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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br>v.<br><br>MICHAEL AARON DAVIS,<br><br>Defendant and Appellant. | C051803<br>Super. Ct. No. 04F06020 |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br>v.<br><br>JAVIER MUNOZ,<br><br>Defendant and Appellant. | C051963<br>Super. Ct. No. 04F06020 |

APPEAL from a judgment of the Superior Court of Sacramento County, Gail Ohanesian, Judge. Affirmed as modified.

Christine Vento (Davis), and Janet J. Gray (Munoz), under appointment by the Court of Appeal, for Defendants and Appellants.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Hokans and Robert Gezi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Javier Munoz made and received several calls on his mobile telephone before and after he and several other men,

including defendant Michael Davis, Preston Baldwin and John Hernandez, drove to the Meadowview Light Rail station in two SUVs to retaliate against "some brothers" who had "jumped" Hernandez's nephews. Instead, the men trapped a car driven by Demario Chappell, who had nothing to do with "jumping" Hernandez's nephews, and fired pistols at the car. Although a number of nine-millimeter and .45-caliber shots were fired, only one bullet struck Chappell. The bullet lodged in Chappell's brain, but miraculously did not kill him.

Defendants were no doubt dismayed to learn that a federal judge had previously authorized the Drug Enforcement Agency (DEA) to wiretap Munoz's mobile telephone. This must have been a welcome surprise to the lead detective, when a DEA agent told him about the recordings.

Hernandez remains a fugitive. Baldwin pleaded no contest to two counts of assault with a firearm, with a vicarious arming enhancement, for a stipulated term of nine years four months, and he did not appeal. (Pen. Code, §§ 245, subd. (b), 12022, subd. (a)(1).) Davis and Munoz were jointly tried before separate juries which convicted them of attempted murder and found each used, discharged, and proximately caused great bodily injury with, a firearm; Munoz's jury also convicted him of conspiracy to murder, but Davis's jury deadlocked on that count and it was dismissed. (*Id.*, §§ 664/187; 12022.53, subds. (b)(c)(d); 182/187.)

Both Davis and Munoz were sentenced to prison and both timely filed their appeals, which we consolidated for decision.

Defendants each raise many issues on appeal and each incorporates the other's briefs. The People agree that Davis is entitled to additional custody credits, and identify an error in Munoz's abstract of judgment. Apart from these two points, we affirm the judgments.

In the published portions of this opinion, we conclude: (1) Wiretap evidence is subject to the normal rule that a party seeking exclusion must object or move to suppress in the trial court, or claims of inadmissibility will be deemed forfeited on appeal. (2) The corpus delicti rule does not apply to uncharged acts, except when uncharged acts are used in the penalty phase of a capital trial.*

FACTS

The DEA began monitoring Munoz's calls on June 24, 2004. (Further unspecified dates are in 2004.) The DEA's recording system captures conversations on the caller's end even before the recipient answers.

Some recordings were introduced into evidence to show the relationships of the parties, their access to weapons and their intent. For example, on June 30, Munoz called Davis and said he was taking a "Glock" to "John" (Hernandez). Davis replied that Munoz should take him the "four-five" (i.e., a .45-caliber pistol) because Davis wanted the Glock back. Munoz said he was referring to *his* Glock, but Davis said Munoz should still give

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* The opinion is certified for publication except for parts I, II, III-B, III-D, III-E, and IV through VII.

Hernandez the “four-five,” so Hernandez could “blow holes.” Munoz explained that he preferred to give Hernandez the Glock because the “four-five” was “fresh” and “clean.”

On July 1, at 9:22 p.m., Hernandez called Munoz, and said “My nig, you got the [clapper (gun)] on you?” “[S]ome brothers” “just jumped my nephews” at the Meadowview Light Rail station; Munoz replied, “I’m coming right now.” At 9:29, Munoz called to tell Hernandez “I’m behind you, I’m, I’m turning right right here on Meadowview[.]”

Chappell drove to the Meadowview station in his white Chevrolet Corsica with his cousin Marquis Landers as a passenger, in order to pick up Arielle Jones, Landers’s friend. She got in the back seat and Chappell started to drive her home. It was about 9:30.

Although the various witness accounts were not entirely consistent, a white or silver SUV cut Chappell off, requiring him to brake hard, and inducing him to make an unfriendly comment to the SUV’s driver. Munoz’s green SUV trapped Chappell’s car. A number of men got out of the SUVs, and when Chappell saw a man pointing a gun at him, he drove off, hitting the second SUV in his effort to get away. After he blacked out he stopped the car and then Jones drove him to the hospital. Landers testified one shooter got out of each SUV, but later he testified he did not know this, and he had so told an officer before trial.

Two passersby heard someone in the green SUV yell "Bitch, ass, Niga" as it left; one heard laughter and described this yell as "Celebrating sort of."

Many shots had been fired at Chappell's car; four 9 millimeter and seven .45-caliber shell casings were found. Two 9 millimeter bullets were found in the car, and a .45-caliber bullet was extracted from Chappell's brain.

At 9:33, Hernandez called Munoz, and said, "Think they got my license plate?" He told Munoz "Put your shit in the garage, I'm putting mine away right now, too."

At 9:49, Munoz spoke with someone and said he could not drive his "truck," and "we just lit some niggers up, bro. I think I murffed [phonetic] one of 'em. I need somebody to go by there, bro."

At 9:56, Munoz called Davis, in part as follows:

"[Munoz:] Where you at?

"[Davis:] Right here. There ain't even nothing up there!

"[M:] So we didn't even shoot 'em then, nigga.

"[D:] Ah, hell no, nigga! The [unintelligible] up there though.

"[M:] Some boys [i.e., police] are out there?

"[D:] Yeah, just a couple o' cars though.

"[M:] We . . . so then we didn't kill his ass?

"[D:] Naw, we didn't kill 'im, man.

"[M, in a disappointed tone of voice:] Fuck! Now we really gotta watch out."

At 9:57, Munoz called Hernandez, but before Hernandez answered on his end, Munoz can be heard on the recording telling someone ". . . seen me shoot like this, 'Pop! Pop!' Then I said, 'Fuck that!' 'Pop! Pop! Pop! Pop! Pop!' That's why . . . ." After Hernandez answered, Munoz told him "Lil' Smokes," meaning Davis, was at the scene, there were some police there and it seemed like nobody got hit; Hernandez said "they probably drove to the hospital." Munoz said "Pop!" seven times and there were seven .45-caliber casings found.

At 10:14, Munoz called someone and in part said, "We just have to show these niggas that we ain't playing," that they had had trouble with "some Blacks" "because of [Hernandez's] nephews" and they "almost killed the dudes."

At 10:47, Munoz talked to someone about the need to fix a dent in his SUV "ASAP", a dent presumably caused when Chappell drove away, hitting one of the SUVs while attempting to escape.

In a call on July 2, Davis told Munoz he should switch "clappers," and Munoz suggested that Davis give him the "forty" (i.e., .40-caliber pistol) and take the "Neener" (nine-millimeter pistol); Davis said, "I don't want them guns around me." They talked about what the police might know.

In Munoz's apartment police found a silver and black .45-caliber Ruger pistol, a black nine-millimeter Glock pistol, and ammunition fitting both. A criminalist testified these guns

fired the bullets that left the shell casings at the scene, and fired the bullet in Chappell's brain.

On July 21, Davis was found hiding under a house in which a safe contained a .40-caliber Glock pistol, as well as a nine-millimeter bullet; another nine-millimeter bullet was found on a nightstand in the master bedroom: Davis refused to surrender until he was extracted with the help of a canine officer.

Munoz's jury heard evidence of statements he made while in custody to Detective MacLafferty on July 7. Munoz first claimed that Davis had borrowed his SUV after Hernandez called to say his nephew Bradley had been jumped; when Davis returned, he said he had been in a shootout. Munoz said that the guns found in his house were not connected to the shooting and his gun was at his father's house. Munoz then admitted that he knew Hernandez was going to the station to "fuck some kids up," and that Davis was armed, and that with that knowledge Munoz drove his green Tahoe, with Davis, Baldwin and "Dion," and met Hernandez and others; Dion gave one man a gun. After a white car cut them off at the station, Davis and Dion shot at it. Munoz denied using a gun or expecting that the men would do anything other than beat someone up.

Munoz's jury also heard some wiretap calls unrelated to Davis, including two calls within minutes of each other on June 26. In the first call, at 1:21 p.m., Hernandez directs Munoz to bring him a gun so he could shoot a rival named "Rabby," Munoz accepts the assignment. The men were discussing where to meet during the conversation. In the second call, at 1:27, between

Munoz and an unidentified person, Munoz says he "caught 'em" and "was about to let 'em have it, nigga, but the boys was right there!," and later says "When John [i.e., Hernandez] runs up on 'im, he pulls a fucking strap out! He almost shot John!"

In a call on June 29, Munoz told Hernandez about shooting at someone from inside his "truck," so the shell casings would not be left; he thought this incident was "hella funny." Also on June 29, a man called Munoz and described beating "Gabino" over a debt; Munoz said he had "hammers" (guns) and would "come 'round the corner lammin.'"

Munoz did not testify, but in argument pressed the theory that he was not one of the shooters.

Davis's jury heard testimony from Munoz's wife about Munoz's drug dealing and the fact both he and Davis were usually armed. Davis's jury also heard about a statement Davis made to the police in which, after initially denying involvement, he admitted he shot at the car with a nine-millimeter Glock pistol.

Davis claimed self-defense: He testified he went with the other men with no purpose to harm anyone, but when the shooting started he feared for his life. In large part this was due to his traumatic experience of having been shot in 2003, and much evidence about that event was presented. He admitted he was a drug dealer and carried a gun because he had a lot of money; he also admitted he carried it generally because he sometimes had drugs and drug dealers could be robbed.

In light of a pretrial ruling, Davis admitted that he threatened B. A.'s sons while displaying a gun to her; the jury

was instructed on the limited use of this misdemeanor moral turpitude evidence.

## DISCUSSION

### I. Munoz's Conspiracy Conviction

Munoz contends no substantial evidence supports his conviction for conspiracy to commit murder. In making this argument he improperly evaluates pieces of evidence in isolation, and views each piece as neutrally as possible.

> "The proper test to determine a claim of insufficient evidence in a criminal case is whether, on the entire record, a rational trier of fact could find appellant guilty beyond a reasonable doubt. [Citations.] In making this determination, the appellate court '"must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." . . . "[O]ur task . . . is twofold. First, we must resolve the issue in the light of the *whole record* . . . . Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*."' [Citations.]
>
> "Although the appellate court must ensure the evidence is reasonable in nature, credible, and of solid value [citation], it must be ever cognizant that '"it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends . . . ."' [Citations.] Thus, if the verdict is supported by substantial evidence, this court must accord due deference to the trier of fact and not substitute its evaluation of a witness's credibility for that of the fact-finder." (*People v. Barnes* (1986) 42 Cal.3d 284, 303-304.)

Munoz claims no substantial evidence supports the implied finding that two or more people agreed to commit murder, and claims that Hernandez cannot be a coconspirator.

The latter claim is based on the view that because Hernandez's name was stricken from the information he could not be one of the "unknown" persons with whom Munoz conspired. No doubt Hernandez's name was stricken because he was a fugitive and was not on trial with the other men. We fail to see how striking him from the information means he could not be an uncharged coconspirator. In any event, substantial evidence shows that Davis and Munoz conspired to commit murder.

> "Conspiracy requires two or more persons agreeing to commit a crime, along with the commission of an overt act, by at least one of these parties, in furtherance of the conspiracy. [Citations.] A conspiracy requires (1) the intent to agree, and (2) the intent to commit the underlying substantive offense. [Citation.] These elements may be established through circumstantial evidence. [Citation.] 'They may . . . "'be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy.'"'" (*People v. Bogan* (2007) 152 Cal.App.4th 1070, 1074.)
>
> "Although there must be some manifestation or communication of assent, it is not necessary to show that the parties actually met together and entered into a formal written or oral agreement. It is enough that by some means they come to a mutual understanding, and this may be established by circumstantial evidence." (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 75, p. 268; see *People v. Superior Court (Quinteros)* 13 Cal.App.4th 12, 20-21 (*Quinteros*).)
>
> "While mere association does not prove a criminal conspiracy [citation], common gang membership may be part of circumstantial evidence supporting the inference of a conspiracy. [Citation.] The circumstances from which a conspiratorial agreement may be inferred include 'the conduct of defendants in mutually carrying out a common illegal purpose, the nature of the act done, the relationship of the parties [and] the interests of the alleged conspirators . . . .'" (*Quinteros*, *supra*, 13

Cal.App.4th at pp. 20-21, partly quoting *People v. Remiro* (1979) 89 Cal.App.3d 809, 843.)

