few of her fiancé's friends were public defenders.

2. *Prosecution Peremptory Challenges and Batson/Wheeler Motions*

(a) *Peremptory Challenge of Juror Nos. 17 and 29*

Duenas made a *Batson/Wheeler* motion, joined by Ramirez, pointing out that with the last five peremptory challenges of the prosecution, two were African American (Jurors No. 17 and 29). Defense counsel observed that there was only one African-American juror left. The trial court found a prima facie case. The prosecution stated that with respect to Juror No. 17, she was concerned because the juror had a nephew who had been convicted based on circumstantial

evidence and that she was troubled by that. With respect to Juror No. 29, she expressed that she had difficulty sitting in judgment of others, and throughout the questioning, she appeared "teary" to the prosecution and acted as if she were having difficulty listening to the voir dire.

The court denied the motion, finding the prosecution had justified the excusal of the jurors because the challenges were "not exercised on the grounds of bias," but rather "were exercised relevant to the facts of this case, for all the reasons stated by the People." Further, the court noted "I also observed particularly juror number 29 as having some issues. I thought at one time she was going to ask to be off, but she had difficulty in a number of areas and also that was true with respect to Juror No. 17."

(b) *Peremptory Challenge of Juror No. 49*

Defendant Portales made a *Batson/Wheeler* motion, joined by Duenas, after the prosecution excused Juror No. 49, an African American female. The trial court found a prima facie case, and the prosecutor explained he was concerned that due to the prior vertigo, the juror might have to leave during trial. Of more importance to the prosecution was the fact her nephew was in the system on a felony case. Finally, Juror No. 49 and Juror No. 9, whom the prosecution had just excused, had become very close and the prosecution did not want Juror No. 49 to hold the excusal of Juror No. 9 against him.

The court denied the motion and observed that it found the prosecution's challenge was not on the basis of group bias but on the basis of reasons relevant to the facts of the case.

(c) *Peremptory Challenge of Juror Nos. 62, 35 and 55*

After the prosecution dismissed Juror No. 62, Bravo made a *Batson/Wheeler* motion on the basis that the prosecution had excused eight Hispanic jurors. The court found a prima facie case. The prosecution pointed out that the juror had multiple friends who were public defenders, and the juror had a sister who had been in the criminal justice system and who had a gang affiliation. When asked whether her sister had been treated fairly, she had responded "for the most part."

Bravo also challenged the prosecution's excusal of Juror Nos. 35 and 55, who were also Hispanic. With respect to Juror No. 35, the prosecution justified its excusal on the basis that she was unemployed. The prosecutor explained that in a prior trial in another case, the prosecutor had left an unemployed juror on the panel. That jury hung, and the prosecutor received criticism from his colleagues for leaving an unemployed juror on the panel.

With respect to Juror No. 55, the prosecution did not like the "self-help revenge thing" her son's friends engaged in after her son was attacked. She was the "not getting involved" type, which was precisely the type of behavior he intended to criticize in his closing argument because (unlike Juror No. 55's son and his friends), the two lay witnesses in this case got involved and called the police. He did not want to take the risk of offending Juror No. 55 because she did not get law enforcement involved in her son's case.

The court stated that it found the prosecution had expressed sufficient justification under the totality of the circumstances. Also, the court observed that there were still a number of Latino jurors in the panel and a number in the venire. The court denied the motion.

B. *Discussion*

The exercise of even a single peremptory challenge solely on the basis of race or ethnicity offends both our United States and California Constitutions. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157 (*Gutierrez*).) The "[e]xclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error, requiring reversal." (*Id.* p. 1158.)

A rebuttable presumption exists that a peremptory challenge was exercised properly, and the burden rests on the party opposing the peremptory challenge to demonstrate impermissible discrimination. (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.) A peremptory challenge of a juror need not be supported by cause; it may be based on even trivial reasons or hunches, including body language, the manner of answering questions, or demeanor. (*People v. Reynoso* (2003) 31 Cal.4th 903, 917.)

A claim that an opposing party improperly discriminated in exercising peremptory challenges is analyzed in a three-step process. (*Gutierrez, supra*, 2 Cal.5th at p. 1158.) First, the party asserting the claim must demonstrate a prima facie case by showing that "the totality of the relevant facts gives rise to an inference of discriminatory

purpose." (*Ibid.*) The moving party satisfies the first step by producing sufficient evidence permitting the trial judge to draw an inference that discrimination has occurred. (*Ibid.*)

In meeting the first step of establishing an inference of discriminatory excusal of a prospective juror, the party making the *Batson/Wheeler* motion must make as complete a record as possible. (*People v. Montes* (2014) 58 Cal.4th 809, 853.) "Certain types of evidence are relevant in determining whether a defendant has carried his burden of showing an inference of discriminatory excusal, such as whether the prosecutor 'struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group,' whether the excused jurors had little in common other than their membership in the group, and whether the prosecutor engaged in 'desultory voir dire' or no questioning at all. [Citation.]" (*People v. Cunningham* (2015) 61 Cal.4th 609, 664; see also *People v. Harris* (2013) 57 Cal.4th 804, 834–835.) Moreover, in analyzing if the party asserting discrimination has established a prima facie case, the trial court may consider nondiscriminatory reasons "'apparent from and "clearly established" in the record'" that necessarily dispel any inference of bias. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 43.)

Second, if the trial court finds that the movant met the threshold for demonstrating a prima facie case, the burden shifts to the opponent of the motion to give an adequate nondiscriminatory explanation for the challenges. (*Gutierrez, supra*, 2 Cal.5th at p. 1158.) The opponent must

provide "'a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.'" (*Ibid.*) The standard imposed at the second step of the process is not exacting. It "'does not demand an explanation that is persuasive, or even plausible. ". . . [T]he issue is the facial validity of the prosecutor's explanation.'"" (*Gutierrez, supra*, 2 Cal.5th at p. 1168.) "'[E]ven a "trivial" reason, if genuine and neutral, will suffice.'" (*People v. Lenix* (2008) 44 Cal.4th 602, 613 (*Lenix*).) "'Unless a discriminatory intent is inherent in the prosecutor's explanation,'" the reason will be deemed neutral. (*Purkett v. Elem* (1995) 514 U.S. 765, 768.)

