Filed 3/2/04 Reposted 3/3/04 to correct footnote numbers in dissent; opinion text unchanged

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROY LOPEZ GARCIA, Defendant and Appellant.	A098872 (Santa Clara County Super. Ct. No. 210516)

In 1998, disputes over his use of newly acquired ranch property pitted appellant Roy Lopez Garcia against residents of an adjacent subdivision in a rural part of Morgan Hill. Debbie Gregg emerged as a leader among Garcia's new neighbors. In November of that year, her shotgunned body was found on his property near a fence dividing their parcels. Five days later, Garcia was arrested and charged with her murder. A grand jury indicted him for first degree murder and alleged that he did so while lying in wait. At trial, the prosecution's evidence was largely circumstantial. Garcia maintained his innocence, but his credibility was repeatedly challenged by many witnesses, including several who testified that he had verbally threatened Gregg.

After four days of deliberations, a jury convicted Garcia of first degree murder with special circumstances. He was sentenced to life imprisonment without

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.B.2. through II.E., III., IV. and V.

possibility of parole. (See Pen. Code,[1] §§ 187, 190.2, subd. (a)(15).) On appeal, he challenges (1) the propriety of a return visit that the jury made to the crime scene during deliberations; (2) his impeachment with evidence of a spousal battery; (3) the admission of dog scent-trailing evidence and the instructions given about its use; and (4) the trial court's limitation of his cross-examination of a jailhouse informant who testified that Garcia implicated himself in Gregg's death.[2] Having carefully considered this complex case, we affirm the judgment.

I. FACTS

A. *The Ranch*

Sleepy Valley Ranch is an undeveloped parcel of land in rural Morgan Hill. The property contains no buildings or water wells, but there is a large spring on it. It is steep in places, is heavily vegetated and has a creek running near one of its boundaries. This creek forms an approximate boundary between the ranch and an adjacent rural subdivision of homes. Access to the ranch can be had by two routes—from the top of the property by way of Sheila Lane through two locked gates before the lane becomes a fire trail; or from the opposite end of the ranch via Sleepy Valley Road, a private spur road off of Armsby Lane, another private road serving as the primary access way into the rural subdivision.

In May 1998,[3] appellant Roy Garcia acquired Sleepy Valley Ranch from prior owner Alfred Farren for $225,000. Garcia had been born in Mexico, but had lived in the United States for 30 years. During that time, he operated a carpet business and became prosperous as a result of his real estate holdings. Garcia hoped to raise cattle on the ranch.

---

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

[2] This case was transferred from the Sixth Appellate District by order of the Supreme Court.

[3] All subsequent dates refer to the 1998 calendar year unless otherwise indicated.

When Garcia bought the ranch, Debbie Gregg owned an adjacent parcel at the end of Sleepy Valley Road and Griffis Way. She lived alone in a trailer that had been on the lot when she purchased it. The trailer sat on a corner of the lot, separated from the nearby creek by a fence. The trailer was not visible from Sleepy Valley Road—a dirt road off of Armsby Lane that had once been paved but had fallen into disrepair—that provided her only access to her property. Gregg was the only resident of the Armsby Lane subdivision who used this dirt road. She worked as a therapist at a San Jose mental health clinic that served a primarily Latino clientele and she spoke fluent Spanish.

B. *Property Disputes*

Even before the sale was complete, a dispute arose over the boundary line between the Garcia and Gregg properties. Farren told Garcia that he believed that Gregg's trailer and a nearby fence encroached on the ranch property. Farren had not disputed this matter with the prior owner of Gregg's property. Gregg herself had sought to purchase part of the ranch near her trailer, but Farren would not sell such a small parcel. In April, Gregg complained to the county sheriff that someone had tampered with surveyor's stakes serving as property markers between her property and the ranch. It was never clear who moved the stakes, but Gregg and Garcia each acted as if the other had done so.

Before the ranch sale, Garcia and Farren agreed to have the property surveyed. Sometime in the spring, a private survey was conducted.[4] Engineer William McClintock calculated that the ranch was 252 acres, disputing old county tax records indicating that the ranch was somewhat larger. In May, he met with Farren, Garcia, Garcia's real estate agent Frank Martinez and Gregg to survey the line between the two properties. McClintock told them that, based on his survey, he concluded that Gregg's trailer sat on her own property. When he conducted another survey for

---

[4] Escrow actually closed on the sale of the ranch in May although the final survey was not finished until June.

Gregg in the fall, he found that the location of a well that had been in dispute was also on Gregg's property, rather than Garcia's ranch. McClintock also conveyed this information to Garcia, who persisted in believing that both Gregg's trailer and her well in fact encroached on his property.

The rural subdivision abutting Garcia's ranch contained homes on large lots that were owned by Gregg and her neighbors. The main access to these homes—Armsby Lane—was a private road maintained by an association of about 50 member households. Gregg was an active member of the association. Each household paid about $300 a year in road maintenance costs. The neighbors maintained Armsby Lane themselves at an annual work party.[5] Spur roads off of Armsby Lane such as Sleepy Valley Road—also private roads—were maintained by the individual property owners who used them for access to their homes.

Garcia believed that he had the right to use privately maintained Armsby Lane and Sleepy Valley Road to access his ranch. One Sunday in late May—probably on May 30—Garcia's workers bulldozed part of Sleepy Valley Road[6] off of Armsby Lane near the line between the Garcia ranch and Gregg's property. He intended to improve the road so that it would support the trucks that he planned to drive to and from his cattle ranch along it. The bulldozer chewed up what little pavement was left on Sleepy Valley Road and pushed debris and dirt into the creek, about 100 yards from where it ran by Gregg's trailer. Some of the Armsby Lane neighbors knew of Garcia's plans to use his property as a cattle ranch and were concerned about its impact on their neighborhood. Other neighbors feared that Garcia intended to fill in the creek and divert its water.

---

[5] Farren had never been a member of the road association and had never paid to maintain Armsby Lane in and through the rural subdivision. Instead, he accessed the ranch by Sheila Lane through its locked gates. That right of access ran with the ranch property.

[6] There was also evidence that Garcia's grading equipment might have only used the private road to access the ranch where actual grading work was done.

Gregg was particularly concerned about Garcia's destruction of the remnants of pavement on Sleepy Valley Road because access to her trailer along this dirt road could become impassable during the rainy season. She telephoned several neighbors—most of whom were members of the road association—and, at her request, they met Garcia where the bulldozing work was being done.

The Armsby Lane neighbors learned that Garcia had not obtained a permit to do any grading. The neighbors told him that it was illegal to obstruct the creek with debris. Garcia told them that he thought that he had the right to do whatever he wanted on his property, but his neighbors did not believe that ownership of his ranch gave him the right to use Armsby Lane and Sleepy Valley Road. They told Garcia and his workers to stop work on Sleepy Valley Road until everyone was certain that he had a legal right to use the road. The neighbors wanted him to establish his right to use the private roads that they paid to maintain before using them again.

The conversation had been friendly, but became less so as the neighbors' list of concerns grew. In particular, Gregg angered Garcia. While most of the neighbors were concerned about his use of their roads, Gregg also wanted to know what Garcia was doing on his own property. Briefly, she spoke to him in Spanish,[7] which incensed him. Neighbors heard Garcia threaten Gregg. One later reported that Garcia told Gregg that he could make her "disappear" and he would be certain that he won this dispute. Two others recalled that Garcia told Gregg that she was his enemy now; one witness added that Garcia told Gregg that his enemies regretted it. As the gathering broke up, Gregg offered her hand to Garcia but he refused to shake it.

Gregg told her neighbors that Garcia was grading his property. Early in June, she complained to the State Department of Fish and Game that he was doing illegal work on the creek. Warden Mark Imsdahl met Garcia at the site to investigate this complaint. He discovered that a cut had been bulldozed through the creek in

---

[7] In October, Gregg testified in a civil trial that she had admonished Garcia in Spanish not to be rude and not to point at her.

violation of state fish and game laws. Imsdahl told Garcia that the cut was a code violation. When Garcia explained that his worker had cut across the creek contrary to his instructions, the warden told Garcia that he was responsible for all work done on his property by his workers. Imsdahl chose not to cite Garcia for this misdemeanor—it was a small violation in a dry creek bed involving minimal damage that was easily correctable—but he advised Garcia to get a permit before doing any more work on the creek.

Later in June, Herbert Hodges—a Santa Clara County land development officer—visited the ranch in response to complaints that Garcia had illegally graded an access road.[8] Hodges found no code violation, but noted evidence of earth movement and culvert construction over the creek. He advised Garcia that if a cut or fill of a certain height or volume of soil was made, it would violate county codes. During this visit, Garcia volunteered to Hodges that Gregg's trailer, well and a drain for a septic tank encroached on his property. He was unhappy about the encroachment. He also told Hodges that he thought it unfair that road association members were trying to prevent him from using the roads to move equipment, materials and cattle onto his property.

About this time, Garcia began to raise issues about Gregg and her property. His attorney, Fernando Hernandez, advised Gregg by letter that she was trespassing on his client's property. Gregg's attorney, Judson Gutheil, responded and countered the claim of trespass. Garcia and Hernandez prepared to bring a civil action against Gregg.

Garcia also filed a formal complaint in June with county land use officials against Gregg, reporting that her trailer and septic tank sat on his property line, thus preventing him from fencing his property. He also claimed that her well was on his property. County land use officials determined that these issues were beyond their

---

[8] Consistent with its privacy policy, county officials did not tell Garcia who filed these complaints. The jury later learned that Gregg and another of the Armsby Lane neighbors did so.

jurisdiction, but the complaint prompted them to learn that Gregg had no permit for the trailer on her property. In August, she was advised by letter that she was in violation of county land use regulations and was told to secure the proper permits.[9]

In August or September, Garcia created a pond to water his cattle and built an earthen dam blocking the creek running beside Gregg's trailer. She filed more complaints with government agencies and passed out petitions to her neighbors. As secretary of the road association, she authored and distributed its newsletter claiming that Garcia intended to dam the spring feeding the creek. Gregg feared that if the dam was not properly constructed, debris could block the culvert during a rainstorm and wash out the road, effectively blocking access to neighborhood property. Several Armsby Lane neighbors filed administrative complaints against Garcia, but Gregg was the galvanizing force in the neighborhood. She sensed Garcia's hostility to her—once, she asked someone to accompany her when she visited him at his ranch.

In September, Garcia asked McClintock to return to the property to clear up some confusion about a boundary stake near Gregg's trailer. By this time, Gregg had hired McClintock to assist her in getting a permit to legalize her trailer. McClintock told Garcia that the stake related to Gregg's trailer—it had nothing to do with his property line.

Later that month, Garcia formally filed a civil action against Gregg for trespass, seeking an injunction to prevent her encroachment onto his ranch. Garcia's complaint alleged that both Gregg's trailer and her well were actually located on his land. Although his main concern was with the road association's activities that were preventing him from using his property, Garcia[10] decided not to sue the association,

---

9 Because of Gregg's death, this matter was never resolved, but the jury heard evidence that the county would probably have required her trailer to be relocated to satisfy its setback requirements.

10 Attorney Fernando Hernandez testified that he—not Garcia—made a strategic decision to sue Gregg rather than the road association. The attorney believed that Gregg had

but sued Gregg alone. When the members of the road association learned of the lawsuit, they hired an attorney to determine whether Garcia had the right to use their subdivision's private roads. Early in the autumn, Garcia's right to use the Armsby Lane private roads to access his property was established.

At a court hearing in October on the civil lawsuit, a court heard evidence that Garcia created a pond to water his cattle by damming the creek on his ranch. Twice, Garcia denied this. Gregg testified that Garcia had threatened her, saying that "anyone that's my enemy will regret it." Garcia told the trial court that he did not want to have trouble with his neighbors—he simply wanted to fence his land. The trial court issued a mutual injunction applying to both Garcia and Gregg. Each agreed to remove an existing, old, wood fence that leaned over Garcia's property—apparently so that a new fence could be constructed in its place on an agreed lot line—and to remove construction debris from the creek. The injunction also contained a general, mutual prohibition against trespass.

After the hearing, Hernandez told Garcia that the injunction should resolve all of his issues with Gregg and the road association. At this point, Hernandez withdrew as counsel and Garcia began to represent himself in the matter. Hernandez advised that if Gregg obeyed the injunction until the next scheduled court date in February of the following year, Garcia should dismiss the case. He believed that Garcia had no interest in pursuing the case any further, regardless of whether the trailer or well encroached on his property. As long as Garcia was allowed to build his fence, the attorney believed that he would be satisfied.

Gregg's attorney, Judson Gutheil, was confused by a letter sent after the hearing in which Hernandez implied that the matter was resolved. Garcia's case had not been formally dismissed, and an answer and any cross-complaint from Gregg

---

fewer resources to prevent Garcia's access to his property than the road association. Hernandez's decision was also prompted by the suspicion—which he and Garcia shared—that Gregg had moved the surveyor's stakes.

were soon due. At this time, Gregg and Gutheil were still filing new complaints against Garcia with state and county officials.

Also in October, the county land development office received a new complaint that a dam had been constructed—earth had been moved, a tree had been felled and the creek had been blocked. Herbert Hodges returned to the ranch property to investigate.[11] He inspected the site and discovered that a large dam had been constructed since his last visit.[12] Both the earth movement necessary to build such a dam and the blockage of the creek constituted code violations. The dam could have been legally built if Garcia had the work designed by a structural engineer and acquired a county permit. At the end of October, Garcia received formal notice of this violation and was ordered to abate it, at a cost of more than $4,500. Garcia called the county land development office and complained that "that crazy woman" was at the root of all his problems.[13] In early November, the county sent Garcia a stop work notice, but never received any response to it.

During the fall, a county sheriff saw Garcia's workers constructing a fence on a different line from the boundary McClintock had marked. The sheriff halted the fence-building. Two days later, the sheriff watched as members of McClintock's engineering firm again marked the property line and fence construction began along that line. Gregg had asked to have the sheriff attend while the boundary line dispute was being resolved. Garcia and Gregg were both present at this meeting. Garcia told the sheriff that he was under court order not to speak with Gregg. When McClintock marked the property line, it ran between Gregg's trailer and Garcia's ranch land, which pleased Gregg.

---

[11] At that time, Hodges did not know who filed this complaint, but he later learned that it was filed by a representative of the Division of Safety of Dams of the State Department of Fish and Game.

[12] The jury saw photographs of these conditions taken in October.

[13] On cross-examination, Garcia denied saying this.

At Gregg's instigation, she and Garcia shook hands. They agreed that the boundary dispute had been resolved and that now Garcia could build his fence. In all, the fence between the ranch and Gregg's property cost Garcia almost $60,000 to build. Garcia told the sheriff that he had only wanted to build a fence, but that the property line had been surveyed several times at a cost that was not worth the few feet of land involved.

However, other issues were yet to be resolved between Gregg and Garcia. By early November, Fish and Game Warden Mark Imsdahl had received another complaint—this one filed by Gutheil—alleging that Garcia had committed further violations at the creek. Imsdahl reported the complaint to Garcia, who said he was improving an existing cattle pond. Imsdahl tried repeatedly to set up an appointment to visit the ranch with Garcia in mid-November, but the meeting never took place.[14]

On November 13, Larry Ford—an inspector for the state Division of Safety of Dams—called Garcia after receiving a complaint from Gregg that he had built an illegal, 35-foot high earthen dam. Garcia denied doing this—he had merely constructed a small dam in order to capture water for his cattle. On Monday, November 16, Ford visited the ranch with Garcia. During the 45 minutes to an hour that they were together, Garcia complained continuously about Gregg. Garcia told Ford "I'm the wrong one to make an enemy out of" but Ford did not sense aggression in his tone. When he viewed the dam, Ford found it to be a small one. It was too small to be within state jurisdiction, but Ford later concluded that it might fall within county authority.

On November 13, Gregg filed an answer in Garcia's lawsuit against her. She also filed a cross-complaint seeking a permanent injunction against him. She alleged

---

14 In late November, Imsdahl inspected the ranch and found that the work had been done was new, not simply an improvement of an existing condition. A fence had been built, trees had been damaged, grading had been done that affected creek drainage, and a dam or pond had been constructed. Garcia had no permits for any of this work. Imsdahl concluded that the fence, the dam and the placement of debris into the creek each constituted a separate code violation.

causes of action for encroachment, abatement of a private nuisance, willful and negligent trespass, assault and slander of title. The cross-complaint also alleged that Garcia threatened Gregg on May 30 by telling her "I used to be a street fighter" and "anyone who becomes my enemy will regret it." It also alleged that he told Gregg that she had become his "enemy." On November 16, Garcia received the cross-complaint.

About 6:00 p.m. or 6:30 p.m. on either Wednesday, November 18 or Thursday, November 19, Armsby Lane neighborhood resident Mitchell Portera saw what appeared to be a pickup truck with running lights mounted atop the cab[15] driving on a ridge on Garcia's property. The truck appeared to approach a gate leading to property next to Garcia's ranch, then turn around and head back. Portera thought it was unusual to see vehicles in this area.

On the afternoon of Thursday, November 19, Garcia met with Attorney Dennis Brown. He told Brown that he had received a notice of a county grading violation as well as Gregg's cross-complaint. It appeared to Brown that Garcia thought these matters had been resolved when the survey was completed and the fence was erected. Garcia seemed confused and somewhat angry that the situation was still unresolved. Brown sensed from Garcia "an undercurrent of . . . grave disappointment, if not . . . anger" because of Gregg's cross-complaint. Garcia told Brown that he and Gregg had agreed to the property line and now that the fence had been placed there, he had no further issue with Gregg. He asked Brown to find out why Gregg had filed her cross-complaint.

---

15 Garcia had a truck with yellow running lights mounted atop the cab for use at his carpet shop.

C. *Gregg's Death*

On Friday, November 20, the Santa Clara County Sheriff's Office received a report that Gregg had not come to work for two days.[16] Her supervisor attempted to reach her at home, but received no response. When sheriff's deputies arrived at Gregg's home about noon, her pickup truck was parked outside the trailer. It appeared that two days' mail was in her mailbox. The trailer was unlocked. No one was inside and it did not appear to have been burglarized.

