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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SUSAN MAE POLK, Defendant and Appellant.	A117633 (Contra Costa County Super. Ct. No. 031668-7)

Defendant was convicted of the second degree murder of her husband following a trial at which she acted as her own attorney. The husband's body had been found in a cottage at their home, stabbed repeatedly. Defendant admitted the stabbing but testified she acted in self-defense.

Defendant argues the trial court should have dismissed the jury panel after the prosecution was unable to explain its peremptory challenge of a female juror, erred in failing to give an instruction on heat of passion voluntary manslaughter, and should not have admitted her statements to police, which were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). In addition, defendant contends the court, prosecutor, and jury committed prejudicial misconduct in the course of the trial. Finding no prejudicial error, we affirm the conviction.

During the proceedings, defendant executed a promissory note, secured by a lien against the family home, agreeing to reimburse the County of Contra Costa (County) for costs incurred in her defense. Following the trial, the County sought an order compelling

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.A., II.B., II.D., II.E., II.F., II.G., II.H., and II.I.

defendant to reimburse those costs from the proceeds of the sale of her interest in the home. Although the trial court held a hearing with respect to the amount of reimbursable costs incurred by the County, it refused to consider whether defendant had the "present ability" to pay those costs, as required by Penal Code section 987.8, subdivision (b), concluding the presence of the lien made such a finding unnecessary. We conclude the County's lien did not obviate the need for the trial court to determine whether defendant had the financial ability to reimburse the County's expenses, and we remand for the necessary hearing.

I. BACKGROUND

Defendant was charged in a single-count indictment, filed August 27, 2003, with the murder of her husband. (Pen. Code, § 187.) The indictment further alleged defendant personally used a deadly and dangerous weapon. (Pen. Code, § 12022, subd. (b)(1).) During defendant's initial trial, she was represented by counsel, but the court declared a mistrial when her attorney suffered a family tragedy. Following a second trial in which defendant represented herself, a jury convicted her of second degree murder, with a finding she used a deadly and dangerous weapon. The trial court imposed a sentence of 16 years to life.

Defendant and her husband, Felix Polk, had been married for 21 years at the time of the killing and had three teen-aged sons.[1] At 71, Felix was 26 years older than defendant. They first met nine years before their marriage when Felix, a psychologist, began treating defendant, then a high school student.

In October 2002, when the killing occurred, the couple was enmeshed in divorce proceedings. When Felix first retained divorce counsel in 2001, he told his attorney defendant "could be violent" and was "unpredictable and . . . possibly dangerous." As

[1] Because defendant's contentions on appeal do not challenge the sufficiency of the evidence, in this background section we review only in general terms the principal evidence from a lengthy trial. To the extent necessary, the particular procedural circumstances and evidence relevant to each of defendant's appellate arguments are set out in subsequent sections.

the proceedings progressed, Felix became more concerned about defendant. By August 2002, Felix was "in fear for his life." According to the couple's youngest son, Gabriel, defendant said on several occasions she intended to kill Felix and discussed the manner in which she would do so. As a result of the frequency and intensity of these threats, a week before the murder Gabriel told his father he "was scared for his [father's] life."

On October 2, 2002, while defendant was away in Montana, Felix obtained a court order granting him custody of Gabriel and exclusive use of the family home in Orinda. When defendant learned of the court order soon after, she and Felix had a "heated" telephone call, during which she threatened to kill him. Felix took the threat seriously enough to report it to the police.

Defendant returned to Orinda on October 9. While Felix was at work the next day, she persuaded Gabriel to help her move Felix's bed and other possessions into a cottage on the property. After Felix arrived home, they had another angry argument, during which defendant again threatened to kill Felix. The police were called, and Felix and Gabriel moved briefly into a hotel. Three days later, a Sunday, Felix and Gabriel awoke early to drive the family's oldest son, Adam, to school at UCLA, returning to the Orinda home late at night. Gabriel went to sleep in the house, while Felix retired to the cottage.

The next day, Felix did not return home from work at the expected time and could not be located by telephone. When Gabriel asked defendant if she knew where Felix was, she said she did not know. Gabriel eventually became suspicious and, later in the evening, checked the cottage, finding the front door locked. When Gabriel returned to the house and again asked defendant about Felix, she said, "Aren't you happy he's gone? I am," and, later, "I guess I didn't use a shotgun, did I?" Unnerved by these enigmatic comments, an hour later Gabriel returned to the cottage, found a second door unlocked, and entered. Inside, he glimpsed his father lying motionless on his back, covered in blood. Gabriel returned to the house, grabbed a telephone, and hiding from his mother outside, called the police.

When police arrived, they found the floor of the cottage living room covered in dried blood. Tracked across the floor were bloody shoeprints matching defendant's shoe size, along with her bloody footprint. Felix's body, hands still clutching a clump of defendant's hair, was found, according to the prosecution's pathologist, to have at least five deep stab wounds, individually penetrating his right lung, stomach, pericardium, diaphragm, and the fat near his kidneys. He also had a large number of superficial stab wounds and defensive cuts to his hands, forearms, feet, and lower legs and a blunt force injury behind his right ear.

When told of Felix's death by police, defendant showed no emotion, saying, "Oh well, we were going to get a divorce anyhow." In a subsequent police interview, she professed ignorance of Felix's death, evenly recounting her marital grievances with Felix and claiming to have last seen him early on the prior morning, before he and Gabriel drove Adam to Los Angeles. Police examined defendant for fresh wounds and found none.

At trial, defendant acknowledged killing Felix, characterizing her acts as self-defense. Defendant described at length her troubled marriage, characterized by Felix's psychological and physical abuse of her. On the night of the killing, she testified, she went to the cottage to talk to Felix between 10:30 and 10:45, taking pepper spray as a precaution. For a time, they discussed financial matters and their children. Felix became angry, and at some point he walked over and struck defendant in the face. Defendant sprayed him, but he was undeterred, hitting her again. After further struggle, he grabbed a knife and stabbed at her leg, piercing her pants. Afraid for her life, defendant kicked Felix in the groin, grabbed the knife from him, and began stabbing him. She then took steps to cover up the killing and denied involvement to the police because she believed she would be "railroaded" by the criminal justice system.

The couple's middle son, Eli, testified in support of defendant. Eli, who was residing at a boys ranch at the time of the killing, confirmed Felix was violent and controlling. Contrary to the testimony of his brothers, Eli denied defendant was ever violent with Felix or had ever threatened him.

Defendant also offered Dr. John Cooper, an expert on forensic pathology, to opine on the cause of Felix's death. According to Cooper, Felix died of "acute coronary insufficiency due to severe coronary artery disease," to which the multiple stab wounds "were a contributing factor." Cooper reasoned Felix's wounds, although serious, were not immediately life-threatening. Felix had, however, serious coronary disease, including severe blockage of two main arteries, that was the primary cause of his death. As a result, Cooper believed Felix's death to have been "natural," rather than the result of a homicide. Cooper also explained the pattern of Felix's wounds was consistent with defendant's claim of self-defense. In addition to Cooper, several other witnesses, including experts, testified for defendant.

II. DISCUSSION

Defendant raises a number of challenges to her conviction. We consider each in turn.

A. Batson/Wheeler *Violation*

Defendant first contends the trial court erred in failing to dismiss the jury panel in response to an objection under *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), disapproved in part by *Johnson v. California* (2005) 545 U.S. 162, 173.

1. *Procedural Background*

Near the close of jury selection, defendant made a motion under *Batson* and *Wheeler*, contending the prosecution had selectively dismissed women jurors.[2] At the time of the motion, the jury consisted of six women and five men, but 19 of the prosecution's 22 peremptory challenges had been directed at female jurors. In

[2] The parties' briefs also discuss the court's failed attempt to reseat a juror who was dismissed by the prosecution. This juror's dismissal was challenged by defendant not on *Batson/Wheeler* grounds but on the claim, ultimately upheld by the court, that the prosecution had been permitted to exercise an extra peremptory challenge. Because this juror's dismissal is irrelevant to the *Batson/Wheeler* issues raised on appeal, we do not discuss it further.

presenting her argument, defendant discussed 14 of the 19 dismissed women jurors, contending there was no legitimate basis for their challenge.[3]

Without expressly finding a prima facie showing of discrimination, the trial court asked the prosecutor to explain the reasons for the dismissals of these jurors. The prosecutor explained 13 of the 14 challenges. Although the prosecutor had notes about the 14th juror, he was unable to recall his reasons for dismissing her.[4] During subsequent argument, at least three additional jurors were addressed. The court found a legitimate, gender-neutral reason had been offered for each challenge, other than the forgotten one. Although the trial court made no express finding of discrimination as to that juror, it was concerned by the prosecution's inability to explain the dismissal. The trial court granted the defense one additional peremptory challenge as a remedy, noting it was unwilling to dismiss the entire panel on this ground. As the court explained, "I think that we have spent a great deal of time with what I thought was a good jury pool in order to select this jury, but I think there has to be a remedy fashioned for that one challenge, which there is no—there doesn't appear to be an articulatable [*sic*] reason for it. [¶] So what I am going to do, because I don't think that starting from scratch is necessary in this case and having to call a brand new panel up for that one challenge, is to grant the defense one additional peremptory challenge as a remedy for that one challenge where there is no reason articulated." Defendant asked a question to clarify the scope of the court's relief, and, receiving a reply, responded, "Thank you." She did not object to the court's remedy, and jury selection resumed. Defendant later exercised an additional challenge.

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[3] With respect to three dismissed jurors who were both female and African-American, defendant asserted her claim on grounds of both gender and race. On appeal, defendant does not challenge the court's ruling that the prosecution's challenges were not motivated by racial discrimination.

[4] As the prosecutor said, "Ms. [] was just someone with no children. Looked like she served on a jury, which came to a verdict, but I don't really recall a—I don't really recall what the reason was, quite frankly, on that one, other than—no, I just don't recall. I don't recall much about Ms. []. She was there for a long time. She had no strong opinions on anything, quite frankly. And she lived in a mobile home park, and she had no kids. So I really don't have a—I don't have a reason for Ms. []."

Following selection of the jury, the parties proceeded to select alternates. When the prosecution exercised a peremptory challenge to a female alternate, defendant again objected on *Batson/Wheeler* grounds, saying, "I'm going to challenge the entire panel of the jury. I don't believe that the remedy that the Court provided . . . is sufficient . . . ." After justifying his challenge to the woman alternate, the prosecutor argued the remedy fashioned by the court was adequate and it was inappropriate to discharge an entire jury when no systematic discrimination had been found. The court acknowledged it had made no finding of systematic bias, reaffirmed its conclusion a gender-neutral reason had been provided for all but one of the dismissals, including the most recent alternate, and denied any further relief.[5]

2. *Applicable Law*

"In *Batson,* the United States Supreme Court held that the exercise of a peremptory challenge for a discriminatory purpose offends equal protection under the Fourteenth Amendment. [Citation.] Years earlier, the California Supreme Court in *Wheeler* held that such conduct violated the State Constitution's guarantee of a trial by a jury drawn from a venire representative of the community. [Citation.] A prosecutor is presumed to exercise peremptory challenges in a manner conforming to these constitutional requirements. [Citation.] Thus, a defendant seeking to challenge a prosecutor's peremptory challenge on these constitutional grounds first must raise a timely objection and must show that the relevant circumstances give rise to an inference that the objectionable challenge was purposefully discriminatory. Second, if a defendant makes this prima facie showing, the burden shifts to the prosecutor to provide permissible race-neutral justifications for the peremptory challenge. Finally, the trial court must then

[5] A short time later, defendant raised the *Batson/Wheeler* objection again. After some discussion, it became clear defendant was seeking the removal of a particular seated juror. After an off-the-record conversation with the prosecutor, defendant announced, "I withdraw my objection." Although the Attorney General argues this comment should be construed as a waiver of defendant's *Batson/Wheeler* claim, it is clear in context defendant was merely retracting her attempt to unseat the single juror, not making a broader statement about her *Batson/Wheeler* claim.

determine whether the defendant has proved that the objectionable challenge was based on purposeful discrimination." (*People v. Calvin* (2008) 159 Cal.App.4th 1377, 1383.)[6]

Batson did not require a particular remedy in the event purposeful discrimination is found in the exercise of peremptory challenges, expressly leaving implementation of the decision to the state and lower federal courts. (*Batson, supra,* 476 U.S. at p. 99, fn. 24.) Prior to *Batson*, however, *Wheeler* had instructed that, in the event an objection was sustained as to any peremptory challenge, the court "must dismiss the jurors thus far selected. So too it must quash any remaining venire . . . . Upon such dismissal a different venire shall be drawn and the jury selection process may begin anew." (*Wheeler, supra,* 22 Cal.3d at p. 282, fn. omitted.)

