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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. NATHANIEL MARCUS GANN et al., Defendants and Appellants.	D055431 (Super. Ct. No. SCD207862)

APPEAL from a judgment of the Superior Court of San Diego County, Frederic L. Link, Judge. Affirmed as to Gann; affirmed, as modified, as to Hansen.

Doris S. Frizzell, under appointment by the Court of Appeal, for Defendant and Appellant Gann.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant Hansen.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Christopher Pratt Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part III.B., C., D., and E, and part IV.

I.

INTRODUCTION

In a joint trial with separate juries, brother and sister Nathaniel Marcus Gann and Brae F. Hansen were convicted of first degree murder in the shooting death of their stepfather. Gann's jury did not sustain a special circumstance allegation that he committed the murder by means of lying in wait within the meaning of Penal Code[1] section 190.2, subdivision (a)(15). Hansen's jury, however, made a true finding as to the lying-in-wait special circumstance. The trial court sentenced Gann to 25 years to life, and sentenced Hansen to life in prison without the possibility of parole.

In his appeal, Gann claims that the trial court erred in allowing his jury to hear evidence of statements that Hansen made to a 911 operator and to police officers prior to her arrest, and in admitting the rebuttal testimony of a former girlfriend of Gann who claimed that Gann had raped her when they were in high school. Gann argues that the cumulative prejudicial effect of these two evidentiary errors requires reversal. In addition, Gann claims that the trial court erroneously instructed his jury concerning Hansen's prearrest statements. Gann further contends that the trial court was biased against the defendants. Finally, Gann requests that this court review sealed psychiatric records of a prosecution witness to determine whether the trial court abused its discretion in refusing to release the records to Gann's counsel.

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1 Statutory references are to the Penal Code unless otherwise specified.

In her appeal, Hansen contends that the trial court erred by admitting her postarrest confession because, she claims, she confessed only after police promised her leniency, thereby rendering the confession involuntary. Hansen also contends that the trial court erred in allowing her jury to hear portions of Gann's defense case. Hansen further asserts that because she is ineligible for parole, it was error for the court to impose a parole revocation fine.[2]

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

In July 2007, Hansen, who was then 17 years old, lived with her stepfather, Timothy MacNeil (MacNeil), on Marraco Drive in the Rolando area of San Diego. Gann lived in Arizona and attended college there. Gann and Hansen's mother, to whom MacNeil had been married, had committed suicide the previous year. MacNeil had begun dating a woman a few months after the suicide. By July 2007, he was spending most of his time with this woman. Hansen thought that MacNeil was ignoring her, and she began to feel unloved and worthless. MacNeil had recently told Hansen that she needed to prepare to move out when she turned 18. These developments angered Hansen.

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[2] Gann and Hansen join in each other's arguments to the extent that he or she would benefit thereby. (Cal. Rules of Court, rule 8.200(a)(5).)

1. *Events leading up to the crime*

Hansen phoned her brother and they discussed killing MacNeil. They agreed on a plan to hire a hit man to kill MacNeil on MacNeil's birthday, July 18. Hansen would take MacNeil out for a birthday lunch, and the hit man would stage either a burglary or a home-invasion robbery and kill MacNeil when MacNeil and Hansen returned to MacNeil's residence after lunch.

Hansen withdrew money from two bank accounts to pay the hit man. She also retrieved a gun that had belonged to her late mother, and made a duplicate house key. Hansen put the cash, gun and key in a box and placed the box on the back porch for the hit man.

The initial plan had to be changed because Gann was unable to hire a hit man, and MacNeil decided to celebrate his birthday with his girlfriend rather than with Hansen. Hansen arranged to take MacNeil to lunch for his birthday on July 19—the day after MacNeil's birthday. After the hit man plan fell through, Gann decided to kill MacNeil himself. He purchased black clothing from a Goodwill store in Arizona and drove to San Diego. Gann parked his truck on a street that was uphill from MacNeil's residence.[3]

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[3] The two-level house on Marraco Drive in which MacNeil and Hansen lived was built on a hill. The upper level was accessible from the street. The lower level was accessible from both a staircase inside the house and a driveway that ran down the left side of the property. From the backyard, a foot path led down to a lower street. Throughout the hilly neighborhood, stairway easements provided homeowners access to higher and lower streets.

According to Hansen's confession, Gann arrived at MacNeil's residence at 4:30 a.m. on July 19 and entered the house, using the key that Hansen had left on the porch. Once Gann was in the house, he awakened Hansen and told her that they were going to proceed with their modified plan regardless of whether she wanted to or not. During her postarrest interview with police, Hansen claimed that after Gann was unable to procure a hit man, she decided that she did not want to go through with the murder plot.[4]

2. *The murder of Timothy MacNeil*

MacNeil, who had spent the previous night at his girlfriend's residence and then attended morning appointments, arrived at his residence at 12:15 p.m. on July 19 to pick up Hansen for their lunch. When MacNeil arrived at the residence, he called out his arrival to Hansen, who responded that she was in the bathroom. As was his habit, MacNeil went downstairs to check telephone messages in his home office. Before he reached his office, MacNeil was confronted in the downstairs game room by Gann, who was dressed completely in black and wearing a mask that had only eye slits. Within minutes, Hansen walked downstairs, where she saw Gann pointing a gun at MacNeil.

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[4] The Gann jury did not hear evidence of Hansen's confession. However, both juries heard testimony from Charles Goodman, who was Gann's cellmate while both were housed in the psychiatric ward of an Arizona jail. Goodman related what Gann had told him about the crime. Goodman's testimony as to what Gann had told him about the crime was similar in many respects to the account that Hansen gave in her confession. (Although the court had ruled that the Hansen jury was to be excused during Goodman's testimony, Hansen's counsel chose to have her jury hear Goodman's testimony, for tactical reasons.)

The disguised Gann ordered her at gunpoint to tie MacNeil's hands with zip-ties. After Hansen complied, Gann tied her hands behind her back with zip-ties.

At one point, MacNeil asked to use the bathroom. Gann cut Hansen's zip-ties and told her to pull down MacNeil's pants. After Hansen complied, Gann retied Hansen's hands with zip-ties, took her to the laundry room area where he placed her facing the wall, and told her not to turn around. Hansen heard a struggle followed by a gunshot. The bullet entered the right side of MacNeil's body, just above the hip bone, causing him to fall down. The first gunshot was followed by three more: a shot that hit MacNeil in the face; a shot that grazed MacNeil's scalp, entered his shoulder and lodged just above the elbow; and a shot to the back of MacNeil's head, which killed him instantly.

According to Goodman's testimony, Gann related that Hansen had contacted him after MacNeil told her that she would have to move out of his house when she turned 18. Gann and Hansen decided to "take care of" MacNeil. They initially planned to hire a hit man to kill their stepfather, but the hit man who Gann contacted failed to show up. Goodman also testified that Gann purchased black clothing at a Goodwill store before driving to San Diego. When Gann arrived at MacNeil's house, Hansen was there, and they discussed their plans. When MacNeil arrived home, Gann put on a makeshift mask and "acted like it was a robbery." Gann directed Hansen to tie up MacNeil; Gann then tied up Hansen. However, MacNeil was not tied up well and he managed to get free. When Gann went to tie MacNeil again, the gun accidentally fired, and the bullet hit MacNeil. MacNeil said, "Why are you killing me, Nathan?" and "Why are you doing this to me, Nathan?" Gann then began to shoot at MacNeil. After shooting MacNeil in the

head, Gann fled the scene. Gann discarded the gun and the black clothing after he left the house, and drove back to Arizona.

Several neighbors told police that they saw a young man running away from the MacNeil house. A witness saw the young man run to a truck that was later identified as Gann's, and drive away. Another witness testified that he was 90 percent sure that it was Gann whom he had seen fleeing.

After Gann left, Hansen, who was still bound, called 911 to report a home-invasion robbery and the shooting of her stepfather. Hansen told the 911 operator that she and MacNeil had entered the house together and said that they had been confronted downstairs by an armed masked man who was dressed entirely in black. Hansen said that the robber had taken her watch and a ring.[5] Hansen told the operator that the robber had demanded the combination to the house safe, and that MacNeil had refused to reveal it. At that point, the robber shot MacNeil, killing him. Hansen made the 911 call at 12:30 p.m.

