Filed 6/12/09 P. v. Newels CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. BRIAN K. NEWELS, Defendant and Appellant.	B204199 (Los Angeles County Super. Ct. No. YA064635)

APPEAL from a judgment of the Superior Court of Los Angeles County. Eric C. Taylor, Judge. Affirmed as modified and remanded with instructions.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Gary A. Lieberman, Deputy Attorney General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant and appellant Brian K. Newels (defendant) slit his wife's throat, wrists and the backs of her knees with the blade from a utility knife; bound her hands and feet with duct tape; and then later doused her with gasoline and set her ablaze. A jury convicted defendant of one count of attempted murder (Pen. Code, §§ 664/187, subd. (a))[1] and one count of arson causing great bodily injury (§ 451, subd. (a)). Defendant asserts numerous claims of trial error, none of which merits reversal.

The trial court erred, however, in sentencing defendant. We modify the judgment to (1) impose section 667, subdivision (a) prior serious felony enhancements with respect to both of defendant's convictions in this case; (2) strike three section 667.5, subdivision (b) prior prison term enhancements relating to convictions that also were the subject of section 667, subdivision (a) enhancements; (3) award defendant presentence conduct credit he improperly was denied; and (4) impose an additional $20 court security fee. In addition, with respect to one remaining section 667.5, subdivision (b) enhancement, we remand to the trial court to determine whether to strike the enhancement or to impose consecutive one-year terms on each of defendant's two convictions.

BACKGROUND[2]

A. The Crime

Defendant was married to and lived with the victim, Deborah L.,[3] in a townhouse in Gardena. Defendant had a drug problem. On the night of April 4, 2006, defendant

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[1] Statutory references are to the Penal Code unless stated otherwise. (See footnote 3 *post*.)

[2] On appeal, "we must view the evidence in the light most favorable to the verdict and presume the existence of each fact that a rational juror could have found proved by the evidence. [Citation.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 139-140, fn. 30, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

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was freebasing cocaine in their home while Deborah was rehearsing with a gospel music group. When Deborah returned home at approximately 9:30 p.m., defendant attacked her from behind and wrapped a telephone cord around her neck. Defendant wrestled Deborah into a hallway, where he demanded that she give him her ATM card and PIN. Deborah complied.

Using the blade from a utility knife, defendant slit Deborah's throat, wrists and the back of her knees. He removed the wedding ring from her finger. Defendant used duct tape to bind Deborah's hands behind her back and her ankles together. He dragged her into a small bathroom on the main floor of the townhouse and closed the door.

Deborah was able to free her hands from the duct tape, but she concealed that fact and feigned death to keep defendant from hurting her more. She heard defendant talking, and he opened and closed the bathroom door several times. She then realized that the bathroom was on fire and she felt the flames burning her. Deborah pulled herself up and put her feet into the toilet; she splashed water on the fire from the sink until the fire was extinguished. The fire had melted the tape around her ankles. Because the front door was locked with a deadbolt and she did not have her keys, Deborah escaped the townhouse by smashing through the front window with a hammer. She went to her next door neighbor, Sidney M., for help. She told Sidney that defendant had tried to kill her. Sidney called 911. Police and paramedics responded.

Police discovered that the front window of Deborah's townhouse was broken. The house smelled strongly of smoke, and there was still smoke inside the residence. There was blood on the curtains and the glass of the window, on the floor and in the kitchen. The bathroom smelled strongly of gasoline; its walls were scorched, and some of its contents were melted, burned or singed. There was "blood all over the bathroom." The smoke marks on the door jamb and the pattern of soot indicated that the bathroom door was closed during the fire. A broken cocaine pipe was discovered outside the bathroom.

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[3] The trial court ordered that her last name be "stricken from the record."

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In the toilet trap of an upstairs bathroom, police discovered a single-sided utility knife blade, wrapped in tape. Two cans of gasoline were discovered in the garage. The ground outside was wet from rain; police observed two fresh wet tire tracks on the garage floor. Deborah's Honda Ridgeline pickup truck was not in the garage. Police also recovered a blood-stained hammer that Deborah had carried to Sidney's house.

Deborah suffered burns on nearly half her body, including second- and third-degree burns on her legs, arms and torso. She suffered lacerations to her neck, wrists and legs. The laceration on her right wrist was deep enough to cut one or two tendons. The lacerations on her legs were completely through the skin and into the fat, but not into the muscle. Doctors induced a coma. Deborah was hospitalized for more than two months and underwent eight surgeries.

Defendant spent April 5 through April 7, 2006, at a motel and one or more crack houses. He used Deborah's ATM card to withdraw money to purchase crack cocaine. Bank records showed seven withdrawals from Deborah's account during that period totaling $1,300. Defendant pawned Deborah's wedding ring, which she had bought for herself, for $200.

B. Defendant's Statements

On April 7, 2006, defendant came to the Los Angeles Police Department's southwest station and announced that he had been told the police were looking for him because he had killed his wife. That same day, police recovered Deborah's missing Honda pickup truck. Defendant's wallet and identification were found inside.

After being advised of and waiving his constitutional rights, defendant gave a recorded interview with an officer of the Gardena Police Department. Portions of the recording were played for the jury. Defendant told police that on the day of the crime he was drinking alcohol and smoking crack cocaine. Defendant stated that he believed he had grabbed Deborah from behind by the neck, punched her and taped her wrists and ankles. He said he had scraped Deborah's arm with a nail, but he denied using a paint scraper or razor blade. He had put her in the bathroom and closed the door. He went

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upstairs and put on some pullovers, took the keys to Deborah's truck, and left the house through the garage, in Deborah's truck. He saw a "flash" before he left; he believed he had used a lighter, but could not remember if it was a lighter or a match. He did not remember using gasoline, but remembered that there was gasoline in the house for use in a pressure washer.

One day later, after again being advised of and waiving his constitutional rights, defendant gave a videotaped interview with police. A portion of the videotape was played for the jury. The second interview was, in all material respects, consistent with the first.

C. The Defense Case

Defendant testified on his own behalf. Defendant admitted to eight prior convictions, seven of which were theft-related serious felonies.

Defendant testified that, on the day of the crime, he started using drugs at about 5:00 p.m. and was freebasing cocaine in the small bathroom on the main floor. To prevent Deborah from finding out that he was using drugs, he unplugged the automatic garage door opener so that Deborah could not enter the townhouse through the garage as she usually did. He was not concerned about her coming through the front door because the deadbolt was locked and a key was broken off in the outside of the lock. At some point, while he was in the bathroom doing drugs, he heard Deborah banging on the front door saying, "Brian, open up the door. I know you are in there." He ran downstairs to the garage to see if she was there and to conceal a bottle of ether. When he came back upstairs, he heard a loud crash. He discovered Deborah on her back with her legs up on the window ledge, as if she had fallen through the window. Defendant helped Deborah up. She was bleeding. Deborah pushed past appellant, went into the small bathroom and slammed the door.

Defendant testified that he had left drug paraphernalia in the small bathroom, including a lit candle and a small bowl containing ether. Defendant told Deborah through the bathroom door that he was going to take her to the hospital. He went to get his truck,

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but was unable to open the garage door because Deborah had parked her truck too close to the outside of the door. As defendant came back up the stairs he saw a flash, but he did not know what it was. Defendant went out the front door, unlocking the deadbolt from the inside, and moved Deborah's pickup truck into the garage to take Deborah to the hospital. When he returned, the bathroom door was open and Deborah was gone. There was blood in the bathroom. Defendant panicked because he was on parole, and he thought Deborah was going to tell the police that he had been using drugs. Defendant fled in Deborah's pickup truck.