In a subsequent decision, *People v. Willis* (2002) 27 Cal.4th 811 (*Willis*), our Supreme Court recognized the need for greater flexibility in remedying discrimination in the selection of the jury, affirming a trial court's decision to retain an improperly challenged juror rather than dismiss the panel after concluding the unlawful challenge was made with the intention of provoking a mistrial. (*Id.* at p. 821.) Similarly, in *People v. Overby* (2004) 124 Cal.App.4th 1237 (*Overby*), the court approved the practice of reseating a challenged juror rather than dismissing the entire panel, holding that under *Willis*, remedies short of jury discharge are acceptable so long as they have the consent of the complaining party. (*Overby*, at pp. 1242–1243.)

3. *Waiver*

Although California decisions have approved the reseating of a challenged juror in limited circumstances, the trial court's grant of an additional peremptory challenge went beyond the remedies approved to date in California.[7] We find it unnecessary to decide

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[6] *Batson* specifically addressed discrimination on the basis of race. The Supreme Court extended its ruling to discrimination on the basis of gender in *J. E. B. v. Alabama ex rel. T. B.* (1994) 511 U.S. 127, 143.

[7] Under federal practice, alternative remedies are permitted with or without the consent of the objecting party, so long as the alternative remedies are reasonable under the circumstances. (*U.S. v. Walker* (11th Cir. 2007) 490 F.3d 1282, 1294; *U.S. v. Ramirez-Martinez* (9th Cir. 2001) 273 F.3d 903, 910, overruled on other grounds in

whether, under these circumstances, the remedy was appropriate because, as discussed below, defendant accepted the trial court's grant of an additional peremptory challenge, thereby waiving any objection to the remedy.

There is no question *Batson/Wheeler* error may be waived. In *People v. Fudge* (1994) 7 Cal.4th 1075, defense counsel withdrew his *Wheeler* motion prior to its resolution by the trial court. (*Fudge*, at p. 1097.) When the defendant attempted to raise the issue on appeal, the court held any error waived. (*Ibid.*) Similarly, in *Overby*, the court held that the defendant's acceptance of an alternative remedy waives any later claim based on the court's failure to discharge the entire jury. (*Overby, supra*, 124 Cal.App.4th at pp. 1242–1244.) As the court held, the waiver need not be express if consent can be implied from the defendant's conduct. (*Id.* at p. 1244.)

Defendant's thanking the court and resuming jury selection without objecting to the court's award of an alternate remedy constituted implied consent to that remedy and a waiver of any later request to discharge the jury on the basis of this claimed *Batson/Wheeler* violation. Although defendant contends her silence at this time should not be interpreted as consent, her decision to thank the court and resume jury selection at a time when an objection would have been expected if she was dissatisfied with the court's proposed remedy is open to no other reasonable interpretation. Not only did her conduct manifest an unmistakable acceptance of the alternative remedy, she proceeded to exercise an additional peremptory challenge, thereby taking advantage of the remedy granted to her. She was not entitled later to withdraw that consent merely because of a change of heart.

U.S. v. Lopez (9th Cir. 2007) 484 F.3d 1186, 1191–1192; *Koo v. McBride* (7th Cir. 1997) 124 F.3d 869, 873.) Other jurisdictions have approved the grant of additional peremptory challenges as a *Batson/Wheeler* remedy. (See *People v. Chin* (2004) 771 N.Y.S.2d 158, 159; *Com. v. Hill* (Penn. Super.Ct. 1999) 727 A.2d 578, 584.) Neither approach has yet been approved in California.

B. *Refusal of Voluntary Manslaughter Instruction*

Defendant contends the trial court erred in concluding the evidence was insufficient to support giving a jury instruction on the lesser included offense of voluntary manslaughter as the result of a sudden quarrel or heat of passion.

Defendant initially resisted any instruction on voluntary manslaughter, but when the court informed the parties it intended to instruct the jury on voluntary manslaughter as a result of imperfect self-defense, defendant asked that a sudden quarrel or heat of passion instruction be given as well. The court declined, finding insufficient evidence in the record to support the instruction.

The trial court has a sua sponte duty to instruct on all principles of law relevant to the issues raised by the evidence, including every lesser included offense of the charged offenses supported by the evidence, regardless of whether the parties request an instruction. (*People v. Blair* (2005) 36 Cal.4th 686, 744; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Accordingly, a trial court in a murder prosecution is required to deliver an instruction on voluntary manslaughter as a result of a sudden quarrel or heat of passion if there is substantial evidence to support a conviction on that theory. (*Blair,* at p. 745.) In this context, "substantial evidence" is "evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." (*Ibid.*)

" 'The Penal Code defines manslaughter as "the unlawful killing of a human being without malice." [Citation.] The offense is voluntary manslaughter when the killing is "upon a sudden quarrel or heat of passion." ' " (*People v. Manriquez* (2005) 37 Cal.4th 547, 583 (*Manriquez*).) "Heat of passion" is present when " 'the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation." ' " (*People v. Lasko* (2000) 23 Cal.4th 101, 108 (*Lasko*).)

"The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. . . . '[T]his heat of passion must be such a passion as would

naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances.' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) The passion aroused need not be anger or rage, but can be any violent, intense, high-wrought or enthusiastic emotion, other than revenge. (*Lasko, supra,* 23 Cal.4th at p. 108.) In addition, the defendant's passion must be a response to provocation by the victim or by "conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People v. Lee* (1999) 20 Cal.4th 47, 59.)[8]

We review de novo the trial court's determination not to instruct on a particular lesser included offense and make an independent determination whether the instruction should have been given. (*Manriquez, supra,* 37 Cal.4th at p. 584.)

Defendant focuses most of her attention on the legal adequacy of Felix's provocation. As suggested above, the victim's provocation must be substantial to qualify as legally sufficient to justify a heat of passion manslaughter. (See, e.g., *People v. Moye* (2009) 47 Cal.4th 537, 551 (*Moye*) [fight the night before and kicking tires of vehicle insufficient provocation]; *Manriquez*, *supra*, 37 Cal.4th at pp. 585–586 [insults and taunting insufficient provocation]; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 83 [cutting off vehicle in traffic insufficient provocation].)

We decline to decide the issue of provocation, however, because even if Felix's conduct was legally sufficient to qualify as provocation, this alone would not demonstrate error in the trial court's refusal to give the voluntary manslaughter instruction. To justify the instruction, defendant was also required to show that substantial evidence supported

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[8] This element of provocation and the "objective" aspect of the element of passion are two sides of the same coin. If a defendant demonstrates the victim's provocation was sufficient to stir irrational passion in an ordinary person, the defendant has necessarily also demonstrated his or her reaction was " 'such . . . as would naturally be aroused in the mind of an ordinarily reasonable person' " (*People v. Steele*, *supra*, 27 Cal.4th at p. 1252) by the provocation.

the "subjective" element of passion: that, in actual fact, her reason was overcome by extreme emotion at the time she killed Felix. (*People v. Steele*, *supra*, 27 Cal.4th at pp. 1252–1253.) We find insufficient evidence of this element to support the heat of passion instruction.

The only direct evidence of defendant's emotional state at the time she killed Felix was her own testimony. According to this testimony, the "subjective" element of heat of passion was wholly absent. Defendant testified that, although fearful for her life, she kept her wits about her when reacting to Felix's conduct. She was neither angry nor otherwise overcome by emotion. Defendant confirmed this during argument over the admission of certain evidence late in the trial, when she denied she "snapped" at the time of the killing. On the contrary, as defendant characterized her testimony, "There was no passion. There was fear on my part, but not passion. I was not angry. I was not enraged. It was the other way around."

Defendant now contends, notwithstanding this direct evidence, the jury could have inferred she acted from passion from the severity of the injuries she inflicted on Felix, which defendant contends "suggest[] that [she] may have inflicted the wounds indiscriminately while under the influence of extreme emotion rather than in an efficient effort to kill him." While there is no doubt Felix's injuries were extreme, they do not necessarily indicate a killing in the heat of passion. In addition to a person overcome by passion, the many wounds are equally consistent with killing by a person striking out in frantic self-defense, as defendant testified, or a coolly determined killer, thoroughly intent on accomplishing her purpose. Given their inherent ambiguity, any attempt to infer the degree of arousal of the killer's emotions from the nature of the wounds would have been sheer speculation. The evidence of Felix's injuries alone was not sufficient for a reasonable jury to conclude defendant acted from passion. (See *People v. Benavides* (2005) 35 Cal.4th 69, 102 [fact that nature of the victim's injuries suggests they were inflicted by person in a rage is not substantial evidence to support a voluntary manslaughter instruction].)

In her reply brief, defendant contends the jury could have concluded Felix's attack, which "stunned" her and stimulated her adrenaline, caused her in fact to have acted from passion. Any such inference, however, was precluded by defendant's own testimony. She told the jury that while she acted from fear, her emotions were not overcome; she did not "snap." In light of this testimony, the only evidentiary basis for an inference that the circumstances caused defendant to act from passion, contrary to her testimony, was the nature of the wounds. As noted above, the nature of the wounds was insufficient to support the instruction.

The situation is indistinguishable from that of *Moye*, *supra*, 47 Cal.4th 537, in which the defendant beat the victim to death with a bat. The only direct evidence of the fatal encounter was the testimony of the defendant, who claimed he acted in self-defense. According to the defendant, the victim attacked him with the bat, but, after a few blows, he was able to wrest control from the victim. When the victim continued to charge, the defendant swung the bat in self-defense. Although the defendant said he was not in his right mind at the time of the fight, his testimony made clear this altered state constituted fear and alertness caused by the threat to his life. As he said, "he was worried about getting hit by [the victim] because he did not want to 'get beat down and possibly be killed.' " (*Id.* at p. 552.) Under these circumstances, the Supreme Court held, the trial court was correct in refusing to give an instruction on sudden quarrel or heat of passion. As the court noted, "[i]n the face of defendant's own testimony, no reasonable juror could conclude defendant acted ' " 'rashly or without due deliberation and reflection, and from this passion rather than from judgment . . . .' " [citations]' [citation] . . . . Although defendant did testify he was not in a 'right state of mind' when [the victim] thereafter turned and attacked him . . . , he immediately explained he was referring to his thought processes being caught up in the effort to defend himself from [the victim]." (*Id.* at pp. 553–554.)

Defendant's situation was the same. The only direct evidence of defendant's mental state was her own testimony, during which she claimed to have reacted to Felix's anger and attack in calculated self-defense, not passionate anger. As in *Moye*, there was

no substantial evidence to support any other inference. The trial court therefore did not err in refusing to deliver a heat of passion instruction.

C. Miranda *Violation*

Defendant contends the trial court erred in admitting evidence of statements she made to police during an interrogation following the discovery of Felix's killing because she was not given proper warnings under *Miranda, supra,* 384 U.S. 436. The Attorney General effectively concedes the warnings did not comply fully with *Miranda*'s requirements, a failing that would have justified exclusion of the statements in the prosecution's case-in-chief. The Attorney General argues, however, that defendant forfeited any claim of error by failing to raise this issue at trial and that any error from admission of the statements was harmless.

1. *Background*

Defendant was interviewed by police soon after Felix's body was discovered. The interviewing officer began by telling defendant she was not free to leave and, as a result, was entitled to be informed of her legal rights. He then told her she had "the right to remain silent," to have an attorney present during questioning, and to an appointed attorney if she could not afford one. When the officer then asked defendant if she wanted to discuss "what happened," she said she did, although she complained she was "very, very tired." Noting he was tired as well, the officer began to question her. Defendant's subsequent statements were introduced as evidence during the prosecution's case.

There is no question the officer's warning did not comply with *Miranda*, which requires a criminal suspect to be informed not only that he or she has the right not to answer questions—to remain silent—but also that if he or she elects to waive that right, any resulting statements can be used against the suspect in court. (*Miranda, supra,* 384 U.S. at p. 469.) If an interviewing officer fails to give either of these warnings or the other two warnings mentioned by the officer relating to counsel, *Miranda* precludes introduction of the statements in the prosecution's case-in-chief. (See *People v. Bradford* (2008) 169 Cal.App.4th 843, 854 (*Bradford*).) Because the officer did not warn

defendant her statements could be used against her in court, admission of the statements during the prosecution case was objectionable.