The People had to prove Munoz intended to kill the people who "jumped" Hernandez's nephews. (See *People v. Petznick* (2003) 114 Cal.App.4th 663, 680-681.) Munoz concedes there is evidence that he brought Davis, knowing Davis was armed, to the anticipated confrontation. Although Davis testified he fired in self-defense, that testimony did not have to be believed and in any event does not change the circumstantial evidence showing a *prior* agreement to retaliate against those who reportedly jumped Hernandez's nephews.

The fact there was no direct evidence of an agreement is not surprising, as such evidence is rare in conspiracy cases. The California Supreme Court has repeatedly held that circumstantial evidence may be used to show a conspiracy agreement. (See *People v. Osslo* (1958) 50 Cal.2d 75, 94-95; *People v. Donnolly* (1904) 143 Cal. 394, 398.)

Munoz claims the evidence shows he "anticipated at best, an encounter where there would be a physical assault." Although the jury might have so found, the facts, viewed in support of the verdict, include that Munoz had obeyed Hernandez's instruction to bring a firearm just days before, so Hernandez could shoot "Rabby," Davis and Munoz discussed firearms, and went to the station after Hernandez reported his nephews had been "jumped," the SUVs worked together to trap Chappell's car, Davis and Munoz got out and fired multiple shots into Chappell's car, someone yelled "Bitch, ass, Niga" from Munoz's SUV after

the shooting and Munoz made statements after the fact regretting that they had not killed the victim and discussing concealing firearms. Although other inferences may be possible, from this evidence a rational inference is that Davis and Munoz agreed to kill someone and had become part of a killing squad, albeit one that shifted its focus to Chappell, apparently because he irritated them.

Munoz's stray assertion that there is insufficient evidence that he was a *shooter* is frivolous. Munoz regretted not having killed the victim, discussed firing shots, and even used "Pop!" seven times, matching the number of .45-caliber shell casings found, and both guns that fired shots were found in his apartment. That is compelling evidence that he was a shooter.

In the reply brief Munoz partly relies on the claim that Davis was *acquitted* of conspiracy. Davis was not acquitted, his jury deadlocked on that count. Further, "whatever the jury might have thought in that trial, it is not evidence *in this case*." (*People v. Wilson* (2008) 43 Cal.4th 1, 17; see *People v. Palmer* (2001) 24 Cal.4th 856, 858 [verdict of one defendant does not change evidence as to another].)

To the extent a portion of Munoz's brief argues the information did not provide him adequate notice, he does not explain where he raised such objection in the trial court (cf. *People v. Toro* (1989) 47 Cal.3d 966, 973-977, disapproved on another point by *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3 [failure to object to instructions on lesser related offense forfeited claim of lack of notice]), he failed to head

the claim properly in his brief (see *Alameida v. State Personnel Bd*. (2004) 120 Cal.App.4th 46, 59 [forfeited] (*Alameida*)), and we fail to see how he was prejudiced, even if the claim was not forfeited (see Pen. Code, §§ 952, 960).

Substantial evidence supports the Munoz's jury's verdict that Munoz conspired to commit murder.

II. Presence of Munoz's Counsel

Munoz claims his right to effective counsel was violated because his attorney became too sick to assist in his defense. The record does not support this claim.

During trial the lead detective, the prosecutor and Munoz became sick; Munoz's counsel, Michael Long, speculated that his client caught a flu from the prosecutor and expressed the hope that he would not become ill. Unfortunately, Long became ill and did not appear on November 28, 2005. He did appear the next morning. Richard Corbin, Davis's attorney, moved to continue, on the ground that Long was ill. Long had a cold, but said his real problem was an eye infection which left him weeping and in need of antibiotic drops. The trial court told him to call his doctor.

The trial court proposed to take up matters only pertaining to Davis, *and Long agreed to this procedure.* After Long left, the court heard preliminary testimony of a witness only pertaining to Davis. Long came back and reported that his doctor thought he might be contagious. However, Long also said, "I would like to get the trial done with." The trial court then

heard preliminary testimony of another witness relevant only to Davis.

Munoz was returned and told his trial was continued to the next Tuesday, December 6, 2005, but the trial court told Long, "if you make some miraculous recovery, I would like to use the time to get jury instructions out of the way." The trial court took up matters pertaining only to Davis.

On the morning of December 1, 2005, Long actively participated in a telephonic conference about requested defense instructions. Long told the court his eyes were better, although "still red and blurry, but I can be [in court] at 1:30." At that point Munoz personally objected because his counsel was not present. The matter was trailed to the afternoon.

That afternoon Long appeared in person: Although the court reporter noted that he appeared "via the telephone," the minutes state he was present, the transcript confirms this, and Munoz does not claim otherwise.

At the beginning of the afternoon, Long told the court:

> "Mr. Munoz is saying he does not want us to proceed this afternoon. He doesn't want a counsel that is sick participating in a hearing I guess until I'm well.
>
> "As far as my health status[:] I'm still sick. My vision is blurry, although if I focus hard, I can read. I do all -- understand all of these jury instructions.
>
> "What my proposal is is that we go through these and have all our rulings still subject to renewal.
>
> "If over the weekend either side comes up with additional arguments to argue either of these or any of

> these instructions, I'm prepared to talk about each of the instructions.
>
> "Over the last several weeks as this trial has been progressing I have been going over the jury instructions, so I have been prepared to do this for quite some time.
>
> "But just in case based on my blurry vision I miss one thing or another, I would like the opportunity to renew any arguments I might have."

The trial court was not persuaded that Long was too sick to participate, based in part on his "poignant" arguments that morning, and made it clear that the conference would go forward. Long stated that "if additional arguments do come up, I will address them at a later time. [¶] If I see something that was missed, if I see something that was I believe cited incorrectly and I have an additional argument to make, I would of course bring that up at a later time."

During the ensuing conference, Long made cogent arguments about individual instructions, and discussed points with Munoz.

Munoz claims Long's inability to appear in person and his continuing illness equates to the absence of counsel or the denial of effective counsel. We reject this view.

Munoz overlooks the fact that the trial court found that Long was *not* too ill to proceed, and that Long had made "poignant" arguments in the morning. The trial court's finding, in part based on observations of Long which are not reflected by the record on appeal, is entitled to deference. Further, the record shows that Long actively participated in both the conferences, and stated he would advise the trial court if any other issues came up regarding the instructions.

Munoz does not point to any actual failings by Long, that is, he does not identify any claimed *mistakes or omissions* by Long. Munoz does point to part of the telephonic conference, a passage about an instruction regarding Munoz's statement to the police. Munoz complains that he had no chance to speak with Long about the issue. But nothing in the record indicates that Long believed it was necessary to talk with Munoz at that point. An attorney is in control of tactical issues, such as which instructions to request or oppose, and contrary to implications in Munoz's brief, there was no need to obtain Munoz's input on every such question. (*People v. Towey* (2001) 92 Cal.App.4th 880, 884; see also *In re Horton* (1991) 54 Cal.3d 82, 95 ["In the criminal context, too, counsel is captain of the ship"].) We cannot conclude Long was *not* providing effective counsel.

Referring to two passages where Davis's counsel and the trial court discussed matters in Long's absence, Munoz claims Long missed "discussions that had bearing on [Munoz's] case, including impeachment of Chappell with his gang affiliations and a motion brought by Long on that subject." Neither of these two passages, when read in context, support his claim.

In the first cited passage, the prosecutor and Corbin, Davis's counsel, discussed "Miss Whent," apparently referring to Officer Shannon Whent, who would testify that Chappell made some statements in the hospital inconsistent with his trial testimony. Corbin stated he was not planning to call her to testify but that Long would. The trial court stated "Well, I'm not going to rule on any testimony concerning Miss Whent, but

I'll just keep it in mind, particularly since it concerns Mr. Long." Nothing in this passage touches on "gang affiliations" and nothing of substance occurred, because the trial court promptly concluded the issue of Officer Whent's testimony should not be resolved in Long's absence and cut off further discussion. We also note that although her name appears on the witness list filed by the People, she did not testify at trial.

In the second cited passage, Corbin raised the issue of the prosecutor's proposed impeachment *of Davis* with prior conduct. The prosecutor stated that Long had filed a motion to discover evidence he planned to impeach Munoz with, but that Corbin "never made that motion." The two attorneys then began quarreling about what discussions or understandings they had had about this issue. In the course of that squabble, Corbin, trying to refresh the prosecutor's or the trial court's recollection, referred to his prior request for "gang reports," and the fact that an officer had "validated" Chappell as a gang member; the trial court had previously ruled the subject was off limits, "and in the meantime, Mr. Long asked, well, if you've got any gang stuff that you're going to bring up, I want to see it. And I joined in that motion to see if there's any gang stuff he wants to bring up. And I still haven't seen any, but apparently now he said that he wants to--." at which point the trial court cut him off.

This passage had nothing to do with Munoz's trial. Corbin argued that he had joined Long's motion to learn about any gang issues, and felt the proposed impeachment evidence *of Davis* was

going to fall within that subject. Thus, this passage, although it mentioned Chappell and gangs, had nothing to do with evidence that might or might not come in before Munoz's jury.

Because neither of the passages referred to on appeal had anything to do with the case against Munoz, the purported denial of counsel could not have affected his rights and therefore even if we found error, it would be harmless beyond a reasonable doubt. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1137.) Similarly, the claim of incompetence of counsel fails because Munoz does not point to any action or inaction by counsel which prejudiced his case, a necessary component of such a claim. (*People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212 (*Scott*).)

## III. Challenges to Wiretap Evidence

Defendants challenge the wiretap evidence on many grounds, some of which are based on wiretap law and some of which are based on other principles. For clarity, we first summarize all of our conclusions touching on the wiretap evidence.

A) We find defendants forfeited their claims that the wiretap evidence should not have been admitted 1) absent a judicial finding of lawfulness, and 2) because the record lacks evidence that the recordings were properly sealed. We reject their fallback claims that their trial attorneys were incompetent because they failed to preserve these claims.

B) We reject on the merits the claim that the affidavit failed to show the "necessity" required for a wiretap order.

C) We reject the claim that the corpus delicti rule applies to evidence of uncharged acts in the recordings.

D) We reject the claims that specific uncharged acts as to each defendant should have been excluded as improper character evidence or as more prejudicial than probative.

E) We reject the claims that the trial court had a duty to give a limiting instruction on the uncharged acts, and the fallback claims that the trial attorneys were incompetent because they did not ask for such an instruction.

A. Forfeited claims

The collection and use of wiretap evidence is regulated by federal law (18 U.S.C.A. § 2510 et seq., "Title III"), and analogous California law (Pen. Code, § 629.50 et seq.).

Munoz moved to suppress the wiretap recordings based on lack of full discovery of the wiretap affidavit and lack of necessity for the wiretap order. Davis's trial brief joined in these objections. The prosecutor's response in part referenced an order by Judge Ransom, sanitizing the material and sealing the affidavit. The prosecutor had requested this order ex parte, explaining that "The charges in this complaint are not targeted offenses of the federal interception order." The United States Attorney's Office had asked the prosecutor to seek this order pursuant to Penal Code section 629.70, subdivision (d), providing for good-cause limits on disclosure. After the trial court ordered full disclosure of the affidavit, defendants renewed their motion to suppress, based on *and only on* the claim that the affidavit did not show necessity. Later, Munoz moved to suppress specific calls, and Davis purported to join as to

calls relevant to him, but that motion was not based on wiretap law (see part III-D, *post*).

The trial court denied the motion to suppress, stating:

> "I did read the entire 74-page affidavit, and the order as well, and frankly I'm very impressed with the affidavit. I thought it was very, very thorough, well-supported. I think the finding of requisite necessity . . . is well-supported and I think the wiretap complies in all respects to the federal law."

When authorities listen for conversations about the crime(s) specified in a wiretap order, it is not unusual for them to hear conversations about other crimes. To use those recordings, the government must seek court permission:

> "When an investigative or law enforcement officer . . . [intercepts] . . . communications relating to offenses other then those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section [relating to investigations and performance of official duties]. Such contents and any evidence derived therefrom may be used under subsection (3) of this section [that is, testimony in any proceeding] when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable." (18 U.S.C.A. § 2517(5); see Pen. Code, § 629.82, subd. (a) [analogous California statute].)

The offenses described in United States District Judge Burrell's order authorizing the wiretap relate to the manufacturing, importation and distribution of narcotics, money laundering and related offenses. Although the trial court made a general finding that the wiretap complied "in all respects" to federal law, it does not appear that the People's ex parte

sealing and sanitization application was a "subsequent application" as contemplated by this statute and therefore for the purposes of argument we do not construe the trial court's general statement to mean that it found compliance with this provision as it was not asked to make this finding.

Federal law also requires that "Immediately upon the expiration of the period of the order . . . such recordings shall be made available to the judge issuing such order and sealed under his directions." (18 U.S.C.A. § 2518(8)(a); see Pen. Code, § 629.64 [analogous California statute].) The record does not show when or how Judge Burrell sealed the recordings.