Third, if the opponent of the *Batson/Wheeler* motion gives a neutral explanation for exercising a peremptory challenge, the trial court must then decide whether the movant has proved purposeful discrimination. (*Gutierrez, supra*, 2 Cal.5th at p. 1158.) To prevail, the movant must show that it was "more likely than not that the challenge was improperly motivated." (*Johnson v. California* (2005) 545 U.S. 162, 170.) This inquiry focuses on the subjective genuineness of the reason, not the objective reasonableness. (*People v. Reynoso, supra*, 31 Cal.4th at p. 924.) In order to satisfy itself that the "explanation is genuine, the presiding judge must make 'a sincere and reasoned attempt' to evaluate the prosecutor's justification, with consideration of the circumstances of the case known at that time, . . . knowledge of trial techniques, and . . . observations of the prosecutor's examination of panelists and exercise of for-cause and peremptory challenges." (*Gutierrez, supra,* 2 Cal.5th at p. 1159.) At this step, the credibility of the explanation becomes

pertinent. To assess credibility, the court may consider the prosecution's demeanor, the reasonableness of the explanations, and whether the proffered rationale has some basis in accepted trial strategy. (*Lenix, supra,* 44 Cal.4th at p. 613.) "'[W]hen the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient.'" (*Gutierrez, supra,* 2 Cal.5th at p. 1171.)

Further, "[w]hat courts should not do is substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual. . . . 'If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.' [Citation.]" (*Gutierrez, supra,* 2 Cal.5th at p. 1159.) Finally, "when it is not self-evident why an advocate would harbor a concern, the question of whether a neutral explanation is genuine and made in good faith becomes more pressing." (*Id.* at p. 1171.)

Ordinarily, we review the trial court's ruling on a *Batson/Wheeler* motion for substantial evidence. (*Gutierrez, supra,* 5 Cal.5th at p. 1159.) We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. As long as the trial court makes a sincere and reasoned effort to evaluate the

nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. (*Lenix, supra*, 44 Cal.4th at pp. 613–614.)

1. *Jurors Nos. 17, 29, and 49*

Defendants contend that the trial court erred in the third stage of the *Batson/Wheeler* analysis because it failed to make a "sincere and reasoned" evaluation of the prosecutor's subjective reasons for excusing African American Jurors Nos. 17, 29, and 49. They argue that the trial court relied on the prosecutor's incomplete summary of Juror No. 29 and 49's responses. According to defendants, although Juror No. 29 stated that she was uncomfortable judging other people, she also said that believed she could judge whether another person's actions violated the law. Similarly, although Juror No. 49 suffered from vertigo, she said at one point that she did not believe her condition would hamper her ability to be a good juror. We conclude with respect to these jurors that the prosecution's explanation was self-evident, and that the trial court's acceptance of the prosecution's race-neutral explanations for the peremptory challenges was "sincere and reasoned." (*Gutierrez, supra,* 5 Cal.5th at pp. 1171–1172 [court must clarify why it accepts prosecutor's explanation of challenge as honest].) The record demonstrates the trial court "understood its duty to scrutinize the prosecutor's reasons to distinguish bona fide reasons from sham excuses contrived to hide discrimination." (*People v. Winbush* (2017) 2 Cal.5th 402, 435.)

(a) *Juror No. 17*

The prosecutor explained that he excused Juror No. 17 because the juror had a nephew who had been convicted based on circumstantial evidence, the juror was troubled by that, and the juror did not agree with the result of her nephew's case. A prospective juror's relative's negative experience with the criminal justice system is a race-neutral reason for a peremptory challenge, and the challenge's propriety is self-evident. (*People v. Booker* (2011) 51 Cal.4th 141, 167, fn. 13; see also *Lenix, supra,* 44 Cal.4th at p. 628.)

(b) *Juror No. 29*

The prosecutor's stated reason for the excusal of Juror No. 29 was that the juror expressed difficulty sitting in judgment of others due to her religion, and throughout the questioning, she appeared "teary" to the prosecution and acted as if she were having difficulty listening to the voir dire, and the challenge's propriety is self-evident. "[A] prosecutor can legitimately be concerned about a person whose religion is very important to her, and who finds it difficult to judge another due to religious, philosophical, or moral reasons." (*People v. Hardy* (2018) 5 Cal.5th 56, 85.) The trial court's commentary indicates it found the prosecution's explanation credible.

(c) *Juror No. 49*

The prosecution excused this juror because: (1) she had a nephew with a felony case and did not believe she could be impartial; (2) she suffered from vertigo that might cause her absence from jury service,

and (3) she appeared to have a close relationship with another juror the prosecutor had excused. These are all valid reasons for excusal, and the challenge's propriety is self-evident. (See, e.g., *Lenix, supra,* 44 Cal.4th at p. 628 [prospective juror's negative experience with law enforcement basis of proper peremptory challenge]; *People v. Arellano* (2016) 245 Cal.App.4th 1139, 1161 [excusal of juror based upon health reasons race neutral].)

2. *Juror Nos. 62, 35, and 55*

Ramirez contends that the trial court erred in concluding that the excusal of these jurors, who were all Hispanic, was "cured" by the presence of other Hispanics on the jury. We conclude, however, that the prosecution's challenges were not based on prohibited racial factors, and the prosecution's explanation was self-evident, and the trial court's acceptance of the prosecution's race-neutral explanations for the peremptory challenges was "sincere and reasoned."

(a) *Juror No. 62*

Juror No. 62 had numerous friends who were public defenders, as well as a relative who had been in the criminal justice system and was a gang member. These are valid race-neutral reasons evident from the record. (*People v. Hardy, supra*, 5 Cal.5th at p. 85 [close and pervasive connection with judicial system legitimate and recognized reason for peremptory challenge]; *People v. Arellano, supra,* 245 Cal.App.4th at p. 1161 [prospective juror with gang member as relative proper subject of peremptory challenge].)