Despite the unambiguous nature of the officer's error, defendant never raised this issue below. Prior to the first trial, defendant's retained counsel did move to suppress her statements to police, but he did not challenge the adequacy of the *Miranda* warnings given to defendant, despite making the motion to suppress under the purported authority of *Miranda*. Instead, counsel argued the statements were "coerced" because police pressured defendant by taking Gabriel into custody at the same time she was detained. Counsel also challenged the admissibility of statements defendant made to police prior to being given any *Miranda* warnings.

An evidentiary hearing was held prior to the first trial at which defendant and the officer testified. The trial court ruled defendant was taken into custody at her home, prior to the formal police interrogation, but it refused to suppress her comments made at that time because they were not made in response to police questioning. The court also rejected her claim of coercion regarding statements made after the *Miranda* warnings were given. Although counsel had not challenged the adequacy of the *Miranda* warnings given defendant, the court nonetheless noted that it had reviewed the tape of the interview and concluded "a *Miranda*, full *Miranda*, advisement was given." Defense counsel did not object to or otherwise comment on the court's unsolicited conclusion that a full *Miranda* warning had been given, although he was provided an opportunity to do so.

During preparation for the second trial, defendant was initially represented by retained counsel. When the attorneys were discussing with the court the need for making in limine motions in preparation for the second trial, the court ruled that all pleadings, arguments, and rulings of the court from the first trial would be incorporated into the second trial, "with the understanding that you're not waiving any objections or . . . objections to rulings, that you made the first time."

Defendant soon thereafter made a motion under *Faretta v. California* (1975) 422 U.S. 806, for leave to represent herself. At the same time, her attorney declared an actual conflict had developed with defendant and asked to be relieved of his

representation. The request was granted, and defendant was permitted to proceed in propria persona. There is no indication in the record counsel had any continuing role in defendant's case.

At the second trial, after the testimony of the officers who responded to her home, defendant raised a general objection "to every non-*Mirandized* statement," disputing again the admissibility of the statements she made before being interrogated at the police station. In response, the court noted, "The *Miranda* issue was litigated prior to the first trial. It wasn't renewed formally. I'm gathering that there's a renewal of that." The court denied the motion after further argument.

Later, when one of the interrogating officers testified, defendant objected to admission of the statements she made to him as "a violation of my *Miranda* rights." The court initially responded, "The *Miranda* issue is one for the Court, and has already been litigated and decided." When defendant contended, "I have new evidence," however, the court sent the jury away and heard argument. Defendant told the court, "I have examined the . . . transcripts very carefully, and I have done some more research. And . . . the transcripts indicate that prior to talking to [the interrogating officer] I told him that I was very, very tired. That is enough to trigger . . . not just a *Miranda* warning, but to indicate to the officers that they should not proceed with the discussion." In the colloquy that followed, defendant did not challenge the substantive adequacy of the *Miranda* warnings, although she did raise again the issues surrounding the statements she made before being given the warnings. The court overruled defendant's objection, in the process reiterating that it had earlier concluded the *Miranda* warnings were "properly given."

Based on this record, there is no question the issue now raised—the substantive adequacy of the *Miranda* warnings given to defendant prior to her police interrogation—was never brought to the attention of the trial court or asserted as a basis for suppressing her statements during trial. Defendant cited *Miranda,* but the only arguments made under the authority of that decision were the claims her statements given after the *Miranda* warnings were coerced and her statements made prior to the warnings should be suppressed.

2. *Waiver*

" ' "An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that 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." ' [Citation.] ' "The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ." ' [Citation.] ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." ' " (*People v. Saunders* (1993) 5 Cal.4th 580, 589–590.)

Under Evidence Code section 353, subdivision (a), a judgment can be reversed because of an erroneous admission of evidence only if the record contains an objection both "timely made and so stated as to make clear the specific ground of the objection or motion." (*People v. Demetrulis* (2006) 39 Cal.4th 1, 20.) If a defendant fails to make a timely objection on the precise ground asserted on appeal, the error is not cognizable on appeal. (*Ibid.*) Accordingly, unless a defendant asserts in the trial court a specific ground for suppression of his or her statements to police under *Miranda,* that ground is forfeited on appeal, even if the defendant asserted other arguments under the same decision. (*People v. Rundle* (2008) 43 Cal.4th 76, 120–121, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Holt* (1997) 15 Cal.4th 619, 666; *People v. Ray* (1996) 13 Cal.4th 313, 339.) Because she did not raise the issue of the substantive adequacy of the *Miranda* warnings in the trial court, defendant has forfeited that issue on appeal.

Defendant argues she "properly preserved" the issue by objecting on grounds of *Miranda* both prior to the first trial and during the second trial. As the discussion of the record shows, however, defendant did not merely cite *Miranda.* She and her retained counsel carefully articulated their arguments under *Miranda.* Both arguments contended her statements to police were coerced. No mention was made of the warnings themselves. These claims of coercion are simply not sufficient to preserve the present issue under Evidence Code section 353, subdivision (a), because they did not call to the attention of the trial court the substantive inadequacy of the warnings under *Miranda* and provide the trial court an opportunity to avoid error on that ground. On the contrary, as noted above, when the trial court sua sponte expressed an opinion the warnings were adequate, retained counsel acceded to the characterization.[9]

3. *Ineffective Assistance of Counsel*

Defendant contends that, if she has forfeited her right to raise the inadequacy of the *Miranda* warnings because the issue was not presented to the trial court, the failure to raise the issue was a consequence of ineffective assistance of counsel. Defendant, however, represented herself in the trial resulting in the judgment presently on appeal. "Defendants who have elected self-representation may not thereafter seek reversal of their convictions on the ground that their own efforts were inadequate and amounted to a denial of effective assistance of counsel." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1226.)

Defendant contends the fault for the failure to raise the inadequacy of the *Miranda* warnings lay with her retained counsel, whose motion in limine to suppress the

[9] We find no significance in the trial court's sua sponte evaluation of the adequacy of the *Miranda* warnings. As noted below, the trial court showed a willingness to listen to argument about its earlier rulings throughout the second trial. We have no reason to conclude the trial court would have held to this ruling had defendant pointed out the specific inadequacy raised on appeal. We do not believe, and defendant does not contend, that the trial court's pronouncement relieved her of the obligation to raise the specific grounds for objection to admission of the evidence under Evidence Code section 353.

statements prior to the first trial did not mention it. When a defendant elects self-representation, however, he or she can cite the errors of counsel as constituting ineffective assistance only when counsel has been assigned a particular role in connection with the proceedings, and only to the extent counsel has performed inadequately in that role. (*People v. Blair, supra*, 36 Cal.4th 686, 723; see, e.g., *People v. Mendoza* (2000) 24 Cal.4th 130, 157 [allowing ineffective assistance claim where defendant officially represented himself, but his attorneys retained responsibility for pretrial and trial proceedings].) While it is true, as defendant argues, her counsel was not merely advisory but responsible for all aspects of her defense at the first trial, he was relieved of those duties prior to commencement of the second trial, which led to the judgment here under consideration. As far as the record reveals, he had no role in that trial. Rather, defendant took on herself the responsibility for making all evidentiary objections. It was therefore defendant's own failure to raise the *Miranda* issue when her statements to police were offered into evidence in the second trial that led to the forfeiture. "A self-represented defendant may not claim ineffective assistance on account of counsel's omission to perform an act within the scope of duties the defendant voluntarily undertook to perform personally at trial." (*People v. Bloom, supra*, 48 Cal.3d at pp. 1226–1227.)

Defendant contends retained counsel should be held responsible because he failed to make the *Miranda* argument prior to the first trial, arguing the trial court incorporated its rulings from the first trial into the second. While we might find some merit in this argument if, at the second trial, the court had prohibited the making of new arguments on issues covered in rulings from the first trial, refused to reconsider rulings made at the first trial, or otherwise dogmatically held to those rulings, that was plainly not the case. On the contrary, the trial court's incorporation of proceedings from the first trial was merely a convenience, intended to relieve the attorneys of the burden of relitigating issues already raised and resolved.[10] Throughout the second trial, the court regularly permitted defendant to raise new legal arguments and even to revisit previously settled issues. In

[10] The ruling was made prior to defendant's request to represent herself.

connection with the exclusion of her statements to police, for example, the court allowed defendant to reargue her contention the pre-*Miranda* statements should be suppressed. While the trial court initially told defendant admission of the post-*Miranda* statements was an issue of law that had been settled prior to the first trial, when defendant told the court she had "new evidence," the trial court heard defendant out and considered her new argument. Defendant was therefore free to raise new issues of law throughout the trial and was in no way bound by her retained counsel's failure to raise the *Miranda* issue prior to the first trial. For that reason, counsel's failure at the first trial to raise the issue was not the cause of defendant's failure to raise the issue at the second trial. There is no basis for a claim of ineffective assistance of counsel on this issue.

4. *Prejudice*

Even if the trial court's error in admitting defendant's statements on the prosecution's case-in-chief had been preserved for appeal, we would find no grounds for reversal because, under these circumstances, any error in the admission of those statements was not prejudicial to defendant. In making this determination, we apply the *Chapman* standard requiring reversal unless admission of the statements was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 21–22; *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1403.)

The evidence of defendant's guilt, apart from her statements to police, was strong. In the days prior to the killing, defendant had made a number of threats to kill Felix. Her son Gabriel, who witnessed the threats, took them seriously enough to fear for his father's life. Felix was similarly concerned. Felix was killed in the cottage behind defendant's house, while defendant was home. Her footprint was found in the dried blood, the shoe prints matched her size, and clumps of her hair were clenched in Felix's hands. Further, there was little or no evidence of self-defense, outside defendant's testimony. The combination of a blunt force wound to the back of the head, a single stab wound to the back, and the remaining stab wounds to the front suggested that defendant set upon Felix from the back. Moreover, she lacked the wounds that might have been expected had she been attacked. She did not report the killing to police, as would have been expected if

she had acted in self-defense, falsely pretended ignorance to her son, and apparently took steps to cover up the killing. Defendant's statements to police, in which she confirmed the couple had marital problems but otherwise denied involvement in the killing, added no significantly inculpatory information to this evidence. Given the strength of the evidence of guilt, and the minimal inculpatory value of her statements to police, admission of those statements was harmless beyond a reasonable doubt.

Defendant contends admission of the statements was damaging because her various complaints about Felix to the interrogating officer revealed "[m]ultiple motives" to kill him. As an example, she cites her comments about Felix's success in obtaining custody of Eli, his reduction of support payments to her, his efforts to remove her from the family home, his remark to Gabriel she was crazy, and his success in winning away Gabriel's loyalty. Virtually all of these issues, however, were covered by the testimony of other witnesses, particularly Gabriel and Felix's attorney. There was ample evidence, apart from defendant's statements to police, that defendant felt herself wronged by Felix and bore extraordinarily angry feelings toward him at the time of the killing. Admission of these statements to police was therefore merely cumulative on issues that, to a large degree, were not even in dispute.

Defendant also argues "her false denials of any involvement in Felix's death suggested guilt." While this may be true, any suggestion of guilt was entirely the result of the strength of the evidence discussed above. Her denials to police were not inculpatory in themselves. If they suggested her guilt in context, it was only because of the strong evidence that she committed the killing.

In this regard, we do not consider as prejudicial any effect her statements to police might have had in refuting defendant's own testimony asserting self-defense. Defendant cannot rely on prejudice arising out of the tendency of the statements to rebut her own testimony because the statements would have been admissible to impeach that testimony, regardless of the *Miranda* violation. (See *People v. DePriest* (2007) 42 Cal.4th 1, 32 [voluntary confession obtained in violation of *Miranda* admissible for purposes of impeachment].)

Defendant contends admission of the statements was particularly harmful because the prosecution made them a "centerpiece" of its case. A review of the prosecutor's closing argument shows the true centerpiece of his case was the forensic evidence, which he argued heavily, along with defendant's prior threats against her husband. While defendant's statements were cited in closing argument, they were used to refute defendant's claim she acted in self-defense. As noted above, there can be no claim of prejudice regarding such a use of the statements, since they would have been admitted as impeachment evidence in response to her testimony.

Defendant acknowledges the statements would have been admissible as impeachment evidence, but she contends, citing our decision in *Bradford, supra*, 169 Cal.App.4th 843, that their admission can nonetheless be found prejudicial because she might not have testified had the statements not been admitted. In fact, we rejected this type of reasoning in *Bradford*. In that case, also a murder prosecution, the evidence, apart from the defendant's statements to police, would have supported any verdict from murder to voluntary manslaughter and was arguably consistent with a claim of self-defense. (*Id.* at p. 855.) The defendant's statements to police, however, were highly inculpatory, tending to rule out any defense for the killing. (*Id.* at pp. 849–850.) The defendant took the stand and claimed he acted in self-defense, but the jury rejected the testimony and convicted him of second degree murder. (*Id.* at p. 850.) We found prejudice, noting, "Because of the significant bearing of the confession on the crucial issue of defendant's mental state and the ample evidence that would have supported a finding of voluntary manslaughter rather than murder, we cannot say admission of the confession was harmless beyond a reasonable doubt." (*Id.* at p. 855.)

