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CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOHN PAUL NELSON, Defendant and Appellant.	D057195 (Riverside County Super. Ct. No. BAF003133)
In re JOHN PAUL NELSON on Habeas Corpus.	D057198 (Riverside County Super. Ct. No. BAF003133)

Consolidated appeal from a judgment of the Superior Court of Riverside County, Vernon Nakahara, Judge, and petition for writ of habeas corpus. Judgment affirmed, petition denied.

Lynda A. Romero and George L. Schraer, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Angela Borzachillo and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of Discussion Part I C, II, III, IV, V, and VI.

In his appeal and habeas petition, John Paul Nelson challenges his conviction of premeditated attempted murder with a finding that he personally discharged a firearm. In the published portion of this opinion, we reject defendant's contention that his constitutional right to confront witnesses, as defined in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), was violated by the admission of the victim's out-of-court statement identifying defendant as the perpetrator. We hold the victim's brief informal statement, made on the night of the shooting in an ambulance when the victim was close to death, was not testimonial. Hence, admission of the statement did not contravene defendant's rights under *Crawford*.

In the unpublished portion of this opinion, we address defendant's other assertions of error, including erroneous admission of uncharged misconduct and bad character evidence; a violation of the *Doyle*[1] rule precluding reference to post-*Miranda*[2] silence; closing argument references to facts not in evidence; and inadequate cross-examination of a key prosecution witness. We find no reversible error, and accordingly affirm the judgment and deny the habeas petition.[3]

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1 *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*).

2 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

3 Defendant has raised numerous contentions by means of an appeal and petition for writ of habeas corpus. We issued an order to show cause in the habeas proceeding and have received a return and traverse from the parties. The issues on appeal and in the habeas proceeding are interrelated, and accordingly we have consolidated the matters and consider the issues together. To the extent defense counsel did not object to the errors at trial, defendant challenges them on ineffective representation grounds in his habeas petition.

FACTUAL AND PROCEDURAL BACKGROUND

At about 10:00 p.m. on February 2, 2004, Anthony Marquez was shot in the stomach while he was standing at the bottom of a driveway. After he was shot, Marquez ran to the door of Joanna Oyler's apartment and collapsed. In a recorded interview with the police on February 19, 2004, Oyler identified defendant and another man (Edward Gordin) as being in a car in the driveway at the time of the shooting. Defendant and Gordin were arrested and charged with premeditated attempted murder.

When interviewed by the police, Gordin initially denied involvement in the shooting, telling the police that the "word . . . on the street" was that defendant and another man were responsible for the shooting. After the police described facts linking Gordin to the crime, Gordin admitted he was the driver of the car and stated defendant was the shooter.

A police officer who arrived at the scene in response to a 911 call testified he found Marquez lying on the ground in front of an apartment. When the officer asked Marquez what happened, Marquez stated he had been shot. Marquez said he had been standing outside at the entrance to the property when a car pulled up and he was shot. When the officer asked who shot him, Marquez told the officer he was shot by "an unknown subject from that vehicle." A firefighter who accompanied Marquez in the ambulance on the way to the hospital testified that when he asked Marquez who shot him, Marquez responded "John Paul" (i.e., defendant).

On the eve of trial, Gordin pleaded guilty to attempted murder (without premeditation) and then testified on behalf of the prosecution. Gordin testified he had

met defendant "on the streets" a couple of weeks before the shooting. Gordin, along with defendant, Marquez, and other people, would "hang around" at Oyler's home to use methamphetamine. Gordin had known Marquez since they were young boys, and their fathers were good friends.

Gordin testified that on the night of the shooting, he was at Oyler's apartment with several other people, and defendant was at the next door duplex. A stolen Honda was parked at Oyler's residence. Defendant came to Oyler's apartment and asked for a ride. Gordin agreed to give him a ride; they got inside the Honda with Gordin in the driver's seat and defendant in the passenger's seat. Gordin drove to the bottom of the driveway and stopped, with the car facing the street.

While Gordin was waiting for a car to pass before driving onto the street, defendant asked "who's that?" Gordin glanced over to the passenger side and saw a shadow of someone walking towards the car, but he could not see who it was because it was dark. Gordin noticed that defendant was "digging around" in his pockets for something. Gordin turned back and focused his attention on the car coming down the street, and then he heard a gunshot. Gordin saw defendant bring his arm back in through the open car window, and saw that he was holding a gun.

After shooting the gun, defendant stated, "'I got that fool.'" Gordin asked "'Who?'", and defendant stated "Anthony" (i.e., Marquez). Gordin, feeling angry and panicked, stated "'What the fuck?'" and rapidly drove off. Defendant responded, "'Sorry, dog, I had to do what I had to do.'" Gordin wanted to get away from defendant; he drove several blocks away from the scene and then left defendant in the car.

Gordin testified he felt angry when defendant told him it was Marquez, because Marquez had never done anything to Gordin and Gordin and Marquez had always been friends. Gordin knew that the people he "hung around" with on the streets were saying Marquez was a snitch who had talked to the police about people doing crimes, but Gordin did not believe it. Gordin testified that if you are a snitch, people want to kill you, and the only reason he could think of for defendant to shoot Marquez was because defendant thought Marquez was a snitch.

Gordin testified he was afraid because he understood that he was now labeled as a snitch and will have a difficult time in prison because of this. He stated defendant's sister had threatened to "do something to" his sisters if he "snitched" on defendant, and his family was trying to move to a different location.

Oyler testified during the prosecution's case, but denied or claimed not to remember essentially all of the matters she told the police that implicated Gordin and defendant in the shooting. Accordingly, the prosecutor was allowed to play a recording of her interview with the police.

In that interview, Oyler stated that at the time of the shooting she had known Gordin about four to six months and he was her friend, whereas she had known defendant only about two months. Just before the shooting, Oyler was standing inside the screen door of her home smoking a cigarette. She saw Gordin and defendant in a Honda car in the driveway by her house; Gordin was driving and defendant was in the front passenger seat. They drove down the driveway and stopped the car by the street. Oyler then heard

a gunshot. Marquez ran to her door, holding his stomach and screaming that he had been shot and to call 911. Oyler heard the Honda speed away. She called 911.

Oyler told the police that from her front door she could not fully see the area in the front of the property. Further, she did not see Marquez until he was running towards her apartment after being shot. She also told the police that she thought that at the time of the shooting Marquez was "walking this way[,] towards [defendant] to the passenger seat," and so she "guess[ed]" defendant was the shooter. She heard that the shooting occurred because Marquez was a snitch. Oyler stated that she had seen defendant with a gun, apparently on the night of the shooting.[4] She did not see Gordin with a gun the night of the shooting, although she saw him with a gun after the shooting (about one week before the police interview).

When the police told Oyler that Gordin had been bragging that he was the shooter and asked if Gordin had told her this, Oyler responded yes. Oyler stated that Gordin had told her "he had the gun and he shot" Marquez because Marquez was a snitch. Oyler opined that Gordin was saying this because he was afraid; he wanted people to think he was "tough"; and he thought that if he put "this reputation out there that he's such a bad ass" then people will leave him alone and be afraid of him. Oyler told the police that people got shot for "telling on people" and she did not want to testify. She stated she was not afraid of Gordin and Gordin would not shoot anyone, but she was afraid of defendant

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[4] The transcript of the recorded interview states that when Oyler was asked if she saw defendant with the gun on "[t]hat same night," she answered, "Mmm-hmm."

because she did not really know him and she heard "bad things" about him and that he would "take you out in a second."

A knife was found in the driveway where the shooting occurred, and a knife sheath was found in Marquez's possession. The officer who found the knife in the driveway testified the knife would have been closer to the driver's side than the passenger's side of a vehicle that was facing the street to exit the driveway. The police assessed that because of a heavy rain that started shortly after the shooting, physical evidence (such as blood) that might have assisted the investigation of the crime was washed away.

In addition to evidence concerning the shooting, the prosecutor introduced several items of uncharged misconduct committed by defendant, including (1) defendant's threat to kill his girlfriend's family if his girlfriend's stepfather reported him to the police for beating the girlfriend; (2) defendant's high-speed evasion of the police when the police responded to a disturbance report at the hotel where his girlfriend's family was staying; and (3) defendant's assault on an inmate (Willie Pullins) when defendant was in a holding cell several years after the shooting.