(b) *Juror No. 35*

The prosecution excused juror No. 35 because she was unemployed and the last time he empaneled an unemployed juror, it resulted in a hung jury. These reasons are self-evident and are legitimate, non-discriminatory reasons. (*People v. Hamilton* (2009) 45 Cal.4th 863, 904 [peremptory against unemployed juror proper.)

(c) *Juror No. 55*

The prosecution's challenge to Juror No. 55 was based upon her son's experience with being attacked. Rather than seek redress through law enforcement, her son and his friends took action themselves. The prosecutor excused this juror because the witnesses in this case, Owens and Marin, "got involved" and Juror No. 55 had not. A juror's attitude towards law enforcement is a proper basis for a peremptory challenge. This reason is self-evident and is a legitimate, non-discriminatory basis for a peremptory challenge. (*People v. Winbush, supra,* 2 Cal.5th at p. 436.)

C. *Comparative Juror Analysis*

Duenas and Ramirez argue that comparative juror analysis demonstrates that the prosecution's peremptory challenges were actually motivated by impermissible group bias, and that the prosecution failed to inquire fully into prospective jurors' experience with law enforcement. Further, defendants asserted that the renewal of the *Batson/Wheeler* motion is not required to preserve a comparative

analysis issue for appeal. (See, *People v. Chism* (2014) 58 Cal.4th 1266, 1319.) Defendants make the following comparative analysis:

First, Juror No. 17 was excused on the basis she had a problem with circumstantial evidence used in her nephew's prosecution, while Juror No. 10, who remained, stated she could not convict based solely on circumstantial evidence. As juror No. 17 had previously served on a criminal jury, the proffered reason was unpersuasive.

Second, regarding Juror No. 49, the prosecutor offered three justifications including that her nephew had a pending felony case prosecuted by his office. However, the prosecutor accepted Juror No. 60 although his son was arrested for possession of narcotics. The prosecutor also accepted Juror No. 41 although his son was arrested and charged with driving under influence.

Defendants contend that in contrast to the prosecutor's extensive voir dire concerning Juror 49's nephew's case, the prosecutor conducted absolutely no voir dire about criminal matters involving family members with either Juror No. 41 or Juror No. 60. These two non-African American jurors who also had family members with criminal case issues, were not questioned by the prosecutor about the specifics of their cases.

"The rationale for comparative juror analysis is that a side-by-side comparison of a prospective juror struck by the prosecutor with a prospective juror accepted by the prosecutor may provide relevant circumstantial evidence of purposeful discrimination by the prosecutor. [Citations.]" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 109.) Pretext is established when the compared jurors have expressed "a substantially

similar combination of responses" in material respect to the excused jurors. (*Id.* at p. 107.)

"Comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at [*Batson/Wheeler*]'s third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons." (*Lenix, supra*, 44 Cal.4th at p. 607.) "In those circumstances, comparative juror analysis must be performed on appeal even when such an analysis was not conducted below." (*Ibid.*)

"On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact. 'Even an inflection in the voice can make a difference in the meaning.'" (*Lenix, supra*, 44 Cal.4th at p. 622.) Moreover, we have recognized "'that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge'" and that "'the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box'" and that "'the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the peremptory challenge and the number of challenges remaining with the other side.'" (*People v. Chism, supra,* 58 Cal.4th at p. 1318.)

Here, defendants paint a very limited picture of the voir dire. Although Juror No. 10 stated she had a problem with circumstantial evidence, she affirmed that she would evaluate every piece of the evidence, thus explaining why she was not challenged. On the other hand, unlike Juror No. 10, Juror No. 17 had a nephew who had been convicted based on circumstantial evidence and had a negative view of his case. Juror No. 17's previous negative encounter with law enforcement is an additional reason to excuse such a juror.

Defendants compare excused Juror No. 49, who had a nephew with a pending felony case, with Juror No. 41, whose son had been arrested for D.U.I. However, Juror No. 41 had served on a civil jury that reached a verdict and believed he could be fair and impartial. On the other hand, although she had a relative in the criminal justice system and believed she could be fair, the prosecution had additional reasons for excusing Juror No. 49: She had vertigo, a potentially debilitating ailment, and also was friendly with Juror No. 9, who had been excused from the jury. The prosecution believed the excusal of the other juror could affect Juror No. 49's view of the case.

Defendants also compare Juror No. 49 to Juror No. 60, who had seven brothers, one of whom was the "black sheep" of the family who was arrested for narcotics possession. The juror felt his brother was treated fairly by the criminal justice system. Juror No. 60 believed he could be fair and impartial. There are similar differences with respect to Juror No. 60 and Juror No. 49. Juror No. 49 had the additional factors of a health condition and a friendly relationship with another juror whom the prosecution excused.

For these reasons, we reject defendants' contention that a comparative analysis discloses the prosecution's reasons were pretextual. On the contrary, comparative analysis discloses that the excused jurors gave materially different responses from those who were not challenged. (*People v. Winbush, supra,* 2 Cal.5th at p. 446.)

II. *Sufficiency of the Evidence of Aiding and Abetting* (*Duenas & Portales*)

Duenas and Portales argue that insufficient evidence supports their convictions for kidnap and murder on an aiding and abetting theory. We disagree.

"[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) The test is "whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures." (*People v. Villa* (1957) 156 Cal.App.2d 128, 134.) Whether a person has aided and abetted the commission of a crime is usually a question of fact. "[P]resence at the scene of the crime, companionship, and conduct before and after the offense" are among the factors that may be considered in making the determination (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094), although mere presence at the scene is not sufficient in and of itself to

make a defendant a participant. (*People v. Durham* (1969) 70 Cal.2d 171, 181.)

"To determine whether sufficient evidence supports a jury verdict, a reviewing court reviews the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt." (*People v. Rountree* (2013) 56 Cal.4th 823, 852-853.) "This standard of review applies when the evidence is largely circumstantial." (*People v. Johnson* (2015) 60 Cal.4th 966, 988.)