On appeal, defendants contend that these gaps in the record compel reversal. Both of these claims are forfeited as they were not lodged in the trial court.

As a general rule a party objecting to evidence must make a timely and specific objection *in the trial court*. (Evid. Code, § 353, subd. (a); see *People v. Smith* (2007) 40 Cal.4th 483, 519-520.) This gives both parties the opportunity to address the admissibility of the evidence so the trial court can make an informed ruling, and creates a record for appellate review. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, pp. 444-445 ["it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial"].)

In some suppression contexts the burden is on the People to prove that evidence was lawfully obtained, for example, during a warrantless search, but this burden arises when and only when a

defendant moves to suppress and makes a prima facie claim that the search or arrest was without a warrant. (*People v. Williams* (1999) 20 Cal.4th 119, 128-130; see *People v. Manning* (1973) 33 Cal.App.3d 586, 600 [“the burden is clearly upon the defendant, as moving party, to raise the issue of illegally obtained evidence”]; see also Cal. Criminal Law Practice and Procedure (Cont.Ed.Bar 2007) Search and Seizure Motions, § 16:18, p. 438.)

Defendants claim the proponent of *wiretap evidence* must show it is admissible and the trial court judge has the duty to review the adequacy of sealing and the propriety of introduction of recordings about crimes other than those specified in the affidavit, and that they had no obligation to move to suppress or object on these grounds. We disagree.

For example, defendants assert the lack of a timely subsequent application to allow the use of recordings not related to narcotics. How is this alleged failure qualitatively different from the failure to comply with the knock-notice rule, the business records exception, the *Miranda* warnings, or the many other constitutional, statutory and judge-made rules that may, *if timely invoked*, result in the exclusion of evidence?

In these and many other examples, the proponent must be prepared to defend the propriety of the evidence, but in the absence of an objection, the evidence will be admitted. It has long been held that inadmissible evidence may support a criminal conviction where no objection has been interposed (*People v. Grayson* (1959) 172 Cal.App.2d 372, 377-378), even unlawfully obtained evidence (*People v. Santiago* (1969) 71 Cal.2d 18, 22

[exception where law changed]; *People v. Rogers* (1978) 21 Cal.3d 542, 547-548 [“The contrary rule would deprive the People of the opportunity to cure the defect at trial and would ‘permit the defendant to gamble on an acquittal’”]).

In a case where an officer testified about the contents of telephone conversations he listened to, the defendants alleged this violated state and federal statutes which would have required exclusion unless one party to the conversation allowed the officer to listen in. The California Supreme Court held: “There is no evidence as to whether Hall did or did not know of or consent to [the officer’s] listening to the conversations, and defendants at the trial did not object to the admission of the evidence on the ground of their present contention. *Therefore, the merits of the contention were not before the trial court and are not before this court*.” (*People v. Rojas* (1961) 55 Cal.2d 252, 259-260, italics added.) Although *Rojas* did not involve the statutes relied on by defendants in this appeal, we see no reason not to apply the general rule requiring a trial-court objection.

Although defendants call it an “untenable premise” to treat wiretap evidence like other evidence, they do not persuasively explain why that premise is untenable. They quote from *United States v. Marion* (2d Cir. 1976) 535 F.2d 697, which stated that, in order to guard against “Orwellian fears,” “Title III imposes detailed and specific restrictions upon both the interception of wire and oral communications, and the subsequent use of the fruits of such interceptions, in an effort to ensure careful

judicial scrutiny throughout." (*Id*. at p. 698.) But Marion moved to dismiss the indictment because the government had not applied for authorization to use the intercepted calls before presenting them to the grand jury. (*Id*. at pp. 699-700.) Thus, the quoted generality does not support the proposition that the trial court had a duty *on its own motion* to review the legality of the wiretap evidence. Defendants have not cited any cases holding that wiretap evidence is immune from the normal requirement that an appropriate motion or objection must be made in the trial court.

Federal and state wiretap laws both provide for motions to suppress. (18 U.S.C.A. § 2518(10) [procedures for motion to suppress for unlawful wiretap, defective wiretap order, or monitoring in violation of valid wiretap order]; Pen. Code, § 629.72 [analogous California statute].) The California statute provides that a motion to suppress wiretap evidence "shall be made, determined, and be subject to review in accordance with the procedures set forth in Section 1538.5." (Pen. Code, § 629.72.) In turn, Penal Code section 1538.5, subdivision (m) provides:

> "The proceedings provided for in this section . . . shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him or her. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgment of conviction is predicated upon a plea of guilty. *Review on*

> *appeal may be obtained by the defendant provided that at some stage of the proceedings prior to conviction he or she has moved for the return of property or the suppression of the evidence*." (Italics added.)

Thus, review of a suppression issue may be obtained if and only if at some point before conviction the defendant raised the issue. (*People v. Gutierrez* (2004) 124 Cal.App.4th 1481, 1484-1485; *People v. Pranke* (1970) 12 Cal.App.3d 935, 941-942; 4 Witkin & Epstein, Cal. Criminal Law (4th ed. 2000) Illegally Obtained Evidence, § 381, pp. 1069-1070.) Penal Code section 1538.5 does not treat wiretap evidence differently than other evidence potentially subject to exclusion.

Federal courts have held that the failure to make an appropriate motion forfeits a claim that wiretap evidence should have been excluded. (*United States v. Morgan* (9th Cir. 1979) 595 F.2d 1168, 1170; *United States v. Scavo* (8th Cir. 1979) 593 F.2d 837, 844 [failure to timely move to suppress on ground conversations were for other crimes than those stated in wiretap order]; *United States v. Rabstein* (5th Cir. 1977) 554 F.2d 190, 193-194; *United States v. Johnson* (D.C. Cir. 1976) 539 F.2d 181, 189-190 [construing "essentially identical" D.C. statute]; *United States v. Daly* (8th Cir. 1976) 535 F.2d 434, 440; see *U.S. v. Torres* (9th Cir. 1990) 908 F.2d 1417, 1424; *United States v. Moon* (5th Cir. 1974) 491 F.2d 1047, 1049-1050 [trial court should not have considered untimely motion].)

It is true that federal law broadly provides:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in

> evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." (18 U.S.C.A. § 2515.)

But suppression is mandated "'where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" (*U.S. v. Duran* (9th Cir. 1999) 189 F.3d 1071, 1085, quoting *United States v. Giordano* (1974) 416 U.S. 505, 527 [40 L.Ed.2d 341, 360].) Whether there has been such a failure must be adjudicated upon timely objection, as with other claims that evidence should be excluded. "A defendant bears the burden of proving that a wiretap is invalid once it has been authorized." (*U.S. v. Ramirez-Encarnacion* (10th Cir. 2002) 291 F.3d 1219, 1222 (*Ramirez-Encarnacion*).) As stated, many cases hold that the failure to bring a timely challenge to wiretap evidence forfeits the claim. We reject the argument that a trial court must evaluate wiretap evidence on its own motion.

*People v. Jackson* (2005) 129 Cal.App.4th 129 (*Jackson*), relied on by defendants, states that the prosecutor moved for authorization to use recordings about other crimes. But *Jackson* does not state or imply that a defendant need not lodge an objection on the ground no such authorization was obtained. A case is not authority for propositions not considered. (*Hart v. Burnett* (1860) 15 Cal. 530, 598.)

Defendants complain that the record does not show compliance with these statutes, but that militates against them: Had they lodged timely objections, the People could have produced the evidence necessary to show, for example, that the proper sealing procedures had been used, or that a judge had authorized the use of the recordings in this case. Their claim that they cannot know whether recordings are properly sealed and therefore should not be charged with the duty to object is unpersuasive: Had defendants claimed in their motion that the recordings were not properly sealed, the record could have been developed, factually, as to what sealing was done. (See *United States v. Orozco* (S.D. Cal. 1986) 630 F.Supp. 1418, 1534-1535 (*Orozco*) [in response to discovery motion regarding sealing, government submitted affidavit of FBI agent explaining the procedures used].) Defendants' view implies that DEA Special Agent Jim Delaney, who testified before each jury (because not all the same conversations were admitted against each defendant) broke federal law by testifying in the absence of an order authorizing him to disclose the calls. Defendants had the opportunity to ask Agent Delaney about this, but did not. We will not assume the DEA broke the law.

Defendants claim their trial attorneys were incompetent because they failed to preserve these grounds. In order to prevail on such a claim, a defendant must show trial counsel acted or failed to act in a manner below the standard of care, and that that mistake caused prejudice, that it is reasonably

probable a more favorable result would have been obtained absent the mistake. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

"Because the decision whether to object is inherently tactical, the failure to object to evidence will seldom establish incompetence." (*People v. Freeman* (1994) 8 Cal.4th 450, 490-491; see *People v. Frierson* (1979) 25 Cal.3d 142, 158.) In a case discussing the effect of a failure to move to suppress, the California Supreme Court said:

> "'Because the legality of the search was never challenged or litigated, facts necessary to a determination of that issue are lacking.' . . . We have repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Defendants cannot show prejudice because they cannot show that timely objections would have resulted in the exclusion of the evidence. As for the sealing issue, Davis claims trial counsel could have no tactical reason not to object, asserting that if an objection had been made it would have succeeded. But this overlooks the fact that counsel may have known there was no impropriety regarding sealing. Absent an objection and hearing in the trial court, we will not assume the *illegality* of the sealing procedures.

Nor will we assume the *materiality* of any claimed transgressions. (See *U.S. v. Crumpton* (D.Colo. 1999) 54

F.Supp.2d 986, 1003 [“The defendants must not only demonstrate a deviation from the requirements of the statute, but this deviation must be substantial”].) Not all wiretap statute violations require suppression, only those that frustrate a central purpose of the statutory scheme. (*United States v. Donovan* (1977) 429 U.S. 413, 432-440 [50 L.Ed.2d 652, 670-675]; *Jackson*, *supra*, 129 Cal.App.4th at pp. 149-152; see *People v. Otto* (1992) 2 Cal.4th 1088, 1114.)

There is no claim that any of the recordings have been tampered with, the evil the sealing requirement is designed to combat. (*United States v. Ojeda Rios* (1990) 495 U.S. 257, 263 [109 L.Ed.2d 224, 234]; see *State v. Campbell* (R.I. 1987) 528 A.2d 321, 328-329.) Davis does assert that as to the CD used at trial, “this second-generation compilation CD-ROM was self-evidently inferior” to the originals. But there is no claim that some exculpatory passages were lost, or some passages could be misinterpreted in a more inculpatory way, because of the alleged loss of quality. The use of the “second-generation” recording is apparently what caused the loss of quality, not the alleged lack of appropriate sealing procedures.

Defendants mention in passing that there is no evidence the DEA properly recorded the calls to ensure their authenticity or adhered to minimization rules. If this was intended as a claim it is forfeited for lack of a proper heading. (*Alameida*, *supra*, 120 Cal.App.4th at p. 59.) In any event, had a timely motion or objection been made, the People could have produced evidence on this issue.

As for allowing into evidence recordings not related to narcotics, the record does not show that there was any illegality in listening to those recordings and no showing that a court order allowing their admission into evidence had not been obtained. Further, some authorities hold that there is no remedy of suppression for unlawful *disclosure* of wiretap information, if the *interception* was lawful. (See *U.S. v. Barnes* (8th Cir. 1995) 47 F.3d 963, 965; *United States v. Vento* (3d Cir. 1976) 533 F.2d 838, 855.) This may be a tactical reason why this claim was not made in the trial court.

In *Jackson*, the court reached some wiretap suppression issues that had not been preserved, partly because of its view that it would have to reach the issues by way of an incompetence of counsel claim. (*Jackson*, *supra*, 129 Cal.App.4th at p. 162.) Similarly, in *People v. Hart* (1999) 74 Cal.App.4th 479, this court suggested that the effect of the failure of a trial attorney to preserve search and seizure claims can be "neutralized" by couching the claim as one of incompetence of counsel. (*Id*. at p. 486.) However, we have cautioned that where the record sheds no light on trial counsel's decisions regarding suppression of evidence, the proper course is to require the defendant to invoke habeas corpus, so the facts, the including tactical reasons of trial counsel, can be determined. (*People v. Hinds* (2003) 108 Cal.App.4th 897, 900-902.)

Because the record sheds no light on whether a "subsequent application" was made nor on the manner in which Judge Burrell sealed the recordings, we cannot conclude there were any

failures to comply with the wiretap laws. Also, trial counsel may have had plausible tactical reasons for not objecting. Therefore, to pursue these points, defendants will have to invoke the remedy of habeas corpus, where relevant facts outside the record on appeal can be determined. (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at pp. 266-267.)

