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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK CURTIS ORTEGA,

Defendant and Appellant.

F057431

(Super. Ct. No. F08902368)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Gary R. Orozco, Judge.

David Joseph Macher, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes, Ivan P. Marrs and Larenda Delaini, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Mark Curtis Ortega was convicted of crimes arising from the home invasion robbery and murder of Regina Morales. The events leading to Regina's death occurred during the night of March 28, and the early morning of March, 29, 2008.<sup>1</sup> With the assistance of a young woman, defendant and his codefendant, Felix Rolando Hernandez, entered Regina's apartment and took her purse and keys and the keys of her companion. Defendant shot and killed Regina.

On appeal, defendant contends (1) the trial court erred by admitting evidence of defendant's prior robbery adjudication; (2) the trial court erred when it sustained the prosecutor's objections to various questions on cross-examination; (3) the trial court erred when it denied the motion for mistrial; (4) the trial court erred in admitting evidence of defendant's cell phone photograph; (5) the trial court erred by imposing firearm use enhancements on both robbery counts; and (6) the trial court made various other sentencing errors. We will vacate the sentence and remand for resentencing. In all other respects, we will affirm.

### **PROCEDURAL SUMMARY**

On November 20, 2008, the Fresno County District Attorney charged defendant with murder (Pen. Code, § 187, subd. (a);<sup>2</sup> count 1), two counts of home invasion robbery (§§ 211, 213, subd. (a)(1)(A); counts 2 & 3), arson (§ 451, subd. (d); count 4), receiving stolen property (§ 496, subd. (a); count 5), and participation in a criminal street gang (§ 186.22, subd. (a); count 6).<sup>3</sup> As to count 1, the information further alleged that defendant committed the murder during the commission of a robbery (§ 190.2, subd. (a)(17)(A)), that a principal intentionally discharged a firearm causing a death

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<sup>1</sup> All dates refer to 2008 unless otherwise noted.

<sup>2</sup> All statutory references are to the Penal Code unless otherwise noted.

<sup>3</sup> Count 4 was originally numbered as count 5; count 5 was originally numbered as count 6; count 6 was originally numbered as count 4.

(§ 12022.53, subds. (d), (e)(1)), and that defendant committed the murder in association with a street gang with the specific intent to promote the gang (§ 186.22, subd. (b)(1)). As to counts 2 and 3, the information alleged that a principal intentionally discharged a firearm causing a death during commission of the robbery (§ 12022.53, subds. (d), (e)(1)), and that defendant committed the robberies in association with a street gang with the specific intent to promote the gang (§ 186.22, subd. (b)(1)). The information also alleged that defendant suffered a prior conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and that he suffered a prior serious felony conviction (§ 667, subd. (a)(1)).

Defendant's codefendants, Hernandez and Oscar Verdugo, were charged with the same counts, except for count 5 (receiving stolen property).

The jury found defendant guilty as charged on counts 1 through 5, and found true the special allegations. The jury found Hernandez guilty on counts 2 and 3, and not guilty on counts 1 and 4. The jury acquitted Verdugo on all counts.

On the bifurcated gang charge (count 6), gang allegations, and prior conviction allegations, the trial court found defendant guilty on count 6, and found true the gang and prior convictions allegations.

The trial court sentenced defendant as follows: on count 1, life without the possibility of parole, plus five years for the prior serious felony enhancement; on both counts 2 and 3, the upper term of nine years, plus five years for the prior serious felony enhancement, plus 25 years to life for the firearm enhancement, all doubled to give 78 years plus 50 years to life, to be served consecutively; on both counts 4 and 5, six years, doubled to 12 years, to be served consecutively; on count 6, four years, stayed in the interest of justice.

### **FACTS**

On March 28, 2008, at about 9:00 or 10:00 p.m., defendant (nicknamed "Little Demon") and Hernandez (nicknamed "Mellow") picked up 21-year-old Benita

(nicknamed “Cute”) at her boyfriend’s apartment.<sup>4</sup> Benita had known defendant for about a month and had socialized with him about a dozen times. She had known Hernandez for about as long, but she had only seen him a few times. Defendant was driving a stolen Mazda Tribute sport utility vehicle (the SUV), the vehicle Benita had always seen him drive.<sup>5</sup> He was wearing a red shirt, and both he and Hernandez were wearing red bandanas around their necks. They drove to the store for cigarettes, then went to a house where they joined several other people, including Verdugo (nicknamed “Little Silent”), whom Benita had never met. Everyone at the party had been smoking methamphetamine and was “high” or “tweaking.” At some point, defendant pulled his red bandana over his face and took pictures of himself and Hernandez with a cell phone. When the methamphetamine started to run low, defendant said they should go get more, and Hernandez agreed.

During the party, Benita was sending text messages to 27-year-old Regina. Regina was like a mother to Benita and she called her “[M]om.” Benita had lived with Regina in the past and wanted to move back in. Regina had told Benita she could move in, and Benita wanted to pay her a good faith deposit to show she could actually pay the rent.<sup>6</sup> Benita had been staying with her boyfriend for about one month and she was looking for a permanent residence because she and her boyfriend had been arguing.<sup>7</sup>

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<sup>4</sup> Benita was on probation for possessing stolen property. She also had a prior misdemeanor conviction for lying to a police officer, and a prior juvenile conviction for running away with her own child. In this case, she pled to home invasion robbery and was sentenced to 10 years in prison in exchange for her testimony.

<sup>5</sup> The SUV was stolen on January 19, 2008.

<sup>6</sup> On cross-examination, Benita testified that she called Regina on about March 27. Regina asked Benita if she had spoken to her younger sister, Heather. Benita said she had not. Regina was upset and told her that Heather had stolen drugs from her.

<sup>7</sup> On cross-examination, Benita testified that she was not in school and did not have a job. She was “just out there messing up. Hanging around with the wrong crowd.”

Defendant asked Benita if he could borrow her cell phone. Benita let him use the phone and when he returned it to her, she could see he had accessed her contacts list. He asked her, “Who is that girl Regina in your phone?” Benita said she was a friend. Defendant asked Benita if she wanted a ride to Regina’s home. Benita said she wanted a ride to her own home, but defendant insisted on taking her to Regina’s home.<sup>8</sup> Defendant got up and went outside. Benita and Hernandez followed. Defendant and Hernandez walked away from Benita and conversed for about five minutes while she talked to her boyfriend on her cell phone. When defendant returned to her, he asked her again if she wanted to get dropped off at Regina’s. Again, she told him no, she wanted to go home. Defendant asked her if Regina still sold drugs and Benita replied that she did.<sup>9</sup> Defendant said, “All right[,] I’m going to take you to Regina’s.”

At about 1:45 a.m., defendant got in the SUV. Benita got in the passenger seat and Hernandez and Verdugo got in the back seat.<sup>10</sup> Defendant’s rifle was between the seats by his right leg; Benita had always seen him with it. He frequently played with it and she had seen him shooting chickens with it in the mountains. As they drove to Regina’s apartment, which was on First Street, diagonally across from Radio Park, defendant passed the rifle to the back seat. Defendant parked the SUV about half a block from Regina’s apartment, on a side street perpendicular to the alley that ran behind the apartments. Everyone got out of the SUV and defendant told Benita to go inside. Benita thought they were just going to drop her off, but they said they were going to another

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<sup>8</sup> On cross-examination, a detective testified that text messages from Regina to Benita showed that Regina was expecting Benita to come to her apartment that night.