A sheriff found Gregg's body on Garcia's side of the fence dividing her property from his ranch.[17] She was lying on her back near the fence. Her head was pointed toward the fence and the trailer beyond it; her feet pointed toward the creek bed. A cordless drill was found at her feet.

Gregg's face, arms and legs were marked with dried blood from multiple shotgun pellet wounds. A copper-colored projectile was found on her pants. Eleven shotgun pellet marks found in the wooden fence formed a tight pattern. Three shotgun pellets had passed through the top of the fence and had lodged in the side of Gregg's trailer. One actually penetrated inside the trailer. Another pellet was found near Gregg's body.

D. *Garcia's Arrest*

News of Gregg's death was televised locally on Sunday, November 22. Frank Martinez—the real estate agent who had helped Garcia purchase the ranch—heard this television report. He called Garcia about 11:00 p.m. that night to tell him that Gregg was dead, but Garcia's wife Ester said that her husband was asleep. Martinez shared his news with Mrs. Garcia. The next day—Monday, November 23—Martinez

---

16 Gregg did not keep scheduled appointments on the afternoon of Thursday, November 19. Her home answering machine recorded a message from a neighbor who called her on November 19.

17 There was evidence that shortly before her death, Gregg was pleased that the surveyor's work was completed and that she could finish building her fence. At the time of her death, the fence was not yet finished.

went to see Garcia at his carpet shop and told him in person that Gregg had been found murdered. Garcia responded that this news had "nothing to do with" him. Martinez told him that the police might want to talk with Garcia about Gregg's death because of his dispute with her.

On Friday, November 25, the county sheriff executed search warrants for Garcia's Gilroy residence and his San Jose carpet shop. The sheriff found two 12-gauge Remington shotguns at the residence. These were pump-action, single-barreled shotguns that required pumping between shots to eject the expended shell and feed a fresh shot into the chamber before a second shot could be fired. More than 100 shotgun shells of varying sizes and manufactures were also found at several locations in and around the Garcia residence.

While the searches were being conducted, the county sheriff repeatedly called Garcia by telephone to arrange a meeting with him. Garcia told the sheriff that he was working; several times, he told the sheriff by cell phone that he was in transit and delayed by traffic. Finally, Garcia arrived at his shop and met with the sheriff. He spoke with Dennis Brown by telephone while awaiting transport to the sheriff's office. He did not mention to Brown that he knew Gregg had been murdered.[18] Garcia did not ask why the sheriff wanted to question him or why his home and shop were being searched.

At the sheriff's office, Garcia was first told that the sheriff wanted to talk about his property dispute with Gregg. Garcia was told that he was not under arrest and he told the sheriff that he had done nothing wrong. He made a tape-recorded statement denying ever having been in jail. Some time after he began giving his statement, the sheriff asked Garcia if he wasn't curious about why he was being questioned. The sheriff told Garcia that Gregg had been murdered and that her body was found on his property. Garcia said he was surprised at this news, but the sheriff

---

18 When Brown asked Garcia what reason the sheriff might have to search his shop, Garcia told Brown that he had no idea.

noted that he smiled. Garcia denied threatening or killing Gregg, but he was arrested for murder at the end of the interview.

E. *Pretrial*

In December, the People filed a complaint charging Garcia with Gregg's murder, alleging that it was committed while lying in wait. He posted $1 million bail and was released from custody. In January 1999, the sheriff again searched Garcia's residence pursuant to a second warrant, this time looking for blood-stained shoes.[19]

In June 1999, the Santa Clara County Grand Jury indicted Garcia for murder, alleging special circumstances—that Gregg was killed while Garcia was lying in wait. (See §§ 187, 190.2, subd. (a)(15).) He was arrested again. In September 1999, he moved to suppress evidence seized in the November 1998 and January 1999 searches. He also moved to quash the grand jury indictment. (See §§ 995, 1538.5.) By October 1999, the trial court denied both motions.

In June 2000, Garcia moved for reconsideration of the trial court's order denying his motion to set aside the indictment, without success. In July 2000, Garcia moved to exclude from evidence the statements he made to the sheriff on November 25. (See *Miranda v. Arizona* (1966) 384 U.S. 436.) This motion was granted in part and denied in part. He also moved to exclude evidence of the results of a dog's search for his scent at the crime scene, without success.

F. *Prosecution Case-in-chief*

Trial began in late July and continued into August 2000. Evidence was introduced establishing that Gregg was a lesbian who engaged in Native American spiritual practices. She was described by neighbors as "very quiet, private"

---

19 Various items of footwear and clothing that were seized from Garcia's home were analyzed. One shoe showed traces of human or higher order primate blood, but the stain was too small to obtain DNA testing. Other items either had no blood or nonhuman blood on them. One of Garcia's sons later testified that the shoe on which human blood was found was his—he had injured himself and bled on his shoes.

sometimes "bashful"—someone who was "charming, very hospitable, pleasant." She appeared to have disagreed with only one person—Roy Garcia.

Even George Mumaw—one of Garcia's workers—liked Gregg. He had a less favorable impression of Garcia. Mumaw testified that when Garcia spoke about his neighbors, he said "they don't know who [they are] messing with." Once, Garcia told Mumaw that for $500, someone from Mexico could make them disappear in the time it would take to snap his fingers or wipe his hands. It did not seem to Mumaw that Garcia was joking when he said this—he seemed genuinely angry. The comment seemed out of character for Garcia, who was usually a quiet man.

Garcia told Mumaw that a woman who lived in a trailer was causing him legal problems. He seemed more irritated every time Mumaw saw him. After the murder, Mumaw told the sheriff that Garcia admitted telling Gregg that he could make her "disappear." Another witness testified that he heard Garcia refer to Gregg as a "bitch."

At trial, the defense suggested that Garcia thought that his lawsuit with Gregg was resolved once the injunction issued that allowed him to build his fence. For her part, Gregg believed that the injunction resolved some issues between them, but not all of them. She and some friends worked on the fence between her property and the Garcia ranch about two weeks before she died. She told her friends that she was relieved that the fence was done—she hoped it would form a buffer between her and her neighbor.

That fence did not protect Gregg from the gunshots that killed her. The medical examiner counted almost 60 pellet wounds in her body—most on her left side, in her chest, shoulder, and neck. The chest wounds formed a tight pattern without powder burns. Gregg suffered numerous internal injuries particularly to her cardiovascular system. She bled internally until her heart stopped beating. The medical examiner estimated from the condition of her body that she was shot by someone standing at almost the same level as she was, shooting slightly upward from a distance of at least two feet away. He opined that Gregg died within 12 to 24 hours

before her body was received at his office in the early evening hours of Friday, November 20. She had no defensive wounds on her body and probably died within five to 10 minutes of injury, the coroner believed. He told the jury that it was possible that she was able to move, talk or think during the time between injury and death.[20]

Some shotgun pellets were retrieved from her body by the coroner and given to the sheriff for analysis. Edward Peterson, the prosecution firearms expert, testified that one of these pellets was a copper-plated lead pellet of No. 4 buckshot, a common size of buckshot found in 12-gauge shot shells. None of the shotgun shells found at Garcia's home that were submitted to him for examination contained No. 4 shot. He could not tell if Garcia's 12-gauge shotguns had ever fired No. 4 copper-coated buckshot. A typical load of No. 4 copper-coated buckshot contained 27, 34 or 41 pellets, depending on the manufacturer and the size of the load. Based on the number of pellets found in and around her body, Peterson believed that the killer fired at least two shots at Gregg.

Law enforcement officials determined the trajectory of the shotgun pellets that went through the fence by placing dowels in the fence. This evidence led sheriff's detective Rick Sprain to conclude that the pellets were shot from a location near an oak tree beyond the creek bed. The pellets went through the fence toward Gregg and her trailer behind her. Two round pellet-shaped holes found in a leaf from the oak tree actually appeared to Sprain to line up with the angle created by the fence holes.[21]

There were at least three theories of where the shooter stood at the time of the killing—in the creek bed, near the oak tree and some bushes, or an open area in front of this stand of vegetation. The difficult terrain between the trailer and the creek led

---

20 A defense expert in forensics later opined that Gregg fell to the ground immediately after she was shot and did not move.

21 A defense expert later opined that the leaf holes were made by insects, not the gunshots that killed Gregg. He noted that the force of a gunshot would not have shot holes through the leaf, but would have blown it off the tree.

the sheriff to believe that Gregg was shot from the bottom of the creek bed. Brush would have hidden a shooter standing in this location from Gregg's view. If the shooter came closer, Gregg might have heard the shooter's approach on the decaying vegetation on the ground. Peterson, who also served as the prosecution forensics expert, testified that the most likely of these three possible scenarios was that the shooter shot from the bushes, not from the creek bed or from the open area in front of the bushes and the oak tree. He believed that the shooter stood more than 10 feet away from her, but there were too many variables to be more precise about the shooter's distance or exact location.

Garcia's November 25 statement to the sheriff was played for the jury. The jury also heard an audiotape taken from the telephone answering machine in Gregg's trailer. It contained four messages—two from her supervisor inquiring about her whereabouts and two from neighbors relating concerns about Garcia's work. The People also put on bloodhound scent trailing evidence tending to link Garcia to the location where the sheriff believed that the shooter stood. (See pt. IV., *post*.) Finally, a jailhouse informant told the jury that Garcia made admissions to him implying that he had killed Gregg. (See pt. V., *post*.)

G. *Defense Case*

1. *Exculpatory Evidence*

Garcia put on a vigorous defense. Jim Norris—his expert in crime scene analysis—criticized the sheriff's method of determining the shotgun's trajectory. Based on his own trajectory analysis using a laser, he disputed the sheriff's conclusion that the shots were fired from someone standing in the creek bed. Norris opined that the creek bed was too deep and the vertical angle of it too steep for a shot fired from this location to strike Gregg. He told the jury that most of the area between the fence and the creek was impenetrable because it was blocked by a dead tree. A tight 15-inch diameter pattern of pellet holes and the large number of these holes led him to conclude that two shots were rapidly discharged, one immediately

after the other, from a double-barreled shotgun.[22] Norris opined that the shooter fired at Gregg from a distance of no more than 15 feet. From this distance, he believed that the shooter would have been visible crouching[23] in front of some brush that was about 18 feet away from Gregg, rather than hidden behind the brush in the creek bed some 28 to 30 feet away from where Gregg's body was found. The use of a double-barreled shotgun was also consistent with the lack of evidence of ejected shotgun shells in the area where the shooter may have been. Once shots are fired, shotgun shells remain in a double-barreled shotgun rather than being ejected as they are from a single-barreled shotgun.

Norris opined that Gregg was standing by the fence with her left hand raised and a cordless drill in her right hand. She turned to look over her right shoulder as two shots were fired in rapid succession. The first rounds probably struck her in the back of her shoulder and left hand. As she turned, Gregg then took rounds in the front of her shoulder and in her eye.

There was also evidence of a longstanding conflict between the Armsby Lane neighbors and the previous owners of Garcia's ranch. Prior owner Alfred Farren's son testified that an earthen dam existed there before his father sold the property to Garcia.[24] He reported problems with the neighbors during past attempts to sell the ranch. He told the jury that the neighbors used the property as if it was theirs. He found Garcia to be a "[r]eal mellow guy." Many witnesses who knew Garcia

---

[22] Edward Peterson, who served as the prosecution's firearms expert, disagreed with this opinion, concluding that no one could determine from the pattern of shot alone whether the shooter used a double- or single-barreled shotgun. He also opined that it might not be possible to determine whether two shots were discharged simultaneously or two shots were discharged in rapid sequence. There was evidence that Garcia did not own a double-barreled shotgun and no such weapon appears to have been found when his home and shop were searched.

[23] A prosecution expert later rebutted this evidence, concluding that the recoil from the shots would have knocked over someone who fired a double-barreled shotgun while squatting.

[24] This contradicted evidence from another witness who had testified that the dam was placed there after Garcia bought the ranch.

testified that he was an honest, truthful man. He told a friend that he was involved in a land dispute with Gregg. His friend told the jury that Garcia was upset that he had to go to court and pay attorney fees, but that he seemed to have no animosity toward her.

Garcia's wife Ester testified that her husband's problems about the ranch were with the road association, not with Gregg. Her husband only wanted to use the roads and fence his property. She never heard him threaten Gregg or call her a "bitch" or a "crazy lady" as other witnesses had said. She admitted that three days before her husband was questioned by the sheriff, Frank Martinez had told her that Gregg had been found dead. She told the jury that she was upset to learn this, but that she did not believe it—that the news of Gregg's death did not really "sink in" with her. She told the jury that she did not wake her husband to tell him about Gregg's death when Martinez's call came. The next day, she forgot about the call until after her husband told her that Martinez came to visit him to tell him that his neighbor was dead.

2. *Garcia's Testimony*

Forty-seven year old Roy Garcia testified in his own defense. He told the jury about his encounters with Gregg. He met her for the first time when he was checking out the ranch property. She introduced herself to him and their meeting was friendly. He testified that he met Gregg a second time when he met the Armsby Lane neighbors. After they expressed their concern about him using the private road, he offered to pay his share of road maintenance costs. He wanted to have friends and neighbors, not enemies, he told them. Gregg spoke with him in Spanish, saying something offensive to him. He told her to speak to him in English because he understood English perfectly.

Garcia told the jury that he met Gregg a third time when she angrily accused the former owner—Alfred Farren—of moving the surveying stakes. Afterward, he asked real estate broker Frank Martinez if he could withdraw from the ranch purchase deal, but Martinez persuaded him not to do so. Garcia saw Gregg again but did not speak with her when they went to court in October. His last encounter with

Gregg was in early November when they settled the boundary line and set up the fence. On Monday, November 23, he learned from Martinez that Gregg had been found dead at her trailer. At that time, he asked Martinez why he mentioned this to him, because he had had nothing to do with it.

On Wednesday, November 25, Garcia was working on a carpeting job. At midafternoon, he received repeated calls from the county sheriff asking to meet with him. Initially, he assumed that one of his animals had gotten loose from his ranch—a simple matter he would deal with when he finished his job. When he got a second call, he learned that this was not the purpose of the sheriff's call, although the officer declined to say why he wanted them to meet until Garcia arrived. Two more calls from the sheriff came in before Garcia finished his work and returned to his office. He had offered to meet with the sheriff at another time, but the sheriff wanted to wait for Garcia to finish.

Before meeting the sheriff, Garcia stopped to fill up his truck with gasoline and sought advice from Attorney Dennis Brown by telephone to see if Brown knew what the sheriff wanted to see him about. He tried to call his home and his office but no one answered the telephone, which seemed odd to him. He arrived at his shop to find that the sheriff had broken in. Garcia protested that he had not done anything wrong and wondered why he was being treated this way.

When questioned by the sheriff, Garcia had denied knowing that Gregg was dead.[25] He explained at trial that he truly did not believe that she was dead. He also denied ever having been in jail. He did not lie when he told the sheriff this—he thought the sheriff wanted to know if he had ever been in prison, not jail. In fact, he had been jailed twice for brief periods of time. Garcia admitted that the sheriff's questioning made him angry. He felt accused and intimidated. At trial, the sheriff took everything he said and turned it against him.

---

[25] At the time of the interview, the sheriff did not know that Martinez had already told Garcia that Gregg was dead.

Garcia admitted that he collected rifles. He owned two 12-gauge shotguns, but he preferred to use a rifle. He told the jury that the many shotgun shells found at his home were left by hunters who had borrowed his truck and left them behind. He never used No. 4 buckshot.

Garcia testified that Martinez had filed the complaint with the county about Gregg's trailer. Although the complaint was filed in Garcia's name, he told the jury that his attorney did not have his permission to sign Garcia's name to it. He denied ever saying that he could make Gregg disappear or ever calling her his enemy. He told the jury that he was offended—not angry—when Gregg spoke to him in Spanish at the neighborhood meeting in May. He never raised his voice and he did not recall refusing to shake her hand when she offered it to him.

Garcia denied killing Gregg or having anything to do with her death. He testified about his whereabouts at the approximate time of her murder. Garcia told the jury that on Thursday, November 19, he went to work, met with an Internal Revenue Service official there and went to see Attorney Dennis Brown. After the meeting with Brown, he returned to the shop to work. On Friday morning, November 20, he drove to Tracy to get some feed, returning to his shop in the late afternoon.

Garcia told the jury that he had been depressed since his arrest. He repeatedly denied having done anything wrong. He protested that the state wanted to take his life for no reason.[26] Garcia testified that he had told the truth to the sheriff and to everyone else.

3. *Domestic Violence*

Outside the presence of the jury, Garcia had moved without success to exclude evidence of domestic violence committed against his wife Ester in 1993 that resulted in a misdemeanor conviction for simple battery. (See §§ 242, 243, subd. (a).) Faced with the trial court's ruling that this evidence would be admitted, Garcia introduced

---

26 The record contains no suggestion that Garcia ever faced the death penalty.

the subject himself during his testimony. He admitted suffering the prior misdemeanor battery conviction, but denied that the San Jose police reports of the incident involving Ester were true. He offered a different version of the events underlying his prior conviction—the act of a father trying to control his teenage daughter, not that of a husband physically abusing his wife. Testimony offered by his wife and daughter—Ester and Evangelina Garcia—bolstered his testimony. (See pt. III.A., *post*.) Garcia also admitted that in 1993, the police had found 14 weapons at his house. One of those weapons—a shotgun—had since been lost.

H. *Prosecution Cross-examination and Rebuttal*

On cross-examination, the prosecutor repeatedly attacked Garcia's credibility. He brought out evidence that Garcia denied knowing that Gregg had been murdered even though Martinez had told him so and had told him that the sheriff would be questioning him about this. Garcia admitted that the sheriff told him that Gregg's body had been found on his property. He was not curious about where her body was found or how she had been killed. He told the jury that he did not ask the sheriff about these matters because they were of no concern to him. When asked why he did not inquire of the sheriff about why he was questioning Garcia about Gregg's murder, he testified that he had no reason to do so.

The prosecutor also challenged Garcia's credibility about the underlying dispute between Garcia and Gregg. He suggested that Garcia knew that Gregg's trailer and well were not on his property long before he alleged that they were in his lawsuit against Gregg. The prosecutor also suggested that Garcia lied at his civil trial when he testified that he did not have a dam on the ranch.