B. "Necessity" for the wiretap

Wiretaps orders are issued only after the applicant has met a number of requirements. One is that the applicant must show the wiretap is "necessary" because other investigative means are not feasible. As stated, the defense in this case moved to exclude the wiretap evidence for lack of such a showing.

A wiretap application must include "a full and complete statement" showing "whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;" and a judge must find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous[.]" (18 U.S.C.A. § 2518(1)(c) & (3)(c); see Pen. Code, §§ 629.50, subd. (d), 629.52, subd. (d) [analogous California provisions].)

The California Supreme Court has held as follows:

> "The requirement of necessity is designed to ensure that wiretapping is neither 'routinely employed as the initial step in criminal investigation' [citation] nor 'resorted to in situations where traditional investigative techniques would suffice to expose the crime.' . . . The necessity requirement can be satisfied 'by a showing in the application that ordinary investigative procedures,

> employed in good faith, would likely be ineffective in the particular case.' . . . As numerous courts have explained, though, it is not necessary that law enforcement officials exhaust every conceivable alternative before seeking a wiretap. . . . Instead, the adequacy of the showing of necessity '"is 'to be tested in a practical and commonsense fashion,' . . . that does not 'hamper unduly the investigative powers of law enforcement agents.'"' . . . A determination of necessity involves '"a consideration of all the facts and circumstances."'" (*People v. Leon* (2007) 40 Cal.4th 376, 385 (*Leon*).)

The 74-page affidavit details a number of reasons why the wiretap was "necessary." Defendants parse each reason and give their views about what else the authorities might have done. But "The finding of necessity by the judge approving the wiretap application is entitled to substantial deference." (*Leon*, *supra*, 40 Cal.4th at p. 385; see *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1204; *U.S. v. Lynch* (9th Cir. 2006) 437 F.3d 902, 912.) Because the affidavit has been sealed to preserve the ongoing investigation, we will not describe all of the facts, only enough to refute the claims raised.

The affidavit, filed on June 24, 2004, states that since August 2003, the DEA, along with a number of other agencies, had been investigating "a large-scale drug trafficking organization headed by the [Doe] family" in Sacramento. The affidavit sought a 30-day wiretap on Munoz's mobile telephone. The affidavit listed people associated with the Doe organization, including Munoz, who was thought to be a methamphetamine distributor on the basis of "consensually monitored" telephone calls and controlled drug purchases. Hernandez was identified as a distributor by an informant, and telephone records showed many

calls between the telephones used by Hernandez and Munoz and Doe.

In particular, in July 2003, an informant identified two houses on Kirk Way where Munoz sold methamphetamine, and stated Munoz could provide "pound amounts"; Munoz had given this person his mobile telephone number to use in deals. In October 2003 this informant made a recorded call to buy an ounce of methamphetamine, and Munoz directed him to the Kirk Way houses. This deal was monitored by law enforcement officers.

In December 2003, an undercover officer called Munoz's mobile telephone and arranged a recorded meeting. He bought an ounce of methamphetamine from Munoz, who told the officer he was getting a pound at a time from his supplier. Munoz told the officer "it did not matter if [the officer] was a cop or not, MUNOZ would 'smoke' (shoot) him before he went to jail again." A week later this officer arranged to buy a half-pound from Munoz, but after Munoz drove to the meeting he spoke with the officer on the telephone and told him never to call again, suggesting that Munoz was suspicious.

In March 2004, an informant made a monitored call to Munoz. Munoz discussed "jacking" or committing a drug robbery, of an individual, and discussed his relationship with Doe. In April, the informant made another monitored call to Munoz. Munoz discussed Doe and individuals connected to him.

Surveillance, including telephone records, connected Doe to Munoz, and as stated, Munoz discussed their relationship. The affidavit recited the evidence about Doe's organization, based

on prior investigations, including a 2001 wiretap of Doe's telephone that had led to the seizure of two methamphetamine laboratories and the arrests of 17 people, not one of whom had been willing to cooperate.

Thus, there was clearly probable cause to believe Munoz was involved in a narcotics organization. Further, it was clear the investigation was dangerous, as Munoz threatened to kill peace officers and showed his suspicion of surveillance.

The necessity for the wiretap was based on the inability to find anyone who could buy drugs directly from Doe, the use of counter-surveillance techniques by Doe and his associates, and Doe's use of multiple telephones. Surveillance had failed to prove Doe was Munoz's drug source.

The stated goals of the investigation were to identify coconspirators, the location of methamphetamine laboratories and storage facilities, and forfeitable assets. A wiretap would likely advance these goals. Other techniques had not worked. Controlled purchases did not penetrate the organization. Because Munoz apparently suspected one undercover agent, and had threatened to kill police rather than go to jail, it was not feasible to try that method again. Although physical surveillance had revealed some useful facts, such as the identity of people Munoz met, it was not enough to determine what people were saying at meetings.

Because of counter-surveillance employed by Doe, Munoz and others, including video cameras at one of the Kirk Way houses, use of multiple vehicles, and dangerous driving techniques, the

utility of physical surveillance was lessened. The Kirk Way neighborhood was not conducive to "static" observation (such as agents in a van) because agents had already been "approached and questioned regarding their presence by neighbors of MUNOZ while attempting to surveil the residence." Munoz often spoke with people in the neighborhood, showing he "is familiar and friendly with many people that live near him, and would quickly recognize persons or vehicles that were out of place." Several of Munoz's associates lived within "an approximate six block area" of the Kirk Way houses.

Because it was unlikely Munoz would store drugs at home, the use of search warrants would not be productive and instead would alert the conspirators. It was thought unlikely that a grand jury would be helpful, because of an expected lack of cooperation by subpoenaed witnesses, and the service of subpoenas would simply alert the conspirators to the investigation. Recall that in the 2001 Doe investigation, none of those arrested had cooperated.

Although there was some limited success with the use of informants, "The government has attempted to utilize several cooperating sources of information in this investigation, but only one informant has been able to actively work on the inside of the organization and purchase methamphetamine from MUNOZ. No [undercover agent] is currently able to purchase drugs or other evidence of crime from MUNOZ, or to bypass him to go to his sources of supply." We omit details of these attempts.

In November 2003, the affiant and two other agents were discovered searching trash at a Doe associate's house and further similar attempts would likely alert the conspirators to the investigation.

Considering this and other information we decline to detail, Judge Burrell issued the wiretap order.

Munoz argues necessity was not shown because the stated goals of the investigation were improperly expanded beyond any activity to which Munoz was connected. Munoz claims he was a low-level dealer, pointing to the two 1-ounce sales documented in the affidavit, one to an informant and one to an undercover officer, and argues it is not reasonable to conclude tapping his telephone would lead to enough evidence to bring down the entire organization, including its manufacturing arm. This overlooks the ties between Munoz and Doe, and evidence from telephone records indicating they spoke often. Further, although only two 1-ounce sales directly from Munoz had been documented, Munoz spoke of pound-increment sales before he became suspicious of the undercover officer. Even if he was not directly part of the manufacturing side of the organization, because he had contacts with the suspected leader, Doe, it was reasonable to focus on Munoz and his telephone.

Defendants claim the difficulties described in the affidavit apply to all narcotics conspiracy investigations, and do not provide a specific reason why the wiretap was necessary *in this case*. This is incorrect. The affidavit explains what steps had been taken in this specific case and why they failed,

and explains why some other steps were not likely to work or were too dangerous. Munoz had already become suspicious and had threatened to kill peace officers, trash searches had been discovered, or nearly discovered, and the suspects lived in a neighborhood which made "static" surveillance unworkable. (See *Ramirez-Encarnacion*, *supra*, 291 F.3d at p. 1223 ["the government attempted surveillance, but . . . the rural nature of the area made concealing surveillance vehicles almost impossible"; "The affidavit indicates that the tight-knit nature of the conspiracy made undercover infiltration impossible, and that search warrants would have been counterproductive"]; *U.S. v. Ashley* (1st Cir. 1989) 876 F.2d 1069, 1073 ["the craftiness and wariness of the intended targets is a significant factor to be considered by the court in its determination of whether to authorize electronic surveillance"].)

Exposing different conspiracies may present similar challenges, but that does not mean a description of those challenges in an affidavit is an improper generalization. Indeed, in this connection the California Supreme Court has held that the existence of a conspiracy, "while not determinative, is an important factor in analyzing the necessity for a wiretap." (*Leon*, *supra*, 40 Cal.4th at pp. 391-392; see *U.S. v. McGuire* (9th Cir. 2002) 307 F.3d 1192, 1197-1198 (*McGuire*).)

Some of the authority relied on by defendants, such as *United States v. Kalustian* (9th Cir. 1975) 529 F.2d 585 (*Kalustian*), applied the *Aguilar-Spinelli* rule (*Aguilar v. Texas* (1964) 378 U.S. 108 [12 L.Ed.2d 723]; *Spinelli v. United States*

(1969) 393 U.S. 410 [21 L.Ed.2d 637]) then applicable in other warrant cases, in which affidavits were reviewed with little if any deference to the agents on the ground. That mode of review of ordinary warrants has been abandoned in favor of a review of the "totality-of-the-circumstances" presented by the warrant. (*Illinois v. Gates* (1983) 462 U.S. 213, 235-239 [76 L.Ed.2d 527, 546-548]; see *People v. Camarella* (1991) 54 Cal.3d 592, 600-601.) Wiretap cases decided by applying the old rules are of little weight.

The California Supreme Court has agreed with one portion of *Kalustian, supra*, 529 F.2d 585, that a wiretap affidavit consisting of wholly conclusory statements cannot meet the standard of necessity: "There, 'no mention was made of the defendants or the particular circumstances to be investigated.' [Citation.] Hence, '*Kalustian* teaches no more than that' an 'affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance' with the necessity requirement. [Citations.] By contrast, the affidavit here described with particularity the problems with conventional investigative techniques, including those posed by the fact that the identity of the user and the location of Target Telephone #1 were unknown." (*Leon*, *supra*, 40 Cal.4th at p. 390; see *United States v. Daly* (8th Cir. 1976) 535 F.2d 434, 439, fn. 4 (*Daly*) ["*Kalustian* ordered the evidence suppressed because the alternative means were given little opportunity to succeed"].)

As stated, the affidavit gives specific reasons about this investigation that justified wiretapping. The fact these reasons may exist in similar narcotics investigations does not invalidate the affidavit. The fact that certain types of surveillance are typically unhelpful or dangerous in some kinds of cases does not mean discussing those types of surveillance does not add to the showing towards necessity in a given case.

In this connection defendants rely heavily on *U.S. v. Blackmon* (9th Cir. 2001) 273 F.3d 1204 (*Blackmon*). In that case the majority held "First, the application . . . contains material misstatements and omissions regarding the necessity for the wiretap. Second, . . . the application contains only generalized statements that would be true of any narcotics investigation. It is bereft of specific facts necessary to satisfy the requirements of § 2518(1)(c)." (*Id*. at p. 1208.) The dissent would have deferred to the trial court's resolution of the issue. (*Id*. at pp. 1211-1213 (dis. opn. of Wardlaw, J.).) A more recent Ninth Circuit Court of Appeals case characterized *Blackmon* as hinging on misstatements:

> "Appellants' most compelling argument is that the generalized averments made in the Olsen affidavits as to why normal investigative techniques would not work in this case were not sufficient to establish necessity. Some aspects of the Olsen affidavits are indeed problematic in this regard, especially in light of our precedent in *Blackmon,* 273 F.3d at 1210, where we concluded wiretap applications that included generalized statements as to why normal investigative techniques would be unsuccessful were insufficient. We noted that the 'boilerplate assertions' made in the affidavits at issue in that case were 'unsupported by specific facts relevant to the particular circumstances of [the] case and would be true of most if

> not all narcotics investigations.' *Id.* Portions of the Olsen affidavits suffer from the same flaws emphasized in *Blackmon:* they include statements that are 'nothing more than a description of the inherent limitations" of particular investigative techniques. *Id.*[fn.]
>
> "In the end, however, we cannot conclude that the district court abused its discretion in finding that the Olsen affidavits satisfied the necessity requirement set out in 18 U.S.C. § 2518(1)(c). This case is distinguishable from *Blackmon* because our holding in that case was premised on a finding that the affidavits supporting the wiretap applications were plagued by material misrepresentations and omissions. *See Blackmon,* 273 F.3d at 1209-10; see also [*United States v. Canales Gomez* (9th Cir. 2004) 358 F.3d 1221,] 1225 (declining to apply *Blackmon* because no material omissions or misstatements were alleged in that case). As we explained above, Appellants have not shown that the Olsen affidavits suffered from material misrepresentations or omissions. We therefore affirm the district court's decision not to suppress the wiretap evidence in this case." (*U.S. v. Fernandez* (9th Cir. 2004) 388 F.3d 1199, 1237; see *Leon*, *supra*, 40 Cal.4th at pp. 390-391 [adopting *Fernandez*'s limiting view of *Blackmon*]; see also *U.S. v. Rivera* (2008) 527 F.3d 891, 899 ["Like the affidavit in *Canales Gomez*, and unlike that in *Blackmon*, the affidavit here did more than recite the inherent limitations of using confidential informants; it explained in reasonable detail why each confidential source or source of information was unable or unlikely to succeed in achieving the goals of the Rivera investigation"].)