The jury found defendant guilty of attempted premeditated murder with a personal gun discharge finding. For the attempted murder conviction, he was sentenced to life with the possibility of parole. He also received a determinate term of 20 years for the personal gun discharge enhancement.

DISCUSSION

I. *Admission of Victim's Hearsay Identification of Defendant*

Defendant asserts the victim's hearsay statement that he shot the victim should not have been admitted into evidence. He contends: (1) the statement is testimonial and hence its admission violates his federal constitutional right of confrontation as defined in *Crawford*, and (2) the statement cannot be characterized as a spontaneous statement admissible under California's hearsay exceptions. We reject these contentions.

A. *Pretrial Hearing on Admissibility*

Before trial, the prosecutor told the court that the victim would likely not be testifying, explaining: "[D]espite our best efforts to find and secure his availability, I don't think the victim in this case will be made available to testify." The prosecutor moved to allow into evidence the victim's hearsay statement made in the ambulance that he was shot by "John Paul." The prosecutor argued the statement did not violate the defendant's right to confront witnesses under *Crawford* because the statement was nontestimonial, and the statement was admissible under the spontaneous statement exception to the hearsay rule.

At a hearing to determine the admissibility of the victim's statement, the prosecutor presented the testimony of a police officer (Mark Smith) who spoke with the victim at the scene of the shooting, and the testimony of firefighter Bradley Witt who spoke with the victim in the ambulance. Smith testified that when he arrived at the scene at about 10:00 p.m. in response to a 911 call, Marquez was lying on the ground by the front door of a duplex. Marquez was holding a bloody towel to his abdomen. Smith

spoke to Marquez for about one or two minutes. Marquez was "very low key and quiet" when he was talking. Marquez told Smith he had been shot "out front" on the street, and the assailant was in a vehicle and used a "large handgun." When Smith asked Marquez who shot him, Marquez told Smith that "an unknown subject shot him."[5] When Smith asked Marquez to describe the shooter and to describe the car, Marquez did not respond to either question. Smith did not ask Marquez any more questions because he felt he was not going to get any more information from Marquez at that point.

The prosecutor asked Smith if he was concerned about whether the shooter might be near the area at that time. Smith responded, "Yes, that's always a concern." After speaking with Marquez, Smith started examining the crime scene to determine exactly where the shooting occurred so the area could be contained. Smith testified that he did not obtain information about the identity of the shooter until later that night.[6]

Firefighter Witt testified that when he arrived at the scene of the shooting, he assisted the ambulance crew with placing Marquez on a backboard and into the ambulance. Witt stated that it typically takes about six to 10 minutes to accomplish this task. Witt accompanied the paramedic in the back of the ambulance and during the ride

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5 The terminology "unknown subject" was derived from the language used by Smith in his police report to describe Marquez's response.

On direct examination at the pretrial hearing, Smith testified that Marquez did not respond when asked who shot him. However, when shown his police report on cross-examination, Smith clarified that Marquez indicated he did not know who shot him, and that he did not respond when asked to describe the shooter.

6 Smith testified at the pretrial hearing that he did not interview other persons at the scene. However, at trial, another officer testified that he interviewed the other people at the scene, apparently with no discovery of the identity of the shooter.

to the hospital assisted with monitoring Marquez's vital signs and providing him oxygen. About midway through the 15- to 20-minute ride to the hospital, Witt asked Marquez, "'Who shot you?'" Marquez responded, "John Paul." The answer stood out in Witt's mind because John Paul is the name of a famous pope and Witt is Catholic. Witt testified that while in the ambulance Marquez was in critical condition; he was fading "in and out of consciousness"; he was having difficulty breathing; and he was bloated and having severe abdominal pain. The police had not asked Witt to question Marquez, but he asked Marquez who shot him because he was concerned that Marquez was going to die. Witt acknowledged that the question had no relevance to Marquez's medical condition. Witt did not ask Marquez any additional questions because they were busy treating him.

Witt stayed at the hospital for a while, and arrived back at the fire station at about 12:30 a.m. He testified he called the police department "right when [he] got back" to the station and provided the name given by Marquez.[7] He thought this was "good information" for the police to know, and he called when it was "fresh . . . in [his] head."[8]

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7 In his trial testimony, Witt estimated about 60 to 90 minutes passed between the time the victim made the identification statement and the time he called the police department to relay the information.

8 On cross-examination in his trial testimony, Witt stated he did not immediately call the police when the victim made the identification statement in the ambulance because during the entire ambulance ride he was "busy . . . [¶] [t]aking vitals" and providing "patient care." He acknowledged that once the victim was situated at the hospital, he could have used his cell phone to call the police before he arrived back at the fire station. He testified he was "not concerned at that time" that the shooter "was still around," but he was concerned about the shooter's identity. He also testified that when he arrived back at the fire station he "immediately" called the police.

With respect to the *Crawford* right of confrontation, the prosecutor asserted the victim's statement to Witt identifying the shooter was nontestimonial because Witt was not a law enforcement agent charged with investigation of crime, and there was no structured questioning akin to a police interview. With respect to California's hearsay rules, the prosecutor argued the statement to Witt was a spontaneous statement "because it was made under the stress of the event."

Objecting to admission of the statement to Witt, defendant asserted the statement was testimonial because Witt was not obtaining information about Marquez's physical condition but rather was acting as an agent of the police to obtain information about the suspect. Further, defendant argued the statement to Witt was not spontaneous because Marquez had time to reflect before making the statement, as shown by the fact that he had earlier stated to Officer Smith at the scene that an "unknown subject" shot him.

The trial court ruled the statement to Witt was nontestimonial because of the circumstances under which it occurred. Further, the court ruled the statement was admissible as a spontaneous statement because Marquez had been shot in the stomach, he was still in a state of shock, and he did not have "time to process the information." The court reasoned that given Marquez's critical condition, he would not be "trying to figure out . . . who should I pin this on."

B. *Crawford Right of Confrontation*

1. *Governing Law*

The Sixth Amendment of the federal Constitution provides that a defendant has the right to confront the witnesses against him. In *Crawford*, the United States Supreme

Court held that admission of a "testimonial" hearsay statement by a declarant who does not appear for cross-examination at trial violates the confrontation clause unless the witness is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the witness. (*Crawford, supra*, 541 U.S. at pp. 59, 68.) This rule applies even if the statement is otherwise admissible under a hearsay exception. (*Id*. at pp. 50-51, 56 & fn 7.) However, the confrontation clause does not bar admission of hearsay statements that are not testimonial. (*Davis v. Washington* (2006) 547 U.S. 813, 823-826 (*Davis*).)

Relevant to the parameters of testimonial statements to which the confrontation clause applies, *Crawford* explained: "[T]he Confrontation Clause . . . applies to 'witnesses' against the accused—in other words, those who 'bear testimony'. . . . 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' [Citation.] An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Crawford, supra*, 541 U.S. at p. 51, second bracket in original.)

However, not all statements to government officers are testimonial. In *Davis*, the court formulated the following test to distinguish nontestimonial from testimonial statements made to law enforcement officials: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to

establish or prove past events potentially relevant to later criminal prosecution." (*Davis*, *supra*, 547 U.S. at p. 822.)

The *Davis* court reasoned that statements to government officials that are "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" satisfy the definition of a testimonial statement because they are a solemn declaration or affirmation made for the purpose of establishing or proving some fact. (*Davis*, *supra*, 547 U.S. at p. 826.) Further, a witness's description of past events to an investigating officer may be testimonial regardless of whether the statements were reduced to a writing signed by the declarant or merely embedded in the memory or notes of the officer. (*Ibid*.) *Davis* acknowledged that "formality is indeed essential to testimonial utterance," but stated the requisite formality and solemnity exists when a witness describes past events to an officer because deliberate falsehoods to officers constitute a criminal offense. (*Id.* at pp. 826-827, 830, fn. 5.) *Davis* also observed that even when statements were made without any detailed interrogation (i.e., volunteered statements or answers to open-ended questions), this does not automatically make them nontestimonial. (*Id.* at p. 822, fn. 1.)