Defendant testified that he found Deborah's wedding ring inside her truck. He already had Deborah's ATM card because he was going to use it earlier that day to purchase supplies. Defendant denied pouring gasoline on Deborah and setting the bathroom on fire.

Defendant went on a drug binge after the incident because he felt responsible for what had happened to Deborah. He thought Deborah was dead because of all the blood he had seen at the townhouse.

Defendant turned himself in on the advice of his mother and his parole officer. Defendant testified that he was high and very tired when he made his statements to police, and that he told police what he thought they wanted to hear.

D. Procedural Background

Defendant was charged with one count of attempted murder (§§ 664/187, subd. (a)) (count 1), one count of arson causing great bodily injury (§ 451, subd. (a)) (count 2) and one count of robbery (§ 211) (count 3). The information further alleged that defendant had inflicted great bodily injury (GBI) on Deborah (§§ 1203.075; 12022.7, subd. (a)) under circumstances involving domestic violence (§ 12022.7, subd. (e)). The information alleged that defendant had seven prior serious felony convictions within the meaning of the Three Strikes Law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)); four prior serious felony convictions within the meaning of section 667, subdivision (a)(1); and four prior prison terms (§ 667.5, subd. (b)).

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The jury convicted defendant on counts 1 and 2, but acquitted defendant of robbery on count 3. The jury found true the domestic violence GBI allegation. After a bifurcated court trial, the trial court found true the allegations concerning defendant's priors.

The trial court sentenced defendant to state prison for a total term of 74 years to life. On count 1, the trial court sentenced defendant to 29 years to life, consisting of 25 years to life for the attempted murder plus the mid term of four years on the domestic violence GBI allegation. On count 2, the trial court sentenced defendant to a consecutive term of 45 years to life, consisting of 25 years to life on the arson charge plus 20 years for defendant's section 667, subdivision (a) priors. The trial court ordered the four one-year terms for defendant's section 667.5, subdivision (b) priors to be served concurrently with his sentences on counts 1 and 2. The trial court also imposed a $200 restitution fine; a $200 parole revocation restitution fine, stayed; and one $20 court security fee. Deborah waived victim restitution. Defendant was given presentence credit of 600 days for actual custody and no conduct credit. Defendant timely appealed.

DISCUSSION

A. Defendant's Section 237 Petition

1. Additional Background

The jurors rendered their verdicts on June 20, 2007. When discharging the jury, the trial court told the jurors to obtain certificates of completion from the jury room and thanked them for their service. The trial court then stated, "You can remain around if you want to talk with the attorneys. Sometimes it's helpful for them to speak with you for various reasons, but you don't have to. You are free to go and you'll receive a letter from the court within a couple of weeks. Don't be surprised by that. It's just a thank you letter. And you shouldn't be contacted by anyone else. If you are contacted, let us know. All right. Thank you and goodbye."

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The trial on defendant's priors and the sentencing hearing were scheduled for October 16, 2007. Prior to the hearing, defendant filed a written motion for a new trial or, in the alternative, an evidentiary hearing on allegations of juror misconduct. Defendant also filed a petition for disclosure of "the names, addresses, and telephone numbers of the jurors" pursuant to Code of Civil Procedure section 237.[4] Both the motion and the petition were based on a written report by James Richardson of Untouchables Private Detectives.

In the report, Richardson stated that he had spoken by telephone to a person named Timothy Boykin. Boykin told Richardson that he (Boykin) was a coworker and friend of one of the jurors in defendant's case. The report referred to the juror by name. Boykin told Richardson that the juror had said that defendant's case was "fucked up"; that some of defendant's testimony had seemed sincere; that he (the juror) did not understand how defendant had been convicted; that Deborah's testimony "kept changing"; that the jurors had "looked at [defendant's] past convictions and felt [defendant] was guilty"; that "everything was thought through and everybody agreed and made up their minds before deliberation that [defendant] was guilty"; and that he (the juror) had gone along with the other jurors "considering the defendant's priors."

Boykin told Richardson that he (Boykin) had known defendant since they were 11 years old, and that he considered defendant to be family. Boykin said that his conversation with the juror had occurred in April or May of 2007.[5] No declaration from Richardson or Boykin was submitted in support of defendant's motion or petition.

The trial court heard the motion for a new trial and the section 237 petition on October 16, 2007. Defense counsel stated that the motion and the petition were "kind of an alternative and that is either to grant a motion for new trial based on jury misconduct

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[4] For purposes of this Discussion, Part A only, references to sections 206 and 237 are to the Code of Civil Procedure.

[5] Defendant's trial occurred in June of 2007.

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or allow the defense access to the names and addresses of at least one of the jurors . . . ." Defense counsel stated, "We got some information as to who that party [the juror] is, but since we are—at least my understanding is that we are not allowed to contact that party unless we get permission [from] the court, we've addressed this motion . . . that the court allow us to have access to that juror and resolve this issue once and for all."

The prosecutor opposed the motion and the petition on the grounds that the statements in the report attributed to the juror were inadmissible multiple hearsay; were not credible on their face because (among other things) the conversation between Boykin and the juror allegedly occurred before trial started; and, even if the statements were true, they did not constitute evidence of juror misconduct. The prosecutor noted that Boykin, who represented himself to Richardson as a close friend of defendant, allegedly worked with the juror. Defendant thus had "ways to contact" the juror other than to "bring him into court for a hearing . . . ." The prosecutor stated, "If he was so inclined, he can speak to whoever he wants to speak to about this trial, as the court is well aware. And it's information that could be obtained directly from this juror rather than hearsay upon hearsay upon hearsay . . . ." Defense counsel stated, "Obviously we can contact the juror, but the problem is we didn't think it was appropriate to contact the juror without the court's permission."

The trial court continued the matter for further briefing on whether the trial court could consider the strength of the evidence against defendant in ruling on the motions. The prosecutor submitted further briefing, but defendant did not. The hearing continued on November 27, 2007. Defense counsel argued, "I think the appropriate thing is to let us have this information so we can interview this juror . . . . That's simply what we are asking for, permission to see this juror, the information that's included in the court file as to the juror's address and phone number so we can interview that particular juror and make a determination as to whether or not there was juror misconduct." Defense counsel continued, "And we are simply asking for permission to interview this particular juror . . . . We are not even asking for all the jurors' names and all the numbers. We are asking for one name, one number to be interviewed."

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The trial court asked, "Did this investigator [Richardson] try to contact this [juror]?" Defense counsel responded, "No we didn't. We didn't think it was appropriate without the court's permission. That's an interesting point whether or not we could legally, but I think at least it was our interpretation that before we should contact, we get permission from the court before we contact [the juror]. Since I believe the jurors are instructed that we wouldn't contact them without the court giving permission." The trial court asked, "He [the juror] sort of identified himself, hasn't he?" Defense counsel answered, "Yes. I think that we probably could go track him down, but the issue is whether or not that's appropriate conduct on the part of the defense without the court's permission."