When police arrived, they found MacNeil lying face down on the floor in a pool of blood. He was naked from the waist down.[6] Hansen was cowering in a corner on the other side of a pool table. Hansen's hands were bound behind her with a plastic zip-tie.

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[5] Police later learned that before MacNeil and Hansen arrived at the house, Hansen had taken off her watch and ring and had hidden them in her bedroom, as part of the plan to make it appear that she was a victim of the home-invasion robbery.

[6] Police found MacNeil's pants and boxer shorts in the bathroom.

Hansen was crying and complained that her wrists hurt because the zip-tie was too tight. Officer Colin Forsey took Hansen outside and removed the zip-tie.

Police found no signs of forced entry. On the back porch, police discovered a .347 caliber revolver at the top of stairs that led to the backyard. Police later found a black shirt in a five-foot-tall tree along the masked man's escape route.[7]

While Hansen was sitting in an ambulance at the scene, she told Officer Forsey that a masked man had surprised MacNeil in the downstairs game room and bound his hands. The masked man also bound her hands and took her ring and cell phone from her. The man then placed her in another room, returned to MacNeil in the game room, and demanded the combination to the safe. MacNeil refused to give the man the combination, and a struggle ensued. The struggled ended with gunshots.

Detective Maria Rivera drove Hansen to the police station, where she interviewed the 17-year-old who, at the time, police considered to be a victim. Hansen told Rivera that she returned to the Marraco Drive residence after taking an hour-long walk and went into the upstairs bathroom. Two minutes later, MacNeil arrived. Assuming that MacNeil had gone downstairs, Hansen did so as well. When Hansen got downstairs, she saw a masked man, dressed entirely in black, pointing a gun at MacNeil, whose hands were tied

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[7] At the time police found the black shirt, they did not realize that there was a dark blue ski mask or hat with cut eye slits inside the black shirt. The mask was not discovered until the shirt was examined in the crime lab. The mask was covered with debris inside and out, but the shirt was not. No DNA was recovered from the shirt. The first sample taken from the mask did not have sufficient DNA for analysis. Subsequently, more samples were taken, and it was determined that DNA from the mask matched Gann's DNA profile.

behind him with zip ties. MacNeil said that he had to go to the bathroom, and the man pointed the gun at Hansen and told her to take off MacNeil's pants. The masked man then zip-tied Hansen's hands and took her ring, watch and cell phone. He pushed Hansen against the wall near the laundry room. Hansen heard the man ask MacNeil for the combination to the safe, which MacNeil refused to give. Hansen heard a struggle and a gunshot. The man fired at least two more shots at MacNeil before running out the back door.

After the interview, Rivera drove Hansen to the residence of Hansen's uncle and aunt, Richard and Bonnie MacNeil. Rivera returned to Richard MacNeil's residence that evening and talked with Hansen again. This time, Hansen's rendition of the events included a significant deviation from her earlier accounts. Referring to the masked intruder, she said, "Nathan tied my hands." At that point, Rivera wrote "Nathan" in her notebook. Later, Rivera asked Hansen about her reference to the intruder as "Nathan." Hansen initially denied having said "Nathan." When Rivera pressed her on the issue, Hansen said that she remembered that MacNeil had addressed the intruder as "Nathan." After Hansen mentioned the name "Nathan," Rivera retrieved a tape recorder and recorded the rest of her conversation with Hansen. Rivera learned from Bonnie MacNeil that Hansen's older brother's name is Nathaniel.

Hansen told Richard and Bonnie MacNeil's daughter (the daughter) that a composite sketch of the intruder, which had been distributed by the media, was inaccurate. The daughter became suspicious because Hansen had previously maintained that she had not seen the intruder's face. On her own, the daughter telephoned the police

and reported the discrepancy. After receiving this information from the daughter, police returned to Richard MacNeil's residence and arrested Hansen at 10:45 p.m.

At the police station, Hansen confessed that she and Gann had planned to kill MacNeil and to make it look like he had been killed during a home-invasion robbery. Gann was arrested early the following morning in Arizona.

Hansen rested without presenting evidence.

In Gann's defense case, he presented evidence that gloves used by MacNeil's assailant were never found, and that Gann's fingerprints were not found on the gun. A police detective demonstrated how a right-handed person typically would lay down the murder weapon. Another detective identified a photograph of Gann's truck. A defense investigator demonstrated that with a zip-tie binding her hands behind her back, she could easily make the binding tighter by herself. Both juries heard this evidence.

Hansen's jury was not present for the testimony of the remainder of Gann's witnesses. These included seven character witnesses who testified that Gann was a nonviolent person, that he had no animosity toward MacNeil, and that he had been physically abused by his mother. Gann also presented witnesses who testified that Hansen was frustrated by MacNeil, resented MacNeil's girlfriend, and had once considered poisoning her own mother.

In rebuttal, the prosecution presented the testimony of Gann's former girlfriend. In surrebuttal, Gann presented four witnesses to impeach the former girlfriend.

The parties stipulated that, among other things, the gun that killed MacNeil was once owned by Gann and Hansen's mother, and that the gun belonged to MacNeil at the

time of his death. They also stipulated that Gann is left-handed and that Hansen is right-handed.

B. *Procedural background*

On January 18, 2008, the district attorney filed an information that charged Gann and Hansen with first degree murder and special circumstances.[8] Gann and Hansen both filed motions to sever their cases for trial. The severance motions were rendered moot on October 9, 2008, when the district attorney announced its intention to try the defendants separately. Also on that day, the court granted Hansen's pending motion for a continuance. This set the stage for Gann's first trial.

On November 5, 2008, jury selection in Gann's first trial began. After seven days of testimony, the jury began deliberating on November 18. On November 20, the jury announced that it was hopelessly deadlocked, and the trial court declared a mistrial.

On December 23, the trial court granted the prosecution's motion for rejoinder, which both Gann and Hansen opposed. The court ruled that the joint case would be tried to two different juries.

On March 16, 2009, jury selection for Hansen's jury began. The following day, a jury was selected and sworn to try the case.

On March 18, a jury was empaneled for Gann's trial. Trial commenced on

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8 The information alleged a special circumstance of lying in wait as to both Gann and Hansen. The information further alleged that Gann had personally used a firearm and proximately caused a death within the meaning of section 12022.53, subdivisions (d) and (e)(1). As to Hansen, the information alleged that she had been vicariously armed within the meaning of section 12022, subdivision (a)(1).

March 23.

On April 15, Gann's jury convicted him of first degree murder. The jury also found that the lying-in-wait special circumstance allegation and the personal use of a firearm allegation were not true.

On April 16, Hansen's jury convicted her of first degree murder and found that she had been vicariously armed. Hansen's jury also found true the lying-in-wait special circumstance.

On June 19, the trial court denied Gann's motion for a new trial and sentenced him to 25 years to life in prison. That same day, the trial court denied Hansen's motion for a new trial and sentenced her to life in prison without the possibility of parole. On its own motion, pursuant to section 1385, the court struck the allegation that Hansen had been vicariously armed.

Both Gann and Hansen filed timely notices of appeal.

III.

GANN'S APPEAL

A. *Admission of Hansen's prearrest statements in Gann's trial*

Gann contends that the trial court erred by allowing his jury to hear evidence of statements that Hansen made prior to her arrest, including the 911 call; the informal interview with Officer Forsey; and the two interviews with Detective Rivera. Specifically, Gann claims that Hansen's prearrest statements were not admissible under any hearsay exception, and that the admission of these statements denied him his Sixth Amendment right to confront a witness against him.

1. *Hearsay exception*

In her prearrest statements to the 911 operator and to police, Hansen claimed that a masked intruder had held her and MacNeil at gunpoint, and that the intruder had killed MacNeil after a struggle. The trial court found that Hansen's prearrest statements were admissible under the hearsay exception for statements of a coconspirator in furtherance of the conspiracy. (Evid. Code, § 1223.) The trial court's ruling was correct.[9]

Hearsay evidence is generally inadmissible. (Evid. Code, § 1200.) However, a hearsay statement is admissible against a party:

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[9] The trial court was correct in ruling that the scope of the conspiracy in this case included an agreement to make it appear that MacNeil was killed during a home invasion robbery. However, insofar as the trial court stated that the conspiracy did not end until the defendants' arrests, that statement was incorrect. A conspiracy is usually deemed to have ended when the substantive crime that is the object of the conspiracy is either attained or defeated. (*People v. Leach* (1975) 15 Cal.3d 419, 431 (*Leach*).)