In *Bradford*, the Attorney General argued the statements to police should not be considered prejudicial because they would have been admitted to impeach the defendant's testimony in any event; the defendant responded he would not have testified if not for the need to counter his statements to police. We rejected both arguments, recognizing, "Whether defendant would have testified in the absence of the need to respond to his confession and, if so, whether the confession would have been admitted for

purposes of impeachment requires us to engage in speculation about the parties' tactical choices. Because it is impossible to determine what might have happened had the trial proceeded differently, we conclude that prejudice should be evaluated on the basis of the evidence actually presented, while excluding the improperly admitted confession. On this basis, as noted above, we cannot find the confession's admission to have been harmless beyond a reasonable doubt." (*Bradford, supra,* 169 Cal.App.4th at pp. 855–856.) For the same reason, we decline to speculate about defendant's decision to testify here and, as noted, find no prejudice "on the basis of the evidence actually presented, while excluding the improperly admitted confession." (*Id.* at p. 855.)

The two cases are otherwise poles apart. In *Bradford,* the defendant's statements to police were highly inculpatory, while the remaining evidence was ambiguous. Thus, the evidence presented, minus the statements to police, could have supported any one of several verdicts, arguably including acquittal. The defendant's statements to police were prejudicial because they tended to make the lesser verdicts much less probable by ruling out self-defense and heat of passion. In comparison, as discussed above, the evidence of guilt here was strong and unambiguous, and defendant's statements to police were not in themselves inculpatory. Accordingly, under the test we articulated in *Bradford,* admission of the statements was harmless beyond a reasonable doubt.

Finally, defendant argues that if the statements had been admitted solely for impeachment purposes during her testimony, rather than introduced in the prosecution's case-in-chief, they would have had less evidentiary force because she would have been entitled to a jury instruction precluding their consideration as proof of her guilt. (See, e.g., *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 63.) Such an instruction, however, would have had little impact on the evidentiary significance of the statements. Their chief value was not to provide affirmative proof of defendant's guilt but to cast doubt on her exculpatory testimony of self-defense. As a result, introduction of the statements in the prosecution's case-in-chief, rather than as impeachment evidence, did not change their value as evidence.

D. *Use of the Word "Homicide"*

Defendant contends the trial court committed misconduct because, by approving the use of the word "homicide" in reference to Felix's death, the court "unmistakably informed the jury that the court had allied itself with the prosecution by accepting its theory" Felix's death was a killing, thereby rejecting defendant's claim he died a natural death.

1. *Background*

As discussed above, Dr. John Cooper opined on defendant's behalf that Felix's death was not a homicide because he died as a result "acute coronary insufficiency due to severe coronary artery disease," to which his wounds "were a contributing factor." Early in the trial, well prior to Cooper's testimony, the prosecutor referred to Felix's death as a "murder." After the trial court sustained defendant's objection to the use of that term and to his subsequent use of the term "killing," the court directed that the death could be referred to as a "homicide." In so doing, it overruled defendant's objection that "homicide" was inappropriate because "[i]t is not established that there was a killing. The cause of death has not been established." The matter was discussed again a few days later, when defendant objected to the court's reference to a "homicide" during argument outside the jury's presence. Defendant told the court she had contacted two experts who claimed Felix died of natural causes. The court responded, "There's no jury here to be prejudiced by that term. If you'll note in front of the jury, I'm not using that term."

2. *Discussion*

A trial court " ' "commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution." ' " (*People v. McWhorter* (2009) 47 Cal.4th 318, 373.) It is essential the court maintain the appearance of neutrality because jurors have "great confidence [i]n the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1233.) Misconduct occurs "[w]hen 'the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent

comment[s] from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge.' " (*Ibid.*) A judgment will be reversed if "judicial misconduct or bias was so prejudicial that it deprived defendant of ' "a fair, as opposed to a perfect, trial." ' " (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112, overruled on another ground in *People v. Rundle*, *supra*, 43 Cal.4th 76, 151.)

Defendant's claim fails for two reasons.[11] First, there was no misconduct. It is by no means clear the court's approval of the word "homicide" communicated to the jury a rejection of defendant's position on this issue. While we agree with defendant the word "homicide" implies a killing, as opposed merely to a death, this is a relatively subtle linguistic distinction, one more apparent to attorneys than laypersons. The incident on which the argument is based occurred on the first day of testimony, long before any presentation of evidence by defendant on this issue, and the court thereafter refrained from using the term "homicide" in front of the jury. When Cooper testified, the court said nothing to suggest it did not believe his testimony.

Yet even if we were to accept defendant's argument that the trial court's approval of the word "homicide" communicated its rejection of the claim Felix died of natural causes, the ruling did not constitute the type of persistent biased conduct necessary to demonstrate judicial misconduct. This ruling was an isolated event. To rise to the level of judicial misconduct on the ground of bias, there must be a pattern of judicial behavior suggesting a more complete rejection of the defendant and his or her innocence. Yet this single use of the word "homicide" is the only example of biased conduct cited by defendant. A review of the trial record shows the court exercised admirable restraint, maintaining an appearance of neutrality under difficult circumstances.

[11] These reasons do not include acceptance of the Attorney General's argument the contention was forfeited. While defendant did not accuse the court of misconduct, she clearly objected that use of the word "homicide" created the impression a killing had occurred and therefore infringed on her defense. Defendant did not request an admonition, but this would have been futile given the court's rejection of her argument.

Defendant relies on *People v. Sturm, supra,* 37 Cal.4th 1218, but the cases are very different. The trial judge in *Sturm* "engaged in a pattern of disparaging defense counsel and defense witnesses in the presence of the jury, and conveyed the impression that he favored the prosecution by frequently interposing objections to defense counsel's questions." (*Id.* at p. 1238.) Nothing of the sort occurred here. At most, the court made a word choice that could be construed to suggest the court did not accept a particular factual contention of the defense. There was no disparagement of Cooper or defendant and no hint the court favored the prosecution more generally.[12]

Second, any rejection of this aspect of Cooper's testimony by the court would have been harmless because his testimony on this issue was insufficient to relieve defendant of criminal responsibility for Felix's death. To prove homicide, the prosecution was not required to show that defendant's criminal conduct was the sole or even the primary cause of Felix's death, but merely that it was a substantial factor in causing his death. As the Supreme Court summarized the law to be applied when there is more than one possible cause of death, "as long as the jury finds that without the criminal act the death would not have occurred when it did, it need not determine which of the concurrent causes was the principal or primary cause of death. Rather, it is required that the [criminal] cause was a substantial factor contributing to the result: ' "[N]o cause will receive judicial recognition if the part it played was so infinitesimal or so theoretical that it cannot properly be regarded as a *substantial factor* in bringing about the particular result." ' [Citations.] [¶] This is true even if the victim's preexisting physical condition also was a substantial factor causing death. [Citation.] 'So long as a victim's predisposing physical condition, regardless of its cause, is not the *only* substantial factor

[12] In addition, the trial court instructed the jury with CALJIC No. 17.30, which states, in part, "I have not intended by anything I have said or done . . . to intimate or suggest . . . that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion." We presume the jury followed this instruction. (*People v. Lynch* (2010) 50 Cal.4th 693, 760.)

bringing about his death, that condition . . . in no way destroys the [defendant's] criminal responsibility for the death.' " (*People v. Catlin* (2001) 26 Cal.4th 81, 155–156.)

Cooper did not testify that Felix's coronary artery disease was the sole cause of his death or, put another way, that Felix would have died that evening of coronary artery disease even if defendant had not stabbed him deeply and repeatedly. Rather, Cooper acknowledged the stab wounds played a crucial role in the death. As he said, "[I]f I were filling out a death certificate I would—I would put as cause of death acute coronary insufficiency due to coronary arteriosclerosis. And then there's a section for significant contributing factors. I would put multiple stab wounds." Accordingly, even if Cooper's testimony was fully credited by the jury on this issue, it would not have proven that a homicide did not occur.[13] In the absence of any substantial evidence Felix's death was not a homicide, the court's reference to it as such was harmless and did not deprive defendant of a fair trial. (See *People v. Guerra, supra,* 37 Cal.4th at p. 1112.)

E. *Cross-examination of Cooper*

Defendant contends the trial court abused its discretion and committed reversible error when it permitted the prosecutor to cross-examine Cooper extensively about the unusual events surrounding the disclosure of his litigation file.

1. *Background*

During Cooper's cross-examination, it emerged he maintained a file with respect to defendant's case but had not brought it to California from his home in Texas. After a contentious exchange regarding the file, which the prosecution contended should have been turned over prior to Cooper's testimony, the court dismissed the jury for the day to discuss the file's disclosure. In response to the court's questioning, Cooper said that, while most of his file remained at home, in his hotel room was a letter written by defendant describing the events on the night of the killing on which Cooper had relied in

[13] The only evidence argued by defendant in support of this theory was Cooper's testimony. Her own account of the struggle leading to Felix's death did not mention any conduct by Felix suggestive of coronary difficulties prior to the stabbing.

formulating his opinions, along with a few other relevant documents. The court asked Cooper to bring the letter to court the next day.

The next morning, a Friday, Cooper told the court the letter from defendant was not in his papers at the hotel, "[w]hich means that it was either taken or I have misplaced it." He explained the lock on his hotel room door was not working, which would have allowed for theft of the document. Alternatively, he thought he might have left it on the airplane. When the court directed Cooper to have the file sent by overnight mail from his home, he responded that no one was at home to ship the documents. After further discussion, the court ordered Cooper to return to court on the following Monday with his file and to call the airline to inquire about the lost letter. Cooper answered, "Certainly," giving no indication he would not comply with the order. Court adjourned at 10:10 a.m.

The following Monday morning, Cooper called the court to say he would not be returning. In a three-page letter sent by e-mail, he explained he was "withdrawing from any further participation" in the trial because of "the hostile behavior" of the prosecutor, who "has contrived to make my record-keeping the central issue." Further, Cooper wrote, the prosecutor's "stalling tactics have caused me to run out of time to participate in this trial." The letter also claimed the prosecution's pathology expert "saw fit to present a distortion of the autopsy evidence" and made "false representations," accused the prosecutor of creating a "smokescreen" and seeking to bring about a mistrial, and claimed Cooper was under no "legal obligation" to bring the documents to court in the absence of a subpoena. In the course of his diatribe, Cooper confidently proclaimed defendant's innocence.

The trial court characterized Cooper's conduct as unprecedented in her experience, noting in consternation: "I have never had an expert take on the role to such an extent of an advocate, and then to indicate that he has chosen not to come back. . . . [¶] . . . [F]or him to do this to [defendant] in the middle of the testimony is . . . bizarre, and somewhat inexcusable, because it puts the defendant in an untenable position in some respects." After denying defendant's request for a mistrial as a result of the controversy, the court issued an order for Cooper's reappearance.

When Cooper returned to court, he was subjected to extensive cross-examination about the foregoing events, over frequent and vigorous defense objection. The prosecutor began with questions about the contents of Cooper's file and his use of various materials from the file in preparation for his testimony, but he soon moved to the events surrounding Cooper's failure to bring his file, the conflicting statements he made about the location and contents of the file, and his sudden withdrawal from the case. Eventually, Cooper admitted he failed to appear because he was preparing for testimony in another matter. This led to questions about his letter to the court and his understanding of his legal obligations as an expert witness. Eventually, the prosecutor accused Cooper of withdrawing in order to avoid cross-examination.

2. *Discussion*

Under Evidence Code section 721, subdivision (a), an expert witness "may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion." " '[I]t is well settled that the scope of cross-examination of an expert witness is especially broad; a prosecutor may bring in facts beyond those introduced on direct examination in order to explore the grounds and reliability of the expert's opinion.' " (*People v. Loker* (2008) 44 Cal.4th 691, 739.) We reverse for error in the admission of evidence if "it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Watson* (2008) 43 Cal.4th 652, 686.)