The trial court reviewed the contents of the report and observed, "This is all I have and I don't think it's enough to release this person's name." The prosecutor agreed, adding that if jurors could be "dragged back into court and asked a bunch of questions" based on such a flimsy showing, "it just has a very chilling effect on the whole process." Defense counsel replied, "Well, it's not necessarily a matter of dragging him in. We would actually go out—we know where he works and we would go out there and interview him, simple as that."

The trial court stated, "Okay. Your motion is denied. That was a motion to reveal the name, address and phone number of the juror and for new trial?" Defense counsel responded, "That's correct, your Honor." The trial court ruled, "Okay. They are both denied."[6]

2. Discussion

Section 206, subdivision (b) permits a criminal defendant or his representative to discuss the jury's deliberations or verdict with a juror, provided the juror consents and the discussion occurs at a reasonable time and place. If contact with the juror is made more

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[6] Defendant raises no issue on appeal with respect to the denial of his motion for a new trial.

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than 24 hours after the verdict, the defendant or his representative must "inform the juror of the identity of the case, the party in that case which the person represents, the subject of the interview, the absolute right of the juror to discuss or not discuss the deliberations or verdict in the case with the person, and the juror's right to review and have a copy of any declaration filed with the court." (§ 206, subd. (c).) To facilitate such post-verdict discussions, a defendant may petition the trial court for access to the jurors' names, addresses and telephone numbers. (§§ 206, subd. (g); 237.) The petition must "be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information." (§ 237, subd. (b).)

a. No Error in Denying Section 237 Petition

The trial court properly denied defendant's section 237 petition. Section 237, subdivision (b) mandates that "[t]he petition *shall* be supported by a declaration . . . ." (Italics added.) Defendant submitted no declaration, but relied solely on Richardson's unsworn report. Defendant's failure to support his petition with the required declaration compelled denial of his petition.

Moreover, even if Richardson had submitted a declaration containing the information in his report, the trial court did not abuse its discretion in denying the petition. (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1097; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 991.) As the prosecutor argued during the hearing, the relevant information related by Richardson consisted of hearsay upon hearsay—that is, Richardson's testimony recounting out-of-court statements by Boykin, which in turn recounted out-of-court statements by the juror regarding the jury deliberations. (Evid. Code, § 1200, subd. (b); see *DiCola v. White Bros. Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 680-681.) Hearsay evidence has been viewed as inherently unreliable. (See *People v. Ayala* (2000) 23 Cal.4th 225, 268 ["'The general rule that hearsay evidence is inadmissible because it is inherently unreliable is of venerable common law pedigree'"].) In addition, according to Richardson, Boykin stated his conversation with the juror occurred in April or May of 2007, *before* defendant's trial in

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June of 2007. Boykin also stated that he had known defendant since childhood and that he considered defendant family. Considering the hearsay nature of the evidence; the objective impossibility of part of Boykin's statement (i.e., that the juror made statements about the jury's deliberations before defendant's trial had begun); and Boykin's potential bias due to his relationship with defendant, the trial court reasonably could conclude that the evidence presented by defendant was not credible, and that defendant therefore failed to carry his burden of showing good cause. (See *People v. Granish* (1996) 41 Cal.App.4th 1117, 1131.)

b. No Improper Prohibition Against Contacting Juror

Defendant contends that the trial court erred by "prohibiting the defense" from contacting the juror based on information defense counsel already possessed. Defendant's theory is that the trial court's remark when discharging the jury that the jurors "shouldn't be contacted by anyone else" "indicat[ed] that any attempt by counsel to contact [the jurors] post-verdict was prohibited." Because defense counsel so understood the trial court's remarks, defendant contends, defense counsel stated during the hearing on defendant's section 237 petition that counsel "knew the whereabouts of the juror" and merely "was seeking the court's permission prior to" contacting the juror. According to defendant, the trial court's denial of defendant's section 237 petition "can only be reasonably construed as *also* denying [defendant] permission to contact that juror . . . ." (Italics added.)

We disagree. The trial court stated when discharging the jury, "You can remain around if you want to talk with the attorneys. Sometimes it's helpful for them to speak with you for various reasons, but you don't have to. You are free to go and you'll receive a letter from the court within a couple of weeks. . . . And you shouldn't be contacted by anyone else. If you are contacted, let us know." The trial court should have discharged

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the jury by instructing it with CALCRIM No. 3590.[7] (See Bench Notes to CALCRIM No. 3590 (Fall 2007 ed.) p. 978 [trial court has sua sponte duty to give CALCRIM No. 3590 on discharge of the jury].) But defendant did not object to the instruction as given by the trial court, nor did defendant seek clarification of his right to contact jurors at that time. (See *People v. Hart* (1999) 20 Cal.4th 546, 622 [failure to seek clarification waives claim on appeal].)

Moreover, although the trial court's final instruction varied from the text prescribed by CALCRIM No. 3590, the trial court did *not* expressly prohibit the parties from contacting jurors, and no such order was entered. Read in context, it appears the trial court's final instruction was an admonition to the jurors—as required by section 206, subdivisions (a) and (d)—that they should report to the trial court any unreasonable or nonconsensual contact by the parties or their representatives. We do not think the trial court's remarks were intended to abrogate defendant's right under section 206, or that the

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[7] CALCRIM No. 3590 states: "You have now completed your jury service in this case. On behalf of all the judges of the court, please accept my thanks for your time and effort. [¶] Now that the case is over, you may choose whether or not to discuss the case and your deliberations with anyone. [¶] [I remind you that under California law, you must wait at least 90 days before negotiating or agreeing to accept any payment for information about the case.] [¶] Let me tell you about some rules the law puts in place for your convenience and protection. [¶] The lawyers in this case, the defendant[s], or their representatives may now talk to you about the case, including your deliberations or verdict. Those discussions must occur at a reasonable time and place and with your consent. [¶] Please immediately report to the court any unreasonable contact, made without your consent, by the lawyers in this case, their representatives, or the defendant[s]. [¶] A lawyer, representative, or defendant who violates these rules violates a court order and may be fined. [¶] [I order that the court's record of personal juror identifying information, including names, addresses, and telephone numbers, be sealed until further order of this court. [¶] If, in the future, the court is asked to decide whether this information will be released, notice will be sent to any juror whose information is involved. You may oppose the release of this information and ask that any hearing on the release be closed to the public. The court will decide whether and under what conditions any information may be disclosed.] [¶] Again, thank you for your service. You are now excused."

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trial court inadvertently or by implication prohibited defendant from contacting the jurors. (See Evid. Code, § 664; see *People v. Diaz* (1992) 3 Cal.4th 495, 567 ["we presume that the trial court has properly followed established law"].) Although the trial court's remarks might have been ambiguous in this respect, mere ambiguity does not constitute reversible error. "Faced with this ambiguity in the record, . . . defendant must lose. We must indulge in every presumption to uphold a judgment, and it is defendant's burden on appeal to affirmatively demonstrate error—it will not be presumed." (*People v. Garcia* (1987) 195 Cal.App.3d 191, 198.)