In support of the battery underlying the misdemeanor conviction, the prosecution offered the testimony of two police officers who took the 1993 battery reports from Ester and Evangelina Garcia. The officers' testimony was consistent with the charges that resulted in the misdemeanor battery conviction and contradicted the testimony offered by the three Garcias. (See pt. III., *post*.)

I. *Final Stages of Trial*

The jury visited the scene of the crime before the close of evidence. (See § 1119.) (See pt. II.A., *post*.) During closing argument, the prosecutor admitted that no one could say precisely where the shooter was when the fatal shots were fired, other than to locate the shooter in the general direction of the creek. He noted events that occurred in the week before Gregg's death—Garcia's hour-long complaint to Larry Ford about her, his receipt of her cross-complaint, the inspections that were pending and the code violations that were still unresolved—tending to undermine Garcia's claim that his dispute with Gregg was over by the time she died and that he bore no animosity toward her. He argued that Garcia even lied when he refused to admit that he knew Gregg was dead.

In closing argument, defense counsel attacked the prosecution's forensic evidence, arguing that the evidence suggested that the shooter was close enough to Gregg at the time of the shooting to be visible to her. Garcia's attorney theorized that the killer was necessarily someone Gregg was comfortable with and that Garcia was someone Gregg feared. He also suggested that witnesses were lying or mistaken when they spoke of Garcia's threats and hostility toward Gregg. Garcia's attorney offered strong challenges to the testimony of the jailhouse informant and the dog handler. He characterized Garcia as a successful businessman who hired professionals to solve his problems and painted Gregg as a person who was simply unimportant to Garcia. Defense counsel argued that this was a circumstantial evidence case in which there were two reasonable interpretations of the evidence, thus compelling an acquittal.

The jury deliberated for four days before reaching a verdict. The trial court permitted the jurors to return to the scene of the crime during the deliberations phase of the trial. (See pt. II.A., *post*.) Ultimately, the jury convicted Garcia of first degree murder and found true the special circumstance allegation that he was lying in wait. The trial court rejected Garcia's posttrial motions for an evidentiary hearing on the jury's return visit to the crime scene and, later, for new trial. Garcia continued to

maintain his innocence as the trial court sentenced him to life imprisonment without possibility of parole.

II. CRIME SCENE VISIT

A. *Facts*

Garcia raises three claims of error pertaining to the jury's September 5, 2000[27] return visit to the crime scene during its deliberations. He objects to the trial court's order precluding himself and his counsel from being present at the visit; he argues that a trial court response to a juror's question about permissible conduct during that visit was improper; and he contends that some jurors improperly deliberated at the crime scene outside the presence of other jurors. Before considering the legal questions presented, we review in detail how these issues arose in the trial court.

Before trial, both sides agreed that a visit to the crime scene would be necessary. The court indicated that it would permit a visit to Gregg's trailer and the nearby creek on Garcia's ranch only if the defendant's presence was waived and if it was agreed that no testimony would be taken. Garcia's counsel seemed to agree to this plan; he certainly did not object to it.

Shortly before the first crime scene visit was to occur, Garcia's counsel twice stipulated that his client would not accompany the jury on its crime scene visit. Garcia personally agreed to this plan. It was to be a closed session of court—no neighbors, family members or media representatives would be allowed to attend, nor would the court reporter be required to be present. The jurors would not be permitted to ask questions about the case while they were at the crime scene, nor would they be permitted to enter Gregg's trailer. The fence through which the shotgun pellets had been fired had been removed and secured as evidence. It was replaced on the property in an attempt to recreate the crime scene as it was on the day of Gregg's

---

27 All subsequent references to dates between August 17 and September 6 refer to the 2000 calendar year unless otherwise indicated.

death. The dowels that had been placed by sheriff's deputies to show the trajectory of the shotgun pellets were also placed into the fence.

The visit to the crime scene took place on August 17. Garcia did not attend, but his defense counsel were present. The jury spent at least an hour there. The prosecution and defense did not rest their cases until after the visit. During closing argument, Garcia's attorney opined that this view of the crime scene helped the jurors to get a sense of the space and the sound made by the vegetation on the property.

On August 31—after the jury had deliberated for two full days—the jurors asked to return to the crime scene. This time, defense counsel objected and refused to waive Garcia's presence. While Garcia characterized the proposed visit as an opportunity to take new evidence, the trial court disagreed, viewing it as part of the jury's deliberation process. It ruled that the jurors could return and review evidence that they had already taken on their first visit. Garcia's counsel also objected to the possibility that the jurors would discuss the case at the scene, arguing that this was tantamount to the jury conducting its own investigation. However, the trial court again ruled that because the jurors were deliberating, any discussion conducted privately among themselves would be proper.

While the plans for the return visit were being debated, the prosecutor asked about replacing the fence. Garcia's attorney objected to the proposal to put the fence and the dowels back at the crime scene. The trial court ruled that because the jury had already seen the fence and the dowels at its August 17 visit, it could see them again. Later, when the jury was advised that the trial court was arranging the return visit, one juror asked whether the fence would be at the crime scene, explaining the importance of that circumstance.[28]

---

28 This comment occurred when Garcia, defense counsel and the prosecutor were outside the courtroom.

Once Garcia and the prosecution understood that the return visit would take place, Garcia's counsel objected to the presence of attorneys at the visit. The trial court ruled that no attorneys would attend, but it construed the previous waiver of Garcia's presence at the first visit to extend to the second visit, as well. Later, defense counsel attempted to withdraw what he characterized as a stipulation that counsel need not be present at the return visit. However, the trial court noted that there was no *stipulation* to withdraw—attorneys would not be present because it had *ordered* that they could not attend. Neither the attorneys nor Garcia would be present, the trial court ruled.

The return visit requested on August 31 occurred on September 5.[29] Before leaving for the return visit to the crime scene, the jurors met with the judge in court. Garcia and the attorneys were not present. The trial court admonished the jurors that this time, they would be deliberating at the crime scene, not taking new evidence. The jurors were permitted to discuss the case at the scene as long as they did not do so within earshot of the trial judge, the court staff and those officials transporting them to the crime scene. The trial court denied a juror's request that he be allowed to bring a laser pointer to the crime scene in order to "shoot a line." It advised the jurors to use materials on the property to take any sight lines. (See pt. II.C.1., *post*.) The fence and the dowels were replaced at the crime scene before the return visit, and the jurors spent almost an hour at the crime scene. The jury returned its guilty verdict against Garcia on the following day, September 6.

In January 2001, Garcia moved for an evidentiary hearing to create a record of what occurred during the September 5 visit to the crime scene. In February 2001, the trial court allowed the prosecution and defense to create a settled record of the August 17 visit which they attended. However, it denied Garcia's requests to order a

---

29 August 31 was a Thursday and the jury did not deliberate on Friday, September 1, although the trial court and the attorneys met on Friday to discuss plans for the return visit. Tuesday, September 5, was the first court day after the Labor Day holiday weekend.

settled record of the September 5 visit and to conduct an evidentiary hearing about what occurred during that visit. It found that the parties had requested the August 17 view of the scene and had agreed that Garcia would not be present at that visit. The trial court concluded that the September 5 visit was undertaken as part of the jury's deliberations, not for taking further evidence. It found that its guidelines for deliberations during the September 5 visit had been placed on the record and found no evidence that the jury failed to follow those guidelines. In particular, the trial court noted that (1) it had denied a juror's request to use a laser pointer to take a sight line because this would have been tantamount to the taking of new evidence; (2) the jurors had been admonished not to discuss the case while in transit, but only at the scene; and (3) all jurors were to be present during any discussions. Finally, the trial court noted its observation that at the September 5 visit, the jurors looked down the dowels that were placed in the fence in an apparent attempt to locate where the shooter had been.

In March 2001, Garcia renewed his motion for an evidentiary hearing in conjunction with his motion for new trial, but the trial court again found no basis for an evidentiary hearing about the September 5 visit. It incorporated its February 2001 findings into this ruling. It reiterated that the August 17 visit constituted the taking of evidence and was made at the request of counsel. It noted that both defense counsel and Garcia himself waived his presence at that first visit. By contrast, the September 5 return to the crime scene was not the taking of new evidence, the trial court ruled, but an opportunity for the jury to review evidence that had already been presented. The second visit took place during deliberations from which Garcia was properly excluded. A juror's request to take new evidence was specifically denied by the trial court before the September 5 visit occurred. When that request and the trial court's ruling on it was explained to counsel after the second visit took place, defense counsel agreed at that time that the response was correct. Garcia raised no objection to the response at that time.

When denying Garcia's motion for new trial, the trial court found that an allegation that it violated state law by responding to the jury's question without first consulting counsel was raised for the first time in this motion. (See § 1138.) By failing to raise this claim earlier, Garcia had waived this claim of error and was now estopped from raising it in his motion for new trial, the trial court ruled. Even if a statutory violation occurred, the trial court ruled that its denial of the proposed laser use by a juror was proper. It considered alleged statements made by some jurors as set forth in Garcia's declarations to be factually true when it ruled on the new trial motion. Errors argued by Garcia in that motion were all harmless beyond a reasonable doubt under the analysis that the trial court used. Ultimately, the trial court denied the motion for a new trial with regard to the September 5 crime scene visit. With these facts in mind, we now turn to the specific challenges that Garcia raises on appeal.

B. *Right to be Present with Counsel*

1. *As Matter of Law*

First, Garcia contends that the trial court's decision to permit the jury to return to the crime scene on September 5 during deliberations while barring his presence and that of defense counsel violated his federal and state constitutional rights to be present with counsel at all critical stages of his trial. He reasons that under state law, a visit to a crime scene by jurors necessarily constitutes the taking of evidence at which a defendant has a right to be present with counsel. He urges us to find that this return visit involved the taking of specific evidence that was different from and beyond that which was taken during the jury's first visit to the crime scene—evidence taken outside his presence and that of his counsel in violation of his rights to counsel and to due process such that a new trial is required. (See U.S. Const., 6th & 14th Amends.)

A motion for new trial may be granted when the jury has received any out-of-court evidence other than that resulting from a view of the premises. (§ 1181, subd. 2.) Under California law, a trial court has specific statutory authority to permit

a jury to view the place where a crime was committed. (§ 1119; see *People v. Bush* (1886) 68 Cal. 623, 630 (*Bush*); see also Annot. (1940) 124 A.L.R. 841.) A view of the crime scene may assist the jurors to more clearly understand and apply the evidence in the case. (*People v. Milner* (1898) 122 Cal. 171, 184.) The decision whether to permit the jury to view a crime scene rests in the sound discretion of the trial court. Its decision will only be reversed for an abuse of that discretion. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053, cert. den. *sub nom. Kraft v. California* (2001) 532 U.S. 908; *People v. Fudge* (1994) 7 Cal.4th 1075, 1104, cert. den. *sub nom. Fudge v. California* (1995) 514 U.S. 1021; *People v. Peggese* (1980) 102 Cal.App.3d 415, 421; *People v. Morales* (1968) 263 Cal.App.2d 368, 379, cert. den. *sub nom. Morales v. California* (1969) 393 U.S. 1104.) An abuse of discretion occurs if the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice. (*People v. Lawley* (2002) 27 Cal.4th 102, 158, cert. den. *sub nom. Lawley v. California* (2002) 537 U.S. 1073.) This grant of authority is very broad, such that a reversal for abuse of discretion is highly unlikely. (See *People v. Wheeler* (1971) 23 Cal.App.3d 290, 312, overruled on another ground in *People v. Wheeler* (1978) 22 Cal.3d 258, 286-287; *People v. Wong Hing* (1917) 176 Cal. 699, 705.)

Garcia's challenge to the September 5 visit to the crime scene involves the intersection of a trial court's authority to permit a view, the defendant's right to be present at all significant stages of trial, and the jury's right to conduct its deliberations in secret. A criminal defendant has a constitutional right to be present and to have the assistance of counsel during trial, particularly during that part of trial when evidence is being taken by the trier of fact. (U.S. Const., 6th & 14th Amends.; Cal. Const. art. I, § 15; *Bush, supra,* 68 Cal. at pp. 631-633; see §§ 977, subd. (b)(1), 1043, subd. (a).) Cases have also held that the defendant and defense counsel have a

right to be present during a visit to the crime scene.[30] (See *Bush, supra,* 68 Cal. at pp. 628, 631, 634; see also *People v. Milner, supra,* 122 Cal. at p. 184.)

The trial court in this case permitted the jury—accompanied by the judge and counsel for both parties—to visit the crime scene on August 17 before the close of evidence.[31] Throughout the proceedings, the trial court's sense of the September 5 return visit was that it was part of the deliberations and did not involve the taking of new evidence. In his motion for new trial, Garcia argued that he was denied his right to be present and to have the assistance of counsel at the return visit,[32] but the trial court denied the motion. It ruled that the jurors did nothing more at the September 5 visit than view evidence that they had seen before, even if they noticed something new about that evidence during their second viewing of it.

On appeal, Garcia contends that the trial court erred in this ruling because new evidence was *necessarily* taken at the September 5 visit. As a matter of law, he reasons, every visit to a crime scene necessarily involves the taking of new evidence. We have considered this issue carefully. Garcia's reasoning is clearly sound if the jury visited the crime scene only once and if that visit occurred during the phase of the trial at which evidence is taken. Evidence includes things presented to the senses that are offered to prove the existence or nonexistence of a fact. (Evid. Code, § 140.) A visit to a crime scene offers visual evidence to the jury. (See Cal. Law Rev. Com. com., 29B West's Ann. Evid. Code (1995 ed.) foll. § 140, p. 15 [term "evidence"

---

30 A criminal defendant may voluntarily waive his or her constitutional right to be present during a visit to the scene of the crime. (*People v. Bolin* (1998) 18 Cal.4th 297, 325, cert. den. *sub nom. Bolin v. California* (1999) 526 U.S. 1006.)

31 Garcia and his trial counsel waived his right to be present at the August 17 visit to the crime scene.

32 At one point, Garcia's defense counsel stated that none of the attorneys for either side should attend the return visit. This could be characterized as a waiver of Garcia's right to challenge the return visit on assistance of counsel grounds, but as Garcia had earlier argued against the return visit and the trial court had ruled that the visit would take place, we do not deem the subsequent comments of Garcia's attorney to constitute a waiver of this claim of error.

defined broadly to include sight such as jury view].) In a case involving a single visit to a crime scene during trial, the California Supreme Court reasoned that it would be "impossible that a jury could go and view [the scene] without receiving some evidence." (*Bush, supra,* 68 Cal. at p. 630; see *People v. Bolin, supra,* 18 Cal.4th at p. 325 [jury receives nontestimonial evidence during view of crime scene]; *People v. Milner, supra,* 122 Cal. at p. 184 [viewing scene as receipt of evidence]; see also § 1181, subd. 2 [new trial may be granted if jury received out-of-court evidence *except* that resulting from view of premises]; *People v. Riel* (2000) 22 Cal.4th 1153, 1196, cert. den. *sub nom. Riel v. California* (2001) 531 U.S. 1087 [assumes jury view constitutes portion of trial involving taking of evidence].) "[I]t is fair to presume that what they . . . saw tended to or did influence their verdict." (*Bush, supra,* 68 Cal. at p. 632.) For this reason, the Supreme Court concluded that a view of the crime scene is a part of the trial at which the defendant has a right to be present. (*Id.* at pp. 633-634.)

In the context of a crime scene visit during the evidence-taking portion of a criminal trial, the California Supreme Court found it important to permit the defendant and defense counsel to attend, reasoning that they needed "to be able to perceive exactly what impression is being made upon the jury by any portion of the evidence given [at] trial. And it may frequently happen that it is within their power then to introduce other evidence which might tend to disabuse that body of a wrong impression, or the counsel might by fair and legitimate argument be able to convince them of the right view to be taken of such evidence." (*Bush, supra,* 68 Cal. at p. 631.) If the defendant and counsel are present at a view of the crime scene, they may "at any moment, by a question, a suggestion, an argument, or even a glance, confound [the defendant's] accusers, vindicate his innocence, or at least mitigate his punishment." (*Id.* at p. 633.)

The cases that provide that the defendant has a right to be present with counsel at a visit to the crime scene involve visits occurring before deliberations began—during the time that the jury was taking evidence in the case. (See *Bush, supra,* 68

Cal. at p. 628.) It stands to reason that every *initial* visit to a crime scene necessarily involves the taking of new evidence, because when a jury first sees the place where a crime took place, it considers whether its assessment of the physical layout of the crime scene fits the prosecution's theory of the crime or whether the defense's arguments countering that theory are more reasonable. (See, e.g., *id.* at pp. 630-631.) As with all evidence taken during trial, the evidence taken during an *initial* visit to a crime scene would tend to influence the verdict that the jurors ultimately reached.

However, this analysis is of little use to us in analyzing the issue in this appeal because the September 5 visit to the crime scene is factually distinguishable from those visits discussed in these cases for two significant reasons. First, the September 5 crime scene visit marked the *second* time that the jury viewed the crime scene, not the first. There are no reported California cases in which a jury made two visits to the scene of the crime—once during trial and a second time during jury deliberations—as happened in Garcia's case. (See *People v. Milner, supra,* 122 Cal. at p. 184 [jury visit during trial]; *Bush, supra,* 68 Cal. at p. 628 [jury visit to crime scene of homicide during trial]; *People v. Peggese, supra,* 102 Cal.App.3d at pp. 420-421.) In our view, these cases are all factually distinguishable from the case before us on appeal.

The issue before us is whether—after an initial visit occurs during that part of trial proceedings at which evidence is taken—a return visit during jury deliberations also necessarily constitutes a taking of evidence. Reason suggests that a jury's second visit to a crime scene does not have the same impact as its first. The cases cited to us, and those we have found in our own independent search for applicable case law, all involve a single crime scene visit made during trial, while the jury was still taking evidence in the underlying case. On a second viewing of the scene of the crime, the premise of these cases—that the jury was necessarily taking in new evidence during its visit to the crime scene—no longer rings true.