Under these principles, statements made to a 911 operator describing events as they are actually happening are not testimonial if their purpose was to provide the police with information necessary to resolve a present emergency and they were made in an environment that was not tranquil or safe. (*Davis*, *supra*, 547 U.S. at pp. 827-828.) In this circumstance, the 911 caller's statements are not "'a weaker substitute for live testimony' at trial" because "[n]o 'witness' goes into court to proclaim an emergency and

seek help." (*Id*. at p. 828; see *People v. Cage* (2007) 40 Cal.4th 965, 984 [testimonial statements are statements that are "out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial"].)

Similarly, statements in response to police inquiries at the crime scene are not testimonial if the inquiries were designed to ascertain whether there was an ongoing threat to the safety of the victim, the officers, or the public. (See *Davis*, *supra*, 547 U.S. at pp. 829, 831-832; *People v. Romero* (2008) 44 Cal.4th 386, 422.) For example, questioning a victim to identify a perpetrator for purposes of immediate apprehension of the perpetrator for safety reasons does not yield a testimonial statement. (*People v. Romero*, *supra*, at p. 422 [statements "are nontestimonial if the primary purpose is to deal with a contemporaneous emergency such as assessing the situation, dealing with threats, or apprehending a perpetrator"].)

In *Romero*, the court concluded a victim's statements to the police at the crime scene were nontestimonial under circumstances where the agitated victim described an assault that had just occurred, and a few minutes later identified the perpetrators who the police found hiding nearby. (*People v. Romero*, *supra*, 44 Cal.4th at pp. 421-422.) *Romero* reasoned the "statements provided the police with information necessary for them to assess and deal with the situation, including taking steps to evaluate potential threats to others by the perpetrators, and to apprehend the perpetrators. . . . The primary purpose of the police in asking [the victim] to identify whether the detained individuals were the perpetrators, an identification made within five minutes of the arrival of the police, was to determine whether the perpetrators had been apprehended and the

emergency situation had ended or whether the perpetrators were still at large so as to pose an immediate threat." (*Id.* at p. 422.)

In contrast, statements that are initially nontestimonial may evolve into testimonial statements if the immediate danger has ended and the questioning continues to elicit details about what happened. (See *Davis, supra,* 547 U.S. at pp. 817, 828-829 [following initial nontestimonial statements, 911 caller's statements may have become testimonial once the caller reported that the assailant (her former boyfriend) had driven away and the operator "proceeded to pose a battery of questions"].) Likewise, statements are testimonial if they are in response to police interrogation that occurs after the emergency has been resolved and where there is no immediate need to identify or apprehend a perpetrator. (See *Davis, supra,* 547 U.S. at pp. 829-830.)

For example, the *Davis* court found statements made to an officer responding to a report of a domestic disturbance were testimonial because there were no signs of a current disturbance; the wife stated she was fine; the wife made statements incriminating her husband only during a second conversation when she was interviewed in a room separate from her husband and some time after the events she described were over; and the officer had the wife write out an affidavit to establish what had occurred previously. (*Davis, supra,* 547 U.S. at pp. 829-832.) The court reasoned that during the second conversation the officer was not seeking information about "'what is happening'" but rather about "'what happened'"; the victim was not making a "cry for help" and was not providing information to enable the officers "immediately to end a threatening situation"; and the sole purpose of the interrogation was to investigate a possible crime. (*Id.* at p.

830-832.) *Davis* concluded the statements are "an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination . . . ." (*Id*. at p. 830.)

Similarly, in *Cage*, the California Supreme Court concluded a victim's statement to an officer at a hospital waiting room was testimonial under circumstances where the officer had earlier been to the scene of the crime and observed evidence that could suggest the defendant (the victim's mother) had committed an assault; the victim had been transported to the hospital and was awaiting treatment in the emergency room; and the officer asked the victim to describe what had happened between the victim and the defendant. (*People v. Cage*, *supra*, 40 Cal.4th at pp. 984-985.) The *Cage* court reasoned that by the time the officer spoke with the victim the incident had been over for more than an hour; the assailant and the victim were geographically separated; and the victim was "in no danger of further violence as to which contemporaneous police intervention might be required." (*Id*. at p. 985.)

Cage concluded the officer's "clear purpose in coming to speak to [the victim] at this juncture was not to deal with a *present emergency*, but to obtain a fresh account of *past events involving defendant* as part of an inquiry into possible criminal activity." (*People v. Cage*, *supra*, 40 Cal.4th at p. 985.) Rejecting an argument that the officer was determining whether further immediate police action might be necessary to apprehend a perpetrator, the court noted the officer did not try to obtain emergency information from the victim when he saw him near the crime scene even though the victim was coherent; at the hospital the officer questioned the victim in a manner that assumed the defendant was

the suspect; and there was no indication the officer followed up with what the victim told him by initiating emergency action. (*Id.* at pp. 985-986, fn. 15.)

On appeal, we independently review whether a statement was testimonial so as to implicate the constitutional right of confrontation. (*People v. Johnson* (2007) 150 Cal.App.4th 1467, 1478.) We evaluate the primary purpose for which the statement was given and taken under an objective standard, "considering all the circumstances that might reasonably bear on the intent of the participants in the conversation." (*People v. Cage*, *supra*, 40 Cal.4th at p. 984.)

2. *Analysis*

Although firefighter Witt was not a police officer, we agree with defendant that he could be an agent of the police for purposes of securing a testimonial statement. (See *People v. Cage*, *supra*, 40 Cal.4th at p. 987 [court evaluated whether medical doctor was "acting in conjunction with law enforcement" and making inquiries with an "evidence-gathering aim"]; *People v. Vargas* (2009) 178 Cal.App.4th 647, 660 [government officers for *Crawford* purposes include those acting "'in an agency relationship with law enforcement'"]; see also *Davis*, *supra*, 547 U.S. at p. 823, fn. 2 [court assumed, without deciding, that 911 operators can obtain testimonial statements because they may "be agents of law enforcement when they conduct interrogations of 911 callers"].)

However, we conclude Marquez's statement in the ambulance to Witt was not testimonial. When Marquez made the statement, he was severely injured from a gunshot wound to the stomach, he was lying in an ambulance en route to the hospital, and he appeared to be on the verge of death. These circumstances lack the solemnity and

formality associated with a testimonial statement and are far different from, for example, the scenario in *Davis* where the officer separated the wife from her husband and had her write out an affidavit describing the incident. Although the victim in *Cage* was questioned by the police while awaiting treatment at the emergency room, there is no indication the victim (who had been cut with glass) was in jeopardy of dying. Given Marquez's physical condition and the brevity of his response, it is unlikely that a reasonable person would construe his statement as a solemn declaration that could lead to criminal charges if it was deliberately fabricated. Further, a statement consisting of two words in response to a single question, made by a declarant lying close to death in an ambulance, cannot be characterized as an "out-of-court analog[]" of the testimony given by an alert witness while sitting in court. (*People v. Cage*, *supra*, 40 Cal.4th at p. 984.)

The circumstances also show that at the time of Witt's inquiry, the shooting had just recently occurred and the shooter was still unidentified and at large.[9] Although Marquez was no longer in immediate danger from the shooter, there was still a possibility that the unidentified shooter could pose an immediate threat to other persons. This is not a case involving a domestic disturbance (as discussed in *Davis* and *Cage*), *where the*

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9 Although the record of the hearing on admission of the hearsay statement does not reveal precisely how much time had lapsed between the shooting and Witt's questioning of the victim in the ambulance, it suggests a relatively short passage of time (less than one-half hour) based on the fact the authorities arrived at the scene in response to a 911 call; it typically takes about six to 10 minutes to place the victim on a backboard; and Witt asked the question about midway through the 15- to 20-minute ambulance ride. Further, the testimony presented at trial reflects that Officer Smith arrived at the shooting scene at about 10:12 p.m.; firefighter Witt spent about eight minutes with Marquez at the scene; and Marquez was removed from the scene sometime before 10:47 p.m.

assailant was identified and the geographic separation of the victim and the assailant would suggest the immediate threat of danger to both the victim and the public was over. Witt's inquiry about the identity of the shooter was a basic question that was crucial to an evaluation by the police whether there was an ongoing danger to the public. Consistent with this immediacy, Witt communicated the information he acquired to the police that same night, once he had finished his medically-related duties and had arrived back at the fire station. Witt's inquiry (in his role as an agent of the police) addressed this concern and was relevant to assist the police in determining whether the at-large perpetrator posed an immediate risk to others.