The record also does not support defendant's contention that denial of his section 237 petition was, in reality, a prohibition against contacting the juror. (Cf. *Townsel v. Superior Court, supra,* 20 Cal.4th at p. 1094 [trial court has inherent power to require parties to obtain court authorization prior to contacting jurors].) Defendant's section 237 petition did not request permission to contact the juror—the relief defendant requested was "an order *to disclose the names, addresses, and telephone numbers of the jurors*[.]" (Italics added.) Defense counsel consistently requested that relief during his argument: "I think the appropriate thing is *to let us have this information so we can interview this juror* . . . . That's simply what we are asking for, permission to see this juror, *the information that's included in the court file as to the juror's address and phone number so we can interview that particular juror* and make a determination as to whether or not there was juror misconduct." (Italics added.) When ruling, the trial court verified with defense counsel the nature of the petition and the relief requested: "Okay. Your motion is denied. That was a *motion to reveal the name, address and phone number of the juror* and for new trial?" (Italics added.) Defense counsel responded, "That's correct, your Honor." Again, at no point during the hearing did the trial court purport to prohibit defendant or his representatives from contacting the juror.[8] If defendant believed he

[8] Accordingly, defendant remains free to contact the juror in a manner consistent with section 206, subdivision (c), and, if he discovers facts establishing juror misconduct, to seek habeas corpus relief on that ground.

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needed and wished to obtain the trial court's permission to speak to the juror, it was defendant's burden clearly to obtain a ruling from the trial court on his request. He did not do so. (See *People v. Brewer* (2000) 81 Cal.App.4th 442, 461-462; *People v. Lewis* (2008) 43 Cal.4th 415, 482 ["[I]t was incumbent on counsel, if they wished to pursue the matter, to secure a ruling from the trial court. The failure to do so forfeits the claim"]; *People v. Williams* (1999) 20 Cal.4th 119, 128.) Defendant has failed to demonstrate error.

B. Testimony of Sidney M.

1. Additional Background

Sidney M. was the neighbor who helped Deborah after defendant attacked her. Sidney had lived next door to Deborah for eight years, and had known defendant for a year and a half. Sidney also knew defendant's sister, Lori, because they both bowled in a Tuesday night bowling league.

During her examination of Sidney, the prosecutor asked, "And did you have occasion to speak with [defendant] after the night of April 4, 2006?" Sidney responded that he had. One night when he was bowling, "[defendant's] sister, his other sister gave me [her] cell phone and said somebody wanted to talk to me." Defense counsel asked for a sidebar and objected that he had been given no discovery that defendant had made any statements to Sidney. The prosecutor responded that she "didn't have any discovery. I found out from the witness." The trial court asked, "Today?" The prosecutor responded, "No, not today."

The trial court excused the jury and asked the prosecutor when she became aware of the conversation between Sidney and defendant. The prosecutor said that she could not remember exactly, but that Sidney had told her of the conversation on the telephone. The prosecutor told the trial court that Sidney would testify that defendant had asked Sidney what Sidney had told the police, and that Sidney answered, "I can't talk about

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this." The prosecutor said that the first she heard of it "was I don't know how many days ago . . . . It was a surprise to me as well." She had no notes of the conversation.

The trial court examined Sidney outside the presence of the jury. Sidney told the trial court that, approximately one month after the crime, defendant had called one of his sisters. Defendant's sister handed her cell phone to Sidney. Defendant had asked Sidney what Deborah had said to the police (not, as the prosecutor had stated, what *he* had said to the police). Sidney answered defendant, "I'm not at liberty to discuss that with you." That was the entire conversation.

The trial court asked counsel for argument. Defense counsel requested that he be permitted to research the issue and argue it the following day. The trial court adjourned the proceedings and ordered that proceedings resume the next day at 1:30 p.m.

When proceedings resumed, the trial court heard argument. Defense counsel moved for a mistrial based on the prosecutor's failure to comply with her discovery obligations. Defense counsel did not request that the evidence be excluded or a further continuance. The trial court denied the motion for a mistrial.[9] The trial court instructed the prosecutor that she could ask Sidney about the conversation.

After the prosecutor examined Sidney regarding the night of the attack, the following colloquy occurred:

"Q . . . Fast forward a few weeks, was there an incident that occurred at the bowling alley where you have your bowling league?

"A Yes. . . .

"Q What was that incident?

"A The incident was I was handed a cell phone by [defendant's] sister.

"[¶] . . . [¶]

"Q Do you know his sister?

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[9] Defendant does not contend that the trial court erred by denying his request for a mistrial.

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"A I know one of his sisters [Lori]. I don't know this sister [Leslie] in particular.

"[¶] . . . [¶]

"Q How did you become aware that she was there?

"A Well, she was visiting her sister who was bowling on the same lane as I was."

"[¶] . . . [¶]

"Q And . . . at some point during that evening, did [defendant's] sister approach you?

"A Yes, as I was getting ready to leave.

"[¶] . . . [¶]

"Q And how did she approach you?

"A She walked up to me and handed me a phone and said[,] 'Somebody wants to talk to you.'

"[¶] . . . [¶]

"Q Who was it?

"A The defendant Brian Newels.

"Q Did you recognize his voice.

"A Yes, but he said exactly who he was when I got on the phone.

"[¶] . . . [¶]

"Q And then what did he say?

"A Well, I got on the phone. I said[,] 'Hello.' He said[,] 'Hello.' He said[,] 'Sidney?' 'Yeah.' 'This is Brian.' I said[,] 'What's up.' He said[,] 'What exactly did Deborah say to the police?' And I said[,] 'I'm not at liberty to discuss that with you.'

"[¶] . . . [¶]

"Q And that was the end of that conversation?

"A That was the extent of the conversation. I handed the phone back to his sister and I left.

"Q Did that make you uncomfortable?"

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"[DEFENSE COUNSEL]: Objection; irrelevant.

"[SIDNEY]: Yes.

"THE COURT: Well, overruled. State of mind."

Defense counsel did not cross-examine Sidney with respect to the telephone call. During his direct examination, defendant admitted he had spoken to Sidney and asked what Deborah had told the police. He explained he did so because Deborah had said that she was "going to tell the truth about what happened."

2. Discussion

Defendant argues that reversal is required because (1) the trial court should have excluded Sidney's testimony regarding his conversation with defendant due to the prosecutor's discovery violation (§ 1054.1); and (2) Sidney's testimony that his conversation with defendant made him "uncomfortable" was irrelevant to the issues before the trial court and should have been excluded. Neither contention has merit.

a. Discovery Violation

Section 1054.1 requires prosecutors to disclose all known statements by the defendant, and all relevant reports of statements by witnesses whom the prosecutor intends to call at trial. (§ 1054.1, subds. (b), (f).) Section 1054.5, subdivision (b) provides that, when a party has failed to comply with discovery obligations, "a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order." The trial court "may prohibit the testimony of a witness . . . only if all other sanctions have been exhausted." (§ 1054.5, subd. (c).) We review the trial court's rulings on discovery matters for an abuse of discretion. (*People v. Ayala, supra,* 23 Cal.4th at p. 299; *People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 48.)