While we agree with defendant that a prosecutor's cross-examination of an expert witness about his or her disclosure of documents would ordinarily be of limited relevance, we find no abuse of the trial court's exercise of its discretion in these circumstances. Although defendant characterizes the disputed cross-examination as addressing Cooper's knowledge of the rules of discovery, it was both broader and more

pertinent than that.[14] Although an experienced expert witness, Cooper failed to bring his litigation file to court. When asked about it, he claimed under oath to have left it at home. Then he told the court he had some of it with him, including a letter from defendant. A day later, he said the letter was either stolen or left on an airplane. When ordered to return to court with the file after the weekend, Cooper acceded without complaint, but when Monday came around he refused to return. Initially, he attributed his refusal to his treatment by the court and the prosecutor, but he eventually disclosed he had another litigation commitment that week. The foregoing conduct was sufficiently irregular and suggestive of evasion and dishonesty as to bear on his credibility. Perhaps even more important, the tone of Cooper's letter was that of an advocate for defendant's acquittal rather than a dispassionate expert. The exploration of this attitude was highly relevant to the credibility of Cooper's opinions. There was no abuse of discretion in permitting cross-examination on these matters.

In any event, there would be no basis for reversal as a result of the questioning even if permitting it had constituted error, since it was not prejudicial.[15] Because defendant acknowledged having killed Felix, the primary issue was whether the killing was in self-defense. The evidence refuting self-defense was strong, including defendant's threats and avowals of intent to kill Felix prior his death, the pattern of his injuries, and her evasive conduct immediately following his death. While Cooper's testimony regarding the pattern of Felix's injuries was a significant part of defendant's defense, the disputed cross-examination did not directly challenge the substance of Cooper's opinion that Felix's injuries were consistent with self-defense. In light of the

[14] To the extent defendant's current argument is concerned only with those few questions asked during cross-examination that specifically addressed Cooper's understanding of an expert's discovery obligations, we find no abuse of discretion in permitting them because they were inextricably connected to the larger issue of Cooper's conduct regarding the file. Further, those limited questions had no conceivable prejudicial impact on the outcome of the trial.

[15] We apply the *Watson* standard in measuring prejudice. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Contrary to defendant's claim, the disputed cross-examination did not render the trial fundamentally unfair.

strong evidence of guilt and the marginal impact of this cross-examination on the substance of Cooper's testimony, there is no reason to believe the jury's verdict would have been different in its absence.

F. *The Prosecutor's Reference to Court TV*

During his cross-examination of Cooper, the prosecutor asked Cooper whether he was aware his opinions had been criticized by forensic pathologists interviewed on television. Although the trial court sustained an objection to this question and admonished the jury to disregard it, defendant contends the court erred in not declaring a mistrial.

1. *Background*

During the cross-examination discussed in the preceding section, the prosecutor asked Cooper if he was aware "how many papers" had quoted his letter to the court. In response, Cooper answered he was unaware, saying, "I haven't read the papers. I have just been following it on Court TV." The prosecutor followed up:

"Q. Really? Did you hear them talking about you on Court TV?

"A. No, I don't watch television. I get the website.

"Q. Oh. You didn't see all those forensic pathologists on Court TV saying that your opinion had no basis?

"[DEFENDANT:] Objection –

"[PROSECUTOR:] You didn't' see any of that?"

The trial court sustained the objection and admonished the jury to disregard the question, but the court denied defendant's motion for a mistrial on grounds of prosecutorial misconduct.

2. *Discussion*

The prosecutor's question was an improper attempt to elicit otherwise inadmissible evidence, and the trial court properly sustained defendant's objection and admonished the jury. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 960.) The trial court was required to declare a mistrial if any prejudice resulting from the prosecutor's question was " 'incurable by admonition or instruction.' " (*People v. Collins* (2010)

49 Cal.4th 175, 198.) " 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' [Citation.] A motion for a mistrial should be granted when ' " 'a [defendant's] chances of receiving a fair trial have been irreparably damaged.' " ' " (*Ibid.*)

We find no abuse in the trial court's denial of the motion for mistrial. There was limited, if any, prejudice from the question. Because defendant intervened before the witness answered the question, the prosecutor's improper implication was not confirmed, and the jury was instructed to disregard the prosecutor's comment in any event. While it was improper to suggest unnamed experts outside the courtroom had rejected Cooper's opinions, his opinions were already subject to challenge by the views of the prosecution's testifying experts. Any prejudice resulting from this suggestion was minor, at most, and curable.

Defendant characterizes the question as "unforgettable and therefore incurably prejudicial." She fails to explain, however, why this question among the thousands posed at trial was unforgettable and why, even if the question was for some reason unforgettable, the jury could not follow the court's instruction to disregard it.

Defendant analogizes the case to *People v. Hill* (1998) 17 Cal.4th 800, but in *Hill* the magnitude of the prosecutor's misconduct, and the resulting prejudice, was of another order entirely. Defendant focuses solely on the *Hill* prosecutor's references to facts not in evidence. (*Id.* at pp. 827–828.) In addition to these references, however, the *Hill* prosecutor committed additional misconduct by misstating evidence and mischaracterizing testimony several times (*id.* at pp. 823–826), making intentionally confusing references to particular evidence (*id.* at pp. 825–826), suggesting the crimes ceased after the defendant's arrest (*id.* at p. 828), suggesting the People had an expert to testify to a matter without calling the expert (*ibid.*), misstating the law on at least four occasions (*id.* at pp. 829–832), treating defense counsel with derision (*id.* at pp. 832–833), and intimidating witnesses (*id.* at p. 834). The Supreme Court's decision to reverse was based on the cumulative prejudice resulting not only from this extensive

prosecutorial misconduct but also from a series of other errors in the trial. (*Id.* at p. 844.) Assuming the prosecutor's single reference to the Court TV experts was prejudicial at all, the degree was in no way comparable to the cumulative prejudice caused by the repeated and persistent misconduct in *Hill.*

G. *"Were They Lying" Cross-examination*

Defendant contends the prosecutor committed misconduct by asking defendant during cross-examination whether she believed certain witnesses were lying and creating a chart listing the accused liars.

1. *Background*

During cross-examination, the prosecutor questioned defendant about her interaction with Gabriel on the night he discovered Felix's body. After claiming not to recall certain aspects of Gabriel's account and denying others, defendant said, "Well, there's a difference between what he has said happened and what I have said happened." The prosecutor followed up by asking, "[A]re you saying to this jury that he lied about that conversation?" After considerable colloquy, with the prosecutor persisting in the question, defendant answered that she was not accusing Gabriel of lying. In so doing, she made no formal objection to the question. After substantial further exploration of Gabriel's testimony, the prosecutor asked defendant whether, after Gabriel returned from discovering Felix's body, she said "something to him, like, I guess I didn't use a shotgun, did I?" When defendant denied making the remark, the prosecutor responded, "So he's lying?" Without objecting, defendant responded that Gabriel "was less than truthful on the stand, yes." Using some type of display, the prosecutor began a tabulation, writing "Liars" at the top of a page and, beneath it, "Number 1, Gabe." Defendant objected to the prosecutor's use of the chart, denying she had called her son a liar.[16]

The prosecutor soon after began questioning defendant about a police investigator. After she denied telling the investigator when informed of Felix's death, "Oh, well, we

[16] Because the prosecutor's subsequent use of the chart did not necessarily involve an oral component, it is not wholly clear from the trial transcript when additions were made to it, although from the testimony there is no doubt some additions were made.

were getting a divorce anyhow," the prosecutor asked whether the investigator was lying. Without objecting, defendant responded, "[He] is exceedingly deceptive and dishonest."

Two trial days later, still continuing his cross-examination, the prosecutor asked defendant about the autopsy testimony. When she denied "stick[ing] the knife in all the way," the prosecutor asked, "Is [the medical examiner] a liar also?" Again without objecting, defendant responded, "I like Dr. Cooper's answer to that, that a gentleman doesn't call someone else a liar. Hm, I think he said that [the medical examiner] was exceedingly, hm, dishonest . . . ." Later that day, during an exchange between the prosecutor and defendant in the course of her testimony, defendant accused the prosecutor of "attempting . . . to make it look like you have a case when you don't. And that's the same reason why you supported [*sic*] perjured testimony from your witnesses and the fabrication of evidence by . . . officers on the scene." After the prosecutor asked, "Who else has perjured themselves, Mrs. Polk," the defendant named him. The prosecutor then threatened to list his own name on the chart of "liars," and defendant and the prosecutor exchanged views of the linguistic distinction between "liars" and persons who are "deceptive." Defendant denied using the former term, but she was comfortable with the latter. Defendant again objected to use of the chart but did not object to the prosecutor's questions.

During continued cross-examination the next day, defendant explained her belief the police had tampered with evidence to make it appear she had murdered Felix by moving furniture, spreading Felix's blood around the cottage, taking a woman's shoe dipped in blood "and stamp[ing] it all over the room," and moving the body. In the process, she expressly accused two of the police investigators of lying. Regarding the second accused officer, the prosecutor asked whether he could add the investigator to his list of liars. Without objecting, defendant demurred because "I'm not sure that he's a habitual liar."

Discussing her sons' testimony during her own redirect testimony, defendant told the jury, "So, hm, I don't think of . . . Gabriel and Adam as liars. Hm, that they have told some lies, a number of lies, hm, I think that that's something that they have learned to do,

and that they have mainly learned to do in the, hm, three and a half years I have been away from them." Turning to the prosecutor's "list of liars," defendant commented, "I think some people tell lies a lot and live their lives around that, and just about everything is a lie." Defendant then discussed the listed persons one by one, rejecting the listing of some and accusing the remainder of giving deceptive testimony. The medical examiner, she claimed, "knew he was lying, and he did so deliberately." Defendant reiterated these claims in closing argument, accusing the prosecutor, her sons, and two police investigators either of lying or of "fabricat[ing] evidence."

2. *Discussion*

"A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such ' "unfairness as to make the resulting conviction a denial of due process." ' [Citations.] Under state law, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial." (*People v. Cook* (2006) 39 Cal.4th 566, 606.)

Our Supreme Court has rejected the argument that asking a witness whether another witness was lying necessarily constitutes prosecutorial misconduct because it invades the province of the jury. Rather, in *People v. Chatman* (2006) 38 Cal.4th 344, the court held that "were they lying" questions must be evaluated individually. (*Id.* at p. 382.) A defendant who is a percipient witness to the events at issue may be able to provide insight into why another witness's testimony differs from his or her own. On the other hand, to ask a witness with no relevant personal knowledge of the events whether another witness is lying calls for irrelevant speculation. (*Ibid.*) Similarly, asking a defendant whether an inanimate object is lying, as occurred in *Chatman*, is purely argumentative. (*Id.* at p. 384.) Accordingly, the court directed, "courts should carefully scrutinize 'were they lying' questions in context. They should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony

that may legitimately assist the trier of fact in resolving credibility questions." (*Ibid.*; accord, *People v. Hawthorne* (2009) 46 Cal.4th 67, 98.)

Initially, defendant has forfeited any claim of misconduct or error regarding the prosecutor's "were they lying" questions because she did not object to them. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 380.) Because her only objection was to the use of the "liar's list," she has forfeited any argument of impropriety regarding the questions themselves.[17]

Even if defendant had not forfeited the argument, we would find no prosecutorial misconduct. As discussed above, "were they lying" questions are appropriate in some circumstances. Defendant's admitted personal knowledge of the events here raised the possibility she would be able to provide relevant, admissible testimony in response to this type of question. Further, as suggested above, one element of her defense was the claim she was being persecuted. Accordingly, there is no indication the prosecutor was *intentionally* seeking inadmissible evidence by asking the questions, and therefore no indication of misconduct. (*People v. Chatman*, *supra*, 38 Cal.4th at pp. 380, 382–384.)

Defendant cites *Zambrano*, *supra*, 124 Cal.App.4th 228, in which officers testified they saw the defendant sell drugs to another person. (*Id.* at pp. 234–235.) When the defendant denied the charge, the prosecutor asked him whether the officers were lying. (*Ibid.*) Because the defendant had no particular knowledge of the arresting officers, the court held, asking him whether they were lying was improper because it called for foundationless lay opinion about the officer's veracity. (*Id.* at pp. 240–241.) In contrast, regarding her sons, defendant had personal knowledge not only of the subject of their testimony, but also their character, and therefore might have provided insight into the reasons for their falsehoods. Indeed, in her redirect testimony she suggested they had

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[17] In *People v. Zambrano* (2004) 124 Cal.App.4th 228, 237 (*Zambrano*), cited by defendant, the defendant objected to at least some of the questions in the general "were they lying" line of questioning. Here, defendant did not challenge the prosecution's inquiry at all. While she did object to his characterization of her answers on the "list of liars," this was insufficient to preserve for appeal the propriety of the questions themselves.

been influenced by others during her time in jail. The case is less clear for the investigators and the medical examiner, but because defendant had acted as her own attorney, and therefore had reason to have examined their conduct and testimony closely, there was a reasonable possibility defendant could shed light on their veracity. In fact, defendant testified freely on redirect about their mendacity, accusing them of participating in a conspiracy to frame her for murder, and repeated these claims in her closing argument. Given defendant's willingness to accuse other witnesses of lying, there was no error in permitting her to be questioned in this manner.