> "[I]f (a) [t]he statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; [¶] (b) [t]he statement was made prior to or during the time that the party was participating in that conspiracy; and [¶] (c) [t]he evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b), or, in the court's discretion as to the order of proof, subject to the admission of such evidence." (Evid. Code, § 1223; see *People v. Hardy* (1992) 2 Cal.4th 86, 139 (*Hardy*).)

A conspiracy is an agreement between two or more persons, with specific intent, to achieve an unlawful objective, coupled with an overt act by one of the conspirators to further the conspiracy. (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1402.) The conspiracy itself need not be charged in order for Evidence Code section 1223's hearsay exception to apply to statements by coconspirators. (See *People v. Jourdain* (1980) 111 Cal.App.3d 396, 404; *People v. Wallace* (1970) 13 Cal.App.3d 608, 617-618.) Further, only prima facie evidence of a conspiracy is required to permit the trial court to admit evidence under Evidence Code section 1223; the conspiracy may be shown by circumstantial evidence and the agreement may be inferred from the conduct of the defendants mutually carrying out a common purpose in violation of a penal statute. (*People v Herrera* (2000) 83 Cal.App.4th 46, 58-64; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135.)

While a conspiracy is usually deemed to have ended when the substantive crime for which the coconspirators are being tried is either attained or defeated (*Leach*, *supra*, 15 Cal.3d at p. 431), it is for the trial court to determine precisely when the conspiracy has ended. (*Id*. at p. 432.) " 'A conspiracy is not necessarily a single event which

unalterably takes place at a particular point in time when the participants reach a formal agreement; it may be flexible, occurring over a period of time and changing in response to changed circumstances.' [Citation.]" (*People v. Vargas* (2001) 91 Cal.App.4th 506, 553.) Further, there may be "a situation where a conspiracy will be deemed to have extended beyond the substantive crime to activities contemplated and undertaken by the conspirators in pursuance of the objectives of the conspiracy." (*People v. Saling* (1972) 7 Cal.3d 844, 852.)

Gann argues that Hansen's prearrest statements to the police do not qualify under Evidence Code section 1223 because they were made after MacNeil's murder, which, he claims, terminated the conspiracy. Gann maintains that since the conspiracy had ended, Hansen's prearrest statements could not have been made in furtherance of the conspiracy; rather, they were mere acts to avoid detection. However, the trial court found that the scope of Gann and Hansen's conspiracy included the murder of their stepfather, as well as making the murder appear to have taken place during a home-invasion robbery.

"[W]hether statements made are in furtherance of a conspiracy depends on an analysis of the totality of the facts and circumstances in the case." (*Hardy*, *supra*, 2 Cal.4th at p. 146.) In *Hardy*, the main objective of the conspiracy was to acquire the life insurance benefits of the insured individuals, who were murdered in furtherance of the conspiracy. (*Id*. at p. 143.) Our Supreme Court held that the conspiracy did not end with the murders, but continued until the conspirators received the insurance proceeds, or until the policy beneficiary was convicted of unjustifiable homicide and rendered ineligible to collect. (*Id*. at p. 144.) The court concluded that coconspirator statements made during

this lengthy period of the conspiracy were therefore admissible under Evidence Code section 1223. (*Hardy*, *supra*, at p. 144.)

The evidence supports the trial court's determination that the scope of the Gann-Hansen conspiracy encompassed both the murder of their stepfather and making it appear that the murder took place during a home-invasion robbery. Making it look like the murder occurred during a home-invasion robbery was integral to the conspiracy. To this end, Gann and Hansen made it appear that Hansen was a victim of the staged home-invasion by binding her hands with zip-ties. In addition, Hansen hid her ring and watch beforehand so that she could claim that the intruder had taken them. After Gann left the residence, Hansen related to the 911 operator that a masked intruder had confronted her and MacNeil at gunpoint and had killed MacNeil. Hansen told both the 911 operator and Officer Forsey that the intruder, whom she said she did not know, and who she said had worn a mask and was dressed in black, had tied her hands with zip-ties and taken her jewelry. Hansen recited essentially the same scenario to Detective Rivera. Hansen's 911 call and her prearrest statements to the police officers were integral to creating the false impression that MacNeil was killed during a home-invasion robbery. The evidence thus fully supports the trial court's conclusion that the statements were made during and in furtherance of the conspiracy.

2. Right to confront adverse witnesses

In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment to the United States Constitution prohibits the admission of out-of-court "[t]estimonal statements of

witnesses absent from the trial [unless] the declarant is unavailable," and "only where the defendant has had a prior opportunity to cross-examine." (*Crawford*, *supra*, at p. 58.) The *Crawford* court did not set forth "a comprehensive definition" of what constitutes "testimonial evidence," but held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id*. at p. 68.) With respect to nontestimonial hearsay, *Crawford* held that where the proffered statement is not testimonial, state law may regulate the admission of evidence by applying statutory hearsay rules, without running afoul of the Confrontation Clause. (*Ibid*.)

In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the United States Supreme Court explained the distinction between nontestimonial and testimonial statements made to law enforcement officers during a 911 call or at a crime scene: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." (*Id*. at p. 822.) Statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Ibid*.)

In *People v. Cage* (2007) 40 Cal.4th 965 (*Cage*), our Supreme Court identified several "basic principles" to assist courts in determining whether a particular statement is or is not testimonial. The court explained that although a testimonial statement need not be made under oath, it must have some "formality and solemnity characteristic of

testimony" and "must have been given and taken primarily . . . to establish or prove some past fact for possible use in a criminal trial." (*Id.* at p. 984, italics omitted.) However, "statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*Ibid.*) "[T]he primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation." (*Ibid.*)

Using the analyses in *Davis*, *supra*, 547 U.S. 813 and *Cage*, *supra*, 40 Cal.4th 965, the Courts of Appeal in *People v. Brenn* (2007) 152 Cal.App.4th 166, 176 (*Brenn*) and *People v. Banos* (2009) 178 Cal.App.4th 483, 492-493, 497 (*Banos*) each found that the victims' respective statements to a 911 operator were not testimonial. In *Brenn*, the court determined that the purpose and form of the statements used in the 911 call were "not the functional equivalents of trial testimony." (*Brenn*, *supra*, at p. 176.) In *Banos*, the court concluded that the statements were not testimonial because the primary purpose of the declarant was "to gain police protection." (*Banos*, *supra*, at p. 497.) The court noted, "The statements were not yet the product of an interrogation, rather they were made to police conducting an investigation into an ongoing emergency." (*Ibid.*)

As these cases make clear, a 911 call made during the course of an emergency situation is ordinarily made for the primary nontestimonial purpose of alerting the police about the situation and to provide information germane to dealing with the emergency. Applying the analysis of those cases here, we conclude that Hansen's statements to the

911 operator were not testimonial under *Crawford, supra,* 541 U.S. 36. The dispatcher was primarily concerned with what was happening at the moment, in order to obtain information that would assist responding officers in rendering aid to the victims and finding the escaping perpetrator—not to secure a conviction in a court trial. The information given was not formal or structured. Because the statements that Hansen made to the 911 operator were not testimonial in nature, they were not subject to the requirements of *Crawford*.

The same analysis applies to the statements that Hansen made to Officer Forsey at the scene of the crime, shortly after her 911 call. Officer Forsey was primarily concerned with determining what had happened and whether Hansen had any information that could help police find the man dressed in black, who officers believed might still be in the area. Officer Forsey's conversation with Hansen was not structured or formal. We conclude that Hansen's statements to Officer Forsey also were not testimonial. (*Banos*, *supra*, 178 Cal.App.4th at p. 497.)