The fact that Witt's inquiry also served to benefit the police in their investigation of the case does not alone render the victim's statement testimonial. The test under *Crawford* is whether the *primary purpose* of the interrogation is to establish facts to be used against the perpetrator. The mere fact that the question might also be expected to ultimately yield evidence against the accused at trial does not transform nontestimonial circumstances into evidence-gathering questioning. (See *People v. Cage*, *supra*, 40 Cal.4th at p. 984, fn. 14 [the fact that a reasonable person could conceive that an out-of-court statement identifying a perpetrator might later become criminal evidence does not alone establish the statement as testimonial]; *People v. Romero, supra,* 44 Cal.4th at p. 422 ["statements are not testimonial simply because they might reasonably be used in a later criminal trial"]; compare *Melendez-Diaz v. Massachusetts* (2009) ___ U.S. ___ [129 S.Ct. 2527, 2532] [lab analyst certificates attesting that substance seized from defendant was cocaine are testimonial because the certificates were made under circumstances

indicating they would be available for later use at trial and they were for the sole purpose of providing evidence against the defendant].)

In sum, the circumstances here involve an unidentified shooter loose in the community, a single question requesting information relevant to immediate public safety, a two-word response by a victim while he was being rushed to the hospital with a potentially fatal injury, and transmittal of the victim's statement to the police that same night. The highly informal circumstances and brevity of the inquiry concerning a basic question of identity on the night of the incident reflect a response to an immediate situation rather than an investigative purpose. The trial court properly ruled the statement to Witt was nontestimonial, and hence its admission did not violate *Crawford*.

C. *Spontaneous Statement*

Evidence Code section 1240 permits admission of hearsay statements that describe an event perceived by the declarant and that are made "spontaneously while the declarant was under the stress of excitement caused by such perception."[10] The "'basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief.'" (*People v. Lynch* (2010) 50 Cal.4th 693, 751.) The statement must be made before there

10 The spontaneous statement exception to the hearsay rule does not require a showing that the declarant is unavailable to testify at trial. (*People v. Anthony O*. (1992) 5 Cal.App.4th 428, 436.)

has been time to contrive and misrepresent, i.e., while the nervous excitement still dominates and reflective powers remain in abeyance. (*Id.* at pp. 751-752.)

Although the passage of time and the use of questions to elicit the statements are relevant factors to consider, they do not necessarily deprive a statement of its spontaneity. (*People v. Poggi* (1988) 45 Cal.3d 306, 319.) As explained in *Poggi*: "'Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance*.'" (*Ibid*.)

The key consideration is whether the statement was made without deliberation or reflection. (See *People v. Lynch*, *supra*, 50 Cal.4th at p. 752.) For example, although responses to detailed questioning are likely to lack spontaneity, an answer to a simple inquiry may be spontaneous. (*People v. Morrison* (2004) 34 Cal.4th 698, 718-719.) Further, a declarant who is distraught and in severe pain, although asked extensive questions, may make spontaneous statements because "'the intense pain . . . and the concern . . . about his survival no doubt preoccupied him so that he could not have contemplated spinning a false tale.'" (*People v. Lynch*, *supra*, at p. 753.)

On appeal, we review a trial court's ruling on the issue of a spontaneous statement under the abuse of discretion standard. (*People v. Lynch*, *supra*, 50 Cal.4th at p. 752.)

Marquez's statement to Witt in the ambulance can reasonably be characterized as a spontaneous statement. When Marquez was in the ambulance, he had been shot in the stomach a short while earlier, he was fading in and out of consciousness, and he was

possibly dying. His life-threatening condition and low level of consciousness supports that his condition"'was such as would inhibit deliberation.'" (*People v. Lynch*, *supra*, 50 Cal.4th at p. 752.) Although at the scene he told the police he could not identify the shooter, this goes to the weight of his subsequent identification of the shooter; it does not establish that the stress of the event had abated by the time he was in the ambulance. The record supports a finding that when Marquez answered Witt's question, he was still in the acute stages of his injury and his physical condition made him incapable of deliberating and reflecting.

II. *Admission of Uncharged Misconduct and Bad Character Evidence*

Defendant challenges the admission of several items of evidence concerning his misconduct or bad character apart from the charged offense. These included: (1) defendant's threats to kill his girlfriend's family if his girlfriend's stepfather called the police because of defendant's battery of the girlfriend; (2) defendant's engagement in a high-speed vehicular evasion when the police responded to a disturbance call at a hotel; (3) defendant's assault of inmate Pullins in a holding cell, purportedly because Pullins was a snitch; and (4) Oyler's statement to the police that she was afraid of defendant because of his reputation for violence whereas she was not afraid of Gordin.

Defense counsel objected to some, but not all, of this evidence. To the extent the evidence was admitted over defense counsel's objection, defendant contends the court abused its discretion; otherwise, he challenges the judgment on grounds of ineffective representation.

We find no error concerning the admission of any of these evidentiary matters, except with respect to the Pullins assault incident. We conclude the error associated with the Pullins misconduct evidence was not prejudicial.

A. *Governing Law*

Evidence of the defendant's misconduct that is not charged in the current case is generally inadmissible for purposes of showing the defendant's bad character or propensity to commit crimes. (Evid. Code, § 1101, subd. (a); *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017.) The rationale for excluding uncharged crimes evidence is based on the danger that the jury will convict merely because of the defendant's criminal propensity or bad character regardless of whether guilt is proven beyond a reasonable doubt. (See *People v. Alcala* (1984) 36 Cal.3d 604, 631.) However, uncharged crimes evidence may be admitted for the limited purpose of proving material facts apart from criminal propensity, such as motive or intent. (Evid. Code, § 1101, subd. (b); *People v. Scheer*, *supra*, at p. 1017.)

Uncharged crimes evidence may be admissible to prove intent if the conduct during the uncharged and current crimes is sufficiently similar to support a rational inference that the defendant harbored the same intent in each instance. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) Motive is an intermediate fact that may be probative of an ultimate issue such as intent or identity. (*People v. Scheer*, *supra*, 68 Cal.App.4th at p. 1017.) The uncharged crimes evidence may be admissible to show motive if the uncharged and charged offenses, even though involving dissimilar crimes, share common features that tend to show the defendant had common reasons for committing the crimes.

(See *People v. Demetrulias* (2006) 39 Cal.4th 1, 15; *People v. Scheer*, *supra*, 68 Cal.App.4th at p. 1017; *People v. Walker* (2006*)* 139 Cal.App.4th 782, 804-805 [common motive of animus towards prostitutes]; *People v. Pertsoni* (1985) 172 Cal.App.3d 369, 374 [common motive of hatred of government officials].)

Because of the prejudice inherent in misconduct evidence, the evidence must have substantial probative value, and the trial court must evaluate under Evidence Code section 352 whether the probative value is outweighed by the probability of undue prejudice, confusing the issues, or misleading the jury. (*People v. Walker*, *supra*, 139 Cal.App.4th at p. 806; *People v. Scheer*, *supra*, 68 Cal.App.4th at p. 1018.) We review the trial court's rulings on uncharged misconduct evidence for abuse of discretion. (*Scheer*, *supra*, at p. 1018.)

B. *Defendant's Conduct of Threats, Evasion, and Battery*

Defendant asserts that evidence showing that several days after the shooting he threatened his girlfriend's family and engaged the police in a high-speed chase was inadmissible misconduct evidence. He also argues that evidence that he beat his girlfriend, which was referred to by the witnesses describing the threats, was inadmissible hearsay. We conclude the trial court could reasonably exercise its discretion to admit these evidentiary items.