<sup>9</sup> On cross-examination, Benita testified that Regina had been selling small amounts of drugs for about one year to make extra money on the side. Benita had used methamphetamine for a few years. She smoked methamphetamine three or four times per week, but she did not get drugs from Regina. Benita usually smoked methamphetamine when she was with defendant.

<sup>10</sup> Benita testified that Verdugo asked defendant to take him home.

house nearby. Defendant told Benita to contact them when she was ready to leave Regina's.

Benita walked down the alley and knocked on Regina's back door because Regina was usually in the back bedroom on the back side of the apartment. No one answered, so Benita went to the front door and rang the doorbell. Again no one answered, so she left and returned to the SUV. The three men were still standing next to the SUV talking. Defendant asked Benita why she had returned. When she said no one answered the door, defendant told her to go back to Regina's apartment. As she walked back, she called Regina and asked her to let her in. It was not unusual for Benita to show up at Regina's apartment late at night. When Benita knocked on the front door, Gabriel, Regina's ex-boyfriend, answered the door.

Benita knew Gabriel because he and Regina had been together a long time, but Benita did not expect to see him there. She was surprised because she had not seen him for about a year. Benita did not like the way he had treated Regina in the past.<sup>11</sup> When Gabriel answered the door, he had his socks off, as though he had been there a while. Benita assumed he was going to stay the night with Regina.

Benita went into Regina's bedroom and gave Regina a hug. Benita gave Regina \$50 as a deposit for moving back into her apartment. They sat and talked with Gabriel.<sup>12</sup> Benita and Regina smoked some methamphetamine, but did not share it with Gabriel

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<sup>11</sup> On cross-examination, Benita testified she did not like Gabriel because he had beaten Regina in the past. Benita thought he was violent. She knew he had hit Regina in the face and Regina had gotten a restraining order against him. As far as Benita knew, Regina did not want him around. Benita was afraid Regina was making a mistake by letting him back into her home. Benita had seen him act violently in the past. He sometimes had a tendency to become violent when he was under the influence of methamphetamine.

<sup>12</sup> On cross-examination, Benita testified that on the night of the murder, Regina again told her that Heather had stolen an eight ball from her. Benita thought an eight ball was worth about \$280.

because Regina did not want him to smoke. Regina told Benita not to pass the methamphetamine to him. Gabriel was going in and out of the room. It did not appear to Benita that there was any tension between Gabriel and Regina, that they were arguing, that he was injured, or that they were surprised to see Benita. Regina did not complain to Benita that she and Gabriel were fighting.

Regina's current boyfriend, Matthew, kept calling Regina, but she did not want to talk to him and she kept telling him to stop calling. After a short time, Benita went into the kitchen to eat something. Defendant called Benita and said they would be right back. Benita finished eating her burrito and returned to the bedroom to talk with Regina. Benita sent a text message to defendant to hurry and come pick her up. He responded that they wanted to buy some drugs from Regina, and Benita should let them in when they got there. Benita did not mention defendant or Hernandez to Regina.

Benita did not see Gabriel consume any drugs at Regina's apartment that night, but he was "tweaking real bad." He was restless, moving around a lot, and could not sit still. Benita could tell he was high when he opened the apartment door, but she did not see him exhibit any type of violence, such as yelling, screaming, or pushing. Nor did she see him argue with Regina or raise his voice.

Benita's boyfriend called her and they started to argue. She went into the living room and continued arguing with him. He wanted her to come home. She said she was trying to go home, but defendant was "acting stupid" and would not give her a ride home. Her boyfriend could not pick her up because he did not have a car. Defendant repeatedly sent her text messages, asking her which apartment was Regina's. According to cell phone records, defendant and Benita exchanged 42 text messages in the hour between 2:20 a.m. and 3:20 a.m. Benita sent defendant Regina's address.

At some point, a woman came into Regina's apartment and talked to Regina for a few minutes. Benita thought the woman was buying methamphetamine. Benita did not know her, but she had seen her in jail a few times.<sup>13</sup>

While Benita was still in the living room, and Regina and Gabriel were in the front bedroom, Benita heard the back door open. She saw defendant and Hernandez walk in the back door, which was unlocked. Benita went to the door and asked defendant what he was doing because they just walked in. Defendant and Hernandez were wearing sweaters and they stood right next to each other with their hands behind their backs. Benita did not see a gun. Defendant put his hand on Benita's face and told her to shut up, and he guided her toward the door. Again, she asked him what he was doing and he told her to shut up. He said to her in a harsh whisper, "Shut up, Benita. I'm trying to rob this bitch." But Benita protested. Defendant told her "not to trip." He promised not to harm Regina. He said that "his word [was] with Bond," and he "put that on the block he wasn't going to hurt Regina." This meant that he was promising on his street and on the Bond Street Bulldog gang members with whom he claimed to associate. He repeatedly told Benita to go to the car, but she refused. She begged them not to do anything. Defendant was getting mad and he told her to "get the fuck in the car." Hernandez pushed her out the door and promised not to let defendant harm Regina. Benita was afraid. She left the apartment and walked to the alley. She was surprised to see that the SUV was now parked in the alley behind Regina's garage. The SUV was running and Verdugo was in the driver's seat. Benita got into the passenger's seat. She was angry. Verdugo asked if she was all right, and he asked if she knew Regina. She told him she

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<sup>13</sup> On cross-examination, Benita testified that a lot of people came into Regina's apartment at night to buy drugs. Benita wanted to help Regina stop selling drugs out of her home because a lot of riffraff came over and Benita thought it was dangerous for Regina.



knew Regina, but she did not speak to him further because she was angry. Verdugo told her “not to trip” and “it was going to be all right.”

According to Gabriel, when Benita was in the living room looking at her cell phone, he and Regina heard a knock on the back screen door and Regina looked at him with a worried expression.<sup>14</sup> Then defendant and Hernandez barged into the room. Defendant was wearing a red beanie on his head and a red bandana covering his face. He was holding a rifle. Hernandez was wearing a dark jacket with a hood over his head. Defendant immediately shot Regina and she fell to the floor. Hernandez hit Gabriel on the side of his head with a fist. Then Hernandez yelled at Regina, “Where are your keys, bitch?” Hernandez yelled at Gabriel, “Give me your shit.” Gabriel gave Hernandez his house keys and said, “I don’t have anything else.” Hernandez left Regina’s purse on the bed and ran out of the room.<sup>15</sup>

Defendant kicked Regina and asked her, “Where is the money, bitch?” While he was kicking her, he kept the rifle pointed at Gabriel, who was sitting on the bed. Gabriel was afraid and he regretted not being able to protect Regina. Defendant told Gabriel to lie face-down on the bed, but Gabriel refused to comply for fear that defendant would shoot him in the back of his head. Gabriel held his hands up and said, “I don’t have anything to do with this. I don’t know what’s going on.” Defendant said, “I heard she’s got a gun, too. Do you know where the gun’s at?” Gabriel said, “I never knew about her having no gun.” When defendant again asked where the money was, Gabriel offered to look through Regina’s purse for him. Defendant signaled for him to do it, so Gabriel grabbed the purse and dumped it on the bed. He found a gold bracelet, but no money.

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<sup>14</sup> Gabriel’s testimony contradicted Benita’s in various regards. He testified that he arrived after Benita, and found Regina and Benita in the bedroom talking.

<sup>15</sup> Gabriel never saw Hernandez’s face and he saw defendant’s eyes only. Gabriel could not identify either of them.