Munoz argues the affidavit is incomplete because it fails to explain why *air surveillance* would not work, and suggests aircraft could counteract evasive driving techniques. An affidavit must address normal techniques; law enforcement "need not exhaust every conceivable alternative before obtaining a wiretap." (*McGuire*, *supra*, 307 F.3d at pp. 1196-1197.) And "'[a]fter-the-fact suggestions by defense attorneys as to how an investigation might have been handled are entitled to little

weight[.]'" (*Leon*, *supra*, 40 Cal.4th at p. 395; see *Daly*, *supra*, 535 F.2d at p. 438; *Orozco*, *supra*, 630 F.Supp. at p. 1509.) The wiretap laws do not "mandate the indiscriminate pursuit to the bitter end of every non-electronic device as to every telephone and principal in question to a point where the investigation becomes redundant or impractical or the subjects may be alerted and the entire investigation aborted by unreasonable insistence upon forlorn hope." (*United States v. Baker* (9th Cir. 1979) 589 F.2d 1008, 1013.)

Munoz quarrels with the statement in the affidavit that "pen registers" had not been effective. They only record the telephone numbers dialed out or in, but cannot verify who actually makes and receives the calls, nor the contents. The affidavit explains that telephones in this case were listed under false names, and simply knowing the calls made to and from these telephones, while useful to a point, would not lead to dismantling the narcotics ring.

Defendants complain that the stated goals were limitless, and artificially expanded in order to make it seem that wiretapping was necessary: "A broader investigation claim would be hard to hypothesize since the investigators simply want to discover everything about the instant operation, which is a fail-safe method to create the so-called necessity requirement of a wiretap application." Here, as stated, the goals reflected in the affidavit were to identify coconspirators, narcotics manufacturers and precursor chemical suppliers, locations used for manufacturing and distribution and to identify forfeitable

assets. The wiretap was expected to help meet these goals, which seem reasonable given the specific facts of this particular investigation as outlined in the affidavit. Although similar goals may be pursued in other narcotics cases, that does not mean these goals were mere "boilerplate," as defendants assert. Law enforcement is not compelled to unduly circumscribe an investigation as a precondition to obtaining a wiretap order.

In short, we uphold Judge Burrell's conclusion, concurred in by the trial judge in this case, that the DEA affidavit showed adequate "necessity" for the wiretap.

C. Corpus delicti rule

Observing that some of the recorded calls introduced against him describe acts at least arguably criminal, Munoz claims these calls should have been excluded because under the corpus delicti rule, uncharged conduct may not be proven by uncorroborated out-of-court statements. This point was raised in the trial court.

Although the corpus delicti rule applies to uncharged conduct *introduced at the penalty phase of a capital trial*, it does not apply generally to uncharged conduct.

We recently addressed the corpus delicti rule as follows:

> "'Wigmore explains [the rule] this way: every crime "reveals three component parts, *first* the *occurrence* of the specific kind of injury or loss (as in homicide, a person deceased; in arson, a house burnt, in larceny, property missing); *secondly*, somebody's criminality (in contrast, e.g. to accident) as the source of the loss,—these two together involving the commission of a crime by *somebody*; and *thirdly*, the accused's *identity* as the doer of this crime." By the great weight of authority, the first two

> without the third constitute the *corpus delicti*.' [Citation.]
>
> "California distinguishes between the evidentiary and the proof sides of the corpus delicti rule since '[it] is not a requirement of federal law, and it has no basis in California statutory law.' [Citation.] The evidentiary side of the rule, that 'restrict[s] the *admissibility in evidence* of otherwise relevant and admissible extrajudicial statements of the accused,' has been abrogated by article I, section 28(d) of the California Constitution (the 'truth-in-evidence' law [Proposition 8]). [Citation.] However, 'section 28(d) did not eliminate the independent-proof rule . . . that prohibits *conviction* where the only evidence that the crime was committed is the defendant's own statements outside of court.' [Citation.]
>
> "Thus, the rule in California: 'In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself — i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant.'" . . . The purpose of the corpus delicti rule is to satisfy the policy of the law that 'one will not be falsely convicted, by his or her untested words alone, of a crime that never happened.'" (*People v. Miranda* (2008) 161 Cal.App.4th 98, 107.)

As mentioned in this quotation, the passage of Proposition 8, generally making all relevant evidence admissible in criminal cases, precludes a defendant from succeeding with a corpus delicti objection to evidence. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1164-1165 (*Alvarez*).) "On the other hand, in our view, [Proposition 8] *did not* abrogate the corpus delicti rule insofar as it provides that every *conviction* must be supported by some proof of the corpus delicti *aside from* or *in addition to* such statements, and that the jury must be so instructed." (*Id.* at p. 1165.) Accordingly, Proposition 8 does not fully dispose

of Munoz's claims: *If* he is correct that the People had a duty to establish a corpus delicti of uncharged acts, the jury should have been so instructed, and we would be obliged to review the record for substantial evidence of the corpus delicti.

Most discussion about uncharged acts and the corpus delicti rule involves using uncharged acts to *satisfy* the corpus delicti rule, that is, using prior acts to corroborate that a charged crime was committed. (See Imwinkelried, Uncharged Misconduct Evidence (2006) §§ 6.4, 9.24 [and authorities cited].)

Although the main purpose of the rule is to prevent a person from being *convicted* of "a crime that never happened[,]" (*Alvarez*, *supra*, 27 Cal.4th at p. 1169), the California Supreme Court has held that in *capital* cases uncharged acts admitted at the *penalty phase* must comply with the corpus delicti rule. (*People v. Hamilton* (1963) 60 Cal.2d 105, 129 (*Hamilton*), overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631 and disapproved on another point in *People v. Daniels* (1991) 52 Cal.3d 815, 866; *People v. Hines* (1964) 61 Cal.2d 164, 174 [relying on *Hamilton*], disapproved on another point in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40; *People v. Nye* (1969) 71 Cal.2d 356, 367 [relying on *Hamilton*]; *People v. Quicke* (1969) 71 Cal.2d 502, 520-521; *People v. Valencia* (2008) 43 Cal.4th 268, 296 [rule applied in current capital cases].) But the language in some cases lends support to Munoz's claim that uncharged acts are *generally* subject to the corpus delicti rule.

The root authority, *Hamilton*, stated as follows:

> "It is well settled that proof of prior crimes is admissible during the penalty phase of the trial [citations]. But no case has as yet held that such could be proved by the introduction of evidence of an extrajudicial admission without proof *aliunde* that such a crime had been committed. *It is unquestioned that during the guilt phase of a criminal trial such evidence is inadmissible in the absence of independent proof of the corpus delicti* (*People v. Cullen* [(1951)] 37 Cal.2d 614, 624[]). Such is the common-law rule and rule of most other jurisdictions (7 Wigmore, Evidence (3d ed. 1940) §§ 2070-2073, pp. 393-406; McCormick, Evidence (1954) § 110, pp. 229-231)." (*Hamilton*, *supra*, 60 Cal.2d at p. 129, italics added.)

The italicized passages addresses the guilt phase of a criminal trial and *none of the authorities* cited by *Hamilton* involved uncharged acts, only the corpus delicti rule related to charged crimes. (See *People v. Cullen*, *supra*, 37 Cal.2d at pp. 624-625; McCormick, Evidence (1954) Corroboration, § 110, pp. 229-231; 7 Wigmore, Evidence (3d. ed. 1940) Required Corroboration, §§ 2070-2073, pp. 393-406.)

This application of the corpus delecti rule was arguably expanded in *People v. Robertson* (1982) 33 Cal.3d 21, a capital case arising out of the sexually-motivated killings of two women. A witness, Kim P., testified *at the guilt phase* that over a year before the killings, Robertson forced her to orally copulate him by holding her at knifepoint and telling her he had killed two others whose bodies had not been found. (*Id*. at pp. 32-33.) In part Robertson claimed his trial attorney was incompetent because he failed to lodge a corpus delicti

objection to this testimony. A plurality of the California Supreme Court said:

> "First, Kim P.'s testimony concerning defendant's admission of two other murders was objectionable on the ground that no independent evidence of the corpus delicti of those crimes was ever introduced. California has long adhered to the rule, established at common law and followed in most jurisdictions, that 'evidence of the commission of a prior crime may not be proved by the introduction of evidence of an extrajudicial admission without proof *aliunde* that such a crime had been committed.' [Citations.]" (*Robertson*, *supra*, 33 Cal.3d at p. 41.)

The plurality then stated that the evidence should have been excluded under Evidence Code section 352, but concluded the error was harmless as to the verdicts and special circumstance findings, because of overwhelming evidence. (*Robertson*, *supra*, 33 Cal.3d at p. 42.) The plurality later found prejudice as to penalty, because the trial court failed to instruct that the other crimes could only be deemed aggravating circumstances for *penalty* purposes if they had been proven beyond a reasonable doubt, and referred to the evidence as "a confession which, but for counsel's inexplicable failure to object, never should have been before the jury." (*Id*. at pp. 54-55.) Justice Broussard, who provided the necessary fourth vote, did not address the corpus delicti rule, but agreed the evidence should have been excluded under Evidence Code section 352, and that error *coupled with* the failure to give proper instructions at the penalty phase, as well as a portion of the prosecution's argument, compelled reversal. (*Id*. at pp. 62-63 (conc. opn. of Broussard, J.).) Justice Mosk dissented, joined by Justices Richardson and

Reynoso, concluding "The statement of defendant to Kim P. that he had killed 'two others' was part of the res gestae of the offense committed on her" and was not a confession. (*Id*. at p. 63 (dis. opn. of Mosk, J.).)

Thus, the *Robertson* plurality's statement that the corpus delicti rule applied generally to uncharged acts, not just at the penalty phase, did not command a majority of the court. But it led to *People v. Williams* (1988) 44 Cal.3d 883, a capital case in which the People uncritically conceded, *as to guilt phase evidence*, that "the corpus delicti rule is applicable to evidence of uncharged crimes introduced to prove the commission of those crimes." (*Id*. at pp. 910-911.) The *Williams* court mentioned the concession, but found sufficient corroboration. (*Id*. at p. 911.) Thus *Williams*, too, did not actually *hold* that the corpus delicti rule applied to uncharged conduct generally.

A later decision reviewed several of these authorities and concluded "The reference [in *Robertson*] to the common law and most jurisdictions is one we have been unable to confirm." (*People v. Denis* (1990) 224 Cal.App.3d 563, 570 [in part relying on more recent versions of those treatises, and other learned works] (*Denis*).) *Denis* concluded the California Supreme Court had only actually *applied* the rule in the penalty-phase context. (*Id*. at pp. 568-569.) "In addition, both Wigmore and McCormick question the need for the corpus delicti rule itself. . . . We are, therefore, unwilling to expand the rule to cover evidence of uncharged conduct, offered for a limited purpose under Evidence Code section 1101, subdivision (b)." (*Ibid*.)

We agree with *Denis*. (See *People v. Martinez* (1996) 51 Cal.App.4th 537, 543-545 [approving *Denis*.) Since *Denis* was decided the California Supreme Court noted the point *Denis* makes, but has not resolved the question. (*People v. Horning* (2004) 34 Cal.4th 871, 899; *People v. Clark* (1992) 3 Cal.4th 41, 124 ["It is not clear that the corpus delicti rule applies to other crimes evidence"].) We conclude the issue is not foreclosed by precedent. (See also 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 46, p. 252; Simons, Cal. Evidence Manual (2008) Introducing Evidence of Uncharged Misconduct, § 6.21, p. 467.)

We have surveyed the "common law" to the extent it addresses this issue, and we have found no authority supporting Munoz's position and ample authority against it.

Several other states, with similar evidentiary rules, have concluded that the corpus delicti rule does not apply to uncharged acts. (See *Commonwealth v. Edwards* (2006) 588 Pa. 151, 184-185 [903 A.2d 1139, 1158] ["appellant's confession to Porter was not to the murders and other offenses with which he was charged, but rather concerned an uncharged robbery that occurred prior to the crimes at issue. In [such a case] there was no possibility that appellant's confession would lead to his conviction for an earlier robbery with which he was not charged, and thus the purpose of the *corpus delicti* rule is not implicated."]; *State v. Davis* (2002) 71 Conn.App. 641, 645, fn. 4 [803 A.2d 363, 366, fn. 4] ["defendant's assertion that evidence of uncharged misconduct must satisfy the corpus delicti

rule is misplaced because that rule applies to *charged* misconduct, not uncharged misconduct"]; *State v. Rehberg* (Mo.App. 1995) 919 S.W.2d 543, 550 ["a thorough reading of the cases dealing with the rule for admissibility of evidence of uncharged crimes does not reveal any requirement of such proof [of corpus delicti] as to the uncharged crimes"]; *State v. Alatorre* (1998) 191 Ariz. 208, 212, fn. 5 [953 P.2d 1261, 1265, fn. 5]; *State v. Armstrong* (1993) 176 Ariz. 470, 474 [862 P.2d 230, 234] ["an admission by defendant to an uncharged offense may, if relevant and otherwise admissible, be admitted at trial absent independent proof of that offense"].)