There is a second reason why the September 5 visit to the crime scene differs from those discussed in the case law—it occurred *during deliberations* and after the

close of evidence rather than during the evidence-taking portion of trial. Garcia's claim of error turns in large part on persuading us that the second visit to the crime scene was necessarily a second opportunity for the jury to take new evidence. He would have us reject the trial court's view that the return visit was merely an opportunity for the jury—as part of its deliberations process—to review evidence it had already taken. During deliberations, neither the defendant nor defense counsel has a right to be present. A jury's deliberations must be conducted privately and in secret, free from outside influences. (See § 1128; *People v. Oliver* (1987) 196 Cal.App.3d 423, 428-429.) The principles allowing a defendant and defense counsel to be present during a jury view clearly apply during the taking of evidence, but the same reasoning loses its force when the crime scene visit occurs during jury deliberations from which the defendant and defense counsel—indeed, all persons other than the 12 jurors—are barred.

We find little case law on point to guide us on the principles that should apply to a jury view conducted during deliberations.[33] In one case, the California Supreme Court suggested in dicta that a trial court might have the authority to allow a view of a crime scene during deliberations. In that matter, the defendant made a request during trial that the jury be allowed to visit a place alleged to have been burglarized. The trial court denied the request, but later indicated that it would permit a view to take place after the jury sought to visit the premises during deliberations. The jury had indicated that they were unable to reach a verdict. In fact, a delay occurred in the trial, other events overtook the jury's request, and the jurors convicted the defendant without visiting the crime scene. The Supreme Court ruled that this view would have

---

33 In one case, a trial court received a request for a crime scene visit from the jury during deliberations. The trial court denied the request, noting that to permit a view at that point would require the reopening of the case. (*People v. Peggese, supra,* 102 Cal.App.3d at pp. 420-421.) That case is factually distinguishable from ours because that jury made no initial visit to the crime scene during trial when the jury was taking evidence. (See *id.* at p. 421.) In such a situation, the jury would have been taking new evidence, because it had no earlier visit to the crime scene to fill that function.

been procedurally irregular, but stated in dicta that the trial court would have had discretion to grant the request for a view during deliberations if a proper motion for a view had been made before the close of evidence. (*People v. Hawley* (1896) 111 Cal. 78, 81-85; *People v. Peggese, supra,* 102 Cal.App.3d at p. 421.) If a view of the crime scene would have been proper as a first visit during deliberations because the defendant unsuccessfully sought a visit, we conclude that, a fortiori, a return visit to the crime scene would be proper during jury deliberations if it had already viewed the scene before the close of evidence.

The *Hawley* court's reasoning provides additional support for this conclusion. That court observed that a view occurring during deliberations would have been within the spirit of state law permitting a jury that had retired for deliberations to be brought back into court so that testimony could be read back in order to resolve any disagreement among the jurors about it. The visit would have been little more than "the exhibition of a map which had been referred to in the evidence, but which had not been exhibited to the jury." (*People v. Hawley, supra,* 111 Cal. at p. 85; see § 1138.)

This reasoning is consistent with our conclusion that, at a return visit to a crime scene during deliberations, the jury need not necessarily be viewed as taking new evidence. Instead, it may simply review the evidence it had already seen at the first visit in order to refresh its collective recollection of the crime scene. When a jury requests a readback of testimony[34] or views physical evidence in the jury room

---

34 The California Supreme Court has held that ordinarily, the readback of testimony is not a critical stage of the proceedings. (*People v Ayala* (2000) 23 Cal.4th 225, 288, cert. den. *sub nom. Medrano Ayala v. California* (2001) 532 U.S. 908; *People v. Horton* (1995) 11 Cal.4th 1068, 1120-1121, cert. den. *sub nom. Horton v. California* (1996) 519 U.S. 805 [harmless error].) Such readback of testimony does not bear a substantial relation to a defendant's opportunity to defend himself or herself. (*People v. Horton, supra,* 11 Cal.4th at pp. 1120-1121 [harmless error]; see *People v Ayala, supra,* 23 Cal.4th at p. 288 fn. 8 [error may be harmless even in absence of waiver]; see also *People v Dennis* (1998) 17 Cal.4th 468, 538, cert. den. *sub nom. Dennis v. California* (1998) 525 U.S. 912 [absence from conference on instructions was not error].)

during deliberations, that review of the evidence that was properly admitted during trial may reveal some new insight to jurors. Even if—as a result of this part of the deliberative process—a juror noticed some fact that was not initially apparent during the evidence-taking portion of the trial, that would not constitute a reopening of evidence or a taking of new evidence. (See, e.g., *People v. Bogle* (1995) 41 Cal.App.4th 770, 779-781; see also *Higgins v. L. A. Gas & Electric Co.* (1911) 159 Cal. 651, 659.) In the same manner, we conclude that a second visit to a crime scene made during deliberations does not, as a matter of law, constitute the taking of evidence when an initial visit made during trial served this purpose.[35]

2. *In Fact*[*]

a. *Claims of Error and Standard of Review*

Alternatively, Garcia argues that even if the jury did not *as a matter of law* take new evidence by virtue of making its second visit to the crime scene, his jury *in fact* took new evidence different from that taken on August 17 when it returned to the crime scene on September 5.[36] For this reason, he contends that his constitutional rights to counsel and due process were violated because neither he nor his attorneys

---

35 Garcia argues that if we conclude that the September 5 visit was a proper part of deliberations, then the trial court erred by accompanying the jury during a secret part of its deliberative process. California law provides that a trial judge or a sworn bailiff should accompany the jury to ensure that nothing improper occurs at the crime scene. (*Bush, supra,* 68 Cal. at pp. 633-634.) In this case, the trial court and court officials who accompanied the jury when it returned to the crime scene remained some distance from the jurors themselves, who were cautioned not to discuss the case except when they were alone. There is no evidence that the trial court or transporting officials overheard any part of the jury's deliberative process. Thus, we see no harm in the trial judge's physical presence at the jury's second view of the crime scene, as he remained out of earshot.

***** See footnote, *ante*, page one.

36 As part of this general claim of error, Garcia also argues that jury separation occurred during the August 17 visit as well. However, the issues raised in the motion for new trial and the challenge raised directly in this appeal pertain only to the September 5 return visit to the crime scene. Thus, we need not consider this collateral issue.

were present at the return visit. Garcia reasons that this error warrants a new trial. (See U.S. Const., 6th & 14th Amends.)

A motion for new trial may be granted when the jury has received any out-of-court evidence other than that resulting from a view of the premises; when the jury separated without leave of court after retiring to deliberate on their verdict; or when the jury has been guilty of any misconduct preventing fair and due consideration of the case. (§ 1181, subds. 2, 3.) A trial court's determination of a motion for new trial rests so completely within its discretion that its action will not be disturbed unless a manifest, unmistakable abuse of discretion clearly appears. (*People v. Turner* (1994) 8 Cal.4th 137, 212, cert. den. *sub nom. Turner v. California* (1995) 514 U.S. 1068; *People v. Duran* (1996) 50 Cal.App.4th 103, 113.) In determining whether the trial court has properly exercised its discretion, we evaluate each case based on its own facts. (*People v. Turner, supra,* 8 Cal.4th at p. 212.) To the extent that the denial is based on factual issues, we must uphold it on appeal if it is supported by substantial evidence. (See *People v. Nguyen* (1994) 23 Cal.App.4th 32, 38; *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1220.)

When reviewing the denial of a motion for new trial based on allegations of jury misconduct, we examine the entire record and determine independently whether the act of misconduct—if it occurred—prevented the complaining party from having a fair trial. (*People v. Cumpian* (1991) 1 Cal.App.4th 307, 311 (*Cumpian*); see also *English v. Lin* (1994) 26 Cal.App.4th 1358, 1364 [civil case].) The defendant bears the burden of proving juror misconduct. (*People v. Stanley* (1995) 10 Cal.4th 764, 836, cert. den. *sub nom. Stanley v. California* (1996) 517 U.S. 1208.) We independently review the trial court's determination of prejudice if it found jury misconduct, but we defer to the trial court's credibility determinations and findings on issues of fact to the extent that they are supported by substantial evidence. (*People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5.)

A criminal defendant has a right to be present with counsel during any part of a trial at which evidence is taken. (U.S. Const., 6th & 14th Amends.; Cal. Const.,

art. I, § 15; *Bush, supra,* 68 Cal. at pp. 631-633; see §§ 977, subd. (b)(1), 1043, subd. (a).) Evidence obtained by jurors out of court constitutes misconduct and, if the defendant has been prejudiced by this evidence, constitutes ground for a new trial. (*People v. Cox* (1991) 53 Cal.3d 618, 697, cert. den. *sub nom. Cox v. California* (1992) 502 U.S. 1062.) Jurors perform an experiment if they conduct an enactment of a scene described during trial. (*Cumpian, supra,* 1 Cal.App.4th at p. 316.) However, not every experiment constitutes the taking of new evidence and thus, jury misconduct. During deliberations, jurors must be given latitude to use common experiences and illustrations when reaching their verdict. (*People v. Bogle, supra,* 41 Cal.App.4th at p. 778; *Cumpian, supra,* 1 Cal.App.4th at p. 316.) Experiments by jurors are prohibited only if the result of those experiments is the production of new evidence which it is not possible for the defendant to meet, answer or explain. (*People v. Bogle, supra,* 41 Cal.App.4th at pp. 778-779; see *People v. Cooper* (1979) 95 Cal.App.3d 844, 853; see also *Cumpian, supra,* 1 Cal.App.4th at p. 315.)

The jury may carry out experiments within the scope of evidence offered at trial. The jurors may engage in experiments amounting to no more than a careful examination of the evidence presented in court. Nothing requires that the jury's deliberations be entirely verbal. Courts expect conscientious jurors to closely examine the testimony of witnesses even if that testimony takes the form of a physical enactment of the crime. (*People v. Cooper, supra,* 95 Cal.App.3d at pp. 853-854; see *Cumpian, supra,* 1 Cal.App.4th at p. 315.)

The critical question for our resolution is whether the field of inquiry is based on evidence adduced at trial—in the presence of the defendant and defense counsel—or whether it opens up a new area of inquiry. If the jury used evidence adduced at trial to conduct an experiment and came to its own conclusion about the case, there is no juror misconduct because the jury did not take new evidence. (*People v. Bogle, supra,* 41 Cal.App.4th at p. 780.) This type of conduct amounts to no more than a careful scrutiny of the evidence. (*Id.* at pp. 779-781; see *Higgins v. L. A. Gas &*

Electric Co., supra, 159 Cal. at p. 659.) Thus, the jury's reenactment of a scene described during trial does not constitute the impermissible taking of out-of-court evidence. (See, e.g., *People v. Cooper, supra,* 95 Cal.App.3d at pp. 853-854.) In this situation, because no new evidence is generated, no jury misconduct occurs warranting a new trial. (See *Cumpian, supra,* 1 Cal.App.4th at pp. 315, 317.)

In order to constitute an improper taking of out-of-court evidence, the evidence must be beyond that which was offered in court at trial. (*Cumpian, supra,* 1 Cal.App.4th at p. 316.) Only if those experiments invade new fields falling outside the scope of the trial evidence and those new discoveries influence the jury's verdict will the jury be found to have improperly taken new evidence. (*People v. Bogle, supra,* 41 Cal.App.4th at p. 778; *Cumpian, supra,* 1 Cal.App.4th at pp. 315, 317; *People v. Cooper, supra,* 95 Cal.App.3d at p. 853; see *Higgins v. L. A. Gas & Electric Co., supra,* 159 Cal. at p. 657.) A "field" of evidence is not one specific fact, but an area of inquiry such as the defendant's access to stolen property or the defendant's credibility. (*People v. Bogle, supra,* 41 Cal.App.4th at p. 779.)

Garcia argues that on the September 5 return visit, the jurors actually saw and did at least three things that they did not see and do at the initial August 17 visit to the crime scene. As a result, he reasons that they received three forms of new evidence at the return visit: (1) they conducted two new experiments—a visual one involving the use of a yellow glove and an auditory one involving the sound of dried vegetation; (2) the trial court permitted a prosecution witness to offer new evidence about the trajectory of the shotgun pellets; and (3) some jurors took evidence that other jurors did not because all the jurors did not remain together as a body, but instead wandered about the crime scene in smaller groups. When denying Garcia's motion for new trial, the trial court disagreed, concluding that the jury took no new evidence and received no extrajudicial information during the return visit.

b. *Evidence Supporting Motion for New Trial*

i. *Defense Investigator's Declaration*

In support of his underlying claims that jurors took out-of-court evidence, committed jury misconduct and improperly separated, Garcia filed four declarations in February 2001—from defense investigator Steve Gore, defense attorneys Thomas Nolan and Christine Pack, and defense expert criminalist Jim Norris.[37] Our first task is to evaluate to what extent the statements contained in these declarations constitute admissible evidence that we may consider in support of Garcia's motion for new trial. (See *People v. Duran*, *supra*, 50 Cal.App.4th at p. 112.)

Defense investigator Steve Gore's declaration repeats statements told to him by two jurors and an alternate juror. Thus, it is entirely composed of hearsay. A jury verdict may not be impeached by hearsay evidence. (*People v. Williams* (1988) 45 Cal.3d 1268, 1318-1319, cert. den. *sub nom. Williams v. California* (1989) 488 U.S. 1050; see *People v. Hayes* (1999) 21 Cal.4th 1211, 1256, cert. den. *sub nom. Hayes v. California* (2000) 531 U.S. 980; *People v. Cox, supra,* 53 Cal.3d at p. 697; *People v. Villagren* (1980) 106 Cal.App.3d 720, 729-730 [defense counsel declaration was inadmissible]; see also Evid. Code, § 1200, subds. (a)-(b).) The trial court would have been justified in according little if any credence to assertions that a juror would not independently verify.[38] (See, e.g., *People v. Hayes, supra,* 21 Cal.4th at p. 1256.) Applying the same reasoning, we are also entitled to disregard this hearsay evidence. Thus, we hold that the statements in Gore's declaration are inadmissible evidence because they were not verified by the three hearsay declarants themselves. (See *People v. Cox, supra,* at p. 697.)

---

37 We have reviewed each of these four declarations, including the sealed declaration from Gore.

38 In fact, the trial court considered the juror statements and assumed that they stated the true facts when it denied Garcia's motion for new trial.

ii. *Defense Attorneys' Declarations*

The declaration filed by defense attorney Christine Pack and part of that filed by Garcia's counsel Thomas Nolan pertain to the August 17 visit to the crime scene. As Pack's declaration and this part of the Nolan declaration refer to events that they personally observed, the evidence is competent. However, as the events of September 5 are the subject of the new trial motion, this admissible evidence of the events of August 17 is of limited relevance.

Other parts of Thomas Nolan's declaration include a recital of statements made at the September 5 proceeding immediately before the jury made its return visit to the crime scene or statements of the condition of the crime scene at the time of the visit. Nolan did not attend the hearing, so he has no personal knowledge of the statements he makes. Likewise, Nolan's declaration that the dowels were in place at the time of the jury's return visit to the crime scene on September 5 is not based on his personal knowledge, but based on evidence that forms part of the record on appeal. We have access to the same evidence that Nolan recounts in his declaration, so we will consider these primary records instead of his second-hand reports of them. (See pt. II.C.1., *post*.)

In the next part of his declaration, Nolan asserted that if he had been present at the September 5 proceeding as the jurors prepared for the return visit to the crime scene, he would have objected to the trial court's response to a juror's request to use a laser to determine the trajectory of shotgun pellets that penetrated the fence. Instead, he declared that he would have noted that Garcia's expert witness Jim Norris had used a laser to make this determination. He also declared that if he had been present, he would have advised the trial court to permit Norris to place his laser at the crime scene or forbid the jurors from attempting to recreate any experiments testified to by witnesses for either side. He declared that at the proceeding, he would have objected to any ruling permitting the jurors to conduct any new experiment or to recreate a prosecution experiment but forbidding recreation of a defense experiment.

These February 2001 assertions of what Nolan would have done on September 5 were contradicted by other statements made by defense counsel. Shortly after the return visit, the trial court informed Nolan of the juror's request and Nolan's response then was "completely opposite" to that asserted in his later declaration. Nolan did not place such an objection on the record while the jury continued to deliberate after its September 5 visit to the crime scene or at the time that the verdict was recorded. Considering this evidence, we ignore the statements in Nolan's declaration about objections that he would have raised as self-serving, untimely and contrary to what he told the trial court at the time that the September 5 exchange was first reported to him.

Nolan further declared that defense expert Jim Norris and prosecution expert Edward Peterson were both critical of the testimony of Detective Rick Sprain that he simply looked over the fence and down the dowels that had been placed through the pellet holes in the fence. Nolan declared that both experts concluded that Sprain's method was likely to result in an erroneous determination of the pellets' trajectory, adding that Peterson would have used a string to determine the correct extension of the dowels. Again, the evidence of testimony given by these witnesses is available to us in the record on appeal. We need not consider Nolan's characterization of it, but will consider the testimony that Sprain,[39] Peterson[40] and Norris[41] offered to the jury on these issues.

---

39 At trial, Sprain testified that he determined the angle at which shotgun pellets went through the fence by inserting dowels that fit snugly in the three pellet holes in the fence. He told the jury that this method of angle determination was accepted police practice that he learned at his police academy. The jury saw photographs of the dowels as he had inserted them into the fence on November 20. Sprain testified that the dowels pointed toward a hollowed out area in a dead oak tree in the creek bed.

40 Peterson disagreed with Sprain's assessment when he testified that it was more likely that the shooter shot Gregg from the bushes, rather than from the creek bed or from an open location in front of some brush and a tree.

41 At trial, Norris told the jury that he was hired by the defense to reconstruct the circumstances of the shooting, including where the shooter stood at the time that the shotgun was

In the remainder of his declaration, Nolan argued that the trial court's response was erroneous because it precluded the jury from recreating Norris's experiment to determine the likely location of the shooter while encouraging it to use the method that prosecution witness Sprain used. He also argued that the trial court permitted the jury to conduct an entirely new experiment with materials found at the crime scene. These arguments are not statements of fact. Thus, the Nolan declaration does not add admissible evidence beyond that already in the record in support of Garcia's motion for new trial.

iii. *Defense Expert's Declaration*

The final declaration was submitted by defense expert Norris himself. He repeated his opinion expressed at trial criticizing the use of dowels in the fence rather than using his laser system to show the trajectory of the shotgun pellets. He also repeated his opinion of where the shooter was when Gregg was shot and rejected the prosecution's theory on this issue. As all of this testimony was presented at trial, its inclusion in his posttrial declaration adds nothing to the evidence we need to consider when determining these issues on appeal.