Defendant said, "I'm going to kill this bitch." He told Gabriel he was going to kill him too because he thought Gabriel was going to try something. Defendant said he was getting an "itchy trigger finger" and he was "ready to die by the Fresno PD." Afraid for his life, Gabriel told defendant, "My cousin is Donkey," referring to a cousin who was well-known in prison. Gabriel hoped defendant would realize there would be retribution if he hurt him. Gabriel repeated that he would not do anything and that he did not know what was going on. Defendant told him to go sit in the hallway with his legs crossed and his hands on his head. He said, "I ain't going to kill you[;] it's this bitch." Gabriel asked defendant why he was going to kill Regina, and he answered, "She burned my homeboy. Sold him 50 dollars worth of cut." This meant the methamphetamine appeared to be real, but was not.

Gabriel heard defendant shoot the rifle a few more times, then defendant said, "I'm gone," and he ran past Gabriel. Gabriel thought the rifle sounded like a .22-caliber rifle. Gabriel waited about 10 seconds, then got up and went to Regina. He told her, "It's okay. Get up. They're gone." He picked her up and sat her on the bed, but she fell back on her back, unresponsive. He said, "They're gone. They're gone." She gasped for air and her eyes rolled back in her head. When Gabriel saw blood on his hand, he lifted Regina's shirt and saw a bullet wound near her pelvis. Only then did he realize she had been shot. He ran around the apartment looking for a telephone, then ran outside and told a neighbor to call 911. While Gabriel was speaking to the 911 operator, he went back into the apartment to check on Regina, and reported that she was still not responsive. Gabriel waited outside the apartment for the police.

Gabriel admitted at trial that he had originally lied about these events to the police because he was violating a restraining order by being near Regina. He was afraid he would get arrested for violating the restraining order, and he also knew he would be a suspect in the shooting. He initially said he was walking down the street when he heard a gunshot from the apartment.

Gabriel also admitted having three prior misdemeanor convictions: spousal battery in 2005, receiving stolen property in 2006, and giving false information to a police officer in 2008. Gabriel testified that these convictions did not cause him to testify untruthfully. He testified that he did not bring a gun to Regina's apartment and he did not kill her. He was currently in compliance with his probation, although he had violated it, and he was almost finished with his batterer's treatment program.<sup>16</sup>

Benita testified that she did not see Gabriel with a gun that night and she did not see Gabriel kill Regina. The only person she saw with a gun was defendant.

Meanwhile, about five minutes after Benita got in the SUV in the alley, defendant returned to the SUV carrying his rifle and Regina's purse. Benita asked him what he was doing and he told her to shut up. He put the purse in the back seat and the gun on the floor. Verdugo asked defendant what the hell he was doing. Defendant told him, "Don't trip," and said they were going to leave right away. Defendant walked away from the car and Benita assumed he returned to the apartment. Benita heard Regina's car alarm go off, then saw her garage door open and Hernandez back Regina's red Geo Prizm out of

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<sup>16</sup> On cross-examination, Gabriel said he would often go to Regina's to do things for her. He would help her out around the house and she would pay him cash. He had been to her apartment five or six times in the past year. They maintained a sexual relationship, although she made it clear to him that they were not "together" and that he was not "her man." Gabriel described her as the love of his life. He had deep feelings for her, but it did not upset him that she had a boyfriend. He also had a girlfriend. He and Regina had an understanding that their relationship was just sex. The night she was killed, Regina wanted Gabriel to come over, but she told him that he could not come if her boyfriend was there, and Gabriel agreed. Gabriel knew Regina was selling methamphetamine. He was addicted to it at the time.

Gabriel admitted that he had battered and falsely imprisoned Regina in 2005. He held her down and put his hands over her face, causing her injuries. She called the police and Gabriel pled guilty to those charges. Gabriel admitted that he thereafter continued to violate the restraining order granted by a court in May 2006. Gabriel denied that the injury he sustained the night Regina was killed resulted from a scuffle he had with Regina in which she lost three fingernails. Gabriel denied shooting and killing Regina.

the garage. Defendant returned to the SUV and got in the back seat. Verdugo was mad at defendant and he cursed and yelled at him until they reached their destination. Defendant just laughed at Verdugo, which made him even madder. He angrily shook his head.

Regina's cell phone rang inside her purse. Upset, Benita told defendant he was "fucked up." He told her to "stop tripping." He put his hand on her shoulder and asked her if she heard any gunshots. She said she did not. He said, "All right," and told her to shut up. He said he was going to drop her off at home and she could call Regina in the morning. They drove back to the house where the party was held. Hernandez met them there in Regina's car.

Chica, a young woman at the party, came out and asked about Regina. Chica recognized Regina's car and asked Benita, "Is that Regina's car over there? [¶] ... [¶] Is Regina in there? Tell her to get down and say hi." Hernandez told Benita not to say anything. Defendant told someone, "Take that bitch inside and tell her to shut up."

Chica saw defendant come back into the house. Then she saw some girls looking through a purse. Chica assumed it was Regina's purse because she knew Regina and recognized the types of things she carried. Chica knew Regina would not go anywhere without her purse and Chica started to realize they had stolen her purse or done something else to her. Chica asked someone to remove the purse from her sight. Chica felt Benita was not a good friend to Regina because Benita was around Regina for the methamphetamine and because Benita's sister, Heather, had stolen from Regina. Chica thought Benita and defendant had been together at the party, perhaps as boyfriend and girlfriend.

Benita stayed in the car, and after a few minutes, she, defendant, and Verdugo left. When defendant dropped Benita off at the apartment, she went directly inside and started to cry. She was mad and afraid. Her boyfriend asked her what was wrong, but she did

not tell him what had happened. She wanted to call Regina to see if she was okay, but she did not know her home number. Benita stayed up all night.<sup>17</sup>

Officers responded to Regina's apartment at 3:42 a.m., two minutes after being dispatched. Gabriel answered the door almost instantly. He was on the telephone, apparently speaking to the police dispatcher.<sup>18</sup> The officers found Regina lying on the bed with her legs hanging down. She was gasping for air and her eyes were open, but her pupils were totally dilated and she was not blinking. Her eyes were becoming dry. The officers observed a small bullet wound in her right pelvis from a .22-caliber gunshot, and a small graze wound on her right arm. Regina was taken to the hospital.

Four expended .22-caliber cartridges were found in Regina's living room, hallway, and bedroom. A criminologist later determined that two of the four expended .22-caliber cartridges found in Regina's apartment had been fired by defendant's rifle. Two of the expended cartridges could not be conclusively identified as having been fired by the rifle.

At 4:42 a.m., Benita received a text message from defendant asking her how she was going to act. He said, "Man my girl. How gonna you act."

At 7:33 a.m., Benita received another message from him telling her he was leaving town. He said, "Cute, I'm gone b. Yo boy wiggin out." "I'm smashing out of town." "C U when I see U."

At about 8:00 a.m., Regina died at the hospital.

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<sup>17</sup> On cross-examination, Benita testified that as she walked back to her apartment, she deleted most of the text messages from defendant because she did not want her boyfriend to see them. She denied that she deleted them because she was afraid the messages would reveal that she tried to get defendant to come to Regina's to help clean up the mess Benita created when she killed Regina. Benita denied killing Regina.

<sup>18</sup> On cross-examination, an officer testified that the door to the apartment was closed when he and another officer arrived. Gabriel answered and led the officers to the kitchen as he spoke on the telephone, and the officers were frustrated by his preoccupation with his telephone conversation. Eventually, Gabriel told them Regina was in the bedroom.