Federal Rules of Evidence, rule 404, is similar to California Evidence Code section 1101 in that it generally forbids the use of character evidence, except to show motive, plan, knowledge, and so forth. (See *People v. Beuer* (2000) 77 Cal.App.4th 1433, 1439, fn. 2; *Holdgrafer v. Unocal Corp*. (2008) 160 Cal.App.4th 907, 932, fn. 14.) The leading federal practice treatise makes this pertinent observation:

> "The reasonable doubt standard is not the only rule of sufficiency that is inapplicable when a prior crime is being used for evidentiary purposes. It has been held that the two-witness rule does not apply to proof of an act of perjury not charged in the indictment.[fn.] By analogy, it would seem that other rules dealing with the sufficiency of evidence, *such as those requiring corroboration of certain kinds of testimony*, should be held to apply only when the defendant is charged with the crime and not when the crime is being used as evidence under Rule 404(b)." (22 Wright & Graham, Federal Practice and Procedure (1978) Character Evidence-Procedure, § 5249, p. 535, italics added.)

The use of other crimes evidence, generally, is not subject to special standards of proof: A jury may find the prior acts occurred by applying the preponderance of the evidence standard. (See CALJIC No. 2.50; *People v. Medina* (1995) 11 Cal.4th 694, 764 [“at the penalty phase, it is appropriate to require proof beyond a reasonable doubt as to defendant’s other crimes, given the high potential for prejudice. To require such exacting proof at the guilt phase, however, could convert the guilt phase into a series of collateral minitrials conducted whenever the People seek to rely on such evidence to assist in proving defendant's identity, intent or similar element of the charged offense”]; *People v. Durham* (1969) 70 Cal.2d 171, 187, fn. 15.)

In a case predating *Hamilton, supra,* 60 Cal.2d 105, the California Supreme Court stated: “‘In effect, we recently held in *People v. Thorne* [(1938)] 10 Cal.2d 705, 708 [], that evidence which merely tends to show an attempt to commit or the commission of other offenses is admissible to prove common scheme or plan *even though it falls short of proving the corpus delicti of such other offenses*.’” (*People v. Lisenba* (1939) 14 Cal.2d 403, 431, italics added; see *People v. Keene* (1954) 128 Cal.App.2d 520, 525-526 [citing *Lisenba* on this point]; *People v. Kerns* (1955) 134 Cal.App.2d 110, 114 [quoting *Lisenba*]; 21 Cal.Jur.3d (2001) Criminal Law: Trial, § 530, p. 875, citing *Keene*.) The cited case concluded that it was not necessary to show all the elements of a *crime* in order for other acts evidence to be admissible. (*People v. Thorne*, *supra*, 10 Cal.2d at p. 708.) Although *Lisenba* predates cases such as *Hamilton*,

which can be read broadly to state a contrary rule, we decline to apply the broad reading of the language in those cases. (See also *People v. Kelley* (1967) 66 Cal.2d 232, 245, fn. 7 [evidence of other acts "is apparently allowed to be shown by extrajudicial admissions of defendant alone without corroborating evidence"].)

*Hamilton, supra,* 60 Cal.2d 105, and subsequent cases carved out a narrow exception for penalty trials, albeit without using narrowly-carved language; the corpus delicti rule is not applicable to uncharged act evidence, except in penalty trials. Therefore, we reject Munoz's claim that the rule has any application to this case.

D. Redaction of recordings.

Munoz moved to exclude specific calls because they comprised improper character evidence and were unduly prejudicial. Davis purported to join the motion. We assume for purposes of argument that defendants preserved the issues pursued on appeal. The trial court denied Munoz's motion but partly granted Davis's.

1. The Recordings

Tracks 1 & 2; June 26, 1:21 p.m. & 1:27 p.m.

In the first call, Hernandez directs Munoz to bring him a gun so he could shoot "Rabby" and Munoz agrees, while apparently driving to meet Hernandez. In the second, between Munoz and an unidentified person, Munoz says he "caught" them and was about to "let 'em have it nigga but the boys was right there!", and says that someone pulled a gun on Hernandez.

Track 7

In Munoz's motion he complained of a call on June 28, at 1:06 p.m., a date and time repeated in his opening brief. The motion states that the transcript of this call "does not indicate that any firearms related activity was discussed. However, when listening to Track 7, 'hammers' and 'clappers' are discussed." It appears he refers to a short call that took place on June 27 at 6:39 p.m., between Munoz and an unknown person, who asks if Munoz has a "clapper," to which Munoz says he has a "hammer."

Track 16; June 29, 9:26 p.m.

In this call, Munoz tells Hernandez that "Smoke" (Davis), "helped me out today," and they "sold this little half for you, 'cause I know you over here strugglin'." Munoz then describes an apparent attempted drug deal with "some niggas that I didn't never seen in my life! They said they were from the north side . . . you know what I'm sayin', I don't know. Jim, Jim was like, 'Cousin, I wouldn't set you up my man and everything like that, you know what I mean and I'd tell you if . . . they were from the south.'" Munoz said he "busted one, and I busted like another three cars [*sic*, caps, meaning bullets] from inside the truck. You know what I'm sayin'? So the shells wouldn't go all outside." "[A]nd then all you hear is Fat Jim going, 'Nigga! That's how we do it, nigga!' [Laugh.] It was . . . Nigga, if you was there, bro, you would've tripped out, it was hella funny." When Hernandez asked what it was about, Munoz said "one of them niggas was talking shit to Boo," and "Right when I

called ‘em, he was like, ‘You got a hammer?’ I was like, ‘Yeah, fo’ sho’.’ Then it went down.”

Track 17

In Munoz’s motion he complained of a call on June 29, at 12:03 a.m., a date and time repeated in his opening brief on appeal. It appears he refers to a call that day at 11:25 p.m., between “Big Jim” and Munoz, in which Big Jim says “that nigga and that rat in the Navigator, we fuckin’ beat that nigga down at the Monte [i.e., Montecarlo]. . . with all the Oak Park fools,” and that he “backed up the Oak Park boys with the forty [i.e., .40 caliber pistol] . . . set it off, nigga.” Munoz clarifies that they beat “Gabino” and Big Jim explains Gabino “owes my boy like ten (10) racks from a couple years ago, before I went to the pen. The nigga’s a rat, he just busted a brand new ‘Vette, so my boys just . . . we just set if off something viciously [on] his ass,” but only came away with a “gold chain” and what was in his pockets. Munoz laughs, calls Big Jim a fool and asks “why didn’t you call me?” Big Jim describes a chaotic scene, with everyone running and diving for cover, and “Bitches screamin’,” and Munoz agrees they were getting a good start on the summer. When Big Jim says he needs Munoz’s “little clapper,” Munoz laughs and says “Nigga, I got hammers . . . you know what I mean? Call me, nigga, I’ll come ‘round the corner lammin’.”

Track 18; June 30, 5:22 p.m.

Hernandez tells Munoz “that mother fucker on 24th and Florin right now!,” and says “Hurry up, bring me the clap I’m

gonna lam on his ass!" Munoz says he will come, but then says he will have to get a "lammer" from his house.

Track 19; June 30, 5:26 p.m.

As an apparent follow-up to the preceding call, when Munoz tells Davis he's "Takin' the Glock" to Hernandez, Davis says "take him the [.45], nigga, 'cause . . . I want the Glock in my back in my rig." Davis says "you shoulda given 'im the [.45], you know, and take that one so he can blow holes," to which Munoz replies "No, I'd rather give 'im this one, you know what I mean? Fuck it! The [.45]'s fresh. [Davis:} Huh, it's clean. [Munoz:] It's clean."

Track 20, June 30, 7:40 p.m.

Munoz called Davis and said "Paul" called him for the .45, caliber pistol, but Davis told him not to sell it to him, apparently because he already owed Davis money, then they discussed anticipated retaliation from the incident described in track 17, involving "Gabino," as follows:

> "MD: No . . . pistols is for sale right now anyway, 'cause Jim and them just laid Jav and them down.
>
> "JM: What happened?
>
> "MD: Jim an' dem? You heard what Jim an' dem did?
>
> "JM: Wha . . . what happened?
>
> "MD: At the Montecarlo?
>
> "JM: Oh yeah, they beat up . . . Gabino and them.
>
> "MD: Yeah, cuz. You know they goin' call us.
>
> "JM: Yeah. Fo' sho' cousin. . . .

> "MD: Fo' sho' I' gonna come by. Man these bitch ass niggas down the street, blood, kept mugging . . . I went down there with . . .
>
> "JM: Who?
>
> "MD: Down the street from my house, blood. Right there on Whitman, where the scraps live or whatever the fuck they is, their [fellow countrymen].
>
> "JM: At the corner?
>
> "MD: Yeah, I hit the block, dude all mugging hell o' hard . . . and then . . . there's like five o' them so I come get the 40 [.40 caliber pistol]. Nigga, I go down there, like Nigga, what the fuck you fucking mugging for nigga. And then . . . the other due is over there like kind of smiling, I'm like, 'Fuck you, nigga! Fuck smell A [*sic*, Los Angeles?]! I'll smoke all you . . . bitch ass niggas!'. . . I was fittin' . . . to bust this nigga bro! I swear, I didn't even have no bullets though. I put it to that nigga's cranium."

2. Defense Motion and Trial Court Ruling

Munoz claimed that because there had been no discovery of evidence of any events described in these calls, they were irrelevant, and nothing but character evidence. As to Munoz, the trial court ruled all the above calls were relevant on the issue of intent, were not "improper character evidence" and were more probative than prejudicial:

> "The conversations take place within five days of the charged crime. They are sufficiently similar to go to the necessary intent for both Count One and Count Two. The evidence is not cumulative, although there has been no conviction for the other acts that are referred to on the wiretapped conversations.
>
> "The evidence is from conversations that Mr. Munoz himself had on his telephone, thus it is reliable.

> "The evidence is also relevant to show that Mr. Munoz possessed weapons in advance of the crime charged here that were or could be consistent with the types of firearms used in the charged attempted murder.
>
> "The evidence is relevant and admissible as [inconsistent with] statements Mr. Munoz made in his police interview to the effect that he does not carry guns, and it is also relevant to establish what Mr. Munoz would objectively know about what was likely to happen at the Light Rail station.
>
> "For all of those reasons, the motion is denied as to Mr. Munoz. [¶] . . . [¶]
>
> "As to Mr. Davis, tracks 19 and 20 I find are relevant and admissible for the same reasons that I just stated."

3. Davis's Claims on Appeal

Davis contends generally that the trial court abused its discretion in admitting Tracks 19 and 20, but discusses only the portion of Track 20 in which he discusses the incident with people on his street. He claims this was bad character evidence and unduly prejudicial. In his view its only purpose was to paint him as a violence-prone man. Further, it was prejudicial because "The enthusiasm with which [Davis] recorded his terrorizing people on his street with his gun had a very strong tendency to persuade jurors that the community would be safer if [Davis] was convicted in this case of the greatest offense available." He alternately characterizes this as a due process violation.

Evidence Code section 1101, subdivision (b) allows proof of what would otherwise be inadmissible character evidence when the evidence is introduced against a person to prove "some fact (such as motive, opportunity, intent, preparation, plan,

knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

Tracks 19 and 20 taken together show Davis's relationship with Munoz and Hernandez, his ready access to guns, and his willingness to use them. Davis impliedly concedes as much, including as to the reference on Track 20 to a .45-caliber gun, the type of gun used to shoot at Chappell's car. Contrary to his apparent view, that reference was not "cumulative" to other evidence about such a gun. And even as to the portion of Track 20 referring to a .40-caliber gun, which was purportedly used by Davis (albeit without bullets) to threaten Davis's neighbors, Davis concedes the prosecutor used it to cross-examine him. Davis admitted owning "matching" Glocks, a .40-caliber gun was in the house where he was found hiding, and after the shooting he and Munoz discussed trading a nine-millimeter for a .40-caliber gun, therefore the reference to the latter on Track 20 was relevant.

Davis's defense was that he did not intend to shoot anybody at the station, but when shooting broke out, he fired his gun, partly because he had had a prior traumatic experience of being shot. Track 20 effectively challenged this story, because it showed Davis was willing, if not eager, to use firearms when he perceived himself to be slighted. It thus shed light on his intention and tended to undermine his claim of self-defense.