Here, circumstantial evidence supported an inference that Duenas was in Mira Loma and thus participated in the beating and shooting of Campos at that location: His car was seen in Mira Loma the day after the murder; Arevalo testified that Ramirez, Duenas and Bravo left for Mira Loma with the victim; Owens saw two men beating up a third man on Troth Street, who then put the victim in the car, and seconds later, the car was followed by Campos' truck; Based on Marin's testimony that Portales only joined the group in Long Beach, it can be inferred that Portales was not present in Mira Loma—supporting an inference the three men in Mira Loma were Ramirez, Duenas, and Bravo.

In Long Beach, Marin saw Duenas exit the vehicle driven by Ramirez, hit Campos in the back of the head, tell him he was going to die, and choked Campos. Portales kicked Campos (perhaps with bare feet) and participated in the attack. While Duenas choked Campos, Portales was talking to Campos. Duenas then helped Ramirez and

Portales put Campos in the truck of the car, and Ramirez drove away with the body, with Portales as the passenger.

By act and advice, both Duenas and Portales encouraged and facilitated the murder and kidnap of Campos in both Mira Loma and Long Beach.

III. *Mistake of Fact*

Relying on *People v. Mayberry* (1975) 15 Cal.3d 143, 155–157, Portales asserts that because a dead person cannot be the victim of a kidnap, and because he believed Campos was dead at the time he put him in the trunk of the car, he was operating under mistake of fact and thus insufficient evidence supports his conviction for simple kidnap (count 2). He also argues that because he relied on the defense in his closing argument,[3] the trial court was obligated to give an instruction on mistake of fact (CALCRIM No. 3406). He is mistaken.

Section 26 codifies the defense of mistake of fact, and provides in pertinent part that persons who "committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent," are not criminally liable for the act. (*People v. Givan* (2015) 233 Cal.App.4th 335, 343; *People v. Reed* (1996) 53 Cal.App.4th 389, 396.) The mistake-of-fact defense operates to negate the requisite criminal intent or mens rea element of a crime, but

---

[3] Counsel argued that Portales was not liable for kidnap because he "put what he believed to be a lifeless Hector Campos into the trunk of the vehicle," and counsel told the jury it was "reasonable to conclude that [Portales] believed that Mr. Campos was dead."

applies only in limited circumstances, specifically when the defendant holds a mistaken belief in a fact or set of circumstances which, if existent or true, would render the defendant's otherwise criminal conduct lawful. (*People v. Lawson* (2013) 215 Cal.App.4th 108, 111.)

In *People v. Mayberry, supra,* 15 Cal.3d 143, the victim asserted the defendant coerced her, under threat of violence to accompany him from a grocery store to his apartment, where the victim asserted he engaged in nonconsensual sex with her. (*Id.* at pp. 147–149.) Defendant was charged with rape and kidnap, but contended he believed the victim consented to her movement from the grocery store and to having sexual intercourse with him. He sought a mistake of fact instruction on that basis. (*Id.* at p. 153.) *Mayberry* concluded the instruction should be given where "a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite . . . to a conviction of either kidnapping (§ 207) or rape by means of force or threat." (*Id.* at p. 155.) Given that there was some evidence of the victim's consent, *Mayberry* concluded the instruction should have been given. (*Id.* at pp. 156–157.)

The trial court's "duty to instruct extends to defenses 'if it appears . . . the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citations.]" (*People v. Brooks* (2017) 3 Cal.5th 1, 73.) Evidence of a defense is

sufficiently substantial to trigger a trial court's duty to instruct on it sua sponte if it is sufficient for a reasonable jury to find in favor of the defense. (*People v. Salas* (2006) 37 Cal.4th 967, 982.) "Error in failing to instruct on the mistake-of-fact defense is subject to the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836." (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1431.) Under this standard, a conviction "may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred [citation]." (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

Here, there was no evidence to support a mistake of fact defense, and hence an instruction. Marin testified that after the beating and choking of Campos in the parking lot, he appeared lifeless, and his arm was flung out of the trunk. However, her perception that he might have been dead was based on her observations from her bathroom window, not any knowledge about Campos' actual condition. Portales, however, was on the scene.

Moreover, Portales "did not testify at trial, so there is no direct evidence that he honestly and reasonably believed" that Campos was dead. (*People v. Brooks, supra*, 3 Cal.5th at p. 75.) And the circumstantial evidence shows that Portales did not harbor this belief—Portales assisted Ramirez in transporting Campos to the alley, where Campos was again shot. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055 [evidence of defendant's mental state is "'almost inevitably

circumstantial'"].) Further, Marin's testimony did not, as circumstantial evidence, establish that Portales *also* believed Campos was dead. Marin viewed the latter part of the attack from the relative safety of her bathroom.

The "only 'evidence' concerning [Portales'] belief was his counsel's theory in closing argument." (*People v. Gonzalez* (1983) 141 Cal.App.3d 786, 793.) But arguments by counsel are not evidence. (*People v. Richardson* (2008) 43 Cal.4th 959, 1004.) And "[j]ury instructions are not to be given if they are based solely on conjecture and speculation. [Citation.]" (*People v. Gonzalez, supra,* 141 Cal.App.3d at p. 793.) As a result, substantial evidence did not support the giving of a mistake of fact instruction, and sufficient evidence supports Portales' conviction for kidnap and murder.

IV. *Instructional Error, Voluntary Manslaughter*

Bravo argues the trial court erred in failing sua sponte to instruct on the lesser included offense of voluntary manslaughter based on sudden quarrel. The trial court instructed on self-defense and imperfect self-defense, but Bravo contends that given evidence that Campos had threatened Bravo and his family and told Bravo that he was going to "send his people for him," the court also should have instructed on voluntary manslaughter based on the theory that Bravo acted rashly in the face of this threat. (See, e.g., *People v. Thomas* (2013) 218 Cal.App.4th 630, 645.) We disagree.

A defendant who commits an intentional and unlawful killing, but who lacks malice, is guilty of voluntary manslaughter. (§ 192.) In limited, explicitly defined circumstances—the defendant acts in a sudden quarrel or heat of passion, or when the defendant kills in unreasonable self-defense—this conduct reduces an intentional, unlawful killing from murder to voluntary manslaughter. Voluntary manslaughter of these two forms is considered a lesser necessarily included offense of intentional murder. (*People v. Breverman, supra,* 19 Cal.4th at p. 154.) The trial court has an obligation to give instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged. (*Id.* at pp. 154–155.)