We assume, without deciding, that the prosecutor violated her discovery obligations by failing to disclose the evidence regarding Sidney's conversation with

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defendant prior to calling Sidney as a witness.[10] (See *People v. Jackson* (2005) 129 Cal.App.4th 129, 169 [§ 1054.1, subd. (b) "requires the disclosure of all statements of a defendant without qualification"]; see also *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 165-166 ["reports of statements" include oral statements reported orally to counsel].) Defendant argues that the trial court was required "to preclude" the evidence because of "the wilful [*sic*] nature of the violation and the tactical advantage gained by the prosecution." Defendant, however, forfeited any such contention. Although defendant requested exclusion of the evidence when he made his initial objection, he did *not* request exclusion of the evidence when arguing the discovery issue to the trial court the following afternoon, prior to Sidney's testimony—he requested only a mistrial. The trial court ruled only on defendant's request for a mistrial. Defendant thus abandoned his request to exclude Sidney's testimony, and he may not raise the issue on appeal. (Evid. Code, § 353, subd. (a); *People v. Ramos* (1997) 15 Cal.4th 1133, 1171 [to preserve claim of erroneous admission of evidence, objecting party "must secure an express ruling from the court"]; see also *People v. Lewis, supra,* 43 Cal.4th at pp. 481-482 [defendant forfeited *Wheeler/Batson* claim by failing to obtain ruling].)

Even if we were to reach the merits of defendant's claim, we perceive no abuse of discretion. Section 1054.5, subdivision (c) permits the exclusion of testimony as a discovery sanction "only if all other sanctions have been exhausted." "[A]bsent a showing of significant prejudice and willful conduct, exclusion of testimony is not appropriate as punishment." (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758.) In this case—in which defendant had given substantial incriminating statements to police—defendant's statement to Sidney was of minor importance. The statement consisted of defendant's question, "What exactly did Deborah say to the police?" and Sidney's response, "I'm not at liberty to discuss that with you." The trial court suspended the prosecutor's examination of Sidney when the issue arose. One sanction permitted by

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[10] The trial court made no express finding with respect to whether a discovery violation occurred.

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section 1054.5, subdivision (b) is "delaying . . . the testimony of a witness[.]" Further, at defendant's request, the trial court granted a continuance to the following afternoon to give defense counsel additional time to research and, presumably, consider the issue. A continuance is another sanction permitted by section 1054.5, subdivision (b). When proceedings resumed, defense counsel did not request a further continuance or that the evidence be excluded. Given the nature of the statement at issue and defendant's failure to contend otherwise, the trial court reasonably could conclude that the delay in Sidney's testimony and the short continuance granted to defendant were sufficient to remedy the prosecutor's discovery violation. Defendant has failed to establish an abuse of discretion.

b. Relevance Objection

Defendant argues that the trial court should have sustained his relevance objection to Sidney's testimony that his conversation with defendant made him "uncomfortable." We need not determine whether the trial court erred, however, for defendant has failed to establish prejudice. Absent of a violation of federal rights, we evaluate a claim of evidentiary error to determine "whether 'it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error.' [Citation]." (*People v. Page* (2008) 44 Cal.4th 1, 41-42, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Defendant claims he was prejudiced because the case turned primarily on the credibility of Deborah and defendant, and Sidney's testimony that he was "uncomfortable" speaking to defendant undermined defendant's credibility. But any impact the testimony might have had on defendant's credibility was minor, indirect and inferential. Defendant's credibility suffered far more damage from his extensive history of theft-related serious felonies, the material inconsistencies between his prior statements to police and his trial testimony, and the implausibility of some of his trial testimony. Sidney's testimony that he was "uncomfortable" was not a direct attack on defendant's credibility, and although one might infer that Sidney perceived the telephone call as intimidating, the prosecutor did not ask the jury to draw such an inference. The jury

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might as easily have inferred that Sidney was uncomfortable speaking with defendant because defendant was accused of setting Sidney's neighbor on fire, or because Sidney was reluctant to discuss an ongoing criminal matter in which he was to be a witness. Defendant explained the telephone call in his own testimony, and the prosecutor did not mention it in her argument to the jury. Accordingly, it is not reasonably probable that defendant would have achieved a more favorable result had the trial court excluded the testimony.

C. Evidence of Deborah's Bias

1. Additional Background

Deborah bought her townhouse seven or eight years prior to her marriage to defendant. She maintained title in her name only. Shortly before the attack, Deborah had refinanced the townhouse. She gave $10,000 of the proceeds to a personal friend who was in need. Defendant was aware of the gift. Deborah also kept a separate bank account because of defendant's drug problem. Defendant would frequently "disappear for days" to do drugs.

Defendant did not have a checking account. Defendant did odd jobs in construction and as a handyman. If defendant was paid by check rather than in cash, the checks would be made out to Deborah, who would cash the checks and place the money in a canister. Defendant could access his money at any time. Deborah sometimes gave defendant small sums of money for lunch or pocket money.

During the prosecutor's redirect examination of Deborah, the following colloquy occurred:

"Q . . . . You said that you didn't have any problems [with your marriage] that day, the day of the incident, . . . did I understand that clearly?

"A Yes.

"Q Any problems that you knew about?

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"A I remember—I don't remember any problems on that day. I was at work. We talked to each other a couple of times in that day.

"Q And at that time did you love your husband?

"A At that time.

"Q And as far as problems are concerned, prior to that day would you describe him leaving for days at a time . . . without knowing where he is a problem?

"A Yes."

Defense counsel later cross examined Deborah as follows:

"Q Had there been any discussion about divorce between you and [defendant]?

"A I have to admit that I was getting frustrated.

"Q And you knew if there was a divorce that you were going to have to share some of that property didn't you? Everything wouldn't be yours as it was during the marriage?

"A Your client never discussed divorce with me.

"Q You have been divorced before, isn't that correct?

"A Yes.

"Q And you lost quite a bit of property during that divorce, did you not?

"[¶] . . . [¶]

"A You're talking about my first marriage? I didn't have any property.

"[¶] . . . [¶]

"Q If there was going to be a divorce, you needed [defendant] out of the way, didn't you?

"[PROSECUTOR]: Objection; argumentative.

"THE COURT: Overruled. [¶] . . . [¶] Hold, on. Approach please."

The trial court held a sidebar conference as follows:

"THE COURT: What was the question?

"[DEFENSE COUNSEL]: If there was going to be a divorce she needed him out of the way.

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"[PROSECUTOR]: It also assumes facts not in evidence, your Honor. [¶] . . . [¶] There's no testimony . . . that there was going to be a divorce.

"[DEFENSE COUNSEL]: Well, I thought she just testified—

"[PROSECUTOR]: No, she didn't.

"THE COURT: She didn't. So lacks foundation. I'm going to sustain the objection."

The trial court refused the prosecutor's request to strike the question, but permitted the prosecutor to state her objection before the jury and sustained the objection. On redirect examination, the prosecutor asked, "Just to clarify, you never discussed divorce with [defendant], is that true?" Deborah answered, "That's true."

2. Discussion

Defendant argues that the trial court erred by sustaining the prosecutor's objection to defense counsel's question, "If there was going to be a divorce, you needed [defendant] out of the way, didn't you?" Defendant contends the question would have elicited evidence of Deborah's bias against defendant, and was thus relevant to her credibility.[11] We review the trial court's decision to exclude evidence for an abuse of discretion. (*People v. Thornton* (2007) 41 Cal.4th 391, 428.)

There was no abuse of discretion here. It is improper cross-examination to ask a question that assumes as true a fact that is not in evidence or likely to be introduced into evidence. (*Dastagir v. Dastagir* (1952) 109 Cal.App.2d 809, 814; *Love v. Wolf* (1964) 226 Cal.App.2d 378, 390-391; see also *Marcus v. Palm Harbor Hospital, Inc.* (1967) 253 Cal.App.2d 1008, 1015; Wegner, et al., California Practice Guide: Civil Trials and

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[11] In his reply brief, defendant contends that the trial court's ruling "effectively prevented counsel from pursuing *a line of questioning* designed to yield" evidence of Deborah's bias. (Italics added.) But the trial court made no ruling foreclosing defense counsel from inquiring whether Deborah was contemplating divorce, and it is not reasonable to so construe a ruling that merely sustained an objection to one improper question on that topic.