After learning of Regina's death, the detective assigned to the case went to the hospital to view her body. He noticed she had several broken fingernails. When Regina's entire apartment was searched, no fingernails and no telephone or cell phone were found.

Also at about 8:00 a.m., defendant gave Chica a ride to work. Defendant drove with a rifle across his lap. Hernandez, who was also in the car, had a long, samurai-type sword.

At 8:00 or 9:00 a.m., detectives interviewed Gabriel at the police station. Gabriel had just learned that Regina had died, and he was sobbing and crying. He had a red mark on the side of his head and down his neck. When a detective noticed some red marks (but no broken skin) on Gabriel's arm, Gabriel explained that he had scratched himself.<sup>19</sup> Gabriel demonstrated how easily he could scratch himself. The marks he made faded during the interview. Soon after the detectives spoke to Gabriel, their investigation began to focus on Benita and the three defendants.<sup>20</sup>

At about 10:00 a.m., defendant and Hernandez came to Benita's apartment. They came into her bedroom and defendant told her, in her boyfriend's presence, that they wanted to take her to the mountains. She refused because she was mad at defendant and she did not want to go anywhere with him. She had gone to the mountains with him once or twice in the past. After her boyfriend left the room, Benita asked defendant what had

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<sup>19</sup> On cross-examination, the detective testified that he said to Gabriel, "Looks like a chick scratched you."

<sup>20</sup> On cross-examination, the detective testified that Gabriel first said he went into Regina's apartment because he thought two men had left the apartment and he thought it was unusual or suspicious. The detective told Gabriel he knew he had been in the apartment. Gabriel was nervous and said he knew he was a suspect. Finally, he admitted being inside Regina's apartment and witnessing her shooting. The detective requested that Gabriel be tested for gunshot residue, which was collected but never tested. Gabriel told the detective that Benita's sister, Heather, had been living with Regina, and Regina had accused Heather of stealing methamphetamine from her about two days before.

happened, but he shook his head and did not answer. He kept saying, “Get your stuff[;] we’re going to the mountains. We can’t be here.” Then he said, “I think I murked [Regina],” which meant he thought he had killed her. Benita started crying and told defendant to get out. He put his head down and repeated that he was sorry. Hernandez just shook his head. Benita told them to leave. She went outside with them and defendant continued to ask her to go with him, but she refused. Benita’s boyfriend told her to come back inside and she did.<sup>21</sup>

At 7:31 p.m., Benita received a text message from defendant. He said, “[M]y dog, answer da phone. Hella important. Number 007.” He had sent her many other messages and he kept calling her, but she did not want to talk to him and she refused to answer.

At about 11:30 p.m., a woman walking in her neighborhood saw an SUV parked behind a small red Geo. Defendant and two other men in dark clothing were standing by the red Geo. They poured gas over the red Geo, set it on fire, and drove away. The woman had previously seen defendant and a neighbor pushing the red Geo into the neighbor’s back yard. A few days after the car fire, the neighbor threatened the woman, telling her to keep her mouth shut or what had happened to her friend would happen to her.

In the early morning hours of March 30, after learning that Regina’s car had just been burned, the detective began actively pursuing defendant. Later in the day, he also started looking for Hernandez.

On April 1, at about 8:00 p.m., undercover officers observed defendant walking with a limp and an obvious bulge in his clothing. They watched him place a .22-caliber rifle, containing a loaded magazine of nine live cartridges, behind a gas station and

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<sup>21</sup> On cross-examination, Benita testified that she went to Easton with defendant and her boyfriend on March 30. She knew the police were looking for her. She went with defendant because her boyfriend was with her.

quickly walk into an adjacent fast food restaurant, where the officers apprehended him. Hernandez and Verdugo were not with him.

Defendant was carrying keys to the SUV, which was parked nearby. The SUV's license plates were covered with Auto Maxx paper plates. Defendant was also carrying a cell phone, a red bandana, and some papers, one of which was signed by "Little Demonologist." When the detective, who was present at the scene, picked up defendant's cell phone and looked at it, he immediately saw a "wallpaper" (background) photograph displayed on the phone's face. It was a photograph of a male wearing a red hat down to his eyebrows, a red bandana over his face (revealing only his eyes), and red clothing.<sup>22</sup> When the detective examined the contacts in defendant's cell phone, he found someone referred to as "Mellow Bonded 007," with a number the detective knew was Hernandez's number, even though it was registered to someone else.

The SUV contained five live .22-caliber cartridges and six expended .22-caliber cartridge casings. The criminologist later determined that four of the six expended .22-caliber casings had been fired from defendant's rifle. The others were inconclusive. The SUV's glove compartment contained several CD's, four of which had Regina's name written on them.<sup>23</sup> Behind the seat was Regina's daughter's toy.

When the police searched Hernandez's bedroom, they found a samurai-type sword in a case and a CD case between two mattresses on the floor. They also found CD's and a CD case, all with Regina's name on them.

On April 5, at about 4:00 p.m., while walking down the street with a friend, Benita was arrested and taken to the police department. She was arrested on outstanding warrants for probation violations, but the police wanted to question her about the

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<sup>22</sup> The detective testified the male in the photograph was wearing red clothing, but it appears to us he was wearing a shirt that was predominantly light blue.

<sup>23</sup> Regina's sister testified that Regina always signed her name on her things.



murder.<sup>24</sup> Benita had been running from the police, especially since she found out Regina had been killed. As Benita walked to the interview room in the police station, she saw Hernandez in a holding cell, and she became afraid for her safety. She decided to lie to the officers.

The detective walking with Benita to the interview room noticed her startled look when she saw Hernandez. Her eyes widened and she looked like a deer caught in headlights. She took a step to the side and the detective told her to keep walking. During the subsequent interview, Benita was soft spoken and not overly emotional. She seemed curious and inquisitive. At first, Benita's story did not correspond with what the detective knew about the crime. When he confronted her with the disparities, she told him she was afraid to tell the truth. Her demeanor changed and she started to sob. The detective reassured her. She said she wanted to "wipe the slate clean."

The detective testified that, about 30 hours before Regina was shot (i.e., at about 9:40 p.m. on March 27) defendant left someone a voicemail message (the parties stipulated it was not left for either Hernandez or Verdugo). The detective recognized defendant's voice. In the message, defendant said, "Aye Bulldog man. [¶] ... [¶] I been cup caking with some little hoe ass beezee ... nigga ..., you know what I mean? [¶] ... [¶] Hit me up boy, Little D." At this point, a female voice could be heard in the background. Then defendant said, "Lay down this ... hit me up boy. [¶] ... [¶] I need the strap at least, man." The detective testified that the term "strap" meant a firearm or gun.

Also on March 27, defendant left a message for "Mellow" on a cell phone registered to someone named Dominguez Perez. The cell phone contained seven voicemail messages that mentioned the name "Mellow."

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<sup>24</sup> On cross-examination, Benita testified that she had failed to drug test since November 2007 and she was trying to avoid contact with law enforcement.

The pathologist who conducted the autopsy of Regina's body found four gunshot wounds: a grazing wound on her upper right arm, a wound through her right thigh, a wound near her vagina, and a wound to her right hip. The bullet that caused the wound to her hip injured her iliac artery and vein, and caused her to bleed to death. On Regina's hands, some of her acrylic nails were missing. Regina had no injuries consistent with choking.