However, the same analysis does not apply to statements that Hansen made to Detective Rivera prior to Hansen's arrest. Detective Rivera's interviews with Hansen were conducted under circumstances that were more formal than the circumstances surrounding the 911 call and the on-the-scene discussion with Officer Forsey. Rivera's first interview with Hansen took place at the police station and was recorded. At the time of this interview, police viewed Hansen as a victim and were attempting to obtain additional information to assist them in their investigation of MacNeil's murder. The second interview took place at Richard and Bonnie MacNeil's residence. While Rivera

still viewed Hansen as a victim at the time she initiated her conversation with Hansen, after Hansen referred to the intruder as "Nathan," Rivera apparently became suspicious of Hansen, and decided to tape-record the rest of their discussion.

Because "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard" (*Crawford*, *supra*, 541 U.S. at p. 52), the statements that Hansen made to Detective Rivera at the police station and at Richard MacNeil's home are "testimonial" under *Crawford*.

However, when Hansen made the statements, she was engaging in conduct that was within the scope of the conspiracy, i.e., reinforcing the notion that MacNeil had been killed during a home-invasion robbery committed by a masked intruder dressed in black. The statements at issue are thus coconspirator statements made during and in furtherance of the conspiracy. The question that we must decide is whether the admission in evidence of the statements that Hansen made to Detective Rivera violated Gann's Sixth Amendment confrontation rights.

The case of *United States v. Stewart* (2d Cir. 2006) 433 F.3d 273 (*Stewart*), in which the court addressed the admissibility of statements that were both in furtherance of a conspiracy and testimonial, is instructive. In *Stewart*, the federal government initiated insider trading investigations of suspicious sales of ImClone Systems, Inc., stock in December 2001. (*Id*. at p. 280.) Concluding that the two codefendants had misled investigators about their sales of large volumes of stock before the company announced that it had been denied approval for a key pharmaceutical product, the government indicted them for conspiracy to obstruct justice, to make false statements, and to commit

perjury. (*Id*. at pp. 280-281.) Following their convictions at a joint trial, each codefendant challenged the admission of the other's prior statements to FBI and SEC investigators. (*Id*. at p. 290.)

While acknowledging that the codefendants' statements, "having been made during interviews with government officials in the course of an investigation, do have characteristics of *Crawford's* 'core class of "testimonial' statements," ' in the context of the crimes for which [d]efendants were convicted," the *Stewart* court also noted that "the challenged statements are part and parcel of co-conspirators' statements made in the course of and in furtherance of [d]efendants' conspiratorial plan to *mislead* investigators." (*Stewart, supra*, 433 F.2d at p. 291, citations omitted, italics added.] Given that the conspiracy's primary objective was to obstruct the federal government's investigation, the *Stewart* court rejected the codefendants' claim that the admission of truthful portions of the otherwise testimonial hearsay violated their confrontation rights. (*Id*. at pp. 291-292.) The *Stewart* court reasoned that the "essence" of the conspiracy to obstruct justice charge "necessarily contemplate[d] that the conspirators would provide false information to government agencies during the course of their investigation and during interrogations that would produce testimonial statements of one or the other of them." (*Id*. at p. 292.)

The *Stewart* court noted that a conspiracy to obstruct justice necessarily involves the use of deception and misrepresentation because it seeks to hide the commission of an already-completed substantive offense. (*Stewart, supra*, 433 F.3d at p. 292.) In this regard, the *Stewart* court stated,

> "It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. . . . "

The court continued,

> "The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice. It would be unacceptably ironic to permit the truthfulness of a portion of a testimonial presentation to provide a basis for keeping from a jury a conspirator's attempt to use that truthful portion to obstruct law enforcement officers in their effort to learn the complete truth." (*Stewart, supra,* 433 F.3d. at pp. 292-293.)

The *Stewart* court concluded,

> "For these reasons, we hold that when the object of a conspiracy is to obstruct justice, mislead law enforcement officers, or commit similar offenses by making false statements to investigating officers, truthful statements made to such officers designed to lend credence to the false statements and hence advance the conspiracy are not rendered inadmissible by the Confrontation Clause. A contrary reading of the rule would result in obvious and unacceptable impediments to prosecuting cases like this one, in which the very object of the charged conspiracy is for the defendants to mislead investigators by responding falsely to the investigators' questions in a structured setting, fully aware that their responses might be used in future judicial proceedings. For these reasons, there was no error here in admitting the testimonial statements of one Defendant against the other." (*Stewart, supra,* 433 F.3d at p. 293.)

While there was a charged conspiracy to obstruct justice in *Stewart*, the *Stewart* court's comments apply with equal force to the present case, in which the uncharged conspiracy included a plan to mislead law enforcement officers who were investigating MacNeil's murder. Gann and Hansen's plan to make it appear that MacNeil was murdered by a masked intruder during a home-invasion robbery was, in essence, a plan to obstruct justice, and all of Hansen's prearrest statements to Detective Rivera—both truthful and untruthful—were made in furtherance of the conspiracy.

As in *Stewart*, any truthful statements that Hansen made to Detective Rivera prior to her arrest were "designed to lend credence to the false statements and hence advance the conspiracy." (*Stewart*, *supra*, 433 F.3d at p. 293.) For these reasons, we conclude that such statements were not inadmissible under the Confrontation Clause.[10]

3. *Claimed instructional error*

Gann contends that the trial court erred by instructing the jury pursuant to CALCRIM No. 418 as follows:

> "In deciding whether the People have proved that the defendant NATHANIEL GANN committed the crime charged, you may not consider any statement made out of court by BRAE HANSEN unless the People have proved by a preponderance of the evidence that:

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10 With respect to any false statements that Hansen made to Detective Rivera, such statements clearly were not offered for their truth, and are thus not "testimonial." Indeed, during Gann's first trial, the prosecutor responded to a hearsay objection to Hansen's prearrest statements by arguing that he was not offering Hansen's statements "for the truth of the matter asserted. In fact, I am going to argue that she's lying through the teeth the whole time."

"1. Some evidence other than the statement itself establishes that a conspiracy to commit a crime existed when the statement was made;

"2. BREA HANSEN was a member of and participating in the conspiracy when she made the statement;

"3. BREA HANSEN made the statement in order to further the goal of the conspiracy; [and]

"4. The statement was made before or during the time that the defendants were participating in the conspiracy.

"A *statement* means an oral or written expression, or nonverbal conduct intended to be a substitute for an oral or written expression.

"*Proof by a preponderance of the evidence* is a different standard of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you include that it is more likely than not that the fact is true."

Gann maintains that the conspiracy ended with the murder of MacNeil, and that this instruction erroneously allowed the jury to consider a statement that Hansen made after the conspiracy had terminated. As indicated above, we have determined that the trial court reasonably concluded that the conspiracy did not terminate with MacNeil's murder, but rather, that the conspiracy included an agreement to make it appear that MacNeil was murdered during a home-invasion robbery. Accordingly, the trial court did not err in instructing the jury pursuant to CALCRIM No. 418.

B. *Propriety of prosecution rebuttal witness*

Gann contends that it was error to admit the testimony of prosecution rebuttal witness K.U., that Gann had raped her while they were dating in high school.

1. *Background*

Gann presented seven witnesses who testified that they believed Gann had a peaceful and nonviolent character. To rebut this evidence, the prosecution called K.U., who testified that in her opinion, Gann was a violent person.

At the time of the trial, K.U. was living in England. The prosecution was able to contact her during Gann's defense case, while she was visiting relatives in Arizona. The day before K.U. was called as a witness, the prosecutor informed Gann's counsel that he intended to call her as a rebuttal witness and gave Gann's counsel a taped recording of a telephonic interview between K.U. and a prosecution investigator. During the recorded interview, K.U. said that she believed that Gann was a violent person, and related that he had slapped her, tried to control her, and sexually abused her. Gann's counsel unsuccessfully attempted to prevent K.U. from testifying.

At trial, K.U. testified that Gann had slapped her in the face once at school and that he had been sexually abusive toward her. When the prosecutor inquired further about the alleged sexual abuse, K.U. blurted out that Gann had raped her. At that point, the court called a recess in order to allow K.U. to regain her composure.