Norris also opined in his declaration that because the dowels were repeatedly placed in the fence and removed before the September 5 crime scene visit, the holes had necessarily deteriorated and changed over time. Even if they had not, he concluded that there was "an excellent chance" that there was some "play" in the dowels when they were fitted back into the fence. Norris was also critical of the placement of the fence on sloping ground, opining that it was not possible to determine whether the dowels were returned to the state that they were in during the

---

discharged. He determined the trajectory of the shotgun pellets by using a laser aimed from the fence back to a pellet hole in the trailer and then—maintaining a steady angle—reversing the direction of the laser to see where it went. Norris criticized the reliability of Sprain's method of using dowels because the solid objects did not allow one to look through the pellet holes and because the dowels were too short to reach the shooter's projected location. The jury saw photographs and a drawing illustrating Norris's laser method and Garcia's theory of the location of the shooter.

initial investigation of the crime. In general, he criticized whether the original trajectory of the dowels was recreated for the jury's September 5 return to the crime scene. He declared that a juror conducting a dowel experiment at the September 5 visit may have had an entirely different view from that seen on August 17.

Part of this aspect of Norris's declaration restates opinion testimony that he offered at trial—opinions that were contradicted by another expert witness. Part of it lacks credibility because it contradicts his own trial testimony.[42] Part is based on Norris's analysis of inadmissible hearsay evidence[43] and thus constitutes speculation about what might have happened at the September 5 return visit to the crime scene about which he had no personal knowledge. For all these reasons, this part of Norris's declaration offers little new evidence of use to the trial court when considering Garcia's motion for new trial or to us considering his claim of error on appeal.

Finally, Norris declared that he had been told that jurors at each jury visit placed themselves in the vegetated area from which the prosecution reasoned that the shooter shot Gregg. He opined that they were conducting experiments that would have been "badly flawed" because the vegetated area might have been significantly different after the passage of two years and after two jury visits to the crime scene had occurred. Again, Garcia gains no support for his motion for new trial from this

---

42 At trial, Norris testified that when he visited the crime scene in April 2000, its vegetation did not appear to be very different from that shown in photographs of the crime scene in November 1999. He opined that a sufficient number of these photographs were taken for him to reach an opinion on another issue. During closing argument, Nolan told the jury that it was impossible to reconstruct the scene except by looking at the photographs of it.

43 This aspect of Norris's declaration was based on what defense counsel told him they had learned about the conduct of the jurors on September 5. As counsel were not present at this visit, the source of Norris's information was the inadmissible hearsay evidence in defense investigator Steve Gore's declaration. (See pt. II.B.2.b.i., *ante.*) We cannot consider hearsay evidence in support of a motion for new trial. (See *People v. Williams, supra,* 45 Cal.3d at pp. 1318-1319; see also *People v. Cox, supra,* 53 Cal.3d at p. 697.) For the same reasons, we cannot consider evidence based on a hearsay declaration.

aspect of Norris's declaration because it is based on inadmissible hearsay evidence and because it contradicts evidence that Norris offered at trial. (See fns. 42 and 43, *ante*.) Thus, Norris's declaration does not add admissible evidence that we may consider in support of the motion for new trial beyond that already in the trial record.

iv. *Other Evidence*

The only other evidence submitted by Garcia in support of his motion for new trial was reporter's transcripts of hearings from August 30 through September 6 setting out the jury's request for a return visit to the crime scene, the arguments of counsel about the proposed visit, the trial court's rulings on this matter, the exchanges between the jurors and the trial court in preparation for the visit, and the jury's verdict in this case. As we have seen, little of the evidence[44] offered to us in these declarations adds to that which was already in the record. Having defined the proper scope of evidence that we may consider when evaluating these claims of error, we turn to the next step in our analysis—whether any admissible evidence establishes juror misconduct. (See *People v. Duran*, *supra*, 50 Cal.App.4th at p. 113.)

c. *Use of Yellow Glove*

On appeal, Garcia argues that on September 5, the jurors conducted an experiment and took out-of-court evidence—evidence beyond that taken at the August 17 visit to the crime scene—when one juror used a yellow glove in order to help the jury test the prosecution's theory about where the shooter stood.[45] For this

---

44 Only Pack's declaration and part of Nolan's declaration are properly before us. As these declarations pertain only to the events of August 17, they are of limited relevance to the motion for new trial challenging the September 5 crime scene visit.

45 Garcia notes in his reply brief that the purpose of this experiment would have been to assist the jury in determining whether someone hiding in the bushes would have been visible to Gregg. He then goes on to argue that no one ever offered specific testimony about whether she might have seen someone from this position. Garcia was alleged to have killed Gregg while lying in wait, a special circumstance that exposed him to life imprisonment without possibility of parole. (See § 190.2, subd. (a)(15).) Thus, the question of whether the victim could have seen the shooter was a relevant issue in the trial.

reason, he contends that he is entitled to a new trial. (See § 1181, subd. 2.) Garcia's claim of error on appeal is based solely on hearsay evidence contained in Gore's declaration. We have already concluded that Gore's declaration was inadmissible to impeach the jury's verdict and that we may not consider it in support of his motion for new trial.[46] (See *People v. Cox, supra,* 53 Cal.3d at p. 697; *People v. Williams, supra,* 45 Cal.3d at pp. 1318-1319; see pt. II.B.2.b.i., *ante*.) Thus, we find that the trial court properly denied the motion for new trial because Garcia offered no admissible evidence in support of it.

In any event, the trial court, after considering the statements contained in this declaration, properly concluded that what was described did not constitute the taking of new evidence: "The same action and result would have occurred if a juror, purely by chance, wore a yellow baseball cap or yellow shirt in the normal course of their dress. We would have the same result if no bright colors were worn by any of the jurors, that is, a person positioned as that juror positioned himself would not be seen from where the other jurors were making their observations. [¶] It must be remembered that the Court and all counsel saw jurors down in the bushes in the creek bed and up on the bank by the fence during the first visit. The recreating of this activity during the second visit was proper and not the taking of new evidence."

d. *State of Vegetation*

Next, Garcia asserts that the jurors conducted an improper experiment at the September 5 visit to the crime scene because they walked at the location where the prosecution theorized that the shooter stood in order to determine whether the shooter would have made any noise from there. He reasons that the jury received evidence out of court when it tried to test whether Gregg would have heard the shooter

---

46 We reject Garcia's implication that because the trial court considered this evidence as true, we must do the same. On appeal, we consider all questions of law anew and are not bound by the trial court's conclusion. (See *People v. Cromer* (2001) 24 Cal.4th 889, 893; *Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1025; see also 9 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Appeal, § 140, pp. 387-388; 6 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 316, pp. 354-355.)

approaching through the organic material in the area where the shooter stood. The trial court rejected this argument when it denied his motion for new trial. (See § 1181, subd. 2.) Again, Garcia's assertion of error on appeal is based on inadmissible hearsay in Gore's declaration which we must disregard. (See pt. II.B.2.b.i., *ante*.) Part of Norris's declaration might also lend support to this claim of error in the trial court, but we have already rejected that part of his declaration for reasons that we have previously stated, including its basis as inadmissible hearsay evidence. (See pt. II.B.2.b.iii., *ante*.) Thus, we find no basis for this claim of error because Garcia did not present admissible evidence in support of it.

e. *Investigator's Participation*

Garcia also contends that the trial court erred by permitting sheriff's detective Rick Sprain to attend the September 5 visit to the crime scene and to, in essence, give new evidence to the jury outside of his presence and the presence of his defense counsel. He reasons that when Sprain replaced the dowels in the fence, he did so without adequate information allowing him to replicate the first experiment and thus, he conducted a new experiment for the jury to consider at their return visit to the crime scene. Garcia argues that he and his defense counsel were denied their right to observe the taking of new evidence necessarily resulting from this recreation of the prosecution's theory of the shotgun pellets' trajectory. He asserts that this error entitles him to a new trial. (See § 1181, subd. 2.)

The position of the fence and the dowels were photographed at the crime scene soon after Gregg's body was discovered. These records were admitted into evidence for the jury's consideration. The fence and dowels were removed from the property and preserved as evidence, but were replaced for the jury's August 17 crime scene visit. The trial court ordered them to be replaced again before the jury made its September 5 return visit to the crime scene, over Garcia's objection. It reasoned that the jury was entitled to see during its return visit anything that it saw during its first visit to the crime scene. When considering Garcia's motion for new trial, the trial court concluded that Sprain did nothing more on September 5 than to return to the

crime scene to replace the fence and the dowels before the jury arrived. Thus, it rejected Garcia's claim that his conduct constituted the giving of new evidence outside the presence of the defendant and defense counsel.

On appeal, Garcia cites as evidence in support of this claim of error the declaration of defense criminalist Norris asserting that there was inadequate information about how Sprain placed the dowels in the fence soon after the shooting, that there was much "play" in the fence holes, and that there was no reliable way to assure that he replaced the dowels in the same place that he did close to the time of the shooting. We have already rejected Norris's declaration for various reasons, concluding that it contains no new evidence beyond that which the jury heard in the form of testimony at trial. (See pt. II.B.2.b.iii., *ante*.) Thus, Garcia offers no new admissible evidence in support of this ground on his motion for new trial in the cited declaration. The remaining evidence supports the trial court's finding of fact—that Sprain's activity occurred before the jury arrived at the crime scene—and its conclusions of law based on those facts. The claim that Sprain did not properly replace the fence or dowels is merely speculative, based on inadmissible hearsay, and no more than the conclusion of one expert witness whose testimony was contested by another expert. The jury had photographs of the proper angle of the dowels in the fence to compare with what it saw on September 5 and the testimony offered at trial about the trajectory of the shotgun pellets made it clear that this issue was an important one for the jury's consideration. Under these circumstances, we are satisfied that the trial court properly denied Garcia's motion for new trial on this basis.

f. *Juror Separation*

Garcia also raises a challenge rooted in the claim that the jurors did not move around the crime scene as a body during the September 5 visit. Preliminarily, he reasons that the dispersal of jurors throughout the crime scene in small groups constituted an impermissible juror separation. He complains that as a result of this separation, some jurors observed evidence that other jurors did not—some jurors

who observed evidence during the first visit must have pointed out that evidence to jurors who did not notice this evidence during the August 17 visit to the crime scene. Garcia reasons that some of these jurors were necessarily taking new evidence at the time of the September 5 visit. For this reason, he contends that he is entitled to a new trial. (See also pt. II.D., *post*.) (See § 1181, subd. 3.)

Juror separation without leave of court[47] after retiring to deliberate on their verdict constitutes grounds for a new trial. (See § 1181, subd. 3.) The trial court understood when it entertained the jury's request for a return visit to the crime scene that the jurors would not remain together on the property, but would likely break up into smaller groups. Initially, it intended to admonish the jurors not to discuss the case at all at the site. It explained to the jurors that they should not deliberate at the crime scene because others would be present who should not overhear their discussions. The next day, the trial court adopted a different approach. Over Garcia's objection at a hearing outside the presence of the jury, it stated that the jury could discuss the case while in smaller groups at the crime scene. The trial court reasoned that to permit the jury to return to the crime scene was tantamount to allowing it to review exhibits such as photographs or other physical evidence. Immediately before leaving for the crime scene visit, the trial court barred alternate jurors from attending and advised the jurors that they could deliberate about the case during the visit, as long as they did so out of earshot of court personnel. It admonished the jurors not to talk about the case while being transported to the crime scene, because of the risk of being overheard by observers. The trial court also advised that any discussion be conducted in the presence of all jurors.

When ruling on the motion for new trial, the trial court found that the jurors remained together on the entire crime scene, but were not all grouped together at one

---

47 In this case, the jury appears to have separated *with* leave of court because the trial court indicated that the jurors would disperse throughout the site and planned for this possibility before the September 5 return visit occurred.

part of the crime scene at the same time.[48] It likened the entire crime scene to a single exhibit that the jury was entitled to review. It reasoned that during deliberations in a jury room, one group of jurors could properly have looked at one exhibit while a second group discussed a different exhibit. The key fact, as the trial court saw it, was that all exhibits were available for any juror to review. Therefore, it reasoned that the jury's division into smaller groups on the site was not improper, because the entire crime scene was available to each juror to view—either when all jurors were together or when the jury had broken up into smaller groups—as long as all discussions took place at that general location.

The trial court also concluded that jurors had an opportunity to review the crime scene and to see things they may not have specifically viewed or recalled but were available to them at the first visit. The trial court specifically rejected Garcia's allegation that jurors received extrajudicial information, finding no evidence to support this claim. It held that at the return visit, the jurors examined the evidence that they had viewed before, although this examination might have been more thorough than it was during the first visit. The trial court likened the jury's acts during their return visit to the crime scene to a juror reexamining a photograph that was in evidence and had been brought into the jury room for review.

Having considered Garcia's contention that some jurors saw evidence that others did not at the September 5 return to the crime scene, we agree with the trial court's interpretation of events. We find that no improper jury separation occurred because the entire jury remained at the crime scene during all of the September 5 visit, even though some jurors dispersed to one part of the property and others to another part of it. The fact that some jurors considered one aspect of the case at the

---

48 Despite Garcia's reliance on Gore's declaration—which states that jurors scattered over the property and did not remain together as a body—we may not consider this inadmissible hearsay evidence. (See pt. II.B.2.b.i., *ante*.) However, the trial court observed the jurors' return visit from a distance and we may rely on *its* observation that the jurors moved about the property in small groups.

time that other jurors considered another aspect of it is, as the trial court noted, no different from some jurors reviewing a photograph in the jury room while other jurors considered a different exhibit.

Garcia's claim that some jurors may have learned something new by observing the crime scene a second time is suspect for two reasons. First, it is speculative, based on an assumption that evidence is necessarily taken at a second visit to the crime scene. In another context, we have already rejected this assumption. (See pt. II.B.1., *ante*.) Second, it wrongly assumes that an individual juror takes new evidence—and therefore commits juror misconduct—if in the review of evidence, he or she observes something not seen during the taking of evidence part of the trial. When a deliberating juror reviews a photograph that was placed in evidence at trial and notices a detail that was not apparent to him or her before, that act does not constitute the taking of new evidence, but a careful consideration of the evidence properly admitted at trial. (See *People v. Cooper, supra,* 95 Cal.App.3d at pp. 853-854; see also *Cumpian, supra,* 1 Cal.App.4th at p. 315.) Applying the same reasoning, we conclude that the jurors did not take new evidence when some or all of them reviewed the evidence of the crime scene at the September 5 return visit, even if one or more jurors noticed something not observed at the August 17 initial visit.[49]

C. *Response to Juror Inquiry*[*]

1. *Trial Court Ruling*

Next, Garcia argues that his constitutional rights to counsel and due process were violated when the trial court answered a juror inquiry in the absence of defense counsel. He contends that its response to a juror's question about the propriety of proposed conduct during the return visit to the crime scene without prior consultation

---

49 We also reject Garcia's argument that section 1119 lends support to his contention that any juror separation into groups while at the crime scene was necessarily improper. That provision does not address whether the jury, once it arrives at a geographically extensive crime scene, must remain together or may divide into groups during deliberations.

***** See footnote, *ante*, page one.

with his counsel constituted grave constitutional error. He reasons that this error must be presumed to be prejudicial—or, at a minimum, was not harmless beyond a reasonable doubt—because the trial court's response was incorrect and damaging to his defense. As such, Garcia contends that he is entitled to a new trial. (See U.S. Const., 6th & 14th Amends; see also CALJIC No. 17.43.)[50]

The facts underlying this issue on appeal occurred over many months' time. Immediately before leaving for the return visit to the crime scene on September 5, a juror asked the trial court if he could use a laser pointer to "shoot a line" while at the crime scene. The trial court denied this request, noting that this conduct would constitute the taking of new evidence. Instead, it advised the jurors to do "whatever sight lines you can do with whatever is down there."

Garcia unsuccessfully challenged the trial court's response when he moved for a new trial.[51] That motion was heard in March 2001, many months after the September 2000 exchange occurred. At the hearing on the motion for new trial, Garcia argued inter alia that the trial court erred by responding to the juror's inquiry before notifying and consulting with defense counsel about that response. (See U.S. Const., 6th Amend.; § 1138.) Before denying the motion, the trial court stated that after the September 5 visit to the crime scene, it had informed defense counsel and the prosecutor of this request and its response to it off the record. At that time, defense counsel had agreed that its response was correct and had raised no objection to the response having been given without notifying Garcia and defense counsel or with doing so outside of their presence.

As it found that Garcia's counsel had approved its response after the fact, the trial court concluded that defense counsel had either waived any claim of error that it

---

50 When the jury was instructed that it could ask questions of the trial court during deliberations, it was told that "counsel must first be contacted before a response can be formulated." (See CALJIC No. 17.43.)

51 In its opposition to the motion for new trial, the prosecution assumed that the trial court violated section 1138, but that Garcia was not prejudiced by its response.

violated section 1138 by the manner of its response by failing to object or that the claim was barred by equitable estoppel. Assuming arguendo that a violation of statute in fact occurred, the trial court went on to hold that its response to the juror denying an opportunity to take new evidence was proper. Again, it noted that defense counsel made no objection to the trial court's action immediately after the incident occurred and, in fact, agreed that the trial court's response was proper. On these facts, the trial court concluded that no prejudice arose to Garcia because his counsel retroactively approved its response.

The trial court also rejected defense counsel's declaration stating what he would have done if he had been present—asking Garcia's expert witness to set up his laser for the jury's use[52]—for three reasons: because having the expert at the crime scene to assist the jury would have been the taking of new evidence, because it was "pure speculation" what Garcia's counsel would have done if he were present, and because the content of the declaration that Garcia's counsel made was contrary to the information conveyed to the trial court off the record when defense counsel first learned of the juror's request and the trial court's response to it. The trial court also noted that in order to accomplish his purpose, defense counsel would first have had to move to reopen evidence, which he never did. Even if the trial court indulged in the speculation expressed by Garcia's counsel, it determined that the result would be the same, because its correct response to the juror's request made any error harmless beyond a reasonable doubt. For these reasons, the trial court denied Garcia's motion for new trial challenging its response to the juror inquiry.