The challenged portion of Track 20 was not prejudicial. "'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) The evidence was not inflammatory when compared to the facts of the charged shooting, did not take much trial time to introduce, was not remote, and was not confusing, therefore there was no Evidence Code section 352 error. (*Ibid.*; see *People v. Harris* (1998) 60 Cal.App.4th 727, 736-740 (*Harris*).) Assuming, as stated above, that the claim has been preserved, the trial court did not abuse its discretion by failing to exclude this portion of Track 20.

Defendant points to federal cases holding that whether or not the admission of evidence complies with state law, its admission violates due process if there is no rational permissible inference to be drawn therefrom. (See *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.) Here, the inferences from the evidence were rational and permissible.

4. Munoz's Claims on Appeal

Munoz raises similar objections to all of the tracks described above, claiming they consisted of improper character evidence and were unduly prejudicial. But these conversations show Munoz's relationship with Hernandez, and thus Munoz's reason for responding to the call to seek vengeance in aid of

Hernandez's nephews, his relationship with Davis, and his access to and willingness to transport guns, including guns of the specific type used to shoot at Chappell's car.

We reject Munoz's claim that his relationship to Hernandez became irrelevant after Hernandez's name was stricken from the information. The prosecutor's theory of trial was that Munoz obeyed Hernandez's call to seek vengeance for Hernandez's nephews, therefore Munoz's relationship with Hernandez, and willingness to obey Hernandez's orders, in the week before the instant offenses, were highly relevant.

Munoz, referring to the same portion of Track 20 Davis objects to, in part relies on *People v. Riser* (1956) 47 Cal.2d 566, a case where the prosecution's theory was that Riser used a specific type of .38 revolver, but introduced into evidence other guns and equipment pertaining to those guns. (*Id*. at pp. 576-577.) The court cautioned:

> "When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon. [Citations.] When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*Id*. at p. 577.)

The .40-caliber pistol Davis described using in Track 20 may not have been used at the Meadowview station, but in that same call Davis and Munoz discussed a .45-caliber pistol, which

was the same kind used to shoot at Chappell's car. (See *People v. Carpenter* (1999) 21 Cal.4th 1016, 1047 [gun referred to in evidence looked like the murder weapon]; Cf. *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1381-1385 ["'[o]nly if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process'"; error to admit evidence defendant fascinated by knives and owned knives, including one that most certainly was *not* the murder weapon, where there was nothing distinctive known about the murder weapon].) The portion of this conversation discussing the .40-caliber pistol was not inflammatory, *particularly not as against Munoz*, who merely listened to Davis's story featuring such weapon. Further, in a call the day after the shooting, Munoz suggested that Davis give him a .40-caliber gun and in exchange take back a nine-millimeter gun, but Davis did not want "them guns around me"; thus .40-caliber gun was relevant to this case.

Munoz complains that the conversation with Big Jim (Track 17) had no connection to the case. In that conversation Munoz laughs about the beating of Gabino and when Big Jim says he needs Munoz's "little clapper," Munoz laughs and says "Nigga, I got hammers . . . you know what I mean? Call me, nigga, I'll come 'round the corner lammin'." Munoz later discussed the Gabino incident with Davis, in Track 20, when they were discussing possibly transferring a .45-caliber gun to someone, and by the context Davis and Munoz expected retaliation. Track 20 was a call on June 30, the day before Hernandez called to say his nephews had been shot. Track 20 was relevant to show that

the men were alert for an incident, and prepared to respond with firearms. Track 17, admitted against Munoz, fleshed out the reasons *why* the men were on alert.

Munoz objects that none of the described acts were shown to have been committed. This appears to be a variation of his corpus delicti claim, which we have already rejected.

We reject Munoz's claim that this evidence was prejudicial. It was highly probative, not inflammatory when compared to the facts of the charged crimes, and consisted of Munoz's own statements. "Painting a person faithfully is not, of itself, unfair." (*Harris*, *supra*, 60 Cal.App.4th at p. 737.)

E. Limiting instruction

Defendants claim the trial court should have instructed the jury on the limited use of prior acts evidence. (CALJIC No. 2.50.) Munoz does not clearly identify what evidence he is concerned about, but it appears to be references on the wiretaps to guns and drugs, used to show Munoz's relationship to Hernandez and Davis. Davis, too, is not crystal clear. He argues the record is "replete with appellant's criminal/anti-social behavior as a drug dealer, a gun trafficker [record citations], and as someone who terrorizes old ladies, young girls, and his neighbors with his gun. The prosecution was trying to show that because appellant was a miscreant, he must have committed the charged attempted murder."

We note that the evidence Davis held a gun on a so-called "old lad[y]," was misdemeanor impeachment evidence and the jury was instructed on its limited purpose.

Defendants claim the trial court had a duty to give a limiting instruction on its own motion, but this is not so. "Although the trial court may in an appropriate case instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct, we have consistently held that it is under no duty to do so." (*People v. Collie* (1981) 30 Cal.3d 43, 63.) Admittedly, "There may be an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. In such a setting, the evidence might be so obviously important to the case that *sua sponte* instruction would be needed to protect the defendant from his counsel's inadvertence. But we hold that in this case, and in general, the trial court is under no duty to instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct." (*Id*. at p. 64; see *People v. Hinton* (2006) 37 Cal.4th 839, 875-876.)

As to both defendants any prior acts evidence was not so "dominant" or prejudicial as to require a limiting instruction absent request. As we have explained, the evidence was not introduced or used to show that defendants had a general propensity for violence or a bad character.

Because CALJIC No. 2.50 was not requested, both defendants assert their trial attorneys were incompetent. However, we agree with the People that the record does not foreclose a legitimate tactical reason: "It may well be that trial counsel did not want such an instruction, believing that it would

emphasize the [unfavorable evidence]. Since the record is silent on counsel's reasoning and a satisfactory explanation exists for not making the request, the case must be affirmed on appeal." (*People v. Bonilla* (1985) 168 Cal.App.3d 201, 206.)

IV. Spontaneous Utterances

The People wanted to call Janice Skerik, a bus driver, who would testify that her passengers described the shooting. Defendants objected on hearsay and Sixth Amendment grounds. At a hearing outside the presence of the jurors (Evid. Code, § 402), Skerik testified that she heard "pops or bangs similar to a firecracker," her passengers said it was gunfire, then she saw a vehicle go by on one side of the bus: Her passengers, who were "all standing up out of their seats and . . . looking out both sides of the bus," said they saw a light green Tahoe SUV pass on the other side. The passengers numbered "at least ten" and were "all youths more or less"; because they declined to fill out cards she passed out after the incident, she did not know their names or contact information. Based on this offer the trial court overruled the objections. Defendants renewed their objections as Skerik testified.

Skerik testified that she was a Regional Transit bus driver and left the Meadowview Light Rail station at about 9:30. She heard "three pops or bangs" she thought were firecrackers, but her passengers became alarmed and said "those are not firecrackers. . . . Someone's shooting." Skerik "heard screeching tires" and saw a fast moving light-colored (likely "white or off-white") SUV, "similar to a Suburban"; it came up

on the left side of the bus, and made "a right-hand turn right across the front of the bus" going the wrong way in its lane and violating a traffic signal. At least three of her passengers "were commenting on another vehicle that was going down the right-hand side of the bus that turned the corner before the vehicle on my left and [said] that [it] had gone in the same direction." They described it as a light green Chevy Tahoe, with "African-American" males inside. She identified two photographs of a Suburban as "consistent" with her recollection. Other evidence connected that Suburban to Hernandez.

Evidence Code section 1240 provides in full:

> "Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> "(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
>
> "(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

In reviewing a decision to admit a spontaneous utterance as against a hearsay objection, we apply the following standard:

> "'Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact. [Citation.] The determination of the question is vested in the court, not the jury. [Citation.]' [Citation.] The trial court's determination of preliminary facts will be upheld if supported by substantial evidence. [Citation.] However, '[w]e review for abuse of discretion the ultimate decision whether to admit the evidence.'" (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1523.)

In part defendants point out that *Skerik* did not personally perceive the event. But Skerik was not the declarant, the bus

passengers were, and the evidence, if believed, showed that they personally perceived the event they related. Nor, contrary to a claim in the reply brief, did Skerik's evidence consist of another level of hearsay. She testified at trial as to statements she heard. Her *testimony* was not another hearsay layer, as defendants contend.

Defendants rely heavily on *Ungefug v. D'Ambrosia* (1967) 250 Cal.App.2d 61 (*Ungefug*). *Ungefug* involved a wrongful death suit arising from an automobile accident, and the admissibility of testimony by an ambulance driver that as he picked up the decedent, "'I heard someone make the statement that she had been hit twice, by another car that did not stop—that didn't stop.'" (*Id*. at p. 66.) This evidence was held inadmissible because there was no showing that *the declarant*, that is, the bystander who made the statement overheard by the ambulance driver, perceived the event: "Although this does not require direct proof that the declarant actually witnessed the event and a persuasive inference that he did is sufficient, the fact that the declarant was a percipient witness should not be purely a matter of speculation or conjecture." (*Id*. at pp. 67-68.) "In our opinion the inference, if any, that the declarant actually witnessed the accident is not persuasive in the instant case. It was therefore error to admit the testimony of the ambulance driver that he heard someone in the crowd say that another car struck decedent." (*Id*. at p. 68; see *People v. Phillips* (2000) 24 Cal.4th 226, 235-237 [court upheld exclusion of evidence that declarant said there had been a "shoot-out" because record

showed declarant was not recounting what he had perceived]; *People v. Provencio* (1989) 210 Cal.App.3d 290, 299-303 [burglary victim heard child cry "'There goes Angel,'" as a suspect ran past an "anxious and expectant" crowd wearing clothes like a suspect the victim had chased earlier; "the only reasonable inference is that the hearsay declarant (the unidentified child) actually perceived the exciting event at the time announced"].)

The preliminary fact whether the declarant(s) perceived the event need only be proven by a preponderance of the evidence. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 965-966 & fn. 13; *People v. Anthony O*. (1992) 5 Cal.App.4th 428, 433-434.) Here, in contrast to a crowd gathered to see the aftermath of an accident, as in *Ungefug*, we have a group of bus passengers who were present when the shots were fired. The circumstances are adequate to support the trial court's ruling.

V. Prosecutorial Misconduct

Davis contends the prosecutor committed misconduct by improperly introducing evidence regarding a prior shooting and his having served time in jail. He refers to a portion of his interrogation. The detective asked if Davis had shot anybody and he said no, but that he had been shot twice:

> "Q. How about those girls a couple of months ago[?] [I] caught up with you, the poor little girls were like 13 years old, you scared to death. [T]hey say you shot at 'em. You went to jail. Remember, back in April?
>
> "A. Yeah, nah, I remember that one too. I said – and I wasn't even at my house. . . .
>
> "Q. Did you do that one?

> "A. Nope. I was across my house. They wanted some CD's and some shit. . . . They [the police] come swooping up. . . . I'm like, What the fuck? . . . He's like put your arms behind your back, pulled a gun on them, like, damn, I drop the CD's like this. . . . [T]hey search my house. They always – they search, they tear everything up every time."

Because Davis failed to interpose any objection, the contention is forfeited. "It is settled that, following a jury trial, a claim of misconduct is not cognizable on appeal absent a timely objection if an objection and admonition would have cured the harm." (*Scott*, *supra*, 15 Cal.4th at p. 1217.)

Contrary to an implication in Davis's brief, it does not appear that the prosecutor circumvented any specific ruling by the trial court. *After* the tape was played to the jury the trial court ruled that *evidence of the shooting* would not come in for impeachment. There was no ruling on the *reference* to the shooting during Davis's interrogation, either before or after the impeachment ruling: "Although it is misconduct for a prosecutor *intentionally* to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct. Defendant's real argument is that the evidence was inadmissible. That claim, too, is not cognizable because he failed to object." (*Scott*, *supra*, 15 Cal.4th at p. 1218; see *People v. Carrillo* (2004) 119 Cal.App.4th 94, 100 [prosecutor "simply elicited as much evidence as the trial court allowed"].)

As for Davis's fallback claim of incompetent counsel, the evidence is not what Davis portrays it to be on appeal. He claims it was evidence that he shot at two girls and spent time

in jail. It was instead an implied accusation by the detective about the incident, *which Davis denied*. Thus, there was no *evidence* that he shot at them. The reference to jail was brief and the jury knew Davis was no stranger to jail, as it was stipulated Davis was on a penal work program on the day of the charged crimes, albeit due to a traffic matter. Further, Davis explained in this passage that he was harassed by the police, unjustly charged, and defense counsel Corbin could rationally conclude this bolstered the defense, and he used this passage to argue the lead detective ignored exculpatory evidence and assumed Davis was guilty.