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Evidence (The Rutter Group 2008) ¶ 10:66, p. 10-12.2 to 10-13.) To respond to defense counsel's question, Deborah would have to assume as true that she was contemplating divorce at the time of the incident. Although Deborah testified that she was getting "frustrated" with defendant, she also testified that she had not discussed divorce with defendant. No other evidence had been introduced that either Deborah or defendant was contemplating divorce; defense counsel made no offer of proof that he would provide such evidence; no such evidence was proffered later in the proceedings. The question was thus improper. The trial court did not abuse its discretion in sustaining the prosecutor's objection.

D. Photographs of Deborah's Injuries

1. Additional Background

The prosecution called a surgeon, Dr. Christopher Lane, to testify regarding Deborah's injuries. Prior to Dr. Lane's testimony, defense counsel stated that he was "concerned" about the photographs of Deborah's injuries, which he said were "repetitive of the same injuries" and "very graphic." He stated that defendant did not object to one photograph of each injury. The prosecutor explained that she had "isolated each picture" so that there was one photograph of the front and one photograph of the back of each of Deborah's injured body parts.

During Dr. Lane's testimony, the prosecution introduced several photographs of Deborah's injuries without objection.[12] During a break in Dr. Lane's testimony, defense counsel raised an objection as follows:

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[12] The photographs admitted without objection were exhibits 40-A [sutured neck laceration]; 40-B [facial burns]; 40-C [burns on lateral hip and upper abdomen]; 41-A [burns on upper abdomen between belly button and breast]; 41-B [different angle of abdomen near belly button]; 42-A [back medial of the right leg]; 42-B [front of left leg]; 43-A [outside of right leg]; 44-A [back of right leg]; 45 [lower right leg]; 46-A [inside of lower right leg]; 46-B [front of lower left leg]; 46-C [back of lower left leg]; 47-A [inner rear of right arm]; 47-B [front of right forearm]; 47-C [upper right forearm]; 47-D [back

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"[DEFENSE COUNSEL]: [T]here's only two [photographs] that I'm opposed to, and that's 43 B and 44 B. I think those are more than graphic with regards to the injuries. It shows what appears to be internal organs of some type.

"THE COURT: They are fat cells.

"[DEFENSE COUNSEL]: In addition, . . . I think they are more prejudicial than probative. I don't think there's a real issue as to whether or not she had injury. The issue is the cause of the injury, not in fact that she did, in fact, have injuries. I think the photographs are highly inflammatory. I think the other photographs more than adequately cover the injuries in question. . . ."

The prosecutor explained that Exhibit 44-B, referred to by defense counsel, showed only fat cells, as the trial court had noted. The trial court remarked that the two exhibits "appear to be different cuts." The prosecutor agreed. Defense counsel reiterated that the photographs were "gory," unnecessary and more prejudicial than probative of any issue before the court. The trial court asked the prosecutor why she was showing the photographs. The prosecutor explained that the photographs were relevant both to the allegation that defendant caused great bodily injury and to show defendant's malice on the attempted murder charge. The trial court ruled, "It does go to intent, if the intent was to injure or kill. They aren't from what I can see, from the same body part, they are . . . the backs of two different legs."

Defense counsel argued that great bodily injury had been established by the photographs already shown, so that the additional photographs were cumulative. The trial court rejected that argument, stating, "But to establish intent, it is relevant. So the question is whether or not it's more prejudicial than probative. They are duplicative. They are graphic, and they don't show internal organs, this person was cut and burned in various places. These are the injuries. . . . I'm going to allow these photographs."

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of right arm]; 47-D [right tricep area]; 48-A [upper inner left arm]; 48-B [left wrist]; 48-C [front of left arm]; 49 [both legs after skin graft].

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Dr. Lane testified that Exhibit 43-B showed the back of Deborah's left leg, and that the photograph showed fat inside the laceration. Exhibit 44-B was a different angle of the back of Deborah's left leg, showing a deeper burn.

2. Discussion

Defendant argues that the trial court erred in admitting exhibits 43-B and 44-B because the photographs were "gruesome and graphic" and were not probative of either the cause of the injuries or defendant's intent to kill. We review the ruling admitting the photographs for abuse of discretion. (*People v. Riggs* (2008) 44 Cal.4th 248, 304; *People v. Lewis* (2001) 25 Cal.4th 610, 641.)

Contrary to defendant's argument, the *cause* of Deborah's injuries was not the only issue at trial.[13] To prove the attempted murder charge, the prosecutor was required to prove beyond a reasonable doubt not only that defendant *caused* Deborah's injuries, but that he did so with the *specific intent to kill*. (§§ 664/187; *People v. Stone* (2009) 46 Cal.4th 131, 136 ["'Attempted murder requires the specific intent to kill'"].)

For example, it was entirely possible that the jury might conclude that defendant caused Deborah's injuries (thus rejecting defendant's trial theory that Deborah's lacerations were caused by glass when she fell through the window), but that he intended only to injure or disable her. Such a conclusion would have been consistent with defendant's prior statements to police that he merely "scratched" Deborah's upper arm with a nail. Evidence that Deborah's injuries were consistent with those caused by a potentially lethal weapon (such as a utility knife blade) and were severe (such as lacerations penetrating through the skin and into the layer of fat beneath) was probative of whether defendant caused Deborah's injuries with the intent to kill her. Photographs

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[13] Defendant asserts that "[i]t was undisputed here that the victim suffered great bodily injury." He provides no citation to the record to support that assertion. In any event, "the absence of a defense challenge to particular aspects of the prosecution's case . . . does not render victim photographs irrelevant." (*People v. Lewis, supra,* 25 Cal.4th at p. 641.)

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of Deborah's injuries were thus probative of defendant's intent. (*People v. Carey* (2007) 41 Cal.4th 109, 127 [victim photographs relevant to prove malice]; *People v. Clair* (1992) 2 Cal.4th 629, 660 [victim photographs "clearly revealed" the defendant's intent to kill]; see also *People v. Riggs, supra,* 44 Cal.4th at p. 304 [victim photographs relevant "to establish that the murder was premeditated and deliberate"]; *People v. Crittenden* (1994) 9 Cal.4th 83, 133 [victim photographs relevant to premeditation, deliberation and intent to cause suffering].)