1. *Background*

During pretrial proceedings, the prosecution moved to allow admission of evidence of defendant's other acts of criminal misconduct that were not charged in the current case. According to the prosecution, a few days after the February 2 shooting of

Marquez, defendant committed two other criminal offenses: criminal threats and vehicular evasion of an officer.[11] The prosecutor told the court that on February 6, defendant came to the home of Alfonso Flores (the stepfather of defendant's girlfriend) looking for his girlfriend. Flores confronted defendant about beatings defendant had inflicted on his girlfriend, leaving bruises on her body. Defendant became angry and threatened to kill Flores and his family if he reported the crime to the police. These threats were repeated on February 7 when defendant returned to the home and Flores refused to tell defendant where his girlfriend was. Because of the threats, Flores moved his family to a hotel. On February 9, Flores contacted the police and reported defendant's battery and threats.

The prosecutor stated that the evasion offense occurred on February 10 when the police were dispatched to the hotel where the Flores family was staying to investigate a report of a man beating a woman. When the police arrived, the man (recognized by the police as defendant) sped away in a vehicle, with the female in the car as a passenger. Defendant engaged the police in a high-speed chase and successfully evaded the police. Defendant ran through intersections without stopping, drove on the wrong side of the freeway, and reached speeds exceeding 120 miles per hour.

The prosecutor argued that the criminal threats offense was relevant on the issue of intent to kill, asserting that the current victim was shot because he was a snitch, and

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11 Defendant was charged with these two other offenses in cases distinct from the Marquez shooting case. Trials on these other offenses were trailed so that they would commence after resolution of the current case.

defendant's threats to kill Flores if he called the police in essence "demonstrated his intent to kill Flores if he snitched on him." The prosecutor contended that the high-speed chase evidence showed consciousness of guilt based on defendant's fleeing from the police shortly after the shooting incident. Defense counsel objected to admission of the evidence, arguing that the Flores threat was different from the alleged shooting; the prosecutor was trying to bolster the case by using other offenses to prejudice the jury against defendant; and the evidence should be excluded as unduly prejudicial under Evidence Code section 352.

Agreeing with the prosecutor, the trial court ruled the evidence of the criminal threats and evasion offenses was admissible.

At trial, Flores (and an officer who spoke with Flores) testified to describe the threats made by defendant when confronted with his battery of his girlfriend, in essentially the same manner as described by the prosecutor during the pretrial proceedings. Flores testified that when defendant came to his home on February 6, he asked defendant why he was beating Flores's stepdaughter and told defendant to leave or he would call the police. Defendant told Flores that he would kill Flores and Flores's family if Flores called the police. After a similar incident on February 7, Flores moved his family to a hotel to hide them from defendant, and Flores reported the threats to the police. The officer who went to the hotel on February 9 in response to Flores's report of the criminal threats briefly described the injuries that he observed on defendant's

girlfriend.[12] The jury was instructed that it could consider evidence of defendant's uncharged crimes for the limited purpose of evaluating his intent or motive, but not to prove his bad character or tendency to commit crimes.

The officer also testified to describe the February 10 high-speed vehicular evasion that defendant commenced at the hotel where the Flores family was staying and continued for about 24 miles. The officer described the details of the chase (consistent with the prosecutor's pretrial description), and characterized it as "the wildest," "most dangerous" pursuit he had ever experienced with no "regard for the public." Over defense objection, a police video of the chase, narrated by the officer at trial, was played for the jury. The jury was instructed that it could consider evidence of flight after the charged crime when evaluating whether the defendant was guilty of the crime.

2. *Analysis*

Defendant argues the evidence regarding his threats to Flores was inadmissible because the evidence was not sufficiently similar to the Marquez shooting and was not of significant relevance to any disputed issue. The trial court could reasonably conclude otherwise. The record supports that the threats evidence was relevant on the issues of motive and intent, i.e., that defendant had a motive and intent to use life-threatening violence against people who made reports to the police. Defendant threatened to kill Flores and his family if Flores contacted the police about defendant's commission of battery. From this evidence, the jury could infer that defendant likewise had a reason to

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[12] The officer testified the girlfriend had "bruising" on her arm, shoulder, and neck area.

shoot Marquez and that he intended to kill him because he perceived Marquez as someone who made reports to the police.

To support his challenge to the Flores threats evidence, defendant contends that intent to kill was not disputed at trial, and hence the uncharged crimes evidence should have been excluded as cumulative. (See *People v. Balcom* (1994) 7 Cal.4th 414, 422-423 [potential for prejudice may outweigh probative value when uncharged crimes evidence is merely cumulative on issue not reasonably subject to dispute].) Defendant posits that no reasonable jury could find the shooting of the victim in the stomach was performed without intent to kill.

A not guilty plea puts in issue all the elements of the charges, and, subject to the court's discretion under Evidence Code section 352, the prosecution is entitled to fully present all evidence that supports its case. (*People v. Waidla* (2000) 22 Cal.4th 690, 723 & fn. 5; *People v. Balcom*, *supra*, 7 Cal.4th at pp. 422-423.) To prove the attempted murder charge, the prosecutor had to show defendant had the specific intent to kill when he shot Marquez. (*People v. Bland* (2002) 28 Cal.4th 313, 327-328.) Contrary to defendant's claim, the intent to kill in this case was not so apparent as to require exclusion of the evidence as cumulative. The shooting occurred at night in the dark while the shooter was in a vehicle and the victim was outside. These facts did not definitively establish that the shooter purposefully aimed the gun at the victim's stomach, and the jury needed to evaluate whether the shooter aimed at the victim with specific intent to kill.

Moreover, apart from intent to kill, the evidence was highly relevant to show defendant's motive to shoot persons who spoke to the authorities. The evidence

supported the prosecutor's theory that defendant had a common motive, based on animus towards snitches, to shoot Marquez and to threaten Flores. As to the motive issue, the Flores threat evidence was not cumulative to a matter not reasonably subject to dispute.

With respect to the high-speed chase, defendant points to the requirement that the evidence must justify an inference that defendant's consciousness of guilt concerned the charged crime, and not some other criminal behavior. (See *People v. Williams* (1988) 44 Cal.3d 1127, 1143, fn. 9.) He argues the chase could show consciousness of guilt about the assault at the hotel, but not consciousness of guilt about the shooting, given the eight-day period between the shooting and the chase and the intervening assault that immediately preceded the chase. The trial court was not required to reach this conclusion. Instead, the court could reasonably infer that the shooting, which nearly killed the victim, was still on the defendant's mind, and that it was much more egregious than the altercation at the hotel and gave the defendant a greater incentive to want to avoid the police. The court could conclude the jury was entitled to consider whether the extreme measures taken by defendant to evade the police reflected that he knew the police might be looking for him because of his involvement in the shooting. (See *People v. Perry* (1972) 7 Cal.3d 756, 772, overruled on another ground in *People v. Green* (1980) 27 Cal.3d 1, 28 ["it is the jury's function to determine which of several possible reasons actually explains why a defendant fled"].)

We also reject defendant's contention that the narrated video of the chase was inadmissible. The court could reasonably find that the jury was entitled to be shown the

great lengths to which defendant was willing to go to avoid police contact for purposes of considering whether his conduct reflected consciousness of guilt concerning the shooting.

Defendant asserts the threats and evasion evidence should have been excluded as more prejudicial than probative under Evidence Code section 352. He contends the Flores threats evidence was highly inflammatory because it involved threats to kill an entire family and a witness (Flores) who was more credible than the witnesses associated with the Marquez shooting. Similarly, he asserts the high-speed chase evidence, unlike a simple departure from the scene of a crime, was unduly inflammatory because the manner of his departure created a high risk of death or injury to innocent persons. He also notes that the potential for prejudice was increased because the evidence was not based on convictions. (See *People v. Walker*, *supra*, 139 Cal.App.4th at pp. 806-807 [potential for prejudice reduced if uncharged acts resulted in convictions so as to minimize risk jury would be motivated to punish for uncharged offenses].) We find no abuse of discretion.

Undue prejudice does not exist merely because highly probative evidence is damaging to the defense case, but rather arises from evidence that uniquely tends to evoke an emotional bias against the defendant or cause prejudgment of the issues based on extraneous factors. (*People v. Doolin* (2009) 45 Cal.4th 390, 438-439.) The threats and evasion evidence was not more inflammatory than the shooting so as to create a risk of an emotional reaction or prejudgment. Further, particularly because the threats and evasion incidents occurred only a few days after the shooting, the evidence had significant relevance on the issues of motive, intent, and consciousness of guilt. Given

the nature of the uncharged evidence and its high probative value, the evidence did not need to be excluded even though it did not involve convictions.