2. *Evidence of September 2000 Exchange*

The exchange between the trial court and trial counsel took place off the record. It appears to have occurred between the time that the jury made its return visit to the crime scene on September 5 and before it rendered its verdict on

---

52 The trial court noted that Garcia did not ask to have his expert Jim Norris set up the laser at the August 17 visit, although Norris testified before that visit occurred.

September 6.[53] The trial court's recitation of the exchange occurred many months later when the motion for new trial was heard in March 2001. On appeal, Garcia suggests that we give no credence to this recitation because no contemporaneous record was made of the underlying exchange. He also characterizes the trial court's response as incomplete, inaccurate and misleading, asserting that it only conveyed to trial counsel part of what it told the jury. Specifically, Garcia argues that the trial court failed to convey to trial counsel its comment allowing the jury to take sight lines using objects available at the crime scene.

Garcia argues that the "absence of any meaningful record of the alleged conversation between the trial judge and defense counsel" casts doubt on the trial court's finding that trial counsel waived this claim of error. The record on appeal contains no evidence to support this argument. Appellate counsel, acting on Garcia's behalf, asserts that this conversation should have been placed on the record for later review. However, he took no steps to memorialize trial counsel's recollection of the exchange that he now suggests must have differed from the trial court's recollection. As Garcia's trial counsel was a party to this conversation, he must know what was said during the crucial exchange. At no time—not immediately after the exchange, not during the hearing on the motion for new trial, nor since then as part of this appeal or Garcia's related petition for writ of habeas corpus (case No. A101394)—has appellate counsel filed any declaration from trial counsel setting forth a recollection of the exchange that might highlight any differences from the facts as recounted by the trial court.

In the record on appeal, the trial court's March 2001 recitation of what was said off the record in September 2000 is the *only* evidence we have of what the trial court and trial counsel said. Garcia's suggestion that we should ignore the trial court's recitation of the crucial exchange as incorrect would require us to ignore the

---

53 In its brief, the Attorney General asserts that the conversation occurred by telephone, but the record contains no evidence to support this assertion.

only evidence properly before us and, instead, to engage in speculation about what occurred. We will not do so.

Garcia also argues that the trial court's recitation is suspect because trial counsel was not permitted to make a record of his recollection of it when he attempted to do so. This argument is misleading and—once we consider the underlying event in context—it is unavailing. The exchange between the trial court and trial counsel occurred in September 2000. Many months later, after defense counsel had submitted the motion for new trial and the trial court had denied it in March 2001, Garcia's attorney sought to put trial counsel's recollection on the record. However, as the motion had been submitted and denied, the trial court refused to allow trial counsel to continue to argue the motion. At that point, the motion was no longer being considered and the trial court acted within its authority by declining Garcia's implied request to continue to argue it.

More importantly, the record is devoid of any evidence that the trial court prevented Garcia's attorney from making a record of trial counsel's view of the September exchange. The six months *before* the motion for new trial was heard and denied offered appellate counsel ample time to obtain a declaration from trial counsel about what was said at the off-the-record session. The prosecution did not assert a waiver or estoppel argument in its response to the motion for new trial, so Garcia could argue that he was unaware of the significance that the trial court associated with trial counsel's statements until they formed the basis of the March 2001 denial of his motion for new trial. However, since that time, Garcia has understood the importance of what was said in September 2000. Although appellate counsel has filed a voluminous appeal and a lengthy petition for writ of habeas corpus, he has not filed any declaration from trial counsel offering any evidence of his recollection of the September 2000 exchange. All these facts combine to satisfy us that we may consider the trial court's recitation of what trial counsel said shortly after the September 5 visit to the crime scene when we decide the issues raised in this appeal.

3. *Appellate Issues*

On appeal, Garcia argues that the trial court's response both undermined the defense and bolstered the prosecution. He contends that when it precluded the juror from using a laser to determine the trajectory of the shotgun pellets that killed Gregg, it denied the jurors an opportunity to recreate an experiment performed by Norris, the defense expert. At the same time, he reasons that the trial court impliedly endorsed the experiment performed by prosecution witness Sprain when it encouraged jurors to use the dowels in the fence to take its sight lines. He asserts that the trial court's response allowed the jury to obtain new evidence or to confirm prosecution evidence, but denied it any opportunity to test the defense theory.[54]

By state law, once the jury has retired for deliberations, if it poses a question to the trial court, the response must be given in the presence of—and after notice is given to—the prosecutor, the defendant and defense counsel—or after they have been called. (§ 1138.) The purpose of this requirement is to permit the defendant an opportunity to evaluate a proposed response in order to allow him or her to pose an objection or to suggest a different reply that might be more favorable to the defense. However, the California Supreme Court has questioned whether a defendant should be permitted to sit back, await a jury verdict and then assert error based on an ex parte communication, especially if that communication was on a relatively minor matter. (*People v. Jennings* (1991) 53 Cal.3d 334, 384, cert. den. *sub nom. Jennings v. California* (1991) 502 U.S. 969.)

Garcia waived his right to assert this claim of error on appeal because he did not challenge the trial court's conduct until *after* the jury had rendered its verdict. According to the only evidence before us on this issue, his trial counsel did more than *fail to object* to the trial court's response—he *affirmatively acquiesced* in the

---

54 He asserts that the jury, in fact, confirmed that the shooting could have happened as the prosecution theorized when it made its September 5 visit to the crime scene. The only evidence we have of the jury's purpose and conduct at this visit is the hearsay evidence contained in Gore's declaration, which we may not consider.

response that the trial court gave soon after it was given, but before the jury rendered its verdict. Even if he had not approved the trial court's response, Garcia's failure to raise an objection in the trial court before the jury verdict precludes him from asserting this claim of error on appeal. (See, e.g., *People v. Jenkins* (2000) 22 Cal.4th 900, 1000, cert. den. *sub nom. Jenkins v. California* (2001) 531 U.S. 1155; see also 6 Witkin & Epstein, Cal. Criminal Law, *supra,* Reversible Error, § 36, pp. 495-497.)

Garcia counters that he cannot be deemed to have waived his constitutional right to counsel in this manner. The California Supreme Court takes a different view. In *People v. Jennings, supra,* the trial court engaged in ex parte communications with jurors during deliberations. On appeal, the defendant asserted various federal and state constitutional and state statutory rights, including the right to counsel. The Supreme Court held that Jennings waived his rights by failing to object or move for mistrial once the trial court informed the defense of its conduct as the jury continued to deliberate. As in Garcia's case, the *Jennings* jury reached its verdict before the defendant raised any objection to the trial court's ex parte communication. (See *People v. Jennings, supra,* 53 Cal.3d at p. 383.) Applying the same reasoning, we conclude that Garcia had the right to waive and did, in fact, waive any right to assert on appeal that the trial court committed federal or state constitutional or statutory error in making its response.

D. *Jury Separation*[*]

Garcia also contends that some jurors engaged in deliberations outside the presence of other jurors at the return visit to the crime scene. He reasons that this constituted an impermissible jury separation that rendered his subsequent conviction invalid and warranted the granting of a new trial. The trial court denied his motion for new trial, grounded in part on this claim of error.

---

[*] See footnote, *ante*, page one.

A new trial may be granted if the defendant establishes that the jury has separated without leave of court after beginning deliberations on their verdict. (§ 1181, subd. 3.) When resolving Garcia's related claim that some jurors took new evidence that other jurors did not during the return visit to the crime scene, we rejected his underlying contention that an improper jury separation occurred at the September 5 return visit to the crime scene. (See also pt. II.B.2.f., *ante*.) Applying the same factual premise, we necessarily reject this related claim of error, as well.

E. *Conclusion*[*]

In sum, we hold that the trial court acted within its authority when it permitted the jury to return to the crime scene on September 5. As the jury's return visit occurred during deliberations, the trial court properly precluded Garcia and defense counsel from attending. (See § 1128; *People v. Oliver, supra,* 196 Cal.App.3d at pp. 428-429.) Garcia has not established that the jury took any new out-of-court evidence or engaged in improper conduct on September 5. He raised no timely objection to the trial court's response to a juror inquiry made immediately before the return visit, barring him from asserting this claim of error on appeal. As such, we find that the trial court properly denied Garcia's motion for new trial.

III. IMPEACHMENT[*]

A. *Facts*

Next, Garcia argues that the trial court erred when it permitted the prosecution to impeach him with evidence of his 1993 misdemeanor battery conviction. He argues that the trial court's admission of this impeachment evidence was prejudicial error warranting a new trial. Outside the presence of the jury, he sought to preclude the prosecution from impeaching him with this evidence if he opted to testify. He argued that he had not put on evidence of his nonviolent character, although he did offer character evidence of his truth and honesty. The trial court ruled that battery

---

[*] See footnote, *ante*, page one.

[*] See footnote, *ante*, page one.

was a crime of moral turpitude—evidence of a readiness to do evil. Accordingly, it ruled that the prosecution would be to admit evidence of the facts of the underlying battery if this could be done without undue consumption of time. (See Evid. Code, § 352.)

Before the jury, two San Jose police officers testified[55] that in March 1993, they responded to the Garcia home. One took a statement from the victim, Ester Garcia. She told the police that her husband had become intoxicated at a wedding. She sought to drive them both home, the Garcias argued and he broke the driver's side window of their vehicle with his fist. Security officials at the wedding arranged for a taxi to take him home.

Ester Garcia drove home and found her husband had already returned. She reported to police that he had said to her: "Turn around and look at me because it's going to be the last time you see my fucking face." After making other verbal threats to her and to their children, he struck her in the back, grabbed her by the hair and pulled her to the ground. She estimated that he dragged her by the hair for a distance of about 15 feet. When someone pulled Garcia off of his wife, she and the children fled their home and called the police. Garcia's daughter Evangelina also reported to police that her parents had argued on the way back from a wedding; that her father had broken a window in the family car with his fist; that he grabbed her mother, threw her to the ground and dragged her across the kitchen floor before she got free of him.[56]

The version of events from the police witnesses differed from the testimony offered by Garcia and his family about this incident. During his direct

---

55 Garcia's testimony about the events of March 1993 was actually given in his direct examination, before the San Jose police officers testified on rebuttal. However, for clarity, we set out the evidence contained in the police reports first.

56 When shown a copy of her statement to police, Garcia's daughter denied making it.

examination,[57] Garcia testified that in 1993, he had forbidden his daughter Evangelina—then 14 years old—to go out late with people of whom he did not approve. When he saw her leave in defiance of his orders, he grabbed her by the hair and pulled her back into the house.[58] He did not think anything more about the incident, but later he was arrested. He entered a plea[59] to the charge against him, did some community service and completed a domestic violence program.

Garcia told the jury that he knew at the time he entered his plea that the police reports differed from the true facts of the incident. The reports stated that he had hit his wife, not that he had assaulted his daughter.[60] He explained that he pled to the charge of assaulting his wife Ester Garcia because he wanted to get the matter over with. He denied grabbing Ester by the hair and dragging her across the floor. Garcia also denied telling her to turn and look at him, "because it's going to be the last time you see my fucking face." He denied that Ester and the children fled their home to call the police from a neighbor's house.

The jury was instructed how to view the evidence of Garcia's misconduct.[61] (See CALJIC No. 2.23.1.) During deliberations, one of the jury's first requests was

---

57 Faced with the trial court's determination of admissibility, Garcia chose to introduce the subject himself.

58 His daughter corroborated his version of these events when she testified. She told the jury that she called the police in retaliation against her father for pulling her hair. Later, he apologized to her.

59 The record on appeal includes a copy of the minutes of the October 1993 hearing, noting that Garcia pled no contest to a misdemeanor battery charge. (See §§ 242, 243, subd. (a).) These minutes were not in evidence before the jury.

60 His wife corroborated this testimony, telling the jury that she was not the actual victim of this domestic violence incident, despite what the police report said.

61 The trial court instructed the jury that evidence had been "introduced for the purpose of showing that [Garcia] engaged in past criminal conduct amounting to a misdemeanor, to wit: battery. This evidence may be considered by you only for the purpose of determining [his] believability . . . . The fact that [Garcia] engaged in past criminal conduct amounting to a misdemeanor, if it is established, does not necessarily destroy or impair [his] believability. It is one of the circumstances that you may take into consideration in weighing the testimony of that

to see the police reports of this incident of domestic violence. The trial court denied this request because the police reports themselves were not introduced into evidence in the case although the San Jose police officers consulted them during their testimony. When the jury later asked to have the testimony of these two officers read back to them, the trial court agreed. These jury communications suggest that the evidence of Garcia's domestic violence was important to the jury's consideration of the murder charge.

B. *Admissibility of Evidence*

California courts have held that no witness—not even a criminal defendant testifying on his or her own behalf—is entitled to a false aura of veracity. (See *People v. Chavez* (2000) 84 Cal.App.4th 25, 28.) In a proper case, prior misdemeanor misconduct evidence is admissible to impeach a witness in a criminal trial. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295 (*Wheeler*).) If past criminal conduct amounting to a misdemeanor has some logical bearing on a witness's veracity in a criminal trial, then evidence of that misconduct may be relevant for impeachment purposes. (*Ibid.*) Not all evidence of misconduct has a direct tendency to prove or disprove a witness's honesty and veracity. However, any moral depravity has some tendency in reason to shake one's confidence in the witness's honesty, allowing a rational inference that a person who commits a crime of moral turpitude—even one that does not involve dishonesty as an element—is more likely to be dishonest than a witness who has not committed such an offense. (*Ibid.*; *People v. Chavez, supra,* 84 Cal.App.4th at p. 29; *People v. Thomas* (1988) 206 Cal.App.3d 689, 694; *People v. Mansfield* (1988) 200 Cal.App.3d 82, 87.)

Misdemeanor misconduct involving moral turpitude may suggest a willingness to lie. A trial court may exclude the proffered evidence if it concludes that it lacks merit, but there is no blanket rule of exclusion of misdemeanor misconduct evidence

---

witness. The party introducing this conduct has the burden of proving it beyond a reasonable doubt." (See CALJIC No. 2.23.1.) The jury was also instructed on the elements of misdemeanor battery.

for impeachment purposes. (See *Wheeler, supra,* 4 Cal.4th at pp. 295-296 & fn. 6 [retaining moral turpitude standard].) Misconduct evidence is relevant for purposes of impeachment if it demonstrates moral turpitude. (*Id.* at p. 296.) In the context of felony convictions used to impeach a witness, courts have held that crimes of moral turpitude include those containing an element of dishonesty and those indicating a general readiness to do evil which in turn allows an inference of a readiness to lie. Crimes suggesting a readiness to do evil are acts of baseness, vileness or depravity in the private and social duties that a person owes to others or to society in general, contrary to accepted and customary rules of right and duty. (*People v. Chavez, supra,* 84 Cal.App.4th at pp. 28-29; *People v. Mansfield, supra,* 200 Cal.App.3d at p. 87.)

If a witness was convicted of a misdemeanor, evidence of the underlying misconduct may be admissible for impeachment purposes, but the conviction itself is not. The fact of a misdemeanor conviction remains inadmissible hearsay when offered to prove the truth of the underlying misconduct bearing on a witness's truthfulness. (*Wheeler, supra,* 4 Cal.4th at pp. 288, 297-300; see *People v. Scott* (1993) 17 Cal.App.4th 405, 411.) This distinction turns on the difference between the evidence of the record of the witness's misdemeanor conviction and evidence of the misconduct underlying that conviction. (See *Wheeler, supra,* 4 Cal.4th at p. 288.) The California Supreme Court has ruled that evidence that a witness committed a misdemeanor may be relevant to credibility; but the fact of a misdemeanor conviction is not. (*Id.* at pp. 288, 297-300; *People v. Scott, supra,* 17 Cal.App.4th at p. 411.)

The trial court retains discretion to exclude even relevant misdemeanor misconduct evidence if its probative value is substantially outweighed by its potential for prejudice, confusion, or the undue consumption of time.[62] (*Wheeler, supra,* 4

---

62 The trial court in our case demonstrated its understanding of its authority under section 352 of the Evidence Code when it warned the prosecution that it would not admit the

Cal.4th at p. 295; see Cal. Const., art. I, § 28, subd. (d); Evid. Code, § 352.) Misdemeanor misconduct is a less forceful indicator of immoral character or dishonesty than felony misconduct. The California Supreme Court has cautioned that this lesser force, combined with the additional difficulty of proving misdemeanor misconduct, should prompt trial courts to take particular care when considering whether admission of this evidence may be more prejudicial than probative. (*Wheeler, supra,* 4 Cal.4th at pp. 296-297.)

C. *Moral Turpitude*

On appeal, Garcia contends that the trial court erred by concluding that evidence of his misdemeanor battery constitutes evidence of his moral turpitude. In 1993, he pled no contest to and was convicted of simple battery—an offense that has been held not to constitute a crime of moral turpitude. (*People v. Chavez, supra,* 84 Cal.App.4th at p. 29; see *People v. Thomas, supra,* 206 Cal.App.3d at p. 694; *People v. Mansfield, supra,* 200 Cal.App.3d at pp. 88-89; see also §§ 242, 243, subd. (a).) Garcia reasons that in order to determine whether his misdemeanor misconduct involved moral turpitude, we must look to the least adjudicated elements of the crime of which he was convicted.

Misdemeanor misconduct evidence is admissible for impeachment only if it involves moral turpitude. (*Wheeler, supra,* 4 Cal.4th at p. 296; see *People v. Alvarez* (1996) 14 Cal.4th 155, 201 fn. 11, cert. den. *sub nom. Alvarez v. California* (1997) 522 U.S. 829.) However, Garcia's reasoning implies that if the offense of which he was convicted was not a crime of moral turpitude, the evidence of his underlying conduct cannot be found to constitute evidence of his moral turpitude, either. We disagree with his assumption that we are confined to the least adjudicated elements of the misdemeanor of which he was *convicted* when determining whether the *underlying conduct* constitutes evidence of moral turpitude. The least adjudicated

---

misdemeanor misconduct evidence if presentation of this evidence required too many witnesses or too much court time.

element standard logically applies when the evidence to be admitted is the fact of a *felony conviction*, but in this case, the evidence admitted was not his misdemeanor conviction, but the misconduct underlying it. (See *Wheeler, supra,* 4 Cal.4th at pp. 288, 297-300 [conduct, not conviction, admissible].) Whether misdemeanor misconduct evinces moral turpitude turns solely on the misconduct itself, not on the label applied to define the statutory offense that the misconduct constitutes. (*People v. Ayala, supra,* 23 Cal.4th at p. 273; *People v. Lepolo* (1997) 55 Cal.App.4th 85, 89-90.)[63]

The evidence offered to the jury showed that in 1993, Garcia—intoxicated and angry—verbally abused his wife Ester, threatened to kill her, beat her, pulled her to the ground and dragged her about their home by her hair until she managed to free herself and flee. In so doing, Garcia terrorized and injured a person of the opposite sex who was in a special relationship with him. Society rationally demands—and Ester could reasonably expect—that this special relationship in fact entitled her to stability and safety, making her especially vulnerable to him. (See *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402.) Such conduct has been found to demonstrate moral turpitude because of the special relationship between husband and wife. (See, e.g., *id.* at pp. 1400-1402 [felony conviction for inflicting corporal injury on spouse].)