Even if these questions had been improper and objection to them preserved, there would be no grounds for reversing the conviction because the questions were not prejudicial under the *Watson* test. (See *Zambrano, supra,* 124 Cal.App.4th at p. 243.) Defendant made no secret of her contention various witnesses were giving false testimony. Explaining the discrepancies between her own testimony and that of the various prosecution witnesses was an important aspect of her defense, and one of her explanations was that certain other witnesses were lying. Far from prejudicial, the prosecutor's questions gave defendant an opportunity to testify about this aspect of her defense. There is no possibility that, in the absence of the questions, the verdict would have been different.[18]

H. *Cumulative Error*

Because we have found little or no preserved error in the proceedings, there is no basis for considering the cumulative prejudice of the error.

I. *Limitations on Defendant's Self-representation*

Defendant contends her conviction must be reversed, without a showing of prejudice, because her ability to conduct her defense was hampered by conditions

[18] The prosecutor's use of the "liar's list" during cross-examination, rather than saving it for argument, was arguably improper. Because it was plainly not prejudicial, however, and was used voluntarily by defendant in her own testimony, it provides no basis for reversing the conviction.

imposed upon her as a result of her incarceration and restrictions imposed by the court.

1. *Background*

Following her conviction, defendant moved for a new trial on the ground her defense had been hampered in various ways. In a declaration, Valerie Harris, who acted as "legal runner and a case manager" for defendant, stated that she was denied "full contact" visits with defendant at the jail and was allowed noncontact visits only with seven-day advance notice. She also said that paperwork dropped off at the jail was subject to examination and she was not guaranteed privacy during telephone conversations. Harris also noted defendant was frequently tired because she was awakened early and sometimes during the night. Harris contended defendant's exhaustion interfered with preparation for her cross-examination and her closing argument, although she cited no specific examples. Defendant was also unable to keep all her preparation materials in her cell, was denied daily transcripts, and was denied more than one change of clothes at a time. Again, no particular prejudice was cited arising from these limitations.

Harris's declaration was at odds with her comments when the issue of visitation was raised at trial. Harris's access to defendant was part of a protocol worked out with the jail. Early in the trial, defendant complained about the need to make arrangements seven days in advance to see Harris at the jail. Harris, however, told the court it was generally unnecessary for her to visit defendant in jail because she saw defendant daily at trial and was able to transfer materials at that time. In fact, the court noted later, Harris sat at counsel table with defendant "[f]or a good part of the time."

The new trial motion was also supported by a declaration from Gary Wesley, who was appointed to serve as defendant's advisory counsel just prior to her cross-examination. At that time, defendant asked the court to appoint Wesley as her cocounsel, allowing him to make objections during cross-examination. The court declined to permit the arrangement requested by defendant, which would allow both her and Wesley to exercise the courtroom privileges of counsel simultaneously. Instead, the court stated, defendant had the option of having Wesley appointed either advisory counsel, "who

usually sits in the audience and is only available for advice and counsel, but doesn't participate," or counsel, "which means that it takes away from [defendant] the ability to object, argue, et cetera, for that period of time." The prosecutor, however, objected to allowing Wesley to be appointed counsel, noting that because of the complexity of the trial, Wesley, who had not even sat in on defendant's direct examination, let alone the remainder of the trial, was not in a position to provide effective assistance as defendant's attorney.

Accepting the validity of the prosecutor's argument, the court denied the request to have Wesley appointed temporary counsel, but it consented to Wesley's acting as advisory counsel during the cross-examination. Defendant was to retain the privileges and responsibilities of counsel, such as making objections. Defendant agreed to the arrangement, telling the court, "that sounds good." The court allowed Wesley to sit behind defendant during her cross-examination, but it refused defendant's request that he be permitted to tap her on the shoulder to alert her to objections. Instead, defendant was required to initiate contact, turning to Wesley if she wanted to consult. In his declaration, Wesley stated this arrangement prevented some objections from being made because he was unable to alert defendant to objectionable questions, but he cited no specific forfeited objections.

After one day of this arrangement, defendant declined without explanation to have Wesley continue to sit with her on the stand. In a declaration filed with the new trial motion, she explained she was concerned turning to consult him would make it look as though she was "trying to evade the questions." Following the second day of cross-examination, Wesley was denied a confidential visit with defendant at the jail, apparently because notice of his appointment as advisory counsel had not been communicated to the jailers.

Finally, during one of the days of cross-examination, defendant complained to the court she had been awakened unnecessarily around 3:00 a.m., saying she "had very little sleep." After the jury entered the courtroom, defendant announced, "I didn't hardly get any sleep last night, and I'm sorry. I was awakened in the middle of the night by a

sergeant on a rampage." In the new trial motion, defendant claimed the early wake-up call decreased her effectiveness, but she did not cite any examples of adverse events occurring that day as a result of her inattention.

In denying the motion for a new trial, the court cited the various allowances made for defendant, noting defendant "was afforded more accommodations than any other pro per or represented defendant that I have known in ten years on the bench, by far," including being housed alone (the only prisoner permitted this privilege), allowed extra written materials in her cell (contrary to jail policy and fire department directives), given extra time for preparation in the morning, granted her own holding cell next to the courtroom, provided access to the courtroom before and after courtroom hours, and allowed to store documents at court. Also, the court saw no indication her self-representation was ever hindered by fatigue.

2. *Discussion*

Because "[r]estrictions on pro. per. privileges in custody are not unusual," one of the risks of self-representation is "custodial limitations on the ability to prepare a defense in jail." (*People v. Butler* (2009) 47 Cal.4th 814, 827, 828.) "[A] defendant who is representing himself or herself may not be placed in the position of presenting a defense without access to a telephone, law library, runner, investigator, advisory counsel, or any other means of developing a defense [citation], but this general proposition does not dictate the resources that must be available to defendants. Institutional and security concerns of pretrial detention facilities may be considered in determining what means will be accorded to the defendant to prepare his or her defense." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1040.) "In the final analysis, the Sixth Amendment requires only that a self-represented defendant's access to the resources necessary to present a defense be reasonable under all the circumstances." (*People v. Blair, supra,* 36 Cal.4th at p. 733.) In addressing a claim such as defendant's, the issue is "whether [the defendant] had reasonable access to the ancillary services that were reasonably necessary for his [or her] defense." (*Id.* at p. 734.)

In making her argument, defendant does not even attempt to demonstrate she was denied "reasonable access" to "reasonably necessary" services. Because defendant had access to Harris each day at trial, requiring her to arrange in advance to see Harris at the jail did not unreasonably impair her access to the runner. Significantly, she points to no way in which her defense was prejudiced by this restriction.

Similarly, defendant had reasonable access to her advisory counsel, Wesley. The role of advisory counsel is limited, and "[t]he court retains authority to exercise its judgment regarding the extent to which such advisory counsel may participate." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1368.) Defendant could have had Wesley at her elbow throughout her cross-examination; it was her own choice to have him remain in the audience after the first day. Requiring defendant actively to seek Wesley's consultation, rather than permitting him to interrupt examination by tapping her on the shoulder or otherwise, was within the court's discretion. Any other rule risked Wesley's interference with defendant's self-representation during a critical part of the trial. Again, no specific prejudice from this restriction, or any other aspect of Wesley's role, has been shown.[19]

Finally, we find no grounds for reversal in defendant's being awakened early one morning, particularly in the absence of any specific showing of prejudice. There is no contention defendant was commonly denied sleep without justification, and any single day's exhaustion would not have rendered the trial fundamentally unfair.

Defendant argues "[t]he effectiveness of her case manager, Valerie Harris, and her advisory counsel, Gary Wesley, was greatly diminished by rules imposed by the court, sheriff, and jail personnel, which were arbitrary, unjustified, and unreasonable." There is no evidence to support any of these assertions. As discussed above, there is no indication Harris's effectiveness was significantly affected. If Wesley was ineffective, it is because

[19] Defendant does not argue the trial court erred in declining her proposal to permit defendant and Wesley to share duties of counsel. The Supreme Court has consistently rejected such "hybrid" arrangements, declaring that either the defendant or an attorney must act as counsel, but not both at the same time. (E.g., *People v. Stewart* (2004) 33 Cal.4th 425, 518.)

defendant chose not to consult him, not because of the court's restrictions. The excuse she provided for not consulting him—that she believed it would look evasive to the jury—would have been present regardless of whether he initiated the consultations or she did. It was inherent in the nature of advisory counsel, and, as noted, defendant does not challenge the decision to restrict Wesley's role to advisory counsel. Finally, there was no showing the restrictions imposed by the sheriff and jail authorities were arbitrary, unjustified, or unreasonable. The record contains no evidence one way or another regarding the reasons for the restrictions placed on defendant. All we know for certain is that defendant was provided privileges never before afforded to a pro se defendant by the Contra Costa County jail, at least in the experience of the trial court.

There is no doubt defendant suffered inconveniences as a result of her incarceration that made preparation of her defense more difficult. A greater showing than inconveniences is necessary, however, to demonstrate that her right of self-representation was infringed. We find no error in the trial court's conclusion defendant was not denied reasonable access to necessary services. Further, defendant has demonstrated no prejudice from whatever inconveniences occurred.[20]

J. *Possible Juror Misconduct*

Defendant's new trial motion also included evidence suggesting juror misconduct. She contends the trial court abused its discretion in declining to conduct an evidentiary hearing with respect to the possibility of such misconduct.

1. *Background*

The claim of possible misconduct was based on jurors' comments during a press conference conducted in the courthouse after the verdict was announced. The jurors were informed of the conference by the trial court while still in the courtroom, and the nine who elected to participate were escorted to the conference by court officials after the jury

[20] Defendant claims she need not show prejudice because the inconveniences she suffered constituted "structural error" in her trial, citing *Arizona v. Fulminante* (1991) 499 U.S. 279. For the reasons stated above, there was no error, let alone the type of structural error that renders a trial fundamentally unfair.

was discharged. In support of her claim of juror misconduct, defendant submitted a declaration from a spectator at the trial that day, stating the spectator "quickly made [her] way downstairs" to attend the press conference after the jurors were discharged. According to the spectator, the jurors who participated in the conference "arrived within minutes."

One of the topics addressed during the press conference was defendant's decision to act as her own attorney. When asked how her self-representation affected the jury's decisionmaking, one juror commented, "Well we all kind of talked about it, and we decided . . . that whether we liked her or not, umm, or her antics or not, was really not . . . a question for us. We didn't have to like her . . . to make a decision." When asked to evaluate her performance as counsel, two jurors expressed the opinion that defendant would have been better off with an attorney. After one juror noted defendant was "extremely smart," another said, "Well she's . . . very smart. And we've been asked—I've been asked that question a lot, . . . and I say that I think she would have been better off with representation." Responding to a follow-up question, the juror explained defendant was subject to frequent warnings from the court regarding the scope of her examinations and an attorney would have been more likely to stay on relevant topics and "maybe ma[k]e a lot of better points." The jurors nonetheless seemed to believe the evidence was sufficiently convincing that representation by an attorney would not have made a difference in their verdict.

After several questions about their decision-making process, discussion turned to the jurors themselves. In response to the question, "How do you feel about all the media attention," a woman juror said, "I want to respond to . . . we didn't read anything . . . we didn't watch anything . . . but we heard there were rumors that [a male juror] and I . . . [at this point, the juror made a gesture suggesting gossiping] . . . which is SO false. . . . He's getting married, loves his fiancé, so that's the only thing that the media was making stuff up, or if you weren't making it up, you know, exaggerating things, that were so far-fetched." The same juror later said the jury consented to the press conference because "we've not been allowed to talk for four months."

In declining to order an evidentiary hearing regarding the possibility of misconduct, the trial court noted, "There must be a threshold of some evidence, not mere speculation, to justify an evidentiary hearing. . . . The hearing is not a discovery expedition to see what might happen and what might come out of it. [¶] In my opinion, there is no evidence here. There is merely speculation based on a couple of cryptic comments that were made during a press conference after the verdict was rendered. [¶] If I had been presented with declarations from former jurors or witnesses to misconduct that might be sufficient to then inquire further. Nothing has been presented here, in my opinion, that rises to the level of misconduct." The court also noted the possibility the jurors discussed the case with outsiders during the time between announcement of the verdict and the press conference, since they were led to the press conference through hallways "packed with media and spectators" and "were free to use their cell phones" during that time. The court concluded, "There is no showing in what has been presented to me that those two comments [on which the new trial motion was based] during the press conference don't reflect conversations between the jurors themselves about unrelated collateral matters . . . that occurred after the verdict."