Finally, defendant contends the testimony from Flores and the officer concerning defendant's battery of his girlfriend was inadmissible hearsay. The contention fails. The brief testimony describing defendant's battery of his girlfriend was admissible for the nonhearsay purpose of explaining the context in which the threats arose. (*People v. Turner* (1994) 8 Cal.4th 137, 189-190, disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

These evidentiary items were all properly admitted.

C. *Oyler's Statements Concerning Her Fear of Defendant*

Because Oyler's trial testimony contradicted her out-of-court statements to the police, the trial court permitted the prosecutor to admit into evidence the recording of Oyler's interview with the police. Portions of the Oyler interview were redacted after discussions between the court and counsel. Defendant contends that defense counsel should have requested redaction of the portion of the interview in which Oyler described her fear of defendant (but not of Gordin) because of defendant's reputation for violence.

To obtain reversal based on ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness and a reasonable probability that absent counsel's errors the outcome would have been more favorable to the defendant. (*People v. Dickey* (2005) 35 Cal.4th 884, 913.) Counsel is not ineffective for failing to make objections that would be futile. (*People v. Thompson* (2010) 49 Cal.4th 79, 122.)

During the interview, Oyler told the police that people got shot for "telling on people"; it was scary; and she did not want to testify. When the police offered to possibly allow her to testify via a camera without being seen in court, she asked, "Yeah but they won't hurt me though, will they though?" Continuing this conversation, the police asked her who she was more afraid of, defendant or Gordin. Oyler answered: "*I'm not afraid of [Gordin] at all"*; *"[I]t's [defendant]* because . . . I don't really know him. *I've heard a lot about him[,] a lot of bad things about him*"; "just say he's crazy, he don't care, *he'll take you out in a second[,] you know*? I've heard a lot about him[,] and I don't trust him"; "*But [Gordin] don't scare me at all*[,]. . . 'cause I know, [Gordin's] not like that, I know [Gordin]. . . . *[Gordin] ain't gonna . . . go and kill somebody, you know, he ain't gonna go shoot somebody*." (Italics added.)

In a declaration submitted with the habeas petition, defendant's trial counsel stated he cannot recall why these statements were not redacted, but that he "must have had a tactical reason" for not objecting to their admission.[13]

The record supports that Oyler was highly evasive in her trial testimony, and thus evidence of her fear of defendant was admissible on the issue of her credibility. (*People v. Dickey*, *supra*, 35 Cal.4th at pp. 912-913 [court did not err in admitting fearful witness's testimony that defendant "'was not afraid of anyone'" and "'would strike like a cobra'" on issue of witness's credibility]; *People v. Sapp* (2003) 31 Cal.4th 240, 300-

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13 Defendant's appellate counsel stated in a declaration that when she spoke with defendant's trial counsel about these statements, he "did not say he had a tactical reason" for not objecting.

301.)[14] Further, the prosecutor was entitled to present good character evidence to support the credibility of Gordin. (See *People v. Harris* (1989) 47 Cal.3d 1047, 1080-1082 [discussing broad admissibility of evidence to attack or support witness credibility based on passage of Proposition 8[15]]; see also *People v. Mickle* (1991) 54 Cal.3d 140, 168; *People v. Stern* (2003) 111 Cal.App.4th 283, 297-298.) Because this evidence was admissible for witness credibility, defense counsel was not ineffective for failing to request redaction.[16]

Defendant also contends defense counsel should have requested redaction of a statement in the recorded interview where an officer stated that he agreed with Oyler that Gordin was "all talk" (apparently referring to Gordin's claims that he was the shooter). It appears the failure to redact this statement was inadvertent because the record shows redaction of other statements made during the interview in which the officers expressed

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14 In his habeas traverse, defendant claims Oyler's testimony about the facts of the offense was consistent with her statements to the police. The record does not support this. Oyler repeatedly denied or stated she could not remember key information she provided to the police.

15 Proposition 8, passed in 1982, added article I, section 28, subdivision (d) to the California Constitution, which states that relevant evidence shall not be excluded in criminal proceedings, subject to several statutory exceptions. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 291 & fn. 3.)

16 We note defense counsel did not request a limiting instruction telling the jury that it should consider Oyler's statements concerning her fears of defendant solely to evaluate witness credibility. However, defense counsel could have reasonably refrained from doing so in order not to draw attention to the evidence. (See *People v. Freeman* (1994) 8 Cal.4th 450, 495 [to prevent emphasizing evidence, defense counsel could reasonably elect not to request limiting instruction for misconduct evidence admitted for impeachment].)

their views on Gordin. In any event, we conclude there is no reasonable probability the outcome would have been different if counsel had requested this particular redaction. The officer's comment was short and merely confirmed Oyler's view that Gordin was engaging in puffery rather than truthfully admitting that he was the shooter.

D. *Defendant's Commission of Assault in Holding Cell*

Defendant challenges the admission of evidence of his assault of inmate Pullins in the holding cell, purportedly because Pullins was a snitch.

1. *Background*

Defendant's assault on Pullins occurred on December 10, 2007, while defendant was in a holding cell awaiting trial for the February 2004 shooting. In pretrial briefing, the prosecutor referred to the incident, claiming that defendant had assaulted Pullins because Pullins was a snitch and was going to testify against him. The prosecutor explained that Pullins had voluntarily gone to the police and reported that Gordin told him that he (Gordin) shot Marquez because Marquez was a snitch. The prosecutor stated that in December 2007, Pullins (who was now in prison) had been transported to the detention center for purposes of testifying against defendant and Gordin, and defendant assaulted Pullins when they were in the holding cell at the courthouse. The prosecutor asserted that the Pullins assault showed that defendant used violence when he perceived someone as a snitch, and this was relevant to show he had the same intent for the Marquez shooting.

Thereafter, in opening statements, the prosecutor stated that during the investigation of the case Pullins had voluntarily gone to the police and talked about the

shooting. The prosecutor told the jury that Pullins reported that Gordin "had been going around bragging about the shooting," and that Gordin told Pullins that Gordin and defendant ambushed Marquez, they both had guns that night, and Gordin fired the shot. Further, Pullins told the police that defendant "always carried a gun with him," and that defendant had admitted to Pullins that he was the person who led the police on the high-speed chase that occurred several days after the shooting. The prosecutor told the jury that Pullins was a snitch, and that evidence would be presented showing that defendant beat Pullins when they were together in a holding cell.

Pullins ultimately did not testify at trial, and no evidence was presented concerning Pullins's contact with the authorities. The only reference to Pullins's statements about the shooting came via trial testimony of Gordin. The prosecutor asked Gordin if he had "heard that Willie Pullins was going around saying" that Gordin told Pullins that he (Gordin) shot Marquez. Gordin answered yes, that he had heard this.

With no discussion concerning admissibility or objection from defense counsel, the prosecutor called Deputy Sheriff David Hernandez to testify about the Pullins assault incident. Deputy Hernandez testified that on December 10, 2007, defendant, Pullins, and three other men were placed in a holding cell (shared by two courtrooms) that is used for inmates who are brought in and out of court.[17] While in the holding cell, defendant slipped his waist chain from his waist, stepped out of it, and wrapped it around his hands. Deputy Hernandez saw defendant strike Pullins in the rear of his head with the chains and

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17 Defendant's trial commenced in June 2008, several months after the Pullins assault incident.

attached padlock. Pullins had an expression of "terror" on his face, and was saying, "'Open the door. Open the door. He's hitting me with his chains.'" Defendant did not comply with the deputy's orders that he kneel and release the waist chain. Pullins was able to stop the assault by grabbing defendant's waist chain, and the deputies used pepper spray to gain defendant's compliance. As a result of the attack, Pullins suffered bleeding of his neck and ear and a one-inch laceration to the back of his head. When questioned by Deputy Hernandez after defendant was removed from the holding cell, Pullins did not want to make any statements.