The trial court also could reasonably conclude that the prejudicial effect of the photographs did not substantially outweigh their probative value. (*People v. Clair, supra,* 2 Cal.4th at p. 660.) "'[P]rosecutors, it must be remembered, are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case.' [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 713, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The photographs at issue were only two of approximately twenty photographs introduced, all of which depicted Deborah's serious injuries. They were the only photographs introduced that specifically depicted the injuries to the back of Deborah's left leg. The photographs were not unusually gruesome or inflammatory, given the nature of defendant's crimes.[14] That fat cells were visible in the photographs might have been unpleasant, but that was one aspect of the photographs that made them probative of defendant's intent. As our Supreme Court has repeatedly observed, """"'murder is seldom pretty, and pictures . . . in such a

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[14] In *People v. Crittenden, supra,* 9 Cal.4th at pp. 131-132, for example, our Supreme Court found no error in admitting photographs depicting "views of the victims' bodies at the respective locations they were discovered, their bludgeoned faces and heads, Katherine's partially unclothed body with a knife protruding from it and her purse with its contents spilled out nearby, William's body covered by blood-soaked clothes, William's body with the knife recovered from inside it held next to the body, and views of tightly bound wrists and blackened fingernails. Several photographs taken prior to autopsy show portions of the unclad bodies with wounds that had been cleansed, and two black and white autopsy photographs depict traumatic head injuries."

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case are always unpleasant . . . .’”’ [Citations.]” (*People v. Riel* (2000) 22 Cal.4th 1153, 1194.) “Here, the trial court did not abuse but carefully exercised its discretion. Moreover, the record clearly shows that it weighed the probative value of the evidence against any prejudicial effect throughout the trial.” (*Id.* at p. 1193.)

E. Prosecutorial Misconduct

1. Additional Background

During her opening argument to the jury, the prosecutor attacked the credibility of defendant’s version of events by pointing out, among other things, the discrepancies between defendant’s statements to police and his trial testimony. One discrepancy was that defendant told police that he had put pullovers on over his clothes prior to leaving the townhouse, but defendant made no mention of that fact during his trial testimony. The prosecutor said, “And the one thing that he [defendant] didn’t add is that he also had the presence of mind to put some pullovers over his clothing, which presumably had blood on them, and take flight.”

One central theme of defense counsel’s argument was that the physical evidence gave rise to reasonable doubt because it did not corroborate Deborah’s testimony, but instead corroborated defendant’s testimony. During her closing argument, the prosecutor responded to defense counsel’s argument by pointing out the inconsistencies between the physical evidence and defendant’s testimony, including defendant’s testimony that he was freebasing cocaine in the bathroom. The prosecutor argued, “And there is no physical evidence to support the defense story. There’s no ether that’s found. There’s no bowl that’s found. There’s no hanger swab that’s found. There’s no cocaine that’s found. All of these things conveniently the defendant had the presence of mind to put in his pockets because, even though he was half out of his brain with freebase, he knew enough to take the evidence with him, including his bloody clothing.”

The prosecutor concluded her argument, “So, lastly, defense counsel said if Deborah told the truth, we wouldn’t be here. And point of fact, because Deborah did

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exactly that, we are here because she told the truth about what happened. And if the defendant had told his story at any point prior to testifying and there had been any evidence of his story, we wouldn't be here but instead, ladies and gentlemen[,] what we have is not buyer's remorse or some, you know, bizarre, unknown motive for Deborah to frame Brian Newels. That she did this to herself. Where is all this stuff the defendant is telling you about? It's nowhere because it doesn't exist."

2. Discussion

Defendant argues that the prosecutor improperly referenced defendant's "bloody" clothing because there was no evidence that defendant had blood on his clothes or that he discarded his clothes. Defendant also contends that the prosecutor impermissibly suggested that defendant was required to produce affirmative evidence to establish a reasonable doubt by remarking that "if the defendant had told his story at any point prior to testifying and there had been any evidence of his story, we wouldn't be here."

Defendant forfeited his claims of prosecutorial misconduct. "To preserve a claim of prosecutorial misconduct for appeal, '"the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." [Citations.]' [Citation.]" (*People v. Bennett* (2009) 45 Cal.4th 577, 595; accord, *People v. Pierce* (2009) 172 Cal.App.4th 567, 572; *People v. Williams* (2009) 170 Cal.App.4th 587, 628.) Defendant did not object to the prosecutor's argument at trial, and has failed to demonstrate that appropriate admonitions would not have cured the harm of which he complains. To the contrary, it appears that timely admonitions to the jury readily would have cured any prejudice. (See *People v. Adanandus* (2007) 157 Cal.App.4th 496, 512.)

In any event, the prosecutor did not engage in misconduct. "'A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.] In other words, the misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." [Citation.] A prosecutor's misconduct

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that does not render a trial fundamentally unfair nevertheless violates California law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."' [Citation.] The crucial issue '"is not the good faith *vel non* of the prosecutor, but the potential injury to the defendant."' [Citation.] We review the prosecutor's remarks to determine whether there is a reasonable likelihood that the jury misconstrued or misapplied them. [Citation.] Also, we do not view the prosecutor's remarks in isolation but rather 'in the context of the argument as a whole.' [Citation.]" (*People v. Adanandus, supra,* 157 Cal.App.4th at pp. 512-513.)

a. Bloody Clothing

The prosecutor's remarks about defendant's bloody clothing was not misconduct as there was sufficient evidence to permit the jury to infer (and to permit the prosecutor to argue) that defendant had blood on his clothes and that he discarded them. A crime scene investigator from the Gardena Police Department testified that she would expect blood transfer from the victim to the perpetrator of an attack like defendant's attack on Deborah. There were bloody items found on the stairway down to the garage, and blood smears on the walls and railing of the stairway. There was no evidence that Deborah used those stairs after she was injured, whereas defendant admitted he did so. In his interview with police, defendant stated that he had put pullovers on over his clothing before leaving the house; it was reasonable to infer he did so because his clothing had blood on it and he did not want to leave bloody clothing in the townhouse where police would find it. Defendant also told police during the interview that he left his clothing at one of the crack houses he went to after he fled the townhouse. The prosecutor thus had a sufficient basis to argue that the jury could infer that defendant discarded his bloody clothing.

b. Burden of Proof

We do not think it reasonably likely that the jury was misled by the prosecutor's remark that "if the defendant had told his story at any point prior to testifying and there

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had been any evidence of his story, we wouldn't be here." As defendant recognizes, the prosecutor's statement appears to have been a direct response to the statement by defense counsel, "If Deborah had come in here and told the truth, we wouldn't be here." As noted, a major theme of defense counsel's argument was that the physical evidence supported defendant's trial testimony but not Deborah's. The prosecutor was entitled to argue in rebuttal that defendant's trial testimony was inconsistent both with the physical evidence and with defendant's prior statements. The jury properly was instructed on reasonable doubt and the prosecutor's burden of proof. We presume the jurors understood and followed those instructions. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005; *People v. Williams, supra,* 170 Cal.App.4th at p. 635.) The fact that the prosecutor chose, as a rhetorical device, to allude to defense counsel's argument does not amount to misconduct.

People v. Hill (1998) 17 Cal.4th 800 (*Hill*) is inapposite. In that case, the prosecutor told the jury during argument in a capital case that reasonable doubt "must be reasonable. It's not all possible doubt. Actually, very simply, it means, you know, you have to have a reason for this doubt. *There has to be some evidence on which to base a doubt.*" The trial court overruled defense counsel's objection. The prosecutor then reiterated, "'There must be *some evidence* from which there is a reason for a doubt.'" (*Id.* at p. 831.) The Supreme Court stated that the prosecutor's remarks were ambiguous, and might have been "simply [an] exhort[ation] [to] the jury to consider the evidence presented, and not attorney argument." (*Id.* at pp. 831-832.) The Supreme Court held, however, that if the remarks were "taken in context," it was reasonably likely that the jury understood the remarks "to mean defendant had the burden of producing evidence to demonstrate a reasonable doubt of his guilt." (*Id.* at p. 832.)