2. *Discussion*

A defendant has the right to trial by unbiased, impartial jurors. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) To preserve their impartiality, jurors are prohibited from discussing the case, even among themselves, until all evidence has been presented and the jury has retired to deliberate. (Pen. Code, § 1122, subd. (a); *People v. Wilson* (2008) 44 Cal.4th 758, 838.) A violation of that prohibition through discussion with a nonjuror prior to rendering a verdict is viewed as serious juror misconduct. (*Wilson*, at p. 838.) "Juror misconduct gives rise to a presumption of prejudice [citation]; the prosecution must rebut the presumption by demonstrating 'there is no substantial likelihood that any juror was improperly influenced to the defendant's detriment.' [Citations.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 397.)

The disapproval of juror conversations with nonjurors derives largely from the risk the juror will gain information about the case that was not presented at trial. (See, e.g., *In*

re Lucas (2004) 33 Cal.4th 682, 696.) Other types of juror misconduct, for example, include independently investigating the facts, bringing outside evidence into the jury room, injecting the juror's own expertise into the deliberations, and engaging in an experiment that produces new evidence. (*People v. Wilson, supra,* 44 Cal.4th at p. 829.) Prohibited juror conversations that result in the communication of extrinsic information are similarly regarded as presumptively prejudicial. On the other hand, where the juror conversations involve peripheral matters, rather than the issues to be resolved at trial, they are generally regarded as nonprejudicial. (See, e.g., *People v. Wilson,* at pp. 839–840 ["trivial" comments to a fellow juror not prejudicial where not meant to persuade]; *People v. Page* (2008) 44 Cal.4th 1, 58–59 [circulation of a cartoon in the jury room that did not bear on guilt not misconduct]; *People v. Avila* (2006) 38 Cal.4th 491, 605 [juror statements disparaging counsel and the court not material because they have no bearing on guilt]; *People v. Stewart*, *supra*, 33 Cal.4th 425, 509–510 [juror who complimented the appearance of the defendant's former girlfriend committed nonprejudicial misconduct]; *People v. Majors* (1998) 18 Cal.4th 385, 423–425 [general comments by jurors that did not address the evidence found not prejudicial]; *People v. Loot* (1998) 63 Cal.App.4th 694, 698–699 [juror who asked a public defender whether the prosecutor was " 'available' " committed " 'technical,' " but nonprejudicial, misconduct].) When determining whether communications are prejudicial, the court must consider the " ' "nature and seriousness" ' " of the misconduct, particularly its connection with evidence extrinsic to the trial. (*People v. Wilson*, at p. 839.)

When a defendant has made a motion for a new trial based on juror misconduct, the trial court has the discretion to hold an evidentiary hearing to determine the validity of the charges if there are material, disputed issues of fact. Such a hearing is not to be used, however, as a " 'fishing expedition' " to search for possible misconduct. (*People v. Avila*, *supra*, 38 Cal.4th at p. 604.) We review the trial court's decision to deny a hearing on juror misconduct for abuse of discretion. (*Ibid.*) When reviewing the trial court's denial of a motion for a new trial based on juror misconduct, we exercise independent

review on the issue of prejudice, but we accept the trial court's findings of fact if based on substantial evidence. (*People v. Dykes* (2009) 46 Cal.4th 731, 809.)

We find no abuse of discretion in the trial court's decision not to hold an evidentiary hearing on the charges of juror misconduct, largely because the matters purportedly discussed were not prejudicial. Although the first juror said he had been asked about defendant's decision to represent herself "a lot," there is no evidence the juror was asked this question by nonjurors. It is an issue the jurors likely would have discussed among themselves. In addition, as the court noted, there was time for him to discuss this issue with others between the jury's dismissal and the press conference, although, judging from the spectator's declaration, it was a fairly limited time. The case for misconduct was not substantial.

Even assuming the first juror had responded to questions on this issue by a nonjuror, however, this was, as the trial court noted, a "collateral" matter. Whether defendant would have been better served by counsel was not an issue bearing on her actual guilt or innocence. There was no indication in the juror's statement at the press conference that he or any other juror had been exposed to information about defendant, the circumstances of the killing, or the witnesses at trial that was not admitted at trial. Nor did the juror indicate any belief defendant's performance as an attorney was related to the issue of her guilt. In these circumstances, any presumption of prejudice was rebutted because there is no substantial likelihood that any juror was improperly influenced to defendant's detriment by the suspected communications. In the absence of more conclusive evidence of *prejudicial* misconduct, there was no duty to hold a hearing.

The evidence suggesting the second juror, who spoke about media rumors of a romantic relationship between herself and another juror, committed misconduct was somewhat stronger. While she denied watching any media reports about the trial, she acknowledged that someone had told a juror about rumors in the media. Presumably, that person was a nonjuror who had watched the media reports. As the trial court noted, however, there was no way to know whether the communications occurred before or after the verdict was rendered.

More important, the issue discussed by the juror—a rumor among the press that she was romantically involved with another juror—had nothing to do with defendant's guilt and bore no plausible relation to the jurors' deliberations. In the context of the trial, it was trivial, and there was no possibility of prejudice to defendant as a result of the presumed communications. Accordingly, the trial court properly denied the motion for a hearing on misconduct. (See, e.g., *People v. Wilson, supra*, 44 Cal.4th at p. 840.)

Defendant's arguments that many more jurors could have been involved in extra-judicial communications and that the jurors might have learned other things as a result of their communications are simple speculation, unsupported by any evidence. There is no basis for inferring that, because the jurors had conversations on particular topics, they had additional conversations on other, unrelated topics, as defendant argues. Further, there is no basis for defendant's speculation the jurors themselves might have watched media reports. The second juror stated expressly that they had not heard or seen any such reports. The trial court was not required to order a hearing merely on the basis of speculation. (See *People v. Avila, supra*, 38 Cal.4th at pp. 604–605.)

K. *Reimbursement of County Expenses*

Defendant contends the trial court erred in failing to hold a hearing to determine her ability to pay before ordering her to reimburse the County for defense costs it incurred on her behalf.

1. *Background*

Prior to the second trial, defendant executed a promissory note to pay the County "the sum as fixed by the Superior Court for Court Appointed Counsel services and for any other cost related to my defense." Performance under the note was secured by a deed of trust against defendant's interest in the Orinda home she owned with Felix, purchased in 2000. In 2006, their respective interests were partitioned at the request of his estate, and in June 2007, a referee was appointed to sell the home.

In August 2007, six months after defendant's sentencing, the County filed a motion for an order requiring her to reimburse the County for the costs of defense it had incurred on her behalf, set at nearly $220,000. The County argued defendant had both a

contractual obligation to reimburse, based on the promissory note she executed, and a statutory obligation under Penal Code section 987.8. Although the home had not been sold at the time the motion was filed, it was listed at $2 million. The County argued defendant had the ability to reimburse the costs in full because, according to a schedule it submitted, she would receive more than $230,000 even if the home sold for only two-thirds of the asking price.[21]

Defendant filed an opposition to the motion, disputing certain of the County's expenses, arguing she had signed the lien "under duress" and had "revoked it the next day," and asserting she had been found to be, and was, indigent. In other filings and argument before the court, defendant contended she should be found financially unable to reimburse the County for its costs because she was incarcerated, lacked funds, and had no way to earn money.

Although subdivision (b) of Penal Code[22] section 987.8 permits the court to order reimbursement of defense costs only if a defendant is found to have the "present ability to pay" them, the trial court declined to make a determination of defendant's ability to repay the County's expenses. The court explained it viewed itself as proceeding under subdivision (a) of section 987.8, which establishes a procedure for securing the reimbursement of fees for court-appointed counsel through an attachment of property. The court interpreted subdivision (a) as requiring an initial hearing to determine whether the defendant was unable to employ counsel, and, if so, whether the defendant possessed property that could be used to secure reimbursement of fees. Once that determination had been made, in the court's view, the defendant was responsible for reimbursing defense costs to the extent of the value of the secured property.

After hearing testimony regarding the various charges claimed by the County, the trial court found the reimbursable costs to be $212,033, and set that amount as the value

[21] It is not clear from the record whether the house has since been sold or, if so, what was the final monetary value of defendant's interest.

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

of the lien on defendant's interest in the home. The trial court's determination of the amount of reimbursable costs is not challenged on appeal.

2. *Legal Background*

Section 987.8 establishes the means for a county to recover some or all of the costs of defense expended on behalf of an indigent criminal defendant. (*Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, 1245.) Under subdivisions (b) and (c) of the statute, an order of reimbursement can be made only if the court concludes, after notice and an evidentiary hearing, that the defendant has "the present ability . . . to pay all or a portion" of the defense costs. (§ 987.8, subds. (b), (c), (e); *People v. Amor* (1974) 12 Cal.3d 20, 29; *People v. Phillips* (1994) 25 Cal.App.4th 62, 72–73.)[23] If this finding is made, "the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability." (§ 987.8, subd. (e).)

"Ability to pay" means "the overall capability" of the defendant to reimburse all or a portion of the defense costs. (§ 987.8, subd. (g)(2).) It requires consideration of the defendant's financial position at the time of the hearing, his or her "reasonably discernible" financial position over the subsequent six months, including the likelihood of employment during that time, and "[a]ny other factor or factors which may bear upon the defendant's financial capability to reimburse the county." (§ 987.8, subds. (g)(2)(A)–

[23] Section 987.8, subdivision (b) (hereafter subdivision (b)) states: "In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided."

Because there is no evidence in the record the County ever adopted a resolution adopting the reimbursement provisions of subdivision (c), a prerequisite under the subdivision, we do not consider it on this appeal.

(D).)[24] In calculating ability to pay, "the court [must] consider what resources the defendant has available and which of those resources can support the required payment," including both the defendant's likely income and his or her assets. (*People v. Smith* (2000) 81 Cal.App.4th 630, 642; see, e.g., *Conservatorship of Rand* (1996) 49 Cal.App.4th 835, 842 [bank account]; *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1394 [real property], but see *People v. McDowell* (1977) 74 Cal.App.3d 1, 4 [possibility of a future insurance recovery cannot be considered].)

Section 987.8, subdivision (a) (hereafter subdivision (a)), on which the trial court relied in denying a hearing on defendant's ability to pay, addresses security for the reimbursement of defense costs.[25] Under subdivision (a), when a court finds "that a defendant is entitled to counsel but is unable to employ counsel," the court may cause to be determined "whether the defendant owns or has an interest in any real property or other assets subject to attachment." If so, the court can impose a lien on the property, to

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[24] The statute anticipates that a defendant's financial position will be determined at the time of sentencing. (*People v. Phillips*, *supra*, 25 Cal.App.4th at p. 73.) It is not clear whether a defendant's future earning potential may be included when, as here, the section 987.8 motion is filed six months after sentencing. Defendant has not challenged the timing of the motion.

[25] Section 987.8, subdivision (a) states: "Upon a finding by the court that a defendant is entitled to counsel but is unable to employ counsel, the court may hold a hearing or, in its discretion, order the defendant to appear before a county officer designated by the court, to determine whether the defendant owns or has an interest in any real property or other assets subject to attachment and not otherwise exempt by law. The court may impose a lien on any real property owned by the defendant, or in which the defendant has an interest to the extent permitted by law. The lien shall contain a legal description of the property, shall be recorded with the county recorder in the county or counties in which the property is located, and shall have priority over subsequently recorded liens or encumbrances. The county shall have the right to enforce its lien for the payment of providing legal assistance to an indigent defendant in the same manner as other lienholders by way of attachment, except that a county shall not enforce its lien on a defendant's principal place of residence pursuant to a writ of execution. No lien shall be effective as against a bona fide purchaser without notice of the lien."

the extent otherwise permitted by law, and the county may later foreclose on the lien. (*Ibid.*)

3. *Discussion*

We conclude the trial court's compliance with subdivision (a) did not avoid the need for a hearing into defendant's "present ability" to pay under subdivision (b). As discussed below, subdivision (a) provides a means for securing reimbursement of defense costs, but it is not an independent basis for awarding reimbursement. As a result, a trial court must comply with the remaining provisions of section 987.8, including making a determination of ability to pay under subdivision (b), before reimbursement may be granted.

a. Enforcement of the Promissory Note

The Attorney General first contends a determination of defendant's ability to pay was unnecessary because the promissory note constituted a contract to reimburse costs that can be enforced regardless of defendant's ability to pay.