Sudden quarrel or heat of passion voluntary manslaughter has both an objective and a subjective component. (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*); CALCRIM No. 570.) To satisfy the objective or reasonable person element of this form of voluntary manslaughter, the accused's heat of passion must be due to sufficient provocation, either caused by the victim or by conduct reasonably believed by the defendant to have been engaged in by the victim. (*Moye, supra*, at pp. 549–550.) To satisfy the subjective element of voluntary manslaughter, the accused must be shown to have killed while under the actual influence of a strong passion induced by such provocation. (*Id.* at p. 550.)

"Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition

to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201.) As explained in *People v. Beltran* (2013) 56 Cal.4th 935: "The proper focus is placed on the defendant's state of mind, not on his particular act. To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react*, without reflection. . . . [T]he anger or other passion must be so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene. Framed another way, provocation is not evaluated by whether the average person would *act* in a certain way: to kill. Instead, the question is whether the average person would *react* in a certain way: with his reason and judgment obscured." (*Id.* at p. 949.) "However, if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter." (*People v. Wickersham* (1982) 32 Cal.3d 307, 327.)"

The failure to instruct sua sponte on voluntary manslaughter based on heat of passion or sudden quarrel is subject to the state law standard for evaluating prejudice. (*Moye, supra*, 47 Cal.4th at p. 556.) Reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of. (*People v. Rogers* (2006) 39 Cal.4th 826, 867–868.)

Here, Bravo argues that the evidence that Campos threatened Bravo and his family combined with the presence of Campos' DNA on

the gun, suggests that Bravo acted on a sudden quarrel. He implies that the victim was armed and was able, despite the presence of Ramirez and Duenas and the victim's confinement to a shed, to sufficiently inflame Bravo with threats that Bravo's reason and judgment was obscured. However, Bravo's theory is pure speculation. Furthermore, the eyewitness testimony establishes the beating of the victim involved too many actors and too long a time period to constitute a "sudden quarrel." As a result, there was insufficient evidence of provocation or sudden quarrel to justify the instruction.

V. *Prosecutorial Misconduct*

Duenas, Ramirez, Portales and Bravo argue that, during a portion of his rebuttal, the prosecutor made statements that diminished the standard of proof beyond a reasonable doubt, shifted the burden of proof, and undermined the presumption of innocence. Duenas separately argues that a portion of this argument misconstrued the effect of circumstantial evidence, and Portales separately argues that the prosecution misstated the evidence with respect to his conduct in the alley parking lot.

A. *General Principles*

As explained in *People v. Hill* (1998) 17 Cal.4th 800 (*Hill*), a prosecutor's intemperate behavior violates the Federal Constitution when it "'comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.]'" (*Id.* at p. 819.) Conduct that does not render the

trial fundamentally unfair is misconduct under state law where it involves the use of deceptive or reprehensible methods to persuade the court or jury. (*Ibid.*) Error occurring during argument may consist of misstating the evidence, referring to facts not in evidence, or misstating the law. (*Hill, supra,* 17 Cal.4th at pp. 823, 827–828, 829–830.)

A prosecutor is given wide latitude in making arguments. "'The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) During summation, the prosecution may state matters that are not evidence if such matters are common knowledge or matters drawn from common experience, history or literature. However, a "prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*Hill, supra,* 17 Cal.4th at p. 820.)

"Although defendant singles out words and phrases, or at most a few sentences, to demonstrate misconduct, we must view the [prosecutor's] statements in the context of the argument as a whole. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) In assessing defendant's claim that the prosecutor made improper arguments to the jury, we "must determine at the threshold how the remarks would, or could, have been understood by a reasonable juror. [Citations.]" (*People v. Benson* (1990) 52 Cal.3d 754, 793.)

A. *Prosecution Argument re Burden of Proof and Circumstantial Evidence*

Duenas, Ramirez, Bravo and Portales argue that the prosecution diminished the proof beyond a reasonable doubt standard of proof, shifted the burden of proof, and undermined the presumption of innocence by argument that told the jury the reasonable doubt standard is satisfied by a reasonable interpretation of the evidence that points to the defendant's guilt absent a contrary reasonable interpretation of the evidence. With respect to the same argument, Bravo, joined by Duenas, argues that the prosecution improperly suggested that the jury could base their verdict only on affirmative evidence introduced at trial, and not a lack of prosecution evidence. Bravo also argues the argument improperly told the jury they were not permitted to ask "what if," or "I wonder," and thus essentially told the jury they could only base their judgment on affirmative evidence, rather than the prosecution not meeting its burden.

1. *Factual Background*

(a) *Reasonable Doubt Argument*

During rebuttal, the prosecution explained reasonable doubt to the jury as follows:

"[The Prosecutor]: So I just want to talk to you very quickly about reasonable doubt and what it really means. It's not that complicated. Do you have more than one reasonable explanation for what happened or is there only one reasonable explanation for what happened? If

there's only one reasonable explanation for what happened, then you are beyond a reasonable doubt."

The joint objections of all defense counsel were overruled.

The Prosecutor continued: "If you only have one reasonable explanation for what happened and you have no other reasonable explanation, you are beyond a reasonable doubt and that begs the question of: Do you have a reasonable explanation of what happened here? I have given a reasonable explanation based on the evidence. [¶] There was a gunshot in Long Beach, a single gunshot and yet the victim has two gunshot wounds. [¶] There's the victim's blood in a shed up in Mira Loma. [¶] We found a gun with two expended bullets, so we know there were two shots. [¶] What is the reasonable explanation of where the second shot happened? Mira Loma. [¶] Is there another reasonable explanation? No, there is not. [¶] So as to that fact, as to that set of facts, it's beyond a reasonable doubt. That's what it means. If you can come up with another reasonable explanation that is based on the evidence in the case and that explanation says they didn't do it, well then you're not beyond a reasonable doubt. [¶] But when you only have one and that one explanation says guilty, then you're beyond a reasonable doubt."