Because the record does not exclude the possibility that trial counsel withheld objection for tactical reasons, we will not consider the claim of incompetent counsel on direct appeal. (See *People v. Mendoza Tello*, *supra*, 15 Cal.4th at pp. 266-267.)

VI. Kill Zone Instruction

Davis contends the trial court erroneously instructed on the "kill zone" theory. We see no prejudice.

The instruction (CALJIC No. 8.66.1) was as follows:

> "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the 'kill zone.' The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a 'kill zone' or zone of risk is an issue to be decided by you."

Davis argues as follows:

> "CALJIC No. 8.66.1 was inapplicable because the prosecution did not rely on the zone of kill to hold [Davis] liable for other attempted murders. The instruction was without evidentiary support because that instruction only applies when there are, for example, multiple counts of attempted murder, but only one intended target, and the prosecution seeks to hold the defendant liable for the attempted murder of non-targeted individuals on a concurrent intent to kill theory because the non-targeted individuals are in the zone of kill."

Although the People claim the target could have been Landers, thus providing a basis for the instruction, assuming Davis is correct, he has failed to demonstrate prejudice. If, as Davis asserts, no substantial evidence supported the factual predicates for liability on a zone of kill theory, as stated in the instruction given, we would only reverse "if the record affirmatively demonstrates there was prejudice, that is, if it shows that the jury did in fact rely on the [factually] unsupported ground." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 (*Guiton*).)

Davis claims the giving of a factually unsupported instruction implicates federal due process and therefore is reversible unless the error is harmless beyond a reasonable doubt. Not so. (See *Guiton*, *supra*, 4 Cal.4th at pp. 1129-1130.) Instead, we must affirm "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*Id*. at p. 1130.) The record does not demonstrate any such probability.

Davis claims the instruction undermined the instructions on intent to kill and the jury may have used a transferred intent theory to convict. This is not correct, because the kill-zone instruction, far from altering intent to kill principles, incorporated those principles explicitly, by stating that a person who intends to kill a target may have a concurrent intent to kill all who are in the zone of danger. Davis does not explain how this instruction would reach back and alter the intent to kill definition or allow use of a transferred intent theory. Nor was the instruction, of itself, inflammatory.

Indeed, the zone of kill principle is not "a legal doctrine . . . as is the doctrine of transferred intent. Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*People v. Bland* (2002) 28 Cal.4th 313, 331, fn. 6 (*Bland*).) The instruction told the jury it could, but did not have to, find it "reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity." (CALJIC No. 8.66.1.)

It is not reasonably likely that the jury would misapply the instruction in the manner posited, that is, that the instruction impaired the instructions on intent to kill. (*People v. Frye* (1998) 18 Cal.4th 894, 957; see *People v. Campos* (2007) 156 Cal.App.4th 1228, 1241-1243.)

We conclude any error was harmless in this case.

## VII. Sentencing Claims
### A. Firearm Enhancement

Both defendants attack the enhancement provided by Penal Code section 12022.53, subdivision (d), providing a term of 25-to-life for personally using a firearm causing great bodily injury, but for different reasons.

First, we set out the text of the subdivision:

> "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 245, or subdivision (c) or (d) of Section 12034, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, 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." (Pen. Code, § 12022.53, subd. (d).)

#### 1. Munoz's claim

Munoz claims conspiracy to commit murder is not an offense covered by Penal Code section 12022.53, subdivision (d). The enhancement applies to "the commission of a felony specified in subdivision (a)," of section 12022.53. That subdivision begins by stating, "This section applies to the following felonies[,]" followed by a list of specific crimes and then "Any felony punishable by death or imprisonment in the state prison for life." (Pen. Code, § 12022.53, subd. (a)(17).)

The punishment for conspiracy to commit murder "shall be that prescribed for murder in the first degree." (Pen. Code, § 182.) First degree murder is punishable "by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life." (Pen. Code, § 190, subd. (a).)

Because the enhancement applied to any felony punishable by death or life imprisonment, and conspiracy to commit murder is so punishable, the enhancement applies to conspiracy to commit murder. (See *People v. Lopez* (2005) 34 Cal.4th 1002, 1005-1008 [construing similar language in gang sentencing statutes].) Munoz's efforts to create or identify some relevant ambiguity in the statute are not persuasive.

2. Davis's claim

As stated, the enhancement applies to a person who "personally and intentionally discharges a firearm and proximately causes great bodily injury[.]" (Pen. Code, § 12022.53, subd. (d).) Davis claims that because Munoz fired the bullet found in Chappell's brain, Davis did not "proximately cause" great bodily injury. We disagree.

Before addressing this issue we observe that the People originally believed Chappell had been shot with Davis's nine-millimeter Glock, and in their opening statement argued Davis *personally* shot Chappell. But the criminalist testified that the bullet recovered from Chappell's brain was a .45-caliber bullet, thus impliedly showing that *Munoz* personally shot Chappell. For purposes of this appeal, we accept Davis's premise that Munoz actually shot Chappell.

By its terms the statute does not require that a person *personally* cause injury, but only that he or she *proximately* cause injury. The Legislature knows the difference between these two concepts, in the context of enhancements. (See *People*

*v. Cole* (1982) 31 Cal.3d 568, 570-579 [only one who "personally inflicts" injury is subject to § 12022.7 enhancement].)

> "Section 12022.53(d) requires that the defendant 'intentionally and *personally* discharged a firearm' (italics added), but only that he 'proximately caused' the great bodily injury or death. . . . The statute states nothing else that defendant must *personally* do. Proximately causing and personally inflicting harm are two different things. The Legislature is aware of the difference." (*Bland*, *supra*, 28 Cal.4th at p. 336.)

The jury was instructed (CALJIC No. 17.19.5):

> "A proximate cause of great bodily injury is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the great bodily injury and without which the great bodily injury would not have occurred.
>
> "The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true."

Davis concedes this is a correct statement of the law applicable to this case. The People argue Davis's act of firing his gun met this standard because by assisting in trapping the victim and by firing shots, he helped set in motion the chain of events leading to Chappell's shooting. We agree.

The California Supreme Court has held that this enhancement "does not require that the defendant fire a bullet that directly inflicts the harm. The enhancement applies so long as defendant's personal discharge of a firearm was a proximate, i.e., a substantial, factor contributing to the result." (*Bland*, *supra*, 28 Cal.4th at p. 338; see *People v. Palmer* (2005)

133 Cal.App.4th 1141 [Palmer fired at a peace officer who dove for cover and thereby broke his ankle, enhancement upheld].)

> "A person can proximately cause a gunshot injury without personally firing the weapon that discharged the harm-inflicting bullet. For example, in *People v. Sanchez* [(2001)] 26 Cal.4th 834, two persons engaged in a gun battle, killing an innocent bystander. Who fired the fatal bullet, and thus who personally inflicted the harm, was unknown, but we held that the jury could find that *both* gunmen proximately caused the death. [Citation.] The same is true here. If defendant did not fire the bullets that hit the victims, he did not *personally inflict,* but he may have *proximately caused,* the harm." (*Bland*, *supra*, 28 Cal.4th at pp. 337-338.)

The facts before Davis's jury fit within the *Bland* quotation. Munoz and Davis were part of a team sent to retaliate against the "brothers" who "jumped" Hernandez's nephews. When Chappell objected to being cut off in traffic, the two SUVs driven by the team members trapped his car, then Davis and Munoz got out (either from the same SUV or one from each) and each used a gun to fire into Chappell's car. The jury could rationally conclude that Davis helped set in motion the chain of events leading to Chappell's shooting, that Davis's act of firing *his* gun was a "substantial" factor contributing to the shooting by Chappell of Munoz.

Defendant points to two concurring opinions in a California Supreme Court case, but they are not inconsistent with this analysis, even if they are legally correct statements of the law. (*People v. Sanchez* (2001) 26 Cal.4th 834, 854-857 (conc. opn. of Kennard, J.) [two men fired at each other and killed a third person but it could not be determined which fired the

fatal shot; both equally liable for murder because even if defendant did not actually shoot the victim, he induced his opponent to engage in the gun battle]; 857-859 (conc. opn. of Werdegar, J.) [fatal shooting was not a superseding cause of the killing, therefore nonfatal shooting which induced or provoked the fatal shooting was a proximate cause of death].)

We recently decided *People v. Zarazua* (2008) 162 Cal.App.4th 1348 (*Zarazua*), which militates against Davis: Defendants were chasing and shooting at a car carrying rival gang members when their targets ran a stop sign, crashing into a car and killing a toddler (Rocky). In part we approved the definition of proximate cause given in CALJIC No. 17.19.5, the same instruction that was given in this case, and explained:

> "Here, the accident that was the immediate cause of Rocky's death was a foreseeable result—a direct, natural and probable consequence—of defendants' discharges of their firearms. They shot at the vehicle occupied by Covington and Osorio. Using the most obvious means of escape available, Covington accelerated rapidly and, still within the zone of danger from defendants' shots, entered Rio Linda Boulevard without stopping or observing whether traffic was approaching. . . . The victims' flight without regard for traffic laws is as predictable when someone shoots at an occupied vehicle as is a stampede for the door when someone yells fire in a crowded theater. Therefore, defendants' personal discharges of their firearms proximately caused Rocky's death[.]" (*Zarazua*, *supra*, 162 Cal.App.4th at p. 1362.)

While there are obvious factual differences between *Zarazua* and this case, the mode of analysis is the same: Both defendants in this case participated in trapping Chappell's car and both fired pistols. Even though the evidence may show that

Davis did not actually shoot Chappell, his act of firing at Chappell's car was a contributing *proximate* cause of the harm, and therefore the evidence supports the enhancement.

B. Penal Code section 654

The trial court sentenced Munoz to a term of 25-to-life for conspiracy to murder, enhanced by a consecutive 25-to-life term for the firearm enhancement, and imposed a concurrent term for attempted murder. The trial court found the attempted murder "is a separate and independent crime from Count One [conspiracy] with a separate objective." The probation report stated that "the crimes and their objectives . . . were predominantly independent of each other."

In the trial court Munoz argued the sentences should run concurrently, as the probation officer recommended and as the trial court agreed. But on appeal Munoz asserts the attempted murder term should have been *stayed* (Pen. Code, § 654) because "the object of the conspiracy was the same as the attempted murder."

Count One charged that defendants "did unlawfully conspire together and with another person and persons whose identity is unknown to commit the crime of murder," and "in pursuance of said conspiracy" defendants "drove to the Meadowview light rail station." Count Two charged that "defendant(s) did unlawfully, and with malice aforethought attempt to murder DEMARIO [CHAPPELL], a human being."

The People agree that a person cannot be punished for both a murder and a conspiracy to commit *that* murder. (*People v. Hernandez* (2003) 30 Cal.4th 835, 866; *People v. Moringlane* (1982) 127 Cal.App.3d 811, 819 (*Moringlane*).)

"However, 'if "a conspiracy had an objective apart from an offense for which the defendant is punished, he may properly be sentenced for the conspiracy as well as for that offense."'" (*Moringlane*, *supra*, 127 Cal.App.3d at p. 819; partly quoting *In re Cruz* (1966) 64 Cal.2d 178, 181.) In *Moringlane*, "the conspiracy was to murder Silva and Rico, whereas it was Danny Kay McDowell who was murdered. McDowell's death was not the object of the conspiracy." (127 Cal.App.3d at p. 819; see *People v. Flores* (2005) 129 Cal.App.4th 174, 184-185 ["the conspiracy was to batter Morales. There was no evidence of a conspiracy to murder Valdivia"].)

Similarly, here the factual theory of the conspiracy charged in Count One was that Munoz and Davis planned to kill the "brothers" who had "jumped" Hernandez's nephews, and drove to the station to advance that purpose. The conspiracy was wholly separate from the attempt to murder Chappell, which apparently stemmed from his act of complaining when he was abruptly cut off in traffic. Contrary to Munoz's view, that was a separate criminal objective. Thus, there is no bar to multiple punishment for both crimes.

C. Davis: Custody Credits

Davis contends and the People concede that he was not given the correct amount of custody credits. Davis does not dispute

that the record shows he was in custody on another matter for part of the time he was awaiting trial, accordingly, we accept the People's view that that time should be excluded from the calculations, and that Davis is entitled to 544 days of actual credit and 81 days of conduct credit, for a total award of 625 days.

D. Munoz: Correction

The People correctly note a typographical error in Munoz's abstract of judgment, which refers to a term imposed under Penal Code section 12022.53, subdivision (*b*) instead of (*d*). The trial court must prepare a new abstract.

DISPOSITION

The judgment as to Munoz is affirmed. The judgment as to Davis is modified to award him 625 days of presentence custody credits and otherwise affirmed. The trial court is directed to forward to the Department of Corrections and Rehabilitation new abstracts of judgment in accordance with this opinion.

MORRISON, J.

We concur:

DAVIS, Acting P.J.

HULL, J.