Outside the presence of the jury, Gann's counsel moved for a mistrial, stating that it would be impossible to overcome the prejudice stemming from the rape accusation. Counsel pointed out that during the interview with the prosecution investigator, the

witness had neither explicitly nor implicitly stated that Gann had raped her.[11] Defense counsel further argued that he was unprepared to cross-examine concerning a rape allegation, and that the violation of Gann's due process rights caused by the witness's unanticipated rape allegation could not be cured. Although the trial court said that it would consider striking the testimony about the rape, the prosecutor objected and defense counsel essentially reiterated that the damage from the testimony could not be cured. The court ultimately did not strike the testimony and did not grant a mistrial. The court directed the prosecutor not to "overreach" in his further questioning about the sexual abuse, and sustained numerous objections in this regard when the prosecutor continued his direct examination of K.U. The court also granted Gann's counsel a one-day continuance to attempt to locate surrebuttal witnesses who could impeach K.U.[12]

2. *Analysis*

Generally, evidence of a defendant's character or a trait of his character is not admissible to prove the defendant's conduct on a specific occasion (Evid. Code, §§ 1101,

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11 The prosecutor professed that he was unaware that K.U. was going to say Gann raped her.

12 During surrebuttal, the defense presented various witnesses to rebut K.U.'s testimony. J.W., who dated K.U. after she and Gann broke up, testified that K.U. told him that she had engaged in sexual intercourse with Gann, and that it had been consensual. However, K.U. also told J.W. that she regretted it. J.W. also testified that K.U. had told him that she was afraid of Gann, but never said that Gann had been violent with her. J.W. also testified that K.U. was somewhat unstable and said that she had a tendency to over-dramatize events. Gann's girlfriend, following K.U., testified that Gann never forced himself on her and said that he had never been violent or abusive toward her.

subd. (a), 1102). However, when a defendant presents testimony of his good character at trial, the prosecution may impeach the testimony or rebut it. (Evid. Code, § 1102, subd. (b).)[13] Under Evidence Code section 1102, subdivision (a), "[a] defendant may introduce opinion evidence of his or her character to show a nondisposition to commit an offense." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1118.) "Lay opinion testimony is admissible under [Evidence Code] section 1102 when it is based on the witness's personal observation of the defendant's course of behavior." (*People v. Felix* (1999) 70 Cal.App.4th 426, 430.)

It follows that "when a criminal defendant presents opinion or reputation evidence on his own behalf, the prosecutor may present like evidence to rebut the defendant's evidence and show a likelihood of guilt. (Evid. Code, § 1102, subd. (b).)" (*People v.*

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13 Evidence Code section 1102 provides: "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)."

Evidence Code section 1101 provides: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

Hempstead (1983) 148 Cal.App.3d 949, 953.) However, if the impeachment or rebuttal of good character evidence "would create a substantial danger of undue prejudice to the defendant, the trial judge has the discretion to preclude [the evidence] under Evidence Code section 352." (*Id.* at p. 954.)

Gann placed his character at issue by presenting seven witnesses who testified that he was a peaceful and nonviolent person. Because Gann opened the character issue, the prosecutor was entitled to present evidence that tended to impeach or rebut that "specific asserted aspect" of Gann's character. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn. 24.)

As the court put it in *People v. Tuggles* (2009) 179 Cal.App.4th 339, 357:

> "A defendant who elicits character or reputation testimony opens the door to the prosecution's introduction of hearsay evidence that undermines testimony of his good reputation or of character inconsistent with the charged offense. 'When a defendant elects to initiate inquiry into his own character, presumably to establish that one with his lofty traits would be unlikely to commit the offense charged, an anomalous rule comes into effect. Opinion based upon hearsay is permitted. (Evid. Code, § 1324; *People v. Cobb* (1955) 45 Cal.2d 158.) But the price a defendant must pay for attempting to prove his good name is to throw open a vast subject which the law has kept closed to shield him. (Evid. Code, §§ 1101, 1102.)' [Citation.]"

A prosecutor does not have unlimited scope in inquiring about a defendant's reputation, however. "The prosecution 'must not be permitted to take random shots at a reputation imprudently exposed, or to ask groundless questions "to waft an unwarranted innuendo into the jury box" . . . .' [Citation.]" (*People v. Tuggles*, *supra*, 179 Cal.App.3d at pp. 357-358.) "When a defense witness gives character testimony, the prosecutor may

inquire of the witness whether he or she has heard of acts or conduct by the defendant inconsistent with that testimony, so long as the prosecutor has a good faith belief that such acts or conduct actually took place." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1170.)

We review a trial court's evidentiary rulings under Evidence Code sections 352, 1101 and 1102 for abuse of discretion. (*People v. Doolin* (2009) 45 Cal.4th 390, 437.)

It is undisputed that no one anticipated that K.U. would blurt out that Gann had raped her. Thus, the issue is not whether the court should have precluded K.U.'s "rape" testimony, but rather, what the court should have done after she claimed that Gann had raped her. When a witness blurts out something unexpected, an order to strike the testimony and an admonition to the jury to disregard the testimony are ordinarily sufficient to cure the harm. (E.g., *People v. Price* (1991) 1 Cal.4th 324, 454-455; *People v. Martin* (1983) 150 Cal.App.3d 148, 162-163.) If a trial court finds that the prejudice is incurable, the court should order a mistrial. (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1581.) When a witness blurts out potentially prejudicial matter, the trial court is vested with considerable discretion in deciding whether to grant a mistrial or strike the testimony. (*Ibid*.)

Here, the trial court did neither. We do not fault the court for refusing to declare a mistrial; the prejudice was not incurable, as demonstrated by the fact that defense counsel was able to quickly locate several surrebuttal witnesses who effectively impeached K.U. However, the trial court should have followed its initial inclination to strike the testimony

and admonish the jury, even though defense counsel did not indicate that he wanted the court to strike the testimony.

Although the trial court should have stricken the "rape" testimony, we conclude that the error in not striking the testimony was harmless. The evidence against Gann was more than ample to convict him of first degree murder. Gann's DNA was found on the inside of the mask that was stuffed in the black shirt, which had been discarded along the getaway route. Gann was identified by one eyewitness as the male who the witness saw running away from the MacNeil residence. Gann's truck was parked on a nearby street at the time of the murder, and another witness saw a male running from the residence to the truck and entering the truck. Goodman, the Arizona jail cellmate who testified about the version of the murder that Gann related to him, linked Gann to the murder conspiracy with Hansen. Goodman's testimony was corroborated by the Goodwill receipts and Gann's credit card transaction statements, which showed that Gann had purchased black clothing in preparation for the murder. Given all of this evidence, it is not reasonably probable that the jury would have returned a different verdict if the trial court had stricken K.U.'s surprise "rape" testimony. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. *Cumulative evidentiary error*

Gann argues that the cumulative effect of the trial court's evidentiary errors deprived him of a fair trial. Because we have concluded that there was only a single evidentiary error, and that this error was harmless, "we have no occasion to consider the impact of cumulative error." (*People v. Holt* (1997) 15 Cal.4th 619, 693.)

D. *Judicial bias*

Gann contends that he was denied due process because the trial court, Judge Frederic L. Link, had prejudged the case. Gann bases this contention on an extrajudicial comment that he alleges Judge Link made before trial. Gann moved for a new trial based on, among other things, the alleged extrajudicial comment.[14] The contention is without merit.

1. *Background*

Judge Link was the judge who reviewed the declaration in support of the arrest warrant and subsequently signed the warrant. All counsel were aware of this fact.

Prior to trial, Judge Link informed the defense attorneys and the defendants, on the record, that he had known MacNeil and that he had presided over two or three cases that MacNeil had tried. Judge Link said that he and MacNeil had been friendly in the courthouse hallway, but that he had never socialized with MacNeil and that they were never present at the same social events. Judge Link also said that he had gone to a poster shop that MacNeil had owned, and that he might have purchased something at the shop. Judge Link added:

> "But that's all my contact with him. So I want everybody to know that. [¶] You know as I said to the attorneys, and say to you now, I'm going to treat this case and . . . Mr. MacNeil like I would any other victim. And I have no reason to treat this case any differently because of my contact with him."

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[14] Hansen joined any of Gann's claims that inure to her benefit. (See fn. 2, *ante*.) This is the only one of Gann's arguments that could possibly benefit Hansen. If Gann is entitled to relief on the basis of this claim, Hansen is, as well.