(b) *Affirmative Evidence Argument*

Appellants also contend the prosecution improperly argued during rebuttal that the jury's verdict must be based upon some evidence affirmatively admitted at trial, such as testimony or an exhibit, rather than a lack of prosecution evidence:

"[The Prosecutor]: The first thing I want to talk to you about is probably the most dangerous thing that can happen in any criminal trial. [¶] The bane of every prosecutor's existence and that is speculation. There's been a whole lot of speculation going on. Speculation is absolutely not allowed in a criminal trial because [speculation is] adding facts that weren't there. [¶] We have all told you what your role is as jurors. You sit here as judges of the facts. You judge what facts are true and the facts that you have to decide whether you believe them or not came to you in court, either through testimony or through exhibits. It did not come from statements I made to you. It did not come from statements the attorneys made to you. [¶] When you're back in the jury room, if somebody says yeah, but what if—stop. I wonder—no."

The joint objection of defense counsel was overruled and the prosecutor continued:

"[The Prosecutor]: You need to stop and ask yourself, what I'm about to say was that evidence in the trial or is that something I'm bringing in from the outside? [¶] For instance, when [counsel for appellant Bravo] got up here and said to you well, Mr. Bravo was saying dude, what are you doing? Dude, look what you did at my mom's house. Now I got to clean up your mess. That never happened. There's no evidence of that. [¶] The lawyers can't testify, then we would be witnesses. That is why the judge has told you the statement of the attorneys are not evidence. It's not just the words he is saying. It's important. [¶] So when you're back there and you find yourself and you might say hey, what if, please stop and ask yourself what I'm about

to say, it is based on the actual evidence I heard or am I bringing in something from the outside that was never proven in court. [¶] You have to use the evidence that actually was presented. That tells you what happened in the case and when you realize that, you realize that each of the defendants, they have all—all defense attorneys have gotten up and given what they want you to believe. [¶] The problem is every single one of them is based on speculation. It's based on evidence that you don't actually have in court."

The objection of Ramirez's counsel was overruled.

The prosecution continued: "You don't get to make it up when you're a juror. Jurors get to decide whether this fact happened and does that fact mean the law was broken and the only facts you consider, the only facts you decide whether they are true or not are the facts that you actually received in court through testimony or exhibits."

"So as I was saying, don't base your judgments on facts that aren't actually facts. Facts are things that were presented to you by witnesses, by exhibits, not by lawyers. All right?"

2. *Discussion*

"[I]t is improper for the prosecutor . . . to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation]." (*People v. Marshall* (1996) 13 Cal.4th 799, 831.) Often, in attempting to clarify the reasonable doubt concept for the jury, the prosecution runs afoul of this rule by suggesting the prosecution has met its burden if it puts forth the only "reasonable" theory of the significance of the evidence or puts forth an explanation

that is not rebutted by the defense. (See *Hill, supra,* 17 Cal.4th at p. 832.)

In *People v. Centeno* (2014) 60 Cal.4th 659 (*Centeno*), a child molestation case, the child victim recanted her earlier statements that defendant had lain on top of her. (*Id.* at p. 662.) Defense counsel's closing argument focused on the reasonable doubt standard and focused on the inconsistencies in the evidence and missing evidence. (*Id.* at p. 664.) In rebuttal, the prosecution urged that the jury's essential task was to decide which version of the facts was true. The prosecution used a "puzzle" to illustrate reasonable doubt and also argued that defendant's testimony was unreasonable, and conversely that the People's burden was met if its theory was "reasonable" in light of the facts supporting it. (*Id.* at p. 664.)

Centeno held this was improper and explained that "[a] jury may only decide the issue of guilt based on the evidence presented at trial, with the presumption of innocence as its starting point. Although the jurors may rely on common knowledge and experience in evaluating the evidence [citation], they may not go beyond the record to supply facts that have not been proved. Facts supporting proof of each required element must be found in the evidence or the People's burden of proof is unmet." (*Centeno, supra*, 60 Cal.4th at pp. 669–670, fn. omitted.)

Centeno further observed that the prosecution improperly told the jury the prosecution's burden was met if its theory was reasonable in light of the acts supporting it. (*Centeno, supra*, 60 Cal.4th at pp. 672–673.) However, "the prosecution can surely point out that

interpretations [of the evidence] proffered by the defense are neither reasonable nor credible. Nevertheless, even if the jury rejects the defense evidence as unreasonable or unbelievable, that conclusion does not relieve or mitigate the prosecutorial burden. The prosecution cannot suggest that deficiencies in the defense case can make up for shortcomings in its own." (*Id.* at p. 673.)

Further, "the prosecutor's argument began with what the jury could consider: reasonably possible interpretations to be drawn from the evidence. While this is an acceptable explanation of the jury's starting point, it is only the beginning. Setting aside the incredible and unreasonable, the jury evaluates the evidence it deems worthy of consideration. It determines just what that evidence establishes and how much confidence it has in that determination. The standard of proof is a measure of the jury's level of confidence. It is not sufficient that the jury simply believe that a conclusion is reasonable. It must be convinced that all necessary facts have been proven beyond a reasonable doubt. [Citation.] The prosecutor, however, left the jury with the impression that so long as her interpretation of the evidence was reasonable, the People had met their burden. The failure of the prosecutor's reasoning is manifest." (*Centeno, supra*, 60 Cal.4th at p. 672.) In sum, the prosecution "confounded the concept of rejecting unreasonable inferences with the standard of proof beyond a reasonable doubt. She repeatedly suggested that the jury could *find defendant guilty* based on a 'reasonable' account of the evidence. These remarks clearly diluted the People's burden." (*Id.* at p. 673.)

We evaluate a prosecutor's remarks in the context of the whole argument and the instructions to determine whether there was a reasonable likelihood that "the jury construed the prosecutor's remarks as placing on defendant the burden of establishing a reasonable doubt as to his guilt." (*People v. Marshall, supra,* 13 Cal.4th at p. 831.)