We are satisfied that the misconduct constituted moral turpitude and that it was admissible for impeachment purposes. The trial court has broad discretion to admit evidence of misconduct demonstrating moral turpitude for impeachment purposes. (*Wheeler, supra,* 4 Cal.4th at pp. 288, 296.) We find that trial court acted within its discretion when it admitted evidence of the conduct underlying Garcia's misdemeanor battery conviction.

---

63 We were not assisted in our resolution of this issue by the Attorney General's failure to cite the appropriate standard by which to determine the issue of moral turpitude in the context of misdemeanor misconduct evidence.

IV. DOG TRAILING EVIDENCE*

A. *Facts*

Garcia next contends that the trial court twice committed reversible error in regard to the dog trailing evidence—when it allowed the prosecution to introduce this evidence to prove the identity of the killer and when it misinstructed the jury on the permissible weight to be given to that evidence. At trial, the People sought to admit evidence that on December 1, a bloodhound named Ronin had detected Garcia's scent from his shirt and followed that scent to Gregg's residence. Garcia moved to exclude this evidence, arguing that the prosecution had not laid a proper foundation for its admission; that it should be excluded as more prejudicial than probative; and that this evidence was so unreliable that its admission violated due process.

The trial court initially excluded this evidence, finding that the prosecution had failed to lay a proper foundation for its admission because there was no evidence that Ronin was placed on the track where circumstances indicated that the shooter had been. It later allowed the People to put on additional evidence of that location—the place that Ronin went to after sniffing Garcia's shirt. The trial court then ruled that the dog trailing evidence could be admitted at trial. It also concluded that the probative value of this evidence far outweighed any prejudicial effect. (See Evid. Code, § 352.)

The jurors heard this evidence at trial. They were told that Ronin was a pedigreed bloodhound trained in scent discrimination—that is, in the detection of an individual's unique scent. Ronin's handler testified as an expert on the trailing of human scent with the bloodhound. He opined that an individual's scent is as unique as fingerprints or DNA evidence, but admitted that there were no studies finding scent discrimination evidence to be as reliable as these other forms of evidence.

The handler told the jury that on December 1, Ronin was taken to the creek bed near Gregg's trailer and given Garcia's shirt to scent. Initially, the handler

---

* See footnote, *ante*, page one.

pointed Ronin away from the trailer. The bloodhound then signaled that he followed a scent from the creek bed to the front door of the trailer, around the trailer and back to the creek bed before going about a half mile deeper into a wooded area. The handler concluded from Ronin's reactions and the length of the run that the bloodhound was sniffing a scent trail that Garcia had left.

Garcia's expert in bloodhound scent discrimination strongly undermined the evidence offered by Ronin's handler. His expert denied that any dog could pick up a trail and find the direction of that trail in the manner that Ronin was said to have done. He did not know of any study suggesting that a bloodhound could scent a specific item and follow its scent. He had seen this effort tried in training situations and it always failed. The defense expert also challenged the prosecution expert's lack of an adequate background in controlled analysis of dog behavior, suggesting that Ronin's handler did not properly interpret his dog's responses under all conditions. He gave little credence to the prosecution's scent trailing theory.

Noting that the bloodhound did not try to find Garcia's scent until December 1, Garcia's expert also opined that a bloodhound could not find and identify a scent so many days after the shooting, which was believed to have occurred on November 19 or 20.[64] He criticized Ronin's training to find scents that were less than fresh. He disagreed with the conclusions of Ronin's handler, opining that the dog would be about as likely to "levitat[e]" as to correctly detect a specific human scent so many days after the scent was laid down.

The trial court refused a jury instruction that Garcia proposed on this subject and instead gave the standard instruction cautioning the jury about the proper use of dog tracking evidence over his objection.[65] (See CALJIC No. 2.16.)[66] During

---

64 The precise time of Gregg's death was not determined, but prosecution evidence supported the theory that she was probably shot on Thursday, November 19.

65 The basis of this objection was not explicitly stated, although Garcia had proposed a different instruction on this issue. The trial court refused the proposed instruction because it found the standard instruction correctly stated the law in a less confusing manner.

closing argument, defense counsel noted that the prosecution did not refer to its dog trailing evidence during its initial closing argument. Garcia's attorney characterized this evidence as "junk" and urged the jury to disregard it. In the final phase of his closing argument, the prosecutor admitted that the defense had rebutted the dog handler's evidence well, but argued that the jury could find Garcia guilty without it.[67]

B. *Admissibility*

On appeal, Garcia raises several claims of error with regard to this evidence. First, he distinguishes between dog tracking and dog trailing evidence, contending that while the former is admissible, the latter is based on an empirically unsound methodology. As such, he appears to argue that dog scent evidence can never be admitted in a case other than one involving the immediate tracking of a felon who has fled from the scene of a crime. Evidence of the conduct of a dog who has tracked an accused has long been held to be admissible, provided that a proper foundation is laid demonstrating the particular dog's ability and reliability in tracking humans. (*People v. Malgren* (1983) 139 Cal.App.3d 234, 237-238 (*Malgren*); see CALJIC No. 2.16; see also Annot., Evidence of Trailing by Dogs in Criminal Cases

---

66 The jury was instructed that evidence of "dog tracking has been received for the purpose of showing, if it does, that the defendant is the perpetrator of the crime of murder. This evidence is not . . . by itself sufficient to permit an inference that the defendant is guilty of the crime of murder. Before guilt may be inferred, there must be other evidence that supports the identification of the defendant as the perpetrator of the crime of murder. [¶] The corroborating evidence need not be evidence which independently links the defendant to the crime. It is sufficient if it supports the accuracy of the dog tracking. [¶] In determining the weight to give to dog tracking evidence, you should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the tracking in question." (See CALJIC No. 2.16.) This standard jury instruction accurately states the law. (See, e.g., *People v. Gonzales* (1990) 218 Cal.App.3d 403, 409-414.) The jury was also given standard jury instructions on the weight to be given to opinions of expert witnesses. (See CALJIC Nos. 2.80-2.83.)

67 The prosecutor told the jury that in every case, some evidence favored the state and some did not. He admitted that the defense expert witness on dog trailing evidence was "excellent." Although he did not concede that the prosecution's expert witness was wrong, "in fairness to the defense" he did not consider that evidence when he argued that he had met his burden of proving that Garcia was guilty beyond a reasonable doubt.

(2000) 81 A.L.R.5th 563, 578, § 2(a) [overwhelming majority of U.S. jurisdictions admit this evidence].)

Before admission of dog tracking evidence, the proponent of the evidence must establish the dog's ability and reliability. (*Malgren, supra,* 139 Cal.App.3d at p. 238.) A proper foundation also includes evidence that the circumstances of the tracking itself make it probable that the person tracked was the perpetrator. Specifically, the proponent of the evidence must show that "(1) the dog's handler was qualified by training and experience to use the dog; (2) the dog was adequately trained in tracking humans; (3) the dog has been found to be reliable in tracking humans; (4) the dog was placed on the track where circumstances indicated [that the perpetrator had] been; and (5) the trail had not become stale or contaminated." (*Ibid*.) Garcia distinguishes the evidence offered in his case—which he characterizes as *dog trailing* evidence—from the results of a dog's immediate search for a fleeing felon—which he denotes as *dog tracking* evidence. He suggests that the *Malgren* standard should not apply at all to admit dog trailing evidence. (See, e.g., *People v. Mitchell* (2003) 110 Cal.App.4th 772, 790-794 [scent lineup identification evidence improperly admitted; proposing modified version of *Malgren* test to be applied].)[68]

Even if we reject this argument and find that the *Malgren* test applies to the evidence that was admitted in his case, Garcia also argues that the evidence of Ronin's handler was improperly admitted because this test was not satisfied. He argues that the evidence was unreliable because it was stale.[69] Ronin conducted his

---

68 In contrast to his claim of error on appeal, the jury instruction that Garcia himself proposed—while different from the standard jury instruction on this evidence—was phrased in terms of the *Malgren* test and referred to the evidence as dog tracking evidence, not dog trailing evidence as he characterizes it on appeal. *Malgren* itself uses both terms interchangeably. (See *Malgren, supra,* 139 Cal.App.3d at pp. 237-242.) As will be seen, we need not determine whether dog trailing evidence differs significantly from dog tracking evidence.

69 The opponent of this evidence must object in the trial court in order to preserve the right to challenge the admission of this evidence on appeal. (*Malgren, supra,* 139 Cal.App.3d at p. 239.) Garcia's pretrial motion to exclude this evidence specifically challenged the People's evidence that the trail was not stale.

search on December 1, eleven days after Gregg's body was found on November 20. *Malgren* requires that the proponent of the evidence show that the trail had not become stale or contaminated. (*Malgren, supra,* 139 Cal.App.3d at p. 238.) When denying Garcia's motion to exclude this evidence, the trial court ruled that the trail had *not* become stale or contaminated either by weather or by age at the time that the December 1 search took place.

The three published California cases in which this type of evidence was admitted each appear to involve tracking that took place very shortly after the time that the scent was put down. (See *Malgren, supra,* 139 Cal.App.3d at p. 238 [25 minutes]; see also *People v. Gonzales, supra,* 218 Cal.App.3d at pp. 406-407 [search begins after 25 minutes; defendant found about one mile away]; *People v. Craig* (1978) 86 Cal.App.3d 905, 910-911 [search for felons occurs shortly after robbery].) These cases involve a much shorter period of time between scent and trailing than the 11-day period between Gregg's death and Ronin's search. The cited cases thus rely on stronger evidence to satisfy the final prong on *Malgren* than that offered in Garcia's case.

Whether or not we conclude that the *Malgren* test should apply—either as set out in that case or in a modified form—Garcia argues that the evidence should not have been admitted at all. Our review of this matter satisfies us that we need not resolve these complex issues. Assuming arguendo that the trial court erred in admitting this evidence, we would find that any error in this regard was harmless. Garcia argues that this evidence was highly significant, because it was the only evidence to link him to the crime. However, it is more accurate to say that the dog evidence was the only *direct* evidence offered by the prosecution linking Garcia to the murder. The remaining evidence in the case was *circumstantial* evidence, but such evidence as his motive to kill Gregg, his repeated threats against her, and his familiarity with weapons—as well as any reasonable inferences that may be drawn from this evidence is as sufficient to support a criminal conviction as direct evidence. It is the function of the trier of fact to draw proper inferences from the evidence.

When circumstances reasonably justify the conclusion of the trier of fact, we may not interfere with that finding. (See *People* v. *Bloom* (1989) 48 Cal.3d 1194, 1208, cert. den. *sub nom. Bloom v. California* (1990) 494 U.S. 1039; *People v. Anderson* (1940) 37 Cal.App.2d 615, 619; see also *People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139; *Malgren, supra,* 139 Cal.App.3d at p. 239.)[70]

When dog trailing evidence is erroneously admitted, the error is not prejudicial unless it is reasonably probable that a result more favorable to the criminal defendant would have resulted in the absence of those errors. (See *People v. Mitchell, supra,* 110 Cal.App.4th at p. 795; *Malgren, supra,* 139 Cal.App.3d at p. 242; see also *People v. Watson* (1956) 46 Cal.2d 818, 836, cert. den. *sub nom. Watson v. Teets* (1957) 355 U.S. 846.) In this case, we conclude that any error resulting from the admission of this evidence was harmless. The evidence was soundly attacked by the defense expert. During argument, defense counsel denigrated this evidence and asked the jury to ignore it. The prosecutor candidly concurred with Garcia's attorney, effectively undercutting this aspect of his evidence at the same time that he rejected its importance to his overall case. The jurors made numerous inquiries over four days of deliberations, but did not ask any questions about this challenged evidence.[71] In such circumstances, we are confident that the evidence had little or no effect on the jurors. As it is not reasonably probable that a result more favorable to Garcia would have resulted in the absence of this asserted error, we conclude that any evidentiary error was harmless.

---

70 The jury was so instructed that direct evidence was not needed to prove guilt, but that circumstantial evidence was sufficient in an appropriate case. (See CALJIC Nos. 2.00, 2.01.)

71 In seven communications during four days of deliberations, the jurors inquired about evidence of domestic violence, the time of Gregg's death, when Garcia produced evidence of his right to road access, the testimony of Fish and Game Warden Mark Imsdahl, and Gregg's request of a neighbor to accompany her to Garcia's ranch. It also asked to revisit the crime scene. There were no inquires about dog sniffing evidence.

C. *Instruction*

Finally, Garcia also argues that the cautionary jury instruction given in this case violated his due process rights. Part of that instruction states that evidence corroborating the dog tracking evidence need not be evidence independently linking the defendant to the crime as long as the corroboration supports the accuracy of the dog's evidence. Garcia criticizes this language as permitting the jury to convict him of murder based on the dog evidence alone if it found its corroboration of Ronin's dog-tracking ability in the expert testimony offered by his handler. He likens this evidence to propensity evidence and reasons that the instruction lowered the prosecution's burden of proof to less than proof beyond a reasonable doubt in violation of his due process rights.

Even if we assume arguendo that the jury instruction given was erroneous, we would not find that its giving prejudiced Garcia in this case. Considering that the challenged instruction related only to the consideration of evidence that the prosecutor himself rejected shortly before the jury began its deliberations, we are satisfied that it is not reasonably probable that a result more favorable to Garcia would have resulted if the alleged instructional error had not occurred. As the jury was unlikely to have even considered this evidence, the related instruction could not have misled the jury. (See *Malgren, supra,* 139 Cal.App.3d at p. 242; see also *People v. Watson, supra,* 46 Cal.2d at p. 836.)[72]

---

[72] Garcia argues that the instruction violated his constitutional rights, but he does not specify what standard of prejudice should be applied if we find that error occurred. Even if we applied a higher standard of prejudice than that set forth in *Watson*, we would still find in the context of this case that the assumed instructional error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

V. CROSS-EXAMINATION*

A. *Facts*

1. *Trial Court Ruling*[73]

Finally, Garcia raises a Sixth Amendment challenge to the trial court's limitation of his cross-examination of a jailhouse informant about the facts underlying his commitment offense and those relating to offenses he later committed while in prison. Before trial, the People moved to limit impeachment of Timothy Villalba with his prior convictions. Villalba was serving a 25-year to life term in state prison for murder and robbery. The prosecutor explained that he had agreed to advise the parole board of Villalba's cooperation as a witness in the Garcia trial, but made no other promises to him.

At trial, Garcia sought to admit two items of evidence relevant on appeal.[74] First, he argued that evidence of Villalba's prior convictions of robbery and homicide were relevant for impeachment purposes. The trial court ruled that Villalba could be impeached with the fact of the prior convictions that formed the basis of his

---

* See footnote, *ante*, page one.

[73] Evidence about Villalba that has arisen since Garcia's trial has been brought to our attention as part of the related petition for habeas corpus relief. We have not considered this evidence when evaluating the issue raised on appeal, because our consideration of an appeal is limited to the facts in the record on appeal. (See *People v. Farnam* (2002) 28 Cal.4th 107, 201, cert. den. *sub nom. Farnam v. California* (2003) 537 U.S. 1124; see also 6 Witkin & Epstein, Cal. Criminal Law, *supra,* Criminal Appeal, § 146, pp. 392-393; 9 Witkin, Cal. Procedure, *supra,* Appeal, § 330, pp. 371-372.) As a court of review on appeal, we consider only those facts known to the trial court at the time it made the challenged ruling.

[74] Garcia also successfully urged that other evidence be brought before jury. At trial, the jury heard evidence of Villalba's sentence, his administrative segregation, the prosecutor's agreement to speak on his behalf at a later parole hearing, and the benefits conferred on him by means of the relative comfort of jail custody and its attendant opportunities to visit with his family. (See pt. V.2., *post*.) He also argued that the jury should learn of several facts about Villalba's incarceration, including his membership in a prison gang and his drug smuggling into jail and prison, reasoning that while Villalba served his prison time in jail awaiting his date to testify in Garcia's trial, he had additional opportunities for drug smuggling. The trial court excluded this proffered evidence.

commitment, but that Garcia could not delve into the underlying facts of the offenses. During trial, Garcia sought reconsideration of the ruling precluding him from going into the facts underlying Villalba's prison commitment, but the trial court declined to change its ruling.

Second, Garcia sought to admit evidence of Villalba's in-prison administrative offenses to impeach this witness. Before trial, he argued that evidence of as many as nine accusations and reprimands that Villalba received while in prison should also be brought to the jury's attention in order to properly evaluate the witness's credibility and motive to lie. The trial court excluded evidence of Villalba's administrative violations, concluding that none of them resulted in convictions and that few involved moral turpitude. If some of the evidence might be admissible as misdemeanor misconduct evidence, the trial court exercised its discretion to exclude it. It found that the probative value of this evidence would be outweighed by the prejudice resulting from the several mini-trials that would be required in order to offer this evidence. The trial court also found that the proffered evidence was cumulative, as Garcia had ample evidence of Villalba's bias to present to the jury. (See Evid. Code, § 352.)

2. *Villalba's Testimony and Related Evidence*

When Villalba testified, he told the jury that he was a felon serving a prison term of 25 years to life for murder and three counts of robbery. He also admitted a prior conviction of felony assault with a deadly weapon. He had been in prison for 15 to 20 years, part of that time in a prison gang. In prison, he had not been a model prisoner, but was regarded as a high security risk who spent time in administrative segregation.