After the parties concluded their evidentiary presentations, the prosecutor requested that the court include CALJIC No. 2.06 in the instructions, which informs the jury that if it found "defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness" it may infer consciousness of guilt. The prosecutor argued the instruction should be given because defendant had beaten Pullins to try to intimidate him and dissuade him from testifying. Defense counsel objected to the instruction, arguing that no evidence had been presented showing that Pullins had spoken to the police or showing the reason for the altercation in the holding cell. In response, the prosecutor stated that Officer Tony Ellis had testified that he had interviewed Pullins about the incident, and Gordin had testified that he had heard Pullins was talking about statements Gordin supposedly made about the shooting.

The trial court ruled the suppression of evidence instruction should be given, and the instruction was provided to the jury. The jury was also instructed that it could

consider evidence of defendant's uncharged crimes for the purpose of evaluating his intent or motive, but not to infer criminal disposition.

In closing arguments, the prosecutor asserted that defendant shot Marquez because he perceived Marquez as a snitch, and that defendant's other acts of misconduct (including the beating of Pullins and the threat to Flores) were motivated by the same desire to intimidate or eliminate snitches. The prosecutor argued that defendant beat Pullins because Pullins "gave a statement to the police" and that defendant's consciousness of guilt could be inferred from his attempts to dissuade Pullins from testifying.

2. *Analysis*

As set forth earlier, because of the inherent prejudice in uncharged misconduct evidence, the evidence must have substantial probative value, and the trial court must determine that probative value is not outweighed by the potential for prejudice. (*People v. Walker, supra,* 139 Cal.App.4th at p. 806.) In order for the Pullins assault evidence to be relevant to show motive, intent, or suppression of evidence for the charged shooting, the jury needed to be presented with evidence from which it could infer defendant's motive for assaulting Pullins. (See *People v. Valdez* (2004) 32 Cal.4th 73, 137.) The prosecutor's opening and closing statements that defendant assaulted Pullins because Pullins was a snitch and prosecution witness were not, of course, evidence. (*People v. Solomon* (2010) 49 Cal.4th 792, 814, fn. 10.) Contrary to the prosecutor's representation to the trial court, Officer Ellis did *not* testify that he had interviewed Pullins. Thus, the trial court's ruling permitting the suppression of evidence instruction based on the

Pullins's assault evidence was premised on a misunderstanding of the evidence in the record. Further, a review of the entire record reveals that no direct evidence was presented to the jury showing that Pullins spoke to the police or that Pullins had been identified as a prosecution witness.

It is apparent that when the court and parties were discussing the instructions, defense counsel had assessed that the prosecution had failed to present evidence to establish the relevance of the Pullins assault evidence. From the evidence presented at trial, the jury knew the following: (1) Gordin had heard that Pullins had told people that Gordin claimed to be the shooter; (2) at the time of the assault on Pullins, Pullins and defendant were in a holding cell used for inmates brought to court; and (3) Pullins did not want to talk about what occurred in the holding cell. Although Gordin testified that he had heard that Pullins was "going around saying" that Gordin had identified himself as the shooter, Gordin did not state that Pullins had told *the authorities* something about the shooting. Although Pullins and defendant were in a courthouse holding cell together several months before defendant's trial, there was no evidence that Pullins was there because he had been designated a prosecution witness.[18] Deputy Hernandez's testimony that Pullins did not want to give a statement after the attack could suggest that Pullins was afraid of being a snitch, but it does not show that defendant attacked him because he

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18 The clerk's minutes indicate that Pullins was in the holding cell because he was an anticipated witness in the case. However, this information was not presented to the jury. The record includes statements out of the presence of the jury which reflect that both the prosecutor and defense counsel were considering calling Pullins to support their respective cases.

had already acted as a snitch, which was the proffered basis for the relevancy of the uncharged misconduct evidence.[19]

Arguably, the jury could have inferred that because Pullins was known to be talking about the shooting, the police contacted him, and the fact that he ended up in the same courthouse holding cell as defendant reflected that he was a snitch and prosecution witness in defendant's trial. However, with no direct evidence provided to the jury showing that Pullins had spoken to the police or that he had been designated as a prosecution witness, the trial court may have concluded any inferences showing defendant's motive for assaulting Pullins were too attenuated to meet the admissibility requirement of *substantial* relevance — not outweighed by the potential for prejudice — applicable to uncharged misconduct evidence. That is, if the trial court had realized that Officer Ellis had, in fact, *not* testified about the police contact with Pullins, the court may have evaluated the state of the evidence with respect to the Pullins incident and concluded it was insufficient to support the suppression of evidence instruction, and (assuming a defense motion to strike) the evidence should be removed from the jury's

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19 The Attorney General cites several documents included in the appellate or habeas record to support its claim that defendant knew Pullins had talked to the police and was identified as a prosecution witness, including (1) Officer Ellis's police report, arrest warrant affidavit, and preliminary hearing testimony referencing his interview with Pullins; (2) the clerk's minute order reflecting that Pullins was in the holding cell as an "[i]n custody" witness on the day of the assault by defendant; and (3) a potential witness list including Pullins's name which was apparently used during voir dire to determine whether the jurors knew any of the potential witnesses. However, none of these documents were submitted *into evidence* at trial.

consideration. Further, the prosecutor would then have been required to refrain from citing to the evidence in closing argument.

We need not further evaluate the probability of a different ruling had the trial court realized the true state of the record, nor need we decide if the court could reasonably have concluded on this evidentiary record that the Pullins assault evidence was shown to be substantially relevant, as there is no reasonable probability the jury would have reached a different result if it had not heard the evidence, instruction, and argument related to the incident. (See *People v. Mullens* (2004) 119 Cal.App.4th 648, 658-659 [reversal for state law error requires reasonable probability of more favorable outcome].) The jury knew from the admissible evidence concerning defendant's threat to kill the Flores family that defendant was prepared to use extreme violence against persons who he perceived as snitches because they speak to the authorities. Flores was frightened enough of defendant's threats that he moved his family from their residence to a hotel. The Flores threat evidence showed that defendant did not simply make passing threats to Flores in the heat of their arguments, but rather that he seriously communicated his intent to use life-threatening violence to thwart Flores from contacting the authorities. The evidence provided strong support for the prosecution's theory of the case: that defendant hated snitches to the point of wanting to kill them. Although the Pullins assault incident, unlike the Flores threat incident, involved an actual battery directed at a purported snitch, the Flores threat evidence presented the jury with pointed evidence reflecting defendant's motive to use violence against snitches.

Further, when defendant fled from the police after they were summoned to the hotel, his lengthy and life-threatening high-speed vehicular evasion reflected that he was willing to take extreme measures to evade the police and had no regard for those placed in danger by his conduct. This provided the jury with evidence that strongly supported an inference that he had evinced a consciousness of guilt about some very serious crime (i.e., the shooting), not just the battery of his girlfriend.

Given the strength of the admissible evidence on defendant's motive, intent, and consciousness of guilt, the record reflects that the Pullins evidence was cumulative on these issues. This conclusion is buttressed by the fact that in closing argument the prosecutor did not single out the Pullins incident as distinctive from the other items of misconduct evidence. Rather, when discussing the evidence showing defendant's motive, intent to kill, and consciousness of guilt, the prosecutor consistently coupled together the multiple items of misconduct evidence, including the Flores threat, the evasion, and the Pullins assault. We are satisfied the jury would not have reached a different result even if it had not heard the evidence, instruction, and argument concerning the Pullins incident. (See *People v. Jennings* (2010) 50 Cal.4th 616, 655, 665 [no prejudice from jury's consideration of improperly admitted evidence that was merely cumulative to properly admitted evidence]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1169 [same].)

III. *Doyle Error*

During examination of Officer Ellis, the prosecutor asked if at the time of Gordin's arrest, Gordin was advised of his *Miranda* rights and agreed to be interviewed. Officer Ellis answered affirmatively, and described the details of the interview, including

Gordin's admission that he was the driver of the vehicle at the time of the shooting and his statement that defendant was the shooter. The prosecutor then asked Officer Ellis if at the time of defendant's arrest, defendant was advised of his *Miranda* rights and agreed to be interviewed. Officer Ellis responded defendant was advised of his rights, but he did not agree to speak. Defense counsel objected, unsuccessfully, that the question about the attempt to interview defendant was irrelevant. Counsel did not object on constitutional grounds.