Gann and Hansen indicated they had no objection to Judge Link continuing to preside over the case.

On April 15, 2009, after the jury verdicts were announced in court, Gann's counsel received information about the case from attorney Geoffrey Morrison—namely, that Morrison had observed Judge Link in the spectator area of the courtroom at Gann and Hansen's arraignment and heard the judge say that MacNeil was a good man and that he "did not deserve what these 'punks' did to him."

In his motion for a new trial, Gann's counsel argued that a new trial was warranted on the nonstatutory ground that the court was biased against him, and stated that Morrison had related to him the comment that Morrison attributed to Judge Link. In the motion for new trial, Gann's counsel did not claim that the judge exhibited bias at trial, and did not cite or refer to any rulings that the trial court made that showed bias.

2. *Legal principles*

A defendant "has a due process right to an impartial trial judge under the state and federal Constitutions. [Citations.] The due process clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of the case. [Citation.]" (*People v. Guerra, supra,* 37 Cal.4th at p. 1111.) It is well settled that "[j]urors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Mahoney* (1927) 201 Cal. 618, 626-627.) Accordingly, it cannot be overemphasized that trial judges must remain scrupulously impartial and be ever vigilant

"not to throw the weight of [their] judicial position into a case, either for or against the defendant." (*Id*. at p. 627.)

As the United States Supreme Court has explained:

> "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias . . . unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an *extrajudicial* source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been made by the District Judge in *Berger v. United States* [(1921)], 255 U.S. 22 . . . , a World War I espionage case against German-American defendants: 'One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans' because their 'hearts are reeking with disloyalty.' [Citation.] Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." (*Liteky v. United States* (1994) 510 U.S. 540, 555-556, original italics omitted, new italics added.)

At the same time, we recognize that there is a presumption of judicial "honesty and integrity." (*Withrow v. Larkin* (1975) 421 U.S. 35, 47.) "[O]nly the most 'extreme facts' would justify judicial disqualification based on the due process clause." (*People v. Freeman* (2010) 47 Cal.4th 993, 996.)

3. *Analysis*

Gann's complaint is based on a claim of an extrajudicial comment that he alleges the trial judge made before the trial. However, Gann has not made a sufficient showing that Judge Link in fact made the comment.

In his motion for new trial, Gann's counsel based his claim that Judge Link made the extrajudicial comment on an e-mail message that Gann's counsel received from attorney Morrison in which Morrison stated that he had information about the case, and on a follow-up telephone conversation with Morrison. According to an investigative report prepared by defense investigator Karen Gould, who had listened in on the conversation via a speaker phone:

> "Mr. Morrison informed Mr. Garcia he had just heard the Gann conviction on the news, and learned the judge who heard the case was Judge Link. Mr. Morrison further stated he felt Judge Link might have a personal interest in the case. Mr. Morrison recalled being in the courtroom when Mr. Gann and Ms. Hansen were arraigned. Mr. Morrison noticed Judge Link was in the audience of the courtroom during the arraignment. On the way out of the courtroom Mr. Morrison [heard] Judge Link sa[y] the victim in the case, Tim M[a]cNeil, was a good man and did not deserve what these 'punks' did to him. Mr. Morrison thought the statement was odd, but dismissed it until he learned Judge Link presided over Mr. Gann's trial at which point he felt it important to contact Mr. Garcia."

Gould's report was attached as exhibit B to the new trial motion. The new trial motion did not include a declaration from attorney Morrison. Counsel made no attempt during the hearing on the new trial motion to substantiate the claim that Judge Link had made the remark. Hence, what is before us is double hearsay and establishes nothing. Even

Gann's counsel referred to the information that Morrison related as an "allegation" during the hearing on the new trial motion.

We will not presume error on appeal. Rather, Gann bears the burden of presenting a record that affirmatively shows that there was an error below. Any uncertainty in the record must be resolved against him. (*People v. Green* (1979) 95 Cal.App.3d 991, 1001; *People v. Clifton* (1969) 270 Cal.App.2d 860, 862.) The record here does not affirmatively demonstrate that Judge Link made the extrajudicial comment at issue.

Further, Gann's counsel never expressed any concern that Judge Link was prejudiced against his client during trial. It is also significant that Gann's counsel has not identified any rulings or comments made by Judge Link at trial that demonstrate bias against Gann. (See, e.g., *People v. Tappan* (1968) 266 Cal.App.2d 812, 816-817 [following trial judge's allegedly prejudicial pretrial comment, defendant's failure to complain of judge's bias during trial showed defendant's confidence in judge's impartiality].)

We reject Gann's contention that he was denied due process because of judicial bias. There was thus no error in denying the new trial motion.

E. *Review of psychiatric records of witness Goodman*

Gann requests that this court examine the sealed psychiatric records of prosecution witness Goodman and determine whether the trial court erred by not releasing all or some of the records to Gann's counsel. We have complied with this request and have also reviewed the sealed transcript of the ex parte hearing in which Gann's counsel argued that the records should be disclosed.

Before Gann's first trial, Goodman's psychiatric records from the Maricopa County, Arizona jail facility were sent to the trial court. The trial court reviewed the records in camera. Gann sought release of the records for use in impeaching Goodman on cross-examination. The court ultimately ruled that Goodman's psychiatric records would not be released and ordered the records sealed.

Generally, a witness's psychiatric records in the possession of third parties are not discoverable prior to trial. (*People v. Gurule* (2002) 28 Cal.4th 557, 592.) In *People v. Hammon* (1997) 15 Cal.4th 1117, 1119 (*Hammon*), the California Supreme Court held that the right of confrontation does not require the trial court, "at the pretrial stage of the proceedings, to review or grant discovery of privileged information in the hands of third party psychotherapy providers." At the outset, the *Hammon* court noted that the right of confrontation is a trial right. (*Id*. at pp. 1123-1124, construing *Davis v. Alaska* (1974) 415 U.S. 308.) The *Hammon* court explained that *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, in which there was no majority opinion, "called into question" a broader reading of *Davis v. Alaska*, leaving it unclear " 'whether or to what extent the confrontation or compulsory process clauses of the Sixth Amendment grant *pretrial* discovery rights to the accused.' [Citations.]" (*Hammon, supra,* at p. 1126, italics added.) The *Hammon* court rejected the argument that the Sixth Amendment grants criminal defendants a right to pretrial discovery of psychiatric information. The court concluded that there was no

> "adequate justification for taking such a long step in a direction the United States Supreme Court has not gone. Indeed, a persuasive reason exists not to do so. When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon, as in *Davis,* to

> balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. [Citation.] Before trial, the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily." (*Hammon, supra*, at p. 1127.)

Under the authority of *Hammon, supra*, 15 Cal.4th 1117, the trial court did not err in rejecting Gann's request for the release of Goodman's psychiatric records prior to his first trial.

Gann's counsel did not renew his motion for disclosure of Goodman's records at any time during Gann's first trial. Nor did Gann's counsel revisit the issue before or during the joint trial. Gann's counsel did ask the trial court prior to the joint trial whether the court's rulings on motions would stand. The trial court replied in the affirmative and added, "Unless there has been some, change, some evidentiary change, whatever, yes."

Gann cannot persuasively argue that he relied on the court's response in not seeking Goodman's psychiatric records during the second trial, since this response did not prevent Gann's counsel from revisiting other adverse rulings that the court made during the first trial, such as the admissibility of Hansen's prearrest statements. Absent a stipulation, a trial court's rulings made at a first trial are not necessarily in effect at a second trial. (*People v. Friend* (2009) 47 Cal.4th 1, 63.) "While it is true the trial judge stated he 'just assumed that rulings [he] made [at the first trial] would be observed by the prosecution' at the second trial, defendant presents no authority that the rulings of the first trial were applicable to the second trial absent a stipulation by the parties to that effect." (*Ibid.*)

In light of the procedural posture on this issue, we conclude that there was no error with respect to the trial court's ruling concerning Goodman's sealed psychiatric records.

IV.

HANSEN'S APPEAL

A. *Admission of Hansen's confession*

Hansen contends that the trial court prejudicially erred by admitting her postarrest confession because, she maintains, the confession was induced by promises of leniency and was therefore involuntary.