Benita testified that she was afraid of defendant because he was a murderer and because he had threatened her in jail. He told her if she went to court and said anything about what happened that night that "he was going to make sure he fuck[ed her] too." To Benita, this meant someone would kill her. She heard him say this through the sink pipes in jail, which was called the "jail Internet." She recognized his voice, but she asked, "Who is this?" and he identified himself by his nickname. He told her that she owed it to him to try to save him because he had saved her when Hernandez wanted to take her to the mountains and kill her. Benita was afraid defendant could get someone to kill her in jail. She found out he was getting copies of the police report and was mailing them to someone. At first, she was afraid to report defendant's threats to the police. She was afraid of Hernandez because of the way he had laughed when defendant said he had kicked Regina after shooting her.<sup>25</sup> Later, the officers promised Benita that defendant and Hernandez would not be able to hurt her.

### *Defense*

Benita's boyfriend testified that he had received many letters from Benita while he was in jail for five months. The boyfriend was familiar with Benita's handwriting and he

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<sup>25</sup> On cross-examination, Benita admitted writing one letter to Hernandez and one letter to Verdugo after the crime, but she denied writing to defendant. She examined certain letters and denied writing them. She denied ever calling herself "Bonita."

On cross-examination, Benita testified that Gabriel and her sister, Heather, dated after Regina was killed.

identified one of the letters she wrote him. He testified that Benita's nickname was "Cute," and she commonly referred to herself as "Bonita." In the letter, she referred to him as "Moko," which was his nickname. He testified that he had met defendant only once.

On cross-examination, the boyfriend testified he had always known Benita to spell her name "Bonita"; he had never seen her spell her name "Benita." The boyfriend had met defendant, but he did not remember a time when defendant came to his apartment and met with him and Benita toward the end of March. Similarly, the boyfriend did not remember defendant wanting to take Benita to the mountains. He also did not remember Benita being upset during that conversation. The boyfriend did not remember defendant ever coming to his apartment. He did not remember defendant giving him and Benita a ride to Easton. He had never been to Easton. The boyfriend did remember that Benita lived with him in his apartment, but he explained he was always high on methamphetamine and he did not keep track of the months. Benita quit living with him when she got in trouble with the law and could not stay around.

The boyfriend did remember that, not long before Benita got into trouble, defendant had dropped her off at the apartment and walked her up to the apartment door.

The boyfriend testified that he did not want to testify because the matter was none of his business and he did not want anything to do with it. He had no concerns about testifying; he just did not want to be there.

On recross-examination, the boyfriend did not remember telling the defense investigator that Benita had come home scared late one night, and he denied telling him that the next day defendant came by the apartment to talk to Benita. The boyfriend did not remember telling the investigator that defendant wanted to talk to Benita alone but the boyfriend would not allow it. The boyfriend denied knowing who "Little Demon" was; he had never heard that nickname before.

Larry Stewart, a forensic scientist and handwriting expert, testified that he had reviewed certain handwritten letters. He opined that they were all written by the same person.

### ***Rebuttal***

The defense investigator testified that the boyfriend did in fact tell him that Benita came home late one night and was scared when she got home. The boyfriend also told the investigator that the next day defendant came by the apartment and wanted to talk to Benita alone, but the boyfriend would not allow it.

## **DISCUSSION**

### **I. Evidence of Defendant's Prior Robbery Adjudication**

At trial, the parties stipulated that on April 26, 2002, defendant and two cohorts drove to the house of a minor. Defendant and one cohort entered the house. While the cohort tried to distract the minor, defendant took a video gaming system. They left the house and drove away in the waiting car. Defendant was charged as a juvenile, and admitted to committing a robbery in violation of section 211.

Defendant contends the trial court erred by allowing the prosecution to introduce evidence of his prior robbery adjudication after he introduced evidence of Gabriel's prior misdemeanor convictions for spousal abuse and receiving stolen property. Defendant argues the court committed various evidentiary errors surrounding the admission of the prior robbery adjudication, but we conclude any error in the admission of the evidence was harmless.

First, the evidence that defendant robbed and killed Regina was absolutely overwhelming. Defendant entered Regina's apartment; defendant told Benita he wanted to rob Regina; defendant shot Regina, demanded her property, and looked through her purse; defendant told Gabriel he wanted to kill Regina because of a bad drug deal; defendant shot Regina three more times when he was alone with her; defendant left Regina's apartment with his rifle and Regina's purse; defendant contacted Benita through

the night, then admitted to her in the morning that he thought he had killed Regina; defendant and the neighbor pushed Regina's car into the neighbor's back yard; defendant and two other men set Regina's car on fire; the neighbor threatened the woman who witnessed the burning of the car; defendant disposed of a rifle; both the crime scene and defendant's SUV contained expended cartridges that had been fired by the rifle; defendant's SUV contained Regina's CD's and Regina's daughter's toy; and defendant threatened Benita when they were both in jail. In light of this powerful evidence, we are hard-pressed to imagine an evidentiary error that could have prejudiced defendant. Certainly this was not one of them. Accordingly, the overwhelming evidence of defendant's guilt convinces us any error in the admission of his prior robbery adjudication was harmless under any standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24.)

Second, we also note that defendant's own defense portrayed him as a thief who was not particularly bright. Defense counsel<sup>26</sup> relied upon defendant's status as a thief to explain why, after the murder, he possessed the murder weapon and Regina's property (and why he regularly drove a stolen vehicle). Defense counsel told the jurors in his opening statement that they would hear evidence suggesting that defendant and his cohorts went to Regina's apartment *after* the murder and did what thieves do—they stole her property and took the murder weapon that someone (the real murderer) had left behind. Defense counsel stated:

“[Defendant] is not a[n] upstanding citizen. I'm not here to try to suggest to you that [defendant] is anything more than a petty thief, but that's what he is. He's a thief. He steals cars. That's what he does. That's what he was doing that night when he was called over to that house many times by [Benita] to help her clean up her mess. [¶] You're going to hear evidence to that suggestion that [defendant] and these gentlemen came over

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<sup>26</sup> Our reference to “defense counsel” is to defendant's (not Hernandez's or Verdugo's) trial counsel.

after the murder not aware of what happened in that house. They saw an opportunity to do what they do which is to be thieves, take some of her property, see a gun that's left there. They take those items and they leave. [¶] ... [¶] Frankly, it wasn't a difficult proposition to get these three gentlemen over to that apartment that evening, once they saw an opportunity to take property. [T]hey have property of the victim, not because they committed murder but because they saw an opportunity to take property.... If you pulled the trigger, you would have known. You would have never taken the property.”

Defense counsel concluded:

“What happened after the crime, it is what it is. [Defendant] made tremendous mistakes that assisted [Benita] in her attempts to put the blame off on somebody else. I did refer to these guys at some level as sort of the Keystone Cops. They come bumbling into a scene. They take property. They're thieves, and they leave, then they realize the next day what they just got themselves into.”

In closing argument, defense counsel reiterated:

“I told you in opening statement [defendant], he's a thief. I'm not going to sit here and tell you [defendant] is an angel. I'm not going to tell you [defendant] is the best citizen that's ever walked our planet. I'm not here to pull the wool over everybody[']s eyes. He's not a murderer.”

As this argument reveals, defendant's defense theory depended on his history as a thief. In light of the defense's portrayal of defendant as a thief, admission of evidence of his prior robbery adjudication for taking a video gaming system was not prejudicial.