Unlike *Hill, supra,* 17 Cal.4th 800, the prosecutor's remark in this case did not imply that defendant had the burden to produce evidence to raise a reasonable doubt. Rather, the prosecutor's remark was a comment on the lack of physical evidence to substantiate defendant's trial testimony, and was directly responsive to a major theme of defense counsel's argument. Moreover, also unlike *Hill*, the trial record in this case is not

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so "profoundly troubling" that the prosecutor's remarks "created a negative synergistic effect" with other instances of misconduct and other trial errors, such that defendant was deprived of a fair trial. (*Id.* at p. 847.) To the contrary, the record demonstrates that the trial was conducted fairly and with due regard for defendant's rights. There was no prosecutorial misconduct.

F. Cumulative Error

Because we have found no trial error, we reject defendant's claim of cumulative error.

G. Section 654

Defendant argues that his consecutive sentences for attempted murder and arson violated section 654.[15] "Section 654 prohibits multiple punishment for a single act or an indivisible course of conduct. [Citations.] Whether a defendant's conduct constitutes a single act under section 654 depends on the defendant's intent in violating penal statutes. If the defendant harbors separate though simultaneous objectives in committing the statutory violations, multiple punishment is permissible. [Citation.] This question is one of fact for the trial court, and we uphold the trial court's finding if it is supported by substantial evidence. [Citation.]" (*People v. Williams, supra,* 170 Cal.App.4th at p. 645.) "'We review the court's determination of [a defendant's] "separate intents" for sufficient evidence in a light most favorable to the judgment, and presume in support of the court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*People v. Andra* (2007) 156 Cal.App.4th 638, 640-641.) The imposition of consecutive sentences implies a finding that the defendant harbored separate intents. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

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[15] Section 654, subdivision (a) provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

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Sufficient evidence supported the trial court's implied finding of separate intents. Deborah testified that defendant slit her throat, wrists and knees, bound her with tape and left her bleeding in the bathroom. Crime scene photos and the testimony of police officers and the crime scene investigator indicated a substantial amount of blood in the bathroom—indeed, even defendant testified that he thought Deborah was dead because of the amount of blood in the bathroom. Deborah testified that she feigned death to avoid further injury. There was then a delay, as Deborah heard defendant talking outside the bathroom, and defendant opened and closed the bathroom door several times. Defendant then set the bathroom and Deborah on fire.

From this evidence, the trial court could reasonably deduce that defendant intended to kill Deborah when he slit her throat, wrists and knees, bound her with tape and left her bleeding to death on the bathroom floor. He waited for Deborah to die, opening and closing the bathroom several times to see if she was dead. She feigned death. Believing Deborah to be dead, defendant then committed arson—not with the intent to *kill* Deborah, but with the intent to burn her body and the contents of the bathroom to conceal the evidence of his crime. Defendant's consecutive sentence on count 2 thus did not violate section 654.

H. Sentencing Issues

1. Section 667, Subdivision (a) Enhancements

The trial court found that defendant had four prior serious felony convictions within the meaning of section 667, subdivision (a). The trial court, however, imposed the enhancements only with respect to count 2, and not with respect to count 1. This was error. When a defendant is sentenced to multiple indeterminate terms, section 667, subdivision (a) enhancements must be imposed separately on each indeterminate term. (*People v. Williams* (2004) 34 Cal.4th 397, 404-405; see *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1560.) Accordingly, the trial court should have imposed the section 667, subdivision (a) enhancements on count 1 as well as count 2. The trial court's failure

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to impose the enhancements on count 1 was a jurisdictional error that may be corrected for the first time on appeal. (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6; *People v. Purata* (1996) 42 Cal.App.4th 489, 498; see *People v. Garcia, supra,* 167 Cal.App.4th at p. 1562.)

2. Section 667.5, Subdivision (b) Enhancements

The trial court found that defendant had served four prior prison terms within the meaning of section 667.5, subdivision (b); imposed the four one-year terms on the enhancements; and ordered the enhancements to run concurrently with defendant's sentences on counts 1 and 2. This was error in three respects.

First, three of the section 667.5, subdivision (b) enhancements related to serious felony convictions, which also were the bases for section 667, subdivision (a) enhancements.[16] The trial court may not impose enhancements under section 667, subdivision (a) and section 667.5, subdivision (b) based on the same prior conviction. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150; *People v. Garcia, supra,* 167 Cal.App.4th at p. 1562.) Accordingly, three of the section 667.5, subdivision (b) enhancements must be stricken.

Second, the one-year term on a section 667.5, subdivision (b) enhancement cannot be stayed or imposed concurrently. The enhancement term must be imposed consecutively, or the enhancement must be stricken. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Johnson* (2006) 145 Cal.App.4th 895, 908, fn. 20.)

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[16] The trial court imposed section 667, subdivision (a) enhancements with respect to the following prior serious felony convictions: (1) attempted robbery (Case No. A767211); (2) robbery (Case No. BA013190); (3) burglary (Case No. BA060739); and (4) robbery (Case No. A371845). The trial court imposed section 667.5, subdivision (b) enhancements with respect to the following prior prison terms: (1) attempted robbery (Case No. A767211); (2) grand theft (Case No. A973447); (3) robbery (Case No. BA013190); and (4) burglary (Case No. BA060739). The trial court thus imposed both section 667, subdivision (a) and section 667.5, subdivision (b) enhancements for defendant's convictions in Case Nos. A767211, BA013190 and BA060739.

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Third, when a defendant receives multiple indeterminate terms and the trial court imposes section 667.5, subdivision (b) enhancements, the enhancements must be imposed separately on each indeterminate term. (*People v. Garcia, supra,* 167 Cal.App.4th at p. 1562.) These errors also were jurisdictional and subject to correction for the first time on appeal. (*Ibid.*; *In re Renfrow* (2008) 164 Cal.App.4th 1251, 1254.)

3. Conduct Credit

Defendant argues and the People concede that the trial court erred by failing to award defendant 90 days of conduct credit pursuant to section 2933.1. We agree, and order the judgment modified accordingly.

4. Court Security Fee

The trial court imposed only one $20 court security fee pursuant to section 1465.8, subdivision (a)(1). The trial court should have imposed one $20 court security fee for each of defendant's two convictions, for a total of $40. (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1372; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866; see also *People v. Alford* (2007) 42 Cal.4th 749, 758, fn. 6.) We modify the judgment to impose an additional court security fee.

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DISPOSITION

The judgment is modified (1) to impose four five-year enhancements pursuant to section 667, subdivision (a) on count 1, for a total of 20 years; (2) to strike the three one-year enhancements pursuant to section 667.5, subdivision (b) with respect to defendant's prior prison terms in case numbers A767211, BA013190 and BA060739; (3) to award defendant presentence credit of 690 days, consisting of 600 days of actual custody and 90 days of conduct credit; and (4) to impose a second $20 court security fee pursuant to section 1465.8, subdivision (a)(1), for a total of $40. The matter is remanded to the trial court with instructions either to strike or to impose the section 667.5, subdivision (b) enhancement with respect to defendant's prior prison term in case number A973447. If the enhancement is imposed, the trial court is to impose the enhancement separately and consecutively on both counts 1 and 2. The clerk of the superior court shall thereafter prepare a corrected abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.