Here, viewed as a whole, the prosecution's argument did not impermissibly reduce the burden of proof. It was not proper for the prosecution to argue that if the jury had only one reasonable explanation, that meant that such an explanation had been established beyond a reasonable doubt. However, the prosecution applied this statement to the facts of the case with respect to the two gunshot wounds sustained by the victim and the two cartridges expended from the weapon to advise the jury that a reasonable explanation for the second bullet in the victim was that the victim was shot in Mira Loma. This latter part of the argument was a proper way to address reasonable inferences to be drawn from the evidence. (*Centeno, supra,* 60 Cal.4th at p. 672 [permissible to argue that the jury may reject impossible or unreasonable interpretations of the evidence and to so characterize a defense theory as set forth in CALCRIM Nos. 224, 226].)

Furthermore, the prosecution did not tell the jury that it could base its verdict on the defense's lack of evidence. Rather, the prosecution told the jury that speculation did not equal evidence and the jury had to base its verdict on the evidence. This is permissible argument.

B. *Prosecution Argument Mischaracterizing Duenas' Counsel's Statements*

Duenas argues that during rebuttal, the prosecution improperly mischaracterized the evidence by falsely asserting that his defense counsel stated that Duenas took the sledgehammer from the car in the alley in Long Beach and put it by the gate.

1. *Factual Background*

"[Prosecutor]: Let's talk about some of these stories you've been given. [¶] This is the explanation for Mr. Duenas that he didn't go to Mira Loma. There's evidence he was in Mira Loma. He got out at [East] 10th Street, hung out there. And when they pulled up, he came out of the apartment building, walks straight up to the car, took the sledge hammer, walked back behind the gate, put it down and walked back inside. [¶] He didn't know what was going on. Had no clue—

"[Duenas' Counsel]: That's a misstatement of—

"THE COURT: It's argument, counsel.

"[Duenas' Counsel]: I never said that."[4]

At sidebar, the following discussion ensued:

---

[4] Duenas' trial counsel argued that Duenas was not at Mira Loma. Counsel asked the jury rhetorically who put the sledgehammer by the gate, and argued that the sledgehammer was not used in the parking lot because Marin did not see it. Further, counsel argued that given that there were family members cleaning the shed in Mira Loma, it did not make sense that the defendants drove to the alley in Long Beach with the sledgehammer. Counsel concluded by observing that there were several possibilities to explain how the sledgehammer ended up in the alley, including that one of the family members put it there.

"[Duenas' Counsel]: I never told the jury that Mr. Duenas went up to the car, took the sledge hammer and took it over to the gate and put it there. I never said that, and that's a lie.

"THE COURT: That's correct. You never said that. I agree.

"[The Prosecutor]: I don't agree. I think he did say that.

"THE COURT: Not in his argument. I don't know when he said that.

"[The Prosecutor]: That was the whole point of his hammer—You don't get to say it by implication and then say you didn't say it.

"[Duenas' Counsel]: I asked the question who put the sledge hammer behind or in the gate. If we don't know who put the sledge hammer at the gate, then there's a gap in Ms. Marin's observation. [¶] I never said my client took that sledge hammer and put it behind the gate. That is [a] total misrepresentation of what I said, and that is deceptive to the jury.

"I would ask the court since I believe the court agrees with me to sustain it and tell the [jury] [the Prosecutor] is wrong. That's not what [Duenas' Counsel] said, but it's up to you, Ladies and Gentlemen. That's what I would ask the court. . . .

"[The Prosecutor]: First of all, this is argument. [¶] Second of all, the implication was made. I get to address the implication.

"[Duenas' Counsel]: Didn't say it as an implication. He said it was a fact."

After some discussion at sidebar, the court sustained the objections and instructed the jury to decide the facts based on the evidence, not the arguments.

2. *Discussion*

While counsel is accorded "great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence," counsel may not assume or state facts not in evidence or mischaracterize the evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 732.) The prosecution may comment on the evidence and draw permissible inferences. (*People v. Rowland* (1992) 4 Cal.4th 238, 278.) "'Whether the inferences the prosecutor draws are reasonable is for the jury to decide.'" (*People v. Farnam* (2002) 28 Cal.4th 107, 169.)

Here, the prosecution did not commit misconduct in arguing that Duenas' counsel's interpretation of the evidence was faulty. Given that the case rested on direct eyewitness testimony of the beatings that was incomplete, both parties relied on the less conclusive nature of circumstantial evidence to argue their case. Duenas' counsel used the gaps in Marin's observations to argue that Duenas did not disembark from the car in the alley, and thus had not come from Mira Loma, and thus was not one of the three men Bridgett Owens saw. Counsel's commentary regarding the sledgehammer similarly used gaps in Marin's recollection. The prosecutor's questioning of Duenas' counsel's arguments, given that they were based on circumstantial evidence and asking the jury to draw inferences, was within permissible commentary on counsel's argument.

C. *Prosecution Argument re Portales' Conduct in the Parking Lot in Long Beach*

Portales argues that the prosecution mischaracterized the evidence by asserting that Portales hit or kicked the victim, although the evidence did not establish Portales did so. Further, he argues that the prosecution misstated the law because merely watching Duenas strangle the victim did not constitute aiding and abetting.

1. *Factual Background*

During closing argument, the prosecutor, in arguing that Portales harbored malice sufficient to establish first-degree murder, told the jury "Mr. Portales [was] picking on a completely helpless human being. When Mr. Portales comes out of that apartment building, the victim has already been shot in Mira Loma. The victim has already had his head smashed by a sledge hammer. [¶] As [Portales] walks up and talks to the victim, Mr. Duenas goes behind [the victim] and punches him in the back of the head, and he goes down. [¶] What does Mr. Portales take this opportunity to do? [¶] Does he jump back, 'What are you doing?' [¶] Does he say, 'Whoa! Whoa! Stop! Are you crazy?' [¶] Does he say, 'Hey, what's going on? What's the problem?' [¶] No. His first immediate response is I'm getting mine in too. Punches to the head, kicks to the head. [¶] Is the victim fighting back? No. He is not capable of fighting back. He just sits there, takes it, tries to keep breathing."