Third, the court's evidentiary decisions did not prevent defendant and Hernandez from presenting a third party culpability defense. In defense counsel's opening statement, he set out the theory, suggesting that although Gabriel and Benita claimed to be innocent bystanders, they were in fact responsible for the murder. Defense counsel explained that Gabriel had been convicted of domestic violence; that he and Regina had a difficult relationship; and that he and Regina obviously engaged in a struggle before her death, evidenced by his scratches and her missing fingernails.

Similarly, Hernandez's defense counsel stated:

“Now, Gabriel [] had had a previous relationship with the victim, Regina Morales. A previous incendiary, violent, contentious, disputatious, relationship with her. A relationship that was so violent that three years before he was charged with a felony spousal abuse, a felony assault which was reduced to a misdemeanor. [¶] Now, it may come out in this trial there is something called spousal abuse or abuse of a partner, something like that. It was a violent assault on her three years before in which he grabbed her and tried to smother her face, that sort of thing. There was a restraining order preventing Gabriel [], because of the violence he committed on her previously.”

Hernandez's counsel noted that Gabriel had a prior conviction for domestic violence and for receiving stolen property, then stated:

“Now, there is going to be testimony that will be elicited through various witnesses that not only Gabriel [] having an opportunity and a potential motive for killing Regina Morales, but also Benita [], the individual who is given the ten year deal, not the lifetime sentence, but the ten year—ten year deal by the prosecution, that she had a motive herself for retaliating against the victim, Regina Morales. [¶] ... [¶] Well, I think the evidence is going to show that Benita [] was using a heavy amount of drugs, was homeless, wanted someplace to go, had no money and that Regina Morales wasn't going to let her come back. [¶] Also, ... Heather [] had been staying with the victim but Benita[']s] younger sister Heather was kicked out of the victim's house because Heather stole money and stole drugs from Regina Morales. So, there is a motive of retaliation against Regina Morales for not letting Benita [] move back in and for having ejected the younger sister from the apartment.”

Then, during the presentation of evidence, the defense introduced evidence of Gabriel's past violence toward Regina; Benita's dislike for Gabriel because of his violent treatment of Regina; Gabriel's ongoing sexual relationship with Regina despite her refusal to resume a serious relationship with him; her current relationship with another man; and Gabriel's past conviction for violence against her. This evidence supported the theory that Gabriel was a jealous lover who was dissatisfied with his relationship with Regina and motivated to harm her. The evidence also suggested a rift between Benita's sister, Heather, and Regina that might have created a motive for retaliation in Benita.

Furthermore, Gabriel's and Regina's credibility was thoroughly impeached. They were exposed as liars and unsavory characters. They both had criminal histories and they both used drugs and associated with drug users and drug dealers. Benita socialized with criminals who carried weapons and stole cars. She participated in the crimes against Regina, a woman she professed to love as a mother. Benita and Gabriel both initially lied to the police, and Benita testified against her comrades after making a deal with the prosecution.

During closing argument, defense counsel argued:

“We were relying upon an admitted perjurer [Benita] for her version of the facts as to what happened that night and not to mention the inconsistencies I think were fairly obvious between what she claimed happened and what Gabriel [] said happened. [¶] Ladies and gentlemen, again, we've made suggestions in my opening statements and perhaps Gabriel [] had motives and opportunities to commit the homicide. Perhaps it was Benita [] had the opportunity and motive. [¶] Let's not forget Gabriel had a relationship with Regina and a restraining order and past incidents of significant violence ....”

Later, defense counsel argued:

“Again, ladies and gentlemen, Benita [] took the opportunity to protect whomever the real murderers were, whether it was herself or whether Gabriel [] was involved, I don't know but she's not being honest. [¶] ... [¶] And getting to Gabriel [], I say things are inconsistent, not words but actions. Why is Gabriel [] alive? That doesn't make any sense, ladies and gentlemen. If people are going to go in and brutally kill somebody, leave a witness there alive, then leave Benita [] alive? If you kill one person, why not kill them all? Well, maybe there are reasons that Gabriel and Benita were still alive. Perhaps they were in on whomever was ripping her off.”

Defendant's portrayal of himself as a thief and his ability to present a third party culpability defense further confirm that he was not prejudiced by admission of his prior robbery adjudication.



## II. Sustained Objections to Cross-examination of Gabriel

### A. *Inside or Outside the Apartment*

On cross-examination, Gabriel equivocated about whether he had been inside or outside Regina's apartment when the police arrived. First, he testified that he waited outside Regina's apartment for the police to arrive. Then he said he thought he waited outside, but he could not remember. He did not think he was inside the apartment when the police arrived. He was "pretty sure" he was outside. He eventually agreed with defense counsel that it was his testimony that he was not inside when the first officer arrived. Then defense counsel asked, "And so if [the officer] would have testified that you were inside and opened the door, he would be mistaken?" At this point, the court sustained the prosecutor's speculation objection.

Defendant contends the trial court erred by sustaining the prosecutor's objection because Gabriel was not improperly asked to speculate about the officer's state of mind, but was "merely asked to confirm his own testimony in light of [the officer's] contrary account of events."

Assuming, without deciding, defense counsel's question was proper, we conclude any error in sustaining the objection was harmless. The evidence established that Gabriel was distracted when the officers arrived at Regina's apartment and, at trial, he could not clearly remember whether he had been inside or outside. An officer testified that Gabriel was in a state of preoccupation and panic when the officers arrived—despite defense attempts to portray Gabriel as high on methamphetamine and more worried about his own situation than Regina's survival. Defense counsel asked the officer about Gabriel's behavior when the officers arrived: "It seems to you that [Gabriel] was more interested in telling what his involvement was [on the telephone] than getting you to [Regina], correct?" The officer answered, "He just seemed preoccupied."

Similarly, Hernandez's defense counsel asked the officer on cross-examination, "[D]id that person seem to be agitated?" The officer answered, "He seemed preoccupied,

kind of panicked sort of.” Counsel then asked, “Did this person who answered the door—did he exhibit to you any of the symptoms of somebody who had been high on meth?” The officer answered, “I couldn’t say one way or the other because what happened, we have to evaluate someone [for] more than just a split second. I was only in his presence for maybe five or six seconds total. That was not sufficient for me to be able to formulate any sort of opinion whether he was or not.” Counsel persisted: “But the individual nevertheless seemed to be somewhat jumpy; is that right?” The officer responded, “He was preoccupied, ma’am. I couldn’t tell you if he was—” at which point counsel changed the subject.

We see no probability whatsoever that defendant was harmed by defense counsel’s inability to ask Gabriel whether the officer would be lying if he said Gabriel was inside the apartment when the officers arrived. Considering the evidence regarding Gabriel’s uncertain memory and his state of mind at the time of the incident, we see little value to the precluded line of questioning. Moreover, we again stress that the evidence against defendant was overwhelming. Any error was harmless under any standard. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *Chapman v. California, supra*, 386 U.S. at p. 24.)

***B. Relationship With Heather***

Defendant also contends the trial court erred by sustaining the prosecutor’s objection to defendant’s cross-examination of Gabriel regarding whether he dated Benita’s sister, Heather, after Regina’s death (as Benita had testified). Defense counsel asked Gabriel, “Again, you haven’t dated Heather [] since?” Gabriel responded, “Never.” Defense counsel asked, “You don’t have any reason to believe why Benita would say that, do you?” At this point, the court sustained the prosecutor’s objection. The court itself identified the grounds as improper impeachment and calling for speculation.