On October 4, 1999, Villalba had been brought to county jail for a child custody hearing. He testified that while in a holding cell, he met Garcia, who said that he was in jail for homicide. According to Villalba, Garcia said that he owned a ranch in Morgan Hill. The White people who were his neighbors did not want a Mexican living near them. His homicide defense would be that his neighbors were

setting him up for murder, having dumped a "small body" over the fence onto his ranch. Villalba testified that Garcia told him that the sheriff took some weapons from his home, but that they were the "wrong" ones. He said that "they would never find the gun that was used" to kill the victim. He had gotten rid of it—"it's disappeared."

Villalba testified that Garcia also told him that he intended to hire a new attorney—a former prosecutor who was known to Villalba. Garcia told Villalba that the attorney had said that for $100,000, he would successfully defend him. He intended to raise the money by selling a home that he owned in San Jose, according to Villalba. Garcia gave Villalba the attorney's business card. There was also evidence that Garcia told Villalba that he had once been released from custody on bail, but that he was later returned to custody.

Villalba told the jury that, at first, he was uncertain what to do with this information. He knew that being an informant and working with prosecutors was dangerous for a prisoner. However, recalling Garcia's reference to a "small body," he assumed the victim was a child and that fact "left . . . a bad taste in [his] mouth." In December 1999, Villalba wrote a letter to the prosecutor about what Garcia said. Later, he met twice with prosecutors to review his statement before he formally agreed to testify about Garcia's statements to him. He and the prosecutor signed a written agreement to testify in Garcia's case.

Villalba also testified that on the morning that he came to court to testify against Garcia at his trial, he saw Garcia in an adjacent holding cell. It was the first time that they had met since their October 1999 conversation. Garcia protested that what he told Villalba was told to him "as a friend."

Villalba's credibility and his motive to testify were clearly at issue at trial. Villalba himself was aware of this fact. He first testified that other prisoners had made admissions to him that he had not reported to authorities. Immediately after giving this answer, he retracted it, stating that he did not wish to give an incorrect or perjured response. He explained that when he had defected from a prison gang, he

went through a debriefing process with gang investigators for the prison system. During this process, he discussed other prisoners' cases with prison officials.

Villalba told the jury that no one made him any promises about what he would get for providing this information to them, other than the prosecutor's agreement to advise the parole board that he had cooperated as a witness in this case. He knew that the prosecutor would not recommend that he be paroled. He believed he had done enough time to have served his sentence, but he did not expect the prosecution to tell the parole board so. If he misled the court, he knew that the parole board would learn about it. If he testified falsely, he could be charged with perjury, which could increase the time he served in prison. Three or four times already, he had been denied parole. Villalba did not expect the parole board to release him on the basis of his testimony in Garcia's case.

Villalba testified that while he was in prison, he was housed at a substance abuse treatment facility. He came to the county jail every six months for a child custody hearing and also came to testify at Garcia's trial. He had a medical visit outside the prison every three months for a heart condition and once had left prison for surgery at a local hospital. Villalba admitted that while he was in jail, he had privileges such as family visits that were often denied to him in prison. A defense witness—another felon who admitted that he perjured himself many times—told the jury that informants like Villalba also obtain benefits in prison after their prosecution testimony. Those benefits could include cash, prison release, visits to county jail, extra telephone calls, extra food, cigarettes, a television set and favorable housing assignments.

In his own testimony, Garcia denied ever speaking with Villalba. He testified that the first time he had ever seen Villalba was when he testified in court. He denied speaking the kind of gang Spanish language that Villalba attributed to him. His daughter Evangelina testified that Villalba attributed words to Garcia that her father never used. He spoke correct Spanish, not the rougher language of gang members like Villalba. His wife Ester also told that jury that Villalba had testified that her

husband used specific words that she had never heard him say in 26 years of marriage.

A notary public testified that he went to jail in October 1999 and notarized Garcia's signature on a deed of trust. He had known Garcia for more than 30 years and knew him to be a family man who was hard working and well liked. He believed that Garcia's signature was part of a real estate transaction to raise money to hire an attorney. The notary public once spoke to an attorney who sought to represent Garcia—the same one that Villalba told the jury that Garcia intended to hire. The named attorney actually represented Garcia at one time in this matter, although he no longer served as defense counsel by the time of trial. Garcia admitted that he had refinanced his Gilroy home in order to raise $100,000 to pay the attorney that Villalba named, but he denied telling Villalba this.

During argument, the prosecutor reminded jurors that they were to view Villalba's testimony with caution and to consider the extent to which he would be influenced by the receipt of any benefits before giving his testimony the weight that the jurors determined it deserved. He recounted the specific details of Gregg's death and Garcia's defense that Villalba knew and urged the jury to consider these details as evidence tending to corroborate Villalba's testimony. He reminded the jury that Villalba had never cooperated with law enforcement in his 20 years in prison and that he accurately anticipated future events in Garcia's case such as the hiring of a new attorney and the sale of property to hire new counsel. The trial court instructed the jury to view Villalba's evidence with caution and to scrutinize it closely; to consider the extent to which he might be influenced by any benefit he might receive or hope to receive; to give his testimony the weight that it deserved; and to carefully review all evidence on which the proof of a fact proven by the testimony of a single witness depended.[75]

---

[75] The jury was instructed that the "fact that a witness has been convicted of a felony, if this be a fact, may be considered by you only for the purpose of determining the believability of

B. *Discussion*

On appeal, Garcia contends that the trial court improperly limited his cross-examination of Villalba. He argues that he should have been permitted to question Villalba about the facts underlying the murder that led to his prison commitment and the facts relating to instances of in-prison misconduct that could have formed the basis of a denial of a request for parole. He contends that this evidence would have shown the jury that Villalba's chances for parole were so limited that the prosecutor's assistance might have been his only real opportunity to be paroled. Garcia reasons that if the jury learned the facts that the trial court excluded, it would have concluded that Villalba lacked credibility as a witness because he was so highly motivated to lie about his conversation with Garcia in order to obtain the prosecutor's assistance. The trial court's limitations of his cross-examination violated his federal constitutional right to confront and cross-examine witnesses against him, he contends. (See U.S. Const., 6th Amend.)

The confrontation clause of the Sixth Amendment guarantees the right of an accused in a state criminal prosecution to be confronted with the witnesses against him or her in order to have an opportunity to cross-examine them. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678; see *Davis v. Alaska* (1974) 415 U.S. 308, 315;

---

that witness. The fact of a conviction does not necessarily destroy or impair a witness'[s] believability. It is one of the circumstances that you may take into consideration in weighing the testimony of that witness. [¶] The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating this testimony, you should consider the extent to which it has been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard this testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in this case. [¶] [An] in-custody informant [is] a person, other than a co-defendant, percipient witness, accomplice, or co-conspirator whose testimony is based on statements made by the defendant while both the defendant and informant were held within a correctional institution. [¶] Timothy Villalba is an in-custody informant. [¶] Santa Clara County jail is a correctional institution." (See § 1127a; see also CALJIC No. 3.20.) The jurors were also instructed that they "should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the [proof] of that fact depends."

Olden v. Kentucky (1988) 488 U.S. 227, 231.) The essential purpose of the right to confrontation is to secure the ability to cross-examine a witness, which is the principal means of evaluating the believability of a witness and the truth of a witness's testimony. The exposure of a witness's motivation for testifying is an important part of the right to cross-examine a witness. (*Davis v. Alaska, supra,* 415 U.S. at pp. 316-317.)

However, the Sixth Amendment right to confrontation does not prevent "a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about . . . interrogation that is repetitive or only marginally relevant. . . . '[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 679, quoting *Delaware v. Fensterer* (1985) 474 U.S. 15, 20; *People v. Ducu* (1991) 226 Cal.App.3d 1412, 1415.)

The proffered evidence of the circumstances of the prior convictions that formed the basis of Villalba's prison commitment was not admissible. When a prior felony conviction is used for impeachment, courts may not admit evidence of the facts underlying that conviction. (*People v. Shea* (1995) 39 Cal.App.4th 1257, 1267; *People v. Heckathorne* (1988) 202 Cal.App.3d 458, 462.) As the proffered evidence was inadmissible, the trial court properly excluded it.

We conclude that the proffered evidence of Villalba's in-prison offenses was also properly excluded. Even if this evidence was relevant to impeach Villalba's credibility, we must also determine that the evidence did not contravene other policies limiting admissibility, such as those contained in section 352 of the Evidence Code. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) A trial court may, in its discretion, exclude evidence if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice.

(Evid. Code, § 352.) In this matter, the trial court ruled that the presentation of evidence of as many as nine in-prison offenses would be too time consuming to warrant their admission. (See *ibid*.) We will not reverse that exercise of discretion on appeal, absent a clear showing of an abuse of discretion. (*People v. O'Brien* (1976) 61 Cal.App.3d 766, 781.) We are satisfied that the trial court did not abuse its discretion in concluding that this evidence—although it might have some relevance to the issue of Villalba's bias—would require too much time to present to the jury when compared to its probative value. Thus, the trial court did not err in excluding either evidence of the circumstances underlying Villalba's commitment offenses or evidence of his in-prison offenses.

Our conclusion is also bolstered by our sense that the jury already had significant evidence of Villalba's potential bias before it. A criminal defendant is not denied an opportunity to cross-examine witnesses if his or her use of that opportunity would not have affected the jury's verdict. As such, to establish a violation of the confrontation clause, the defendant must be able to show that a reasonable jury might have received a significantly different impression of the witnesses' credibility had the defendant been permitted to pursue the proposed line of cross-examination. (*Delaware v. Van Arsdall*, *supra,* 475 U.S. at p. 680.)

In this matter, the jury knew that Villalba had been convicted of murder and three counts of robbery; that he had been sentenced to a term of 25 years to life in state prison; that he had been in prison for 15 to 20 years; that he had been in a prison gang; that he was a security risk who was often in administrative segregation because of his violation of prison rules; that three or four previous requests for parole had been denied; that visits to county jail resulting from his trial testimony offered him some benefits; and that the prosecutor had agreed to advise parole authorities at an upcoming parole hearing about his cooperation.

On this record, Garcia cannot demonstrate that his jury would have had a significantly different view of Villalba's credibility if it had heard the excluded evidence in addition to the evidence that was admitted tending to show this witness's

potential for bias. Garcia argues that the evidence that was excluded differed significantly from that which was before the jury because this evidence would have shown the jury how desperate Villalba's parole bid was without the prosecution speaking on his behalf. Regardless of the manner in which Villalba's credibility was challenged, the record is clear that the jury heard ample evidence of bias casting doubt on that credibility. Even if we assume arguendo that the evidence should have been admitted, we are satisfied that Garcia would not have been prejudiced by the exclusion of this cumulative evidence. The jury had sufficient information before it to evaluate Villalba's biases and motives. (See *U.S. v. Bensimon* (9th Cir. 1999) 172 F.3d 1121, 1128.)

The judgment is affirmed.[76]

_____
Reardon, J.

I concur:

_____
Kay, P.J.

[76] We issue a separate order ruling on Garcia's related petition for writ of habeas corpus. (Case No. A101394.)

Dissenting Opinion of Rivera, J.

In 1886, our Supreme Court held that a defendant has a statutory right to be present at a jury view. (*People v. Bush* (1886) 68 Cal. 623, 634.) "We are of the opinion that it is not intended by section 1119, Penal Code, that a view to be taken by the jury of any place or places contemplated by that statute should ever be ordered by the court, or take place *unless* in the presence of the defendant." (*Ibid.*, italics added.) Thus, it has long been the law of this state that, in the absence of a waiver, permitting a jury view out of the presence of defendant is plain error. (*People v. Lowrey* (1886) 70 Cal. 193, 194; *People v. Milner* (1898) 122 Cal. 171, 184 ["[i]t has . . . been declared to be error for the jury to receive a view of the premises in the absence of defendant [citing *Bush*]"].)

Although hoary with age, *Bush* is still binding precedent and has continually been reaffirmed by the Supreme Court. (See, e.g., *People v. Lang* (1989) 49 Cal.3d 991, 1025-1026 ["[u]nder our state law, a defendant has a right to be present at a jury view [citing *Bush*], but the right may be waived"]; *People v. Bolin* (1998) 18 Cal.4th 297, 325 [defendant has statutory right to be present at a jury view].) The *Bush* rule is grounded in two well-established principles. The first is that a defendant has the right to be present at all evidentiary proceedings. (*United States v. Gagnon* (1985) 470 U.S. 522, 526; *People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202; Cal. Const., art. I, § 15; Pen. Code, § 1043.) The second is that a jury view of premises constitutes the taking of evidence. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 325 ["we have long held that 'in so viewing the premises the jury was receiving evidence' even if nontestimonial"]; *People v. Bush, supra*, 68 Cal. at p. 634 [" 'though no witnesses are examined at the view, yet the jurors, from their observation of the place and its surroundings, may receive a kind of evidence from mute things, which cannot be brought into court to confront the accused, and are in their nature incapable of cross-examination' "].)

To be sure, these cases address a jury view taken during the evidentiary portion of a trial. The question before us is whether the same rule should apply to a

subsequent view, conducted during jury deliberations. The majority concludes that it does not, reasoning that a jury view of the crime scene during deliberations does not *necessarily* involve the taking of evidence, that the view is no different than the reexamination of an item of physical evidence in the jury room from which a defendant is properly excluded, and that a second site visit does not have the same impact as the first. (Maj. opn., *ante*, at pp. 30-35.)

Here, I must part company with the majority. I cannot agree that a jury view of a crime scene during deliberations is no different in kind or quality from a jury view of an item of physical evidence in the jury room. It is one thing for jurors to examine and manipulate a pistol, a duffel bag, or a safe and a set of keys in the controlled environment of a jury room. It is quite another for jurors to spend nearly an hour hiking around on an acre or so of land with virtually no supervision.[1] The fact that both occur during the deliberations stage of the trial does not make them equivalent.

Putting aside the question of whether a second view should have been permitted at all, any reexamination of a crime scene is fraught with difficulties. Even with precautions in place, it simply is not possible to anticipate and exclude all potential evidentiary intrusions, be they planned or inadvertent, such as an unreported or unexpected physical change in the premises, the uninvited appearance and commentary of a neighbor or bystander, or the unauthorized performance of jury experiments or tests. In my view, if a jury is to be allowed to conduct deliberations at the crime scene and away from the stringently monitored setting of the courthouse, the defendant and defense counsel should have the right to be present to observe what occurs on the scene, to ascertain for themselves whether new evidence has been taken (or has simply emerged), and to witness the occurrence of any irregularities.

---

[1] As the trial court itself acknowledged, "there is no question that the jury during the second visit acted outside the presence of the Court and staff. . . ."

Any logistical concerns that may arise from the defendant being present during such a visit can be resolved with common sense solutions.[2]

The majority's additional reasons supporting their decision are unpersuasive. First, we can only guess at whether a second view will have a greater or lesser impact on a jury; much would depend on the state of the evidence and each juror's state of mind at the time of each view. In any event, the relative impact of a second view has no bearing on the core issue before us: whether the view could involve the taking or receiving of new evidence. Second, the fact that the second view takes place during the deliberative phase of the trial is not a reason to reject defendant's right to be present. No one would dispute defendant's entitlement to be present at a second view of a crime scene if it occurs during the evidentiary portion of the trial. The fact that it occurs during deliberations should not negate the salutary rule enunciated in *Bush*. It is the wiser course to ensure the regularity of *any* site visit by securing defendant's right to be present. Indeed, the strange turn of events in this case exemplifies the wisdom of this result.

I would conclude it was error to allow a jury view of the crime scene in the absence of the defendant (*People v. Bush, supra,* 68 Cal. at p. 634) where there was no waiver of defendant's presence (*People v. Lang, supra,* 49 Cal.3d. at pp. 1025-1026).

Even if the bright line rule of *Bush* were not applicable, the question remains whether the second jury view implicates defendant's right to be present or to have

---

[2] For example, in this case, because the trial judge and courtroom staff accompanied the jurors during their deliberations, the jurors were instructed not to talk about the case unless they were all together and out of earshot of the judge and the staff. The same admonition could be given if the defendant and counsel were present as well. Alternatively, the jurors could simply be admonished not to engage in deliberations during the site view. (Cf. *People v. Lang, supra,* 49 Cal.3d at p. 1026 [practical measures could be taken to prevent jury from observing defendant in shackles at the jury view].)

counsel present at other stages of the proceedings, such as during a rereading of testimony requested by the jury (Pen. Code, § 1138). I conclude that it does. " 'Penal Code section 1138 requires that any questions posed by the jury regarding the law or the evidence be answered in open court in the presence of the accused and his or her counsel, unless presence is waived.' " (*People v. Hawthorne* (1992) 4 Cal.4th 43, 69.) Here, the jury's request for a jury view was akin to a question regarding the evidence; defendant, therefore, had a right to be present. (*People v. Hawley* (1896) 111 Cal. 78, 85 [jury's request for a view of the scene during deliberations was considered to be "within the spirit of section 1138"].) Although *defendant's* exclusion from proceedings enumerated in Penal Code section 1138 is not necessarily error (see, e.g., *People v. Ayala* (2000) 23 Cal.4th 225, 288 [readback of testimony is not a critical stage of proceedings at which defendant's presence is required]), it is error when, as here, both defendant *and his counsel* are excluded, over defendant's objections. "While it makes perfect sense to conclude that the presence of the defendant would be largely a matter of form when a defendant's lawyer is present at proceedings raising largely legal issues, when the lawyer is also absent and uninformed, the matter becomes a problem of constitutional substance." (*Fisher v. Roe* (9th Cir. 2001) 263 F.3d 906, 916, overruled on other grounds in *Payton v. Woodford* (9th Cir. 2003) 346 F.3d 1204, 1217, fn. 18.) On this record, I would hold the trial court committed prejudicial error in excluding both defendant and his counsel from the second view.

Accordingly, I respectfully dissent.

Trial court:	Santa Clara County Superior Court
Trial judge:	Hon. Hugh F. Mullin III
Counsel for appellant:	Riordan & Horgan Dennis P. Riordan Donald M. Horgan Dylan L. Schaffer
Counsel for respondent:	Bill Lockyer Attorney General Robert R. Anderson Chief Assistant Attorney General Ronald A. Bass Senior Assistant Attorney General Laurence K. Sullivan Supervising Deputy Attorney General John H. Deist Deputy Attorney General