After arresting Hansen at the home of Richard and Bonnie MacNeil, detectives Jonathan Smith and Brett Burkett drove Hansen to the police station. While en route to the station, Smith made two comments to Hansen that Hansen maintains induced her to confess. The first comment is that, " 'the next hour . . . would be the most important hour of her life,' " and the second is that, " '[Hansen's] behavior would affect how she spen[t] the rest of her life.' "

At the police station, Detective Smith told Hansen that he wanted a "truthful statement." He then advised Hansen of her *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436) rights. Hansen waived her *Miranda* rights, and the interview proceeded. Due to a technical glitch, the audio recording of the interview failed to start immediately. As a result, the initial portion of the interview was not recorded. After Hansen had confessed to her participation in the murder of MacNeil, the detectives, who had discovered the recording problem, asked her whether they had threatened her or promised her anything. Hansen replied that the only thing that she had been promised was that she

would be a lot better off if she told the truth—which, Hansen said, she thought was "pretty much common knowledge." When the detectives asked Hansen about her familiarity with the *Miranda* case, Hansen related that her stepfather was a defense attorney, that she excelled in her government class, and that she aspired to become a judge. When asked if she remembered what Smith had told her was going to happen to her, Hansen said, "It depends on what I say." Smith left the room at this point. When he returned, the following colloquy occurred:

> "[SMITH]: . . . [D]o you remember when the first, do you remember what happened the first time or before, just before we ask[ed] you questions? Do you remember what happened?"
>
> "HANSEN: You read me my *Miranda* rights?
>
> "[SMITH]: Correct. So, were there any questions asked of you before that?
>
> "HANSEN: No.
>
> "[SMITH]: No. So, you clearly remember us reading your rights and you told us you understood your rights. And you told us, you want to talk. Correct? And then the other thing I wanted to clear up was, uh, you said, that, uh, well, I asked if or I think [Burkett] asked you if any promises were made to you. You said, 'No.' Right? No promises were made to you, were there?
>
> "HANSEN: No. Other than, just what I said, like . . .
>
> "[SMITH]: He said[] that you'd be better off . . .
>
> "HANSEN: If I told the truth.
>
> "[SMITH]: Right. And what, what did that mean to you?
>
> "HANSEN: That I wouldn't go to jail my whole life.

"[SMITH]: Did you think . . . you wouldn't go to jail if you told us the truth?

"HANSEN: No."

Smith left the interview room again. After Smith returned, he told Hansen that she was mistaken in her belief that her confession would keep her from going to prison for the rest of her life. Smith said that it was possible that she *would* go to prison for the rest of her life and that he wanted to clarify this because she had told him "that[] that was your interpretation." Smith and Burkett told Hansen that it was up to the district attorney to decide how to handle the case and that her punishment would be determined by the criminal justice system.

In denying Hansen's motion to suppress the confession, the trial court found that the totality of circumstances did not demonstrate that the detectives' statements were "sufficient inducement to be the motivating cause for [her] confession."

A defendant's confession is involuntary, and therefore inadmissible at trial, if it is the product of coercive police activity. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167; *People v. Williams* (1997) 16 Cal.4th 635, 659.) The presence of police coercion is a crucial element in determining whether a confession is voluntary. (*Withrow v. Williams* (1993) 507 U.S. 680, 693; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1093 [coercive policy activity is a necessary predicate to a finding that the statement was involuntary].) In addition to the crucial element of whether police used coercion to attempt to induce a confession, there must be a causal connection between the police activity and the confession. (*People v. Guerra*, *supra*, at p. 1093; see also *People v.*

Vasila (1995) 38 Cal.App.4th 865, 873 [improper promise of leniency does not make statement involuntary unless the promise was motivating factor in giving statement].) Thus, there are two prerequisites to a finding that a confession was involuntary: (1) whether there was police coercion, and, if so, (2) "whether defendant's choice to confess was not 'essentially free' because his will was overborne. [Citation.]" (*People v. Memro* (1995) 11 Cal.4th 786, 827, overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.)

On a motion to suppress a statement made to police, the prosecution must show by a preponderance of the evidence that the statement was made voluntarily. (*People v. Boyette* (2002) 29 Cal.4th 381, 411.) When determining whether a statement to police is voluntary, the "totality of circumstances" must be considered, including the details of the interrogation and the characteristics of the accused. (*Withrow v. Williams*, *supra*, 507 U.S. at pp. 693-694; *People v. Williams*, *supra*, 16 Cal.4th at p. 660.) Among the factors to take into account are: (1) the crucial element of police coercion; (2) the length of the interrogation; (3) its location; (4) its continuity; and (5) the defendant's maturity, education, physical condition and mental health. (*People v. Williams*, *supra*, at p. 660.)

It is undisputed that Hansen was not subjected to overt physical brutality. However, this fact is not dispositive, "for 'coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.' " (*People v. Montano* (1991) 226 Cal.App.3d 914, 934, quoting *Blackburn v. Alabama* (1960) 361 U.S. 199, 206.) The question in this case is whether psychological coercion, by means of an implied promise of leniency, occurred. "It is well settled that a

confession is involuntary . . . if it is elicited by any promise of benefit or leniency whether express or implied. [Citations.]" (*People v. Jiminez* (1978) 21 Cal.3d 595, 611, overruled on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 409, fn. 17.)

In this context, not all references to potential benefit are improper. Truthful statements that an accused's cooperation might be useful in later plea negotiations, when unaccompanied by threats or promises, will not render a confession involuntary. (*People v. Jones* (1998) 17 Cal.4th 279, 298.) Similarly, it is not improper for police to tell an accused that it would be better to tell the truth. (*Ibid*.) When the police merely point out a benefit that flows naturally from truthful and honest conduct, a subsequent statement will not be considered involuntary. (*People v. Thompson* (1990) 50 Cal.3d 134, 170.) Thus, police comments to the effect that the accused would "feel better" or would be "helping himself by cooperating" do not, by themselves, establish improper inducement. (*People v. Jackson* (1980) 28 Cal.3d 264, 299, disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.)

However, if the accused "is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one," the statement is deemed to be coerced. (*People v. Hill* (1967) 66 Cal.2d 536, 549.)

Once police coercion is demonstrated, a causal link between that coercion and the confession must be shown. The due process issue in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to

overbear petitioner's will to resist and bring about confessions not freely self-determined." (*Rogers v. Richmond* (1961) 365 U.S. 534, 544.)

> "A confession is 'obtained' by a promise within the proscription of both the federal and state due process guarantees if and only if inducement and statement are linked, as it were by 'proximate' causation. . . . The requisite causal connection between promise and confession must be more than 'but for': causation-in-fact is insufficient. [Citation.] 'If the test was whether a statement would have been made but for the law enforcement conduct, virtually no statement would be deemed voluntary because so few people give incriminating statements in the absence of some kind of official action.' [Citation.]" (*People v. Benson* (1990) 52 Cal.3d 754, 778-779; see also *People v. Mickey* (1991) 54 Cal.3d 612, 647 [coercive activity must be "the 'proximate cause' of the statement"].)

In reviewing the trial court's denial of a suppression motion, we defer to any factual findings that the court may have made as to the circumstances surrounding the confession, if supported by the record. We independently review the legal issue of whether the prosecution met its burden to prove that the confession was voluntarily given without previous inducement, intimidation or threat. (*People v. Woods* (1999) 21 Cal.4th 668, 673-674.)

With respect to the two statements by Smith, i.e., that " 'the next hour . . . would be the most important hour of [Hansen's] life' " and that " '[Hansen's] behavior would affect how she spen[t] the rest of her life,' " the first statement is neither an express nor implied promise of leniency. Rather, it appears that Smith was emphasizing the seriousness of the situation. Although one could interpret the statement as implying that now was the time to start being truthful, such an implication does not constitute psychological

coercion. (*People v. Jones*, *supra*, 17 Cal.4th at p. 298; *People v. Williams*, *supra*, 16 Cal.4th at pp. 660-661; *People v. Flores* (1983) 144 Cal.App.3d 459, 469.)