Defendant argues that this sustained objection prevented him from exploring a motive for Gabriel to kill Regina. Heather had stolen drugs from Regina, causing Regina

to eject her from the apartment. If Gabriel had been romantically involved with Heather, he might have shared her motive for revenge against Regina.

Again, assuming that defendant's counsel should have been allowed to ask Gabriel why Benita would lie about his relationship with Heather, we find any error harmless. The defense successfully generated evidence of motive in both Gabriel and Benita. As for Gabriel's motive to kill Regina, most of the evidence revolved around Gabriel's long-standing love for Regina, now unreturned, and his currently unfulfilling relationship with her. In our opinion, evidence of Gabriel's romantic interest in Heather, although an alternative motive, seemed to operate in direct contradiction to the strongest and most plausible defense theory. Thus, we believe that Gabriel's opinion of why Benita would lie about his relationship with Heather would have added little to the defense. And, as we have explained, the evidence against defendant was overwhelming. For these reasons, we conclude that any error in preventing Gabriel from giving his opinion on why Benita would lie about his relationship with Heather was harmless under any standard. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *Chapman v. California, supra*, 386 U.S. at p. 24.)

### **III. Sustained Objections to Cross-examination of Benita**

Defendant next asserts that the trial court erred when it sustained the prosecutor's objections to defense counsel's cross-examination of Benita regarding her pending charge of possessing marijuana in jail.

Assuming it was error to preclude this impeachment of Benita's credibility, any error was harmless. As we have explained, Benita's credibility had already been thoroughly tarnished, and she had already been shown to be a drug abuser. We are confident that her pending charge for marijuana possession in jail would have come as no surprise to anyone in the jury, and we believe it could not have further damaged her credibility in any meaningful way. Furthermore, evidence provided by sources other than Benita supported the conclusion that defendant was guilty. For example, police discovered that defendant left someone a message about getting a gun; Gabriel witnessed

a man wearing a red hat and a red bandana over his face shoot Regina and take her property; police determined that the expended cartridges at the crime scene had been fired by defendant's rifle; a witness saw defendant and a neighbor pushing Regina's red Geo into a back yard; the witness saw defendant and two other men set Regina's red Geo on fire; police observed defendant disposing of the murder weapon; the detective observed that defendant's cell phone wallpaper was a photograph of a male dressed in a red hat with a red bandana over his face; and police found more expended cartridges fired by defendant's rifle and Regina's personal property in the SUV. Again, any error was harmless under any standard. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *Chapman v. California, supra*, 386 U.S. at p. 24.)

#### **IV. Evidence of Defendant's Parole Status—Motion for Mistrial**

Defendant contends that the officer's testimony that defendant stated he was on parole when he was apprehended—testimony in violation of a pretrial ruling—was prejudicial error. He claims the trial court erred in denying his motion for a mistrial, and the court's admonition to the jury to ignore the testimony about his parole status could not undo the damage and simply caused further prejudice.

We again conclude that any error in the trial court's denial of the mistrial motion was harmless. Even if the jurors could not wipe the brief testimony from their minds, their knowledge of defendant's parole status could not have prejudiced defendant. His reputation as a law-abiding citizen was nonexistent, and the evidence pointed overwhelmingly to his guilt. The evidence established him as a gun-toting car thief who shot a woman in cold blood as retribution for a bad drug deal, stole her car and her CD's, then set her car on fire. Even defense counsel repeatedly portrayed defendant as an unintelligent car thief. Defendant's prior criminality and parole status could not have surprised the jurors. We cannot conceive that this revelation made defendant look any worse than he did already. Under these circumstances, we have no doubt that the incidental remark about his parole status was harmless. (*People v. Watson, supra*, 46

Cal.2d at p. 836; *Chapman v. California*, *supra*, 386 U.S. at p. 24; see, e.g., *People v. Allen* (1978) 77 Cal.App.3d 924, 935 [improper reference to a prior conviction is nonprejudicial in the light of a record that points convincingly to guilt]; *People v. Harris* (1994) 22 Cal.App.4th 1575, 1580-1581 [any error harmless in light of overwhelming evidence].)

## **V. Evidence of Defendant's Cell Phone Wallpaper Photograph**

Defendant argues that evidence of the wallpaper photograph on his cell phone was admitted without proper foundation. He asserts there was no evidence of the identity of the person in the photograph or when the photograph was taken. He claims the photograph was irrelevant without evidence concerning the person's identity. The People respond that the photograph was relevant and properly admitted, but they do not address defendant's foundation argument. We conclude the trial court did not err by admitting the photograph.

“Authentication of a writing is required before it may be received in evidence.” (Evid. Code, § 1401, subd. (a).) A “writing” includes a photograph. (Evid. Code, § 250.) The purpose for which a photograph or other writing is admitted affects what is needed for its authentication. (*People v. Mayfield* (1997) 14 Cal.4th 668, 747 [videotape].)

“The general rule is that photographs are admissible when it is shown that they are correct reproductions *of what they purport to show*. This is usually shown by the testimony of the one who took the picture. However, this is not necessary and it is well settled that the showing may be made by the testimony of anyone who knows that the picture correctly depicts what it purports to represent. [¶] The essential element is that it be shown in some way that the picture does correctly depict what it purports to show, in other words that it be verified or authenticated as a genuine picture of what it purports to depict. This being the purpose it is not required that the photographer himself be produced where other evidence is available to accomplish the same end. The effect and probative value of such other evidence is the important consideration, and not that the

way or manner of making the requisite showing should be exactly the same in all cases. [¶] There is no reason why the essential element should not be shown in a particular case by other evidence which varies somewhat from the usual pattern, provided it is sufficient to give an equally satisfactory result. There is no reason why it should not be shown by the testimony of witnesses, assisted by other matters, including those which are an inherent part of the picture itself, aside from the relative matter which it purports to depict, provided these other or inherent matters reliably appear and provided that they, with the testimony, sufficiently disclose the authenticity and genuineness of the photograph.” (*People v. Doggett* (1948) 83 Cal.App.2d 405, 409-410, italics added.) A trial court’s ruling on the substantiality of foundational evidence is reviewed for abuse of discretion. (*Alvarado v. Anderson* (1959) 175 Cal.App.2d 166, 179.)

Here, the photograph purported to be a wallpaper photograph from defendant’s cell phone showing an unidentified person wearing a red hat and a red bandana over his face. No one testified that the person in the photograph was defendant; the question was left to the jurors. The photograph was admitted to show that defendant chose to prominently display on the opening screen of his cell phone an image of a person (possibly himself) dressed in a manner similar to the manner in which the perpetrator of the crimes in this case was dressed. Even if the jurors did not believe that the person in the photograph was defendant, the fact that he displayed the image prominently suggested he personally related to the image, admired it, and derived satisfaction from both viewing and exhibiting it. This implication in turn supported the inference that he adopted the same style and wore a red hat and a red bandana over his face on certain occasions—for example, during the robbery and killing of Regina.<sup>27</sup> In light of Gabriel’s

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<sup>27</sup> Other evidence supporting that inference included evidence that defendant was wearing a red bandana at the party, that he put the red bandana over his face and took pictures of himself at the party, and that he was carrying a red bandana when he was arrested.

testimony that the perpetrator was wearing a red hat and a red bandana over his face, the photograph was relevant.