Further, "[Portales] walked up and talked to the victim, then just stood there while Duenas attacked him. [¶] How did he look? Was he

shocked? Did he try to help? No. No. He just stood there and then got in himself. Used his hands, punch to the head, punch to the head, . . . used his feet. Kicking."

2. *Discussion*

As discussed above, "a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman, supra,* 35 Cal.3d at p. 561.)

Here, Marin's testimony established that Portales did more than merely watch Duenas strangle the victim. On the contrary, he participated in hitting and kicking the victim in the alley behind Marin's apartment. Even if he had done no more than watch Duenas strangle Campos, his conduct constituted aiding and abetting because by talking to the victim, he promoted and encouraged Duenas to continue strangling the victim.

VI. *Mitigating Evidence Under People v. Franklin*

Ramirez, joined by Portales and Bravo, argues that the case should be remanded for them to present mitigating evidence, as youthful offenders (they were 19 and 20 years old at the time of the offenses) relevant to a future parole hearing pursuant to *People v. Franklin, supra,* 63 Cal.4th 261. Respondent asserts that a remand under *Franklin* is unnecessary because defendants had an opportunity

to present mitigating evidence in the trial court; in any event, the trial court had before it the prosecution's sentencing memorandum, probation reports, and victim impact testimony from the victim's family; and defendants cannot show that any failure of defense counsel to present *Franklin* mitigating information was prejudicial because defendants have the ongoing ability, under section 3051, subdivision (f), to present evidence to the parole board.

Section 3051, the youth offender statute, provides an inmate convicted of a "controlling offense" committed before he or she was 25 years of age, a parole hearing that provides "a meaningful opportunity to obtain release." (§§ 3051, subd. (d), (e), (f)(1).) To effectuate the purpose of section 3051, "the statutes also contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration." (*People v. Franklin, supra*, 63 Cal.4th at p. 283.) Assembling mitigating evidence at the time of trial, "is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (*Id.* at pp. 283–284.)

In *Franklin*, the California Supreme Court observed that the Eighth Amendment of the United States Constitution prohibition against cruel and unusual punishment prohibits a criminal court from sentencing a minor "to the functional equivalent of [life without parole] for a homicide offense" without taking into account "how children are different, and how those differences counsel against irrevocably

sentencing them to a lifetime in prison." (*People v. Franklin*, *supra,* 63 Cal.4th at pp. 275, 276.)

Relevant here, *Franklin* found that the defendant had not had sufficient opportunity to put forward information that would be deemed relevant at a later youth offender parole hearing. (*People v. Franklin, supra*, 63 Cal.4th at p. 284.) As a result, *Franklin* remanded "the matter to the trial court for a determination of whether [the juvenile] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing" because it was "not clear" whether the juvenile had been afforded such an opportunity previously. (*Id.* at p. 284.)

Defendants argue that, although they were sentenced after *Franklin,* it appears that neither the trial court nor the defense was aware of the ability to present evidence for a future parole hearing. By contrast, in the cases not remanding under *Franklin* (see, e.g., *People v. Woods* (2018) 19 Cal.App.5th 1080), it appears that counsel and the court were aware of the provision of section 3051, and as pointed out in *People v. Tran* (2018) 20 Cal.App.5th 561, the real question is "whether the juvenile was given a sufficient opportunity to make the sort of record contemplated by *Franklin."* (*Id.* at p. 569.)

In *People v. Tran, supra,* 20 Cal.App.5th 561, the court observed that the materials to be presented at a *Franklin* hearing were potentially voluminous, and would include materials not normally in a probation report, such as character, cognitive ability, psychological functioning or maturity. (*Id.* at p. 570.) In preparing for a *Franklin*

hearing, defense counsel would have to gather records, letters and other information on appellant's behalf and look into the prospect of psychological testing and a risk assessment analysis. "Not knowing what their investigative efforts might turn up, it would be unrealistic to expect them to make an offer of proof at this stage of the case." (*Id.* at p. 570.) As other courts have done, we will simply remand the matter to the trial court to permit the parties the opportunity to present evidence bearing on the factors discussed in *Franklin*. (See, e.g., *People v. Jones* (2017) 7 Cal.App.5th 787, 818-820; *People v. Perez* (2016) 3 Cal.App.5th 612, 618-620.)

VII. *Cumulative Error*

Bravo, joined by Portales and Duenas to the extent applicable, argues that the cumulative error of prosecutorial misconduct and instructional error on the sudden quarrel voluntary manslaughter theory denied him a fair trial and requires reversal of the judgment because the error is not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) We disagree.

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.] Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]" (*Hill, supra*, 17 Cal.4th at pp. 844-845.)

Here, however, we either found no error with respect to any of defendants' claims, or that any errors were harmless. Although we

recognize a cumulation of harmless errors can result in an unfair trial, our review of the record here does not demonstrate any unfairness. (*People v. Valdez* (2004) 32 Cal.4th 73, 139.)

VIII. *Correction of Abstracts of Judgment to Reflect Conviction of Second Degree Murder*

Ramirez, Bravo, Portales and Duenas request that this court correct their abstracts of judgment to reflect that they were convicted of second-degree murder, not willful, deliberate and premeditated first-degree murder. Respondent does not dispute that the abstracts are incorrect.

A court has the inherent power to correct clerical errors in its records to make those records reflect the true facts. Such power exists independently of statute and may be exercised in criminal as well as in civil cases. The court may correct such errors on its own motion or upon the application of the parties. Courts may correct clerical errors at any time, and appellate courts that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

Here, although the jury returned verdicts of murder in the second degree, the abstracts state that all four defendants sustained convictions of first degree murder (willful, deliberate, premeditated). Therefore, we order the abstract of judgments be corrected so as to reflect the jury's verdict of convictions of second degree murder.

DISPOSITION

The trial court is directed to correct the abstract of judgment to reflect that all four defendants were convicted of second degree murder, and forward certified copies of the corrected abstracts of judgment to the Department of Rehabilitation and Corrections. The judgment is affirmed as modified, and the matter is also remanded to the trial court for the limited purpose of permitting defendants to make a record pursuant to *People v. Franklin, supra,* 63 Cal.4th 261.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

MICON, J.*

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