The second statement is more problematic. That statement arguably implied that Hansen might or might not spend the rest of her life in prison, depending on how she conducted herself during the interview. Smith's postconfession attempts to clarify that he did not intend this implication do not cure the problem, since Hansen had already confessed; an after-the-fact explanation cannot remedy an improper inducement.

The question remains whether, under the totality of the circumstances, the implied promise that if Hansen were to confess, she would not spend the rest of her life in prison, motivated her to confess—that is, whether such inducement was sufficient "to overbear [her] will to resist and bring about [a] confession[] not freely self-determined." (*Rogers v. Richmond*, *supra*, 365 U.S. at p. 544.)

The interrogation was recorded on a DVD player. Throughout the interview, Hansen, who was one month shy of her 18th birthday, displayed a calm and rational demeanor. She showed emotion only during breaks and at the end of the interview. Hansen's responses and her level of engagement in the interview indicate that she understood what was being discussed and that she was aware of her predicament. She also told the detectives that she was familiar with her *Miranda* rights. The interview lasted about 80 minutes, and thus, was not excessive in length. The detectives removed Hansen's handcuffs for the interview. Throughout the interview, the detectives' tone and demeanor were civil and professional. The detectives did not use deceptive practices during the interview. In fact, Hansen remarked during the interview that the detectives

were "both very nice," and said, "I think you guys are the most straightforward people I've seen."

The DVD recording of the interview supports the trial court's finding that Hansen did not confess because of coercion applied by the police, but rather, that she confessed freely and voluntarily. After independent review of the interrogation DVD, we agree.

B. *Presentation of Gann's defense before Hansen jury*

Hansen contends that the trial court prejudicially erred by allowing her jury to hear portions of Gann's defense case. The contention is without merit.

After the prosecution presented its last witness in its case-in-chief, Hansen's counsel stated that Hansen's jury should not be present for Gann's defense case because Gann's witnesses were not relevant to Hansen. In later discussions with the court, Hansen's counsel elaborated that since the prosecution had rested its case as to Hansen, allowing Gann's counsel to present Gann's case-in-chief in the presence of Hansen's jury would effectively mean that Gann's counsel would be acting as an additional prosecutor against Hansen.[15]

The trial court rejected these arguments and ruled that Hansen's jury would be present during portions of Gann's defense case. The court found that the evidence was

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15 Additionally, Hansen's counsel asked for discovery of the evidence that Gann planned to present during his case to allow counsel to prepare for cross-examination.

relevant to both defendants, that there was no *Aranda-Bruton* issue,[16] and that Hansen's counsel had been given sufficient time to prepare for this eventuality.

After the prosecution rested its case-in-chief against both defendants, Hansen rested without presenting any evidence. Gann's counsel then presented his defense case. Both Hansen's jury and Gann's jury were present during the testimony of four of Gann's witnesses. Detective Robert Donaldson demonstrated how a right-handed person typically would lay down the murder weapon. Lisa Dimeo, a forensic investigator, testified that two sets of fingerprints were found on the murder weapon, and that neither set was from Gann. Dimeo also said that she could not exclude MacNeil's right ring finger as a source in one of the sets of fingerprints. Detective Smith identified a photograph of Gann's truck, which had been impounded in Arizona. Karen Gould, a defense investigator, demonstrated that with a zip-tie binding her hands behind her back, she could easily make the binding tighter by herself. On cross-examination by Hansen's counsel, Gould admitted that she did not suffer from rheumatoid arthritis, as Hansen did. The Hansen jury was excused after Gould's testimony, and did not hear the testimony of the remainder of Gann's witnesses.

The law has a preference for joint trials of jointly charged defendants. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1049.) Section 1098 provides that criminal defendants charged jointly with a crime must be tried jointly unless the court orders separate trials.

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16 *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*); *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).

The need for multiple juries in joint trials arises because of the holdings in *Aranda, supra,* 63 Cal.2d at pages 529 to 531, and *Bruton, supra,* 391 U.S. at pages 126 and 137—namely, that extrajudicial statements of a nontestifying codefendant implicating the other defendant are inadmissible against the other defendant in a joint trial. "[T]he problem addressed in *Bruton* and *Aranda* may be solved by the use of separate juries for codefendants, with each jury to be excused at appropriate times to avoid exposure to inadmissible evidence." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1207-1208.) The use of dual juries is not a basis for reversal on appeal in the absence of either "identifiable prejudice" resulting from the manner in which it is implemented or " 'gross unfairness' " that deprives the defendant of a fair trial or due process. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1287, citation omitted.)

The testimony of the four witnesses that Hansen's jury heard constituted relevant evidence, and did not implicate Hansen's rights under *Aranda* and *Bruton*. Further, the fact that the prosecution had rested did not render the testimony of these four witnesses "inadmissible evidence" as to Hansen. (*People v. Jackson, supra,* 13 Cal.4th at p. 1208.) The issue is not whether the testimony would have been precluded in a separate trial under the rules governing the order of proof (see §§ 1093, 1094), but rather, whether the evidence was in fact admissible as to Hansen in her joint trial with Gann.

Hansen argues that if she had been separately tried, her jury would not have heard the prejudicial testimony of these four witnesses. Hansen claims that the testimony of these witnesses decimated her defense, i.e., that she had withdrawn from the conspiracy,

because the evidence implied that she—and not Gann—had fatally shot MacNeil. Specifically, Hansen claims that

> "the jury would [] have been left with the impression: (1) [Hansen] could have been the shooter because [Dimeo] did not test the latent fingerprints lifted from the weapon against [Hansen's] known prints and her counsel apparently did no such testing; (2) [Hansen] also could have been the shooter because the orientation of the gun on the ground was consistent with that of a right-handed person and Gann was not right-handed; and (3) [Hansen's] extrajudicial statements regarding zip-ties were fabrications. More importantly, [Hansen's] jury would not have seen a live demonstration on placement of a firearm on the ground by a right-handed person. Nor would it have seen the use of the zip-ties."

Hansen's arguments are based on conjecture. During Gann's first trial, the defense called Donaldson and Dimeo. If Hansen had been tried separately, it is possible, if not likely, that the prosecutor would have chosen to present testimony from Donaldson and from a fingerprint expert who examined the gun. However, because this was a joint trial, the prosecutor may have anticipated that Gann would call such witnesses and, for tactical or strategic reasons, chose to cross-examine the witnesses when Gann called them rather than calling them during the prosecution's case-in-chief. Hansen's speculative claims as to possible prejudice from the use of dual juries do not establish the "identifiable prejudice resulting from the manner in which it is implemented" that is required for reversal. (*People v. Harris* (1989) 47 Cal.3d 1047, 1075.) Further, there was no constitutional violation because the evidence that Gann presented in the presence of Hansen's jury is evidence that the prosecutor could have presented, but did not. (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1208.) Hansen's due process rights were not infringed

because Gann, rather than the prosecutor, introduced *admissible* evidence against her. (*Ibid*.) Third, Hansen had no right to a separate trial. (See *People v. Baa* (1944) 24 Cal.2d 374, 377; *People v. Wallace* (1970) 13 Cal.App.3d 608, 616.)

Even if a jury at a separate trial would not have heard the testimony of these four witnesses, it does not follow that it was reversible error for Hansen's jury to have been present during the testimony of these witnesses at this trial. (See *Zafiro v. United States* (1993) 506 U.S. 534, 540.) "[I]t is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." (*Ibid*.)

There was no error in allowing Hansen's jury to hear these four witnesses testify. Hansen has failed to demonstrate either prejudice or gross unfairness that deprived her of a fair trial or due process.

C. *Imposition of parole restitution fine*

Hansen contends that the trial court erred by imposing a parole restitution fine of $1,000 pursuant to section 1202.45 because her sentence was life in prison without the possibility of parole. She is correct. The fine must be stricken.

As the Attorney General acknowledges, a parole restitution fine under section 1202.45 does not apply to a defendant who has been sentenced to a term of life in prison without the possibility of parole. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183-1186.)

V.

DISPOSITION

As to Gann, the judgment is affirmed.

As to Hansen, the trial court is directed to (1) strike the $1,000 parole restitution fine under section 1202.45; (2) prepare an amended abstract of judgment; and (3) forward the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

McINTYRE, J.