During argument on the motion, defendant and the trial judge disagreed over the circumstances of the execution of the promissory note. Defendant contended she had executed the note after having been found to be entitled to appointment of counsel as a result of her indigence. The trial judge, speaking from his own memory of events, recalled no finding of indigence.[26] According to the judge, after defendant began acting pro se, she asked to be assisted by her prior attorney, rather than the public defender. The attorney declined to accept as payment a security interest in defendant's home, however, and defendant apparently had no money to pay him. The court recalled that, in order to secure her choice of counsel, defendant agreed to execute the secured promissory note,

[26] The trial judge who presided at this hearing was not the same judge who presided at defendant's trial.

granting the County reimbursement for his fees from the proceeds of the sale of the home, if the County would pay the attorney.[27]

While the Attorney General may be correct that the promissory note constituted an enforceable contractual obligation to reimburse the County's defense costs, this would not provide a basis for affirming the trial court's order. Contracts are enforced through civil proceedings, following the filing of a complaint and service of process. Neither the Penal Code nor the promissory note contains a provision waiving or abbreviating normal civil process for the enforcement of this type of contractual obligation. (See *Bradley v. Superior Court* (1957) 48 Cal.2d 509, 519–520 [spousal support obligation in property settlement could not be enforced through criminal contempt proceedings].)

Although section 987.8 provides statutory authority for the court to order a criminal defendant to reimburse defense costs, any such order must be made pursuant to its provisions. Section 987.8 makes no mention of a contract between a county and the defendant. Conversely, there is no statutory provision for an award of damages for breach of contract through a summary proceeding in the criminal court, the procedure invoked by the County to obtain reimbursement. In the absence of any legal authority permitting enforcement of the promissory note in this manner, the County was required to proceed in the civil courts, providing defendant the opportunity to raise her objections to payment as defenses in a civil action. Because the trial court could not enter an order of reimbursement on a theory of contract in this proceeding, we cannot affirm the court's order on that basis.

b. Section 987.8

The Attorney General also argues, echoing the trial court's reasoning, that an "ability-to-pay" hearing was unnecessary because the County had followed the procedures for obtaining a lien under subdivision (a). The absence of any reference to a defendant's ability to pay in subdivision (a), it is argued, "demonstrates that the

[27] Notwithstanding this exchange, the trial court took no evidence regarding the circumstances under which the note was executed and made no formal findings regarding the transaction.

Legislature did not intend to impose an ability-to-pay requirement in cases where the defendant had signed a promissory note secured by a lien on real property."

The rules governing statutory construction are familiar. " ' " '[A]s with any statute, we strive to ascertain and effectuate the Legislature's intent.' " [Citations.] "Because statutory language 'generally provide[s] the most reliable indicator' of that intent [citations], we turn to the words themselves, giving them their 'usual and ordinary meanings' and construing them in context [citation]." [Citation.] If the language contains no ambiguity, we presume the Legislature meant what it said, and the plain meaning of the statute governs. [Citation.] If, however, the statutory language is susceptible of more than one reasonable construction, we can look to legislative history in aid of ascertaining legislative intent.' " (*People v. Allegheny Casualty Co.* (2007) 41 Cal.4th 704, 708–709.)

Subdivision (a) allows the trial court, upon "a finding . . . that a defendant is entitled to counsel but is unable to employ counsel," to order a hearing to inquire into the defendant's ownership of attachable real property. Unlike a hearing pursuant to subdivision (b), which occurs only after the conclusion of proceedings, a subdivision (a) hearing can occur at any time. If such property is found, the court may impose a lien. The county thereafter is granted "the right to enforce its lien for the payment of providing legal assistance to an indigent defendant" in the same manner as any lienholder. The language of the subdivision does not expressly state that it is an alternative to the procedures described in the remainder of section 987.8, nor does it state that lien foreclosure can proceed independent of a determination under subdivision (b) that cost reimbursement is appropriate because the defendant has a "present ability" to pay.

Subdivision (a) is lacking important provisions one would expect if it provided a basis for reimbursement of defense costs independent of the procedures in the remainder of the statute. Most prominently, although subdivision (a) states the county may "enforce its lien for the payment of providing legal assistance to an indigent defendant," there is no provision for determining the amount of the defendant's obligation, either the amount of defense costs incurred by the county or the share of those costs the defendant is required

to reimburse. As a result, subdivision (a) lacks any provision for determining the amount of the costs that can be recovered upon lien foreclosure. Similarly, subdivision (a) does not provide for the entry of an order requiring repayment. Enforcement of a lien for the payment of defense costs would be difficult, if not impossible, without some type of order or judgment establishing the debt. Given these omissions, subdivision (a) arguably lacks the due process guarantees required before an indigent defendant can be charged for the costs of his or her defense. (E.g., *People v. Amor, supra,* 12 Cal.3d at p. 29 [implying the requirement of notice and a hearing into an earlier version of section 987.8 as a matter of constitutional necessity]; *People v. Phillips, supra,* 25 Cal.App.4th at pp. 72–73.)

The trial court assumed that, in the absence of any provision for determining the amount of recoverable defense costs, cost recovery is permitted up to the value of the lien interest in the property. The language of subdivision (a), however, contains no such direction. More important, under the trial court's interpretation the statute provides no authority for the reimbursement of defense costs that exceed the value of the lien interest in the property. The trial court held the County was limited in its recovery of costs to the value of the lien interest, but there is nothing in the statutory language requiring such a limit. Further, there is no reason why, if a defendant is financially able to reimburse the county from other income sources, the county should be so limited in its recovery.

These problems are avoided if the remaining subdivisions of section 987.8 are interpreted as supplying the content missing from subdivision (a). Under this interpretation, subdivision (a) allows the court to impose a lien on a defendant's assets early in the criminal proceedings, when the decision to provide counsel is made, thereby securing later reimbursement. The remaining provisions of section 987.8 provide for the determination and documentation of the amount of the obligation for which the subdivision (a) lien provides security. These subdivisions describe the means for determining the collectible amount of the defendant's debt, prescribe the procedural requirements applicable to that determination, and provide for the entry of an enforceable order requiring payment. This reading, of course, requires the trial court to find the defendant has a "present ability" to pay before an order of repayment can be entered,

regardless of whether a subdivision (a) lien has been secured. (§ 987.8, subds. (b), (e).) Given the incomplete nature of subdivision (a), the Legislature does not appear to have intended it as an alternative to the remainder of the statutory procedures, but rather as a supplement.

While not conclusive, the statutory history of subdivision (a) provides support for this reading. Subdivision (a) was added in 1988, at a time when the other provisions of section 987.8 already existed in substantially their present form. (Stats. 1988, ch. 871, § 1, p. 2807.) It was intended to ensure that if counsel was appointed for a defendant who owned real property but had insufficient liquid assets to pay an attorney, reimbursement for public expenditures on counsel could be obtained at a later date from the defendant's property. As a Senate committee analysis of the bill stated, the purpose of the amendment was "to facilitate the recapture of expenditures arising from the defense of individuals entitled to counsel at public cost." (Sen. Com. on Judiciary, analysis of Sen. Bill No. 2577 (1987–1988 Reg. Sess.) Apr. 26, 1988, p. 2.)

As originally proposed, the subdivision would not have amended section 987.8, but section 987, which governs the appointment of counsel. Subdivision (c) of section 987 permits the court to require a defendant to execute a financial statement to assist the court in determining "whether a defendant is able to employ counsel." With substantially its current language, subdivision (a) was to be added as a new subdivision "(d)" of section 987, permitting a hearing with respect to attachable assets in addition to the financial statement required under subdivision (c). (Sen. Bill No. 2577 (1987–1988 Reg. Sess.) as introduced Feb. 19, 1988.) In this form, the subdivision appears to have been envisioned as an alternative to the procedures of section 987.8. (See Sen. Com. on Judiciary, analysis of Sen. Bill No. 2577 (1987–1988 Reg. Sess.) Apr. 26, 1988, at p. 1.)

As so constituted, the bill was criticized both because the existence of two means for obtaining reimbursement "will be confusing to the judicial system" and because the bill "present[ed] a significant equal protection problem," lacking the procedural guarantees of section 987.8. (Assem. Com. on Public Safety, analysis of Sen. Bill No. 2577 (1987–1988 Reg. Sess.) Aug. 1, 1988, at p. 3.) Prior to enactment, the bill was

amended to insert the new provision in its present location as subdivision (a) of section 987.8, rather than in section 987. The legislative history contains no explanation for this change of codification, but it is plausible to conclude the insertion into section 987.8 was intended to address the two criticisms by incorporating subdivision (a) into the existing section 987.8 procedures. By integrating the provision for security in subdivision (a) into section 987.8, the change removed the possibility of confusion arising from the creation of a second means for determining reimbursement. In addition, by making subdivision (a) subject to the procedural protections already present in section 987.8, the change removed any constitutional concerns.[28] Incorporating subdivision (a) into section 987.8 did not impair the purpose envisioned for it, since the new provision continued to provide counties a means for aiding the recapture of defense costs.

Requiring a hearing into a defendant's ability to pay prior to the enforcement of a lien for repayment of defense costs is consistent with the overall statutory scheme. By enacting section 987.8 to govern reimbursement of defense costs, the Legislature demonstrated its intent to require reimbursement only from those defendants with the means to repay. While the ownership of attachable real property is certainly evidence of an ability to repay, it is not conclusive. A trial court could determine, for example, that forced sale of a personal residence would bring extreme hardship on a defendant's dependents. Alternatively, if the attached property supports an income-producing asset, such as a personal business, seizure of the real property to satisfy a defense cost obligation could compromise the defendant's livelihood and jeopardize his or her rehabilitation. There is no indication in subdivision (a) the Legislature intended the real property of a defendant to be sold without regard to the impact of the seizure on the defendant's family, life, or livelihood, the nature of the asset, or the defendant's other

[28] Following the amendment, the governor sought and obtained an opinion from the Legislative Counsel that the bill was constitutional. (Legis. Counsel, letter to Governor George Deukmejian re Sen. Bill No. 2577 (1987–1988 Reg. Sess.) Aug. 31, 1988.) This supports the inference the amendment was sought to address constitutional concerns.

personal and financial circumstances. Requiring a hearing into these matters by virtue of subdivision (b) prevents an inflexible and potentially counterproductive application of the attachment provisions of subdivision (a).

In the present circumstances, our holding may be largely academic. Defendant, serving an indeterminate prison term with a minimum duration of 16 years, owns an asset that appears to be sufficient to cover her debt to the County. Based on this evidence, the trial court may well conclude defendant has the present ability to pay the debt. Nonetheless, defendant is entitled to a hearing at which she can present evidence and argument to persuade the court that, notwithstanding the value of her interest in the home and her present circumstances, she should not be required to reimburse all or a portion of the County's expenses.[29]

III. DISPOSITION

The trial court's judgment of conviction is affirmed, but the court's order requiring reimbursement of the County's defense costs is vacated. The matter is remanded to the trial court solely for the purpose of holding a hearing to determine defendant's present ability to pay all or a portion of the $212,033 in reimbursable defense costs determined by the trial court and entering an appropriate order under section 987.8, subdivision (e).

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[29] Because defendant is a state prisoner, it has been held that the trial court must make an express finding of "unusual circumstances" before requiring her to repay the County. (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537; see § 987.8, subd. (g)(2)(B).) The *Lopez* holding may, however, be unnecessarily broad in these circumstances. The basis for the holding is a portion of subdivision (g)(2)(B) of section 987.8, which states that a defendant who has been sentenced to state prison is deemed not to have a "reasonably discernible future financial ability" to repay defense costs in the absence of "unusual circumstances." Although *Lopez* held that this statement applies generally to the obligation to reimburse defense costs, its placement within subdivision (g)(2)(B) suggests it was intended only to apply to the determination of the prisoner's future prospects for income, the specific concern of subdivision (g)(2)(B). The provision does not appear to apply to the prisoner's "present financial position" (§ 987.8, subd. (g)(2)(A)) or the "other factor or factors which may bear upon the defendant's financial capability to reimburse the county" (*id.*, subd. (g)(2)(D)), the critical determinations in these circumstances.

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Margulies, Acting P.J.

We concur:

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Dondero, J.

_____
Banke, J.

A117633

Trial Court: Contra Costa County Superior Court

Trial Judge: Hon. Laurel L. Brady

Counsel:

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