Thus, evidence that defendant was the person in the photograph was not required as foundation for admission of the photograph. Similarly, evidence of when the photograph was taken (and by whom) was not required for its foundation. Even if the photograph had been 20 years old, its *current presence* as the wallpaper on defendant's cell phone would still have been relevant. What *was* required for foundation was evidence that the photograph came from defendant's cell phone, which was provided by the detective's testimony that defendant was carrying the cell phone when he was arrested, that the cell phone contained Hernandez's contact information, and that the cell phone instantly displayed the photograph when the detective picked up the phone.

Although no one testified that defendant was the person in the photograph, the prosecutor was permitted to argue that he was, and the jurors were free to accept or reject the argument. If they accepted it, the presence of the photograph as defendant's cell phone wallpaper had greater weight, but this did not affect the photograph's foundational requirements.

Finally, we note again that, even if admission of the photograph was error, it was harmless in light of the overwhelming evidence against defendant. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

## **VI. Cumulative Error**

Next, defendant contends the cumulative impact of these purported errors denied him a fair trial and due process. He argues that the case was a close one, evidenced by the jurors' lengthy deliberations (more than two days), testimony readbacks, and lighter verdicts against Hernandez and Verdugo.

As to each contention, however, we have found either no error or no prejudice. Whether defendant's contentions are considered individually or cumulatively, he was not deprived of due process or his right to a fair trial. Furthermore, this was *not* a close case

against defendant; the evidence was overwhelming, even if the witnesses were not ideal. As we have “either rejected on the merits defendant’s claims of error or have found any assumed errors to be nonprejudicial[,]” we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236; *People v. Rogers* (2009) 46 Cal.4th 1136, 1181.)

## **VII. Multiple Firearm Use Enhancements Based on Regina’s Death**

Defendant asserts that the section 12022.53, subdivision (d) enhancements attached to the two home invasion robbery convictions in counts 2 and 3—for the robbery of Regina and the robbery of Gabriel—cannot be based on the same injury or death. He argues that relying on Regina as the victim in both instances resulted in double punishment. This, however, is not the law.

Section 12022.53, subdivision (d) provides: “Notwithstanding any other provision of law, any person who, in the commission of a [specified] felony ... personally and intentionally discharges a firearm and proximately causes great bodily injury ... or death, *to any person other than an accomplice*, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.” (Italics added.) Subdivision (f) of the same section limits this enhancement to one per person per crime: “Only one additional term of imprisonment under this section shall be imposed per person for each crime.” Moreover, the Supreme Court has confirmed that “section 12022.53 itself calls for imposition of multiple subdivision (d) enhancements based on a single injury.” (*People v. Oates* (2004) 32 Cal.4th 1048, 1054-1055 (*Oates*).) In *Oates*, the court upheld multiple enhancements based on the injury to one victim, explaining that “[b]ased on the single injury to [one victim], the requirements of a subdivision (d) enhancement [were] met as to *each* of defendant’s five attempted murder convictions, including those not involving the attempted murder of [that one victim]; attempted premeditated murder constitutes a specified offense ..., and, in the commission of each offense, defendant ‘personally and intentionally discharge[d] a firearm and



proximately cause[d] great bodily injury’ to a person ‘other than an accomplice.’ (§ 12022.53, subd. (d).)” (*Id.* at p. 1055.) The court stressed that where the requirements of the enhancement are satisfied as to each of the defendant’s convictions, subdivision (f) of section 12022.53 *requires* that the enhancement be imposed as to each conviction. (*Oates, supra*, at p. 1056 [statute uses the language “the court *shall impose*”].) Finally, the court noted the statute’s legislative history and cited a report stating: “““With the 10-20-life provisions of [Section 12022.53], we are sending another clear message: If you use a gun to commit a crime, you’re going to jail, and *you’re staying there.*”” [Citation.] Imposing multiple subdivision (d) enhancements under the circumstances here clearly serves these legislative goals.” (*Id.* at p. 1058.)

Defendant attempts to distinguish *Oates* because in that case the perpetrator fired at a group of five people, striking one, whereas in the present case the perpetrator fired only at Regina. Unlike the victims in *Oates*, defendant explains, Gabriel was neither an intended victim nor an actual victim of the shooting. Section 12022.53, subdivision (d), however, does not require that the shooter intended to hit a particular victim. If the shooter fired the weapon in the commission of a qualifying crime against one person (i.e., the robbery of Gabriel), the injury or death of *any another person* other than an accomplice (i.e., the death of Regina) proximately caused by that shooting supports this enhancement. (See *Oates, supra*, 32 Cal.4th at p. 1058; *People v. Palacios* (2007) 41 Cal.4th 720.) The trial court did not err in imposing the section 12022.53, subdivision (d) enhancement on the convictions for both the robbery of Regina and the robbery of Gabriel.

### **VIII. Other Sentencing Errors**

Lastly, defendant raises various other challenges to his sentence, some of which the People concede.

As previously noted, the trial court sentenced defendant to two identical and consecutive terms on the two home invasion robbery convictions in counts 2 and 3: the

upper term of nine years for the robbery conviction (§§ 211, 213, subd. (a)(1)(A)), plus five years for the prior serious felony conviction enhancement (§ 667, subd. (a)(1)), plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (e)(1)). The court then doubled the entire term based on defendant's prior strike, resulting in a determinate term of 28 years to life, plus a consecutive indeterminate term of 50 years to life. Defendant contends these terms are improper. He also contends the court erred when it imposed multiple five-year prior serious felony enhancements.

The People agree that defendant should not have been sentenced to two full terms on the two robbery convictions. On one of the two counts, he should be sentenced to nine years, and on the other, only two years, which is one-third the midterm of six years. (§ 1170.1, subd. (a).)

Second, both the principal term and subordinate term should then be doubled pursuant to the "second strike" sentencing provision of the Three Strikes law. (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1); *People v. Dominguez* (1995) 38 Cal.App.4th 410, 424; *People v. Sok* (2010) 181 Cal.App.4th 88, 93-94.) Thus, the nine-year term and the two-year term should both be doubled.

Third, enhancements are not doubled pursuant to the second strike sentencing provision. (*People v. Dominguez, supra*, 38 Cal.App.4th at p. 424; *People v. Sok, supra*, 181 Cal.App.4th at pp. 93-94.) Thus, the serious felony enhancements and the firearm enhancements should not have been doubled on counts 2 and 3.

On the fourth point, however, the People differ, correctly arguing that a serious felony enhancement was properly applied to each count of defendant's second strike sentence. (*People v. Williams* (2004) 34 Cal.4th 397, 402; *People v. Misa* (2006) 140 Cal.App.4th 837, 846.)

In summary, the court properly imposed the multiple five-year serious felony enhancements. But on either count 2 or 3, defendant should be sentenced to nine years, doubled to 18 years, plus a five-year serious felony enhancement and a 25-year-to-life

firearm enhancement. And on the other count, defendant should be sentenced to two years, doubled to four years, plus a five-year serious felony enhancement and a 25-year-to-life firearm enhancement. We will remand for resentencing.

In addition, we noticed in our review of the record that defendant's abstract of judgment erroneously refers to the arson charge as section 451, subdivision (a), when it should refer to subdivision (d). Secondly, the abstract erroneously refers to the firearm enhancement as section 12022.53, subdivision (g), when it should refer to subdivision (d). These errors must be corrected on remand.

**DISPOSITION**

Defendant's sentence is vacated and the case is remanded to the trial court for resentencing. The trial court is directed to amend the abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

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Kane, Acting P.J.

WE CONCUR:

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Poochigian, J.

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Detjen, J.