Defendant asserts his counsel provided ineffective representation by failing to object on constitutional grounds to the prosecutor's adverse use of his exercise of his right to remain silent. In the habeas petition, defendant's trial counsel declared that due to the passage of time he could not explain why he did not object on constitutional grounds.

In *Doyle*, the court held that a defendant's silence after receiving *Miranda* warnings may not be used for impeachment at trial based on the defendant's failure to tell his or her exculpatory story at the time of arrest. (*Doyle, supra,* 426 U.S. at pp. 611, 619.) The *Doyle* rule is premised on the recognition that it is fundamentally unfair to use post-*Miranda* silence against the defendant at trial given that *Miranda* warnings implicitly assure that exercise of the right to silence will not be penalized. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 65, 118.) Thus, a defendant's invocation of the right to remain silent cannot be admitted into evidence or commented upon at trial. (*Id.* at p. 118; *People v. Evans* (1994) 25 Cal.App.4th 358, 368.)

The import of the prosecutor's line of questioning to Officer Ellis was that Gordin did not have a consciousness of guilt because he spoke to the police, whereas defendant did have a consciousness of guilt because he refused to speak. This was *Doyle* error.[20]

Although the courts presume defense counsel had a reasonable tactical reason for not objecting to evidence and will not second guess counsel's reasonable strategic choices (*People v. Kelly* (1992) 1 Cal.4th 495, 520; see *People v. Weaver* (2001) 26 Cal.4th 876, 925-926), this rule does not apply, as here, when counsel was asked to provide an explanation but failed to do so (*Kelly, supra,* at p. 520). We likewise cannot conceive of a satisfactory explanation. In this circumstance, defendant has carried his burden to show deficient performance arising from defense counsel's failure to raise a constitutional objection to the evidence. (*People v. Myers* (2007) 148 Cal.App.4th 546, 552 [deficient representation from failure to object to inadmissible evidence shown if counsel asked for tactical explanation but failed to provide one]; *People v. Lopez* (2005) 129 Cal.App.4th

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20 The Attorney General asserts no *Doyle* error occurred, citing the statement in *People v. Evans, supra,* 25 Cal.App.4th 358 that *Doyle* error requires two components: (1) that the prosecutor make improper use of the defendant's silence, and (2) that the trial court permit that use. (*Evans, supra,* at p. 368, citing *Greer v. Miller* (1987) 483 U.S. 756, 763.) In *Greer,* the court noted that *Doyle* error occurs when the trial court "has permitted specific inquiry or argument respecting the defendant's post-*Miranda* silence." (*Greer, supra,* at p. 764.) In *Greer,* the court found no *Doyle* error because the trial court, by sustaining a defense objection to the prosecutor's question about the defendant's silence, did not permit the use of the evidence; i.e., the defendant's "postarrest silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference . . . ." (*Greer, supra,* at pp. 764-765.) Here, unlike in *Greer,* the testimony *was* submitted to the jury as evidence. Defense counsel made no objection, and the jury heard the improper testimony. (See, e.g., *People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520-1521 [*Doyle* error occurred when defense counsel failed to object to improper testimony]; see also *People v. Hinton* (2006) 37 Cal.4th 839, 867.)

1508, 1523-1524 [counsel's representation fell below objective standard of reasonableness because there could be no tactical reason for failing to object to inadmissible evidence].)

However, we conclude the error was harmless even if we apply the harmless beyond a reasonable doubt standard applicable to federal constitutional error. (See *People v. Huggins* (2006) 38 Cal.4th 175, 249.) The prosecutor's elicitation of testimony referencing defendant's silence was brief and was not referred to during closing argument. The jurors knew from other admissible evidence that Gordin had spoken to the police; thus the testimony did not provide them with new information in this regard. The jury was instructed that a defendant has a constitutional right not to testify and it could not infer guilt from the fact that the defendant did not testify; we presume the jury followed this instruction. (*People v. Gray* (2005) 37 Cal.4th 168, 217.) There is no reasonable possibility that the jury relied on the fact that defendant exercised his right not to speak to the police as a pivotal factor when deciding that he was the shooter.

IV. *Prosecutor's Suggestion in Closing Argument that Victim Did Not Testify Because of Fear of Defendant and Reference to Victim's Medical Condition*

In closing arguments to the jury, the prosecutor argued that witnesses at trial (including Oyler) recanted information they provided to the police because they were afraid of being labeled a snitch; that defendant beat Pullins because he was a snitch; and that defendant terrified Flores by stating he would kill Flores and his family if Flores reported defendant to the police. Continuing in this vein, the prosecutor stated, "Ladies and gentlemen, although I can't ask you to speculate on why Mr. Marquez did not come

in here to testify, what I want to make clear is that fear and intimidation is what this case is about. That's what this is about."

Defendant contends his counsel provided ineffective representation by failing to object to this testimony because the prosecutor in effect told the jury the victim did not testify because he was afraid of defendant. In the habeas petition, defendant's trial counsel declared that he did not object to the prosecutor's argument because he "rarely, if ever, object[s] during closing argument."

The prosecutor has wide latitude to draw inferences in closing argument; however, the inferences must be based on evidence. (*People v. King* (2010) 183 Cal.App.4th 1281, 1306-1307.) No evidence was presented indicating why the victim did not testify. We are not persuaded by the Attorney General's assertion that the jury could infer the victim did not testify because he was afraid of being labeled a snitch based on the evidence supporting that *other* witnesses had this concern. Indeed, the other witnesses did testify notwithstanding their fears of being labeled a snitch. On a silent record concerning why the prosecution did not call the victim to testify, any inferences on this point are speculative.

Although failure to object during closing argument rarely constitutes ineffective representation because it is presumed counsel had a tactical reason, this principle does not apply when "counsel was asked for an explanation and failed to provide one." (*People v. Huggins*, *supra*, 38 Cal.4th at p. 206.) Defense counsel has provided no explanation as to why he did not object to the prosecutor's improper suggestion concerning the reason for

the victim's failure to testify other than to observe that he rarely objects during closing argument.

Defendant also contends the prosecutor committed misconduct by stating in closing argument that the victim had his spleen and kidney removed, because there was no evidence submitted to support this. Although the victim's medical records may have been proffered at trial, it appears they were not actually submitted into evidence and provided to the jury.[21]

We find the prosecutor's statements during closing argument harmless. Both remarks were brief. The statement concerning the victim's fear was indirect and was mentioned only in passing. The jury knew the victim had been shot in the stomach and that he was near death on the way to the hospital. Given these facts, the prosecutor's statements that the victim underwent surgical removal of two organs located in his abdominal area did not provide the jury with any surprising information. There is no reasonable probability these brief comments affected the verdict.

V. *Cross-examination of Gordin*

Defendant contends his trial counsel provided ineffective representation by failing to fully cross-examine Gordin. He asserts his counsel should have cross-examined Gordin regarding (1) his full sentencing exposure prior to the plea agreement, (2) his

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21 During the defense portion of closing argument, defense counsel told the jury to disregard the prosecutor's description of the victim's loss of organs because no evidence concerning the victim's medical condition had been presented. In rebuttal, the prosecutor told the jury the victim's medical records would be provided to them. The medical records are not listed on the exhibit list, and the habeas record does not show they were admitted.

arrest for attempted murder in another case (involving victim Stephen Harville), and (3) the details of the Harville incident.

At trial, Gordin testified that he agreed to testify for the prosecution as part of his plea agreement; that he pled guilty to attempted murder; and that he would be sentenced to nine years in prison. On cross-examination, defense counsel asked Gordin what he was told his sentencing exposure for the current case was; Gordin responded "[s]ixteen to life." Gordin also acknowledged that his plea agreement resolved several other cases pending against him "which all had significant time behind them," including cases in which he pled guilty to felony assault with a deadly weapon, misdemeanor criminal threats, and misdemeanor possession of a weapon other than a firearm.[22] In the habeas petition, defendant's trial counsel declared that he examined Gordin concerning his benefits from the plea agreement "to the extent [he] believed it would benefit [his] client tactically."

We find no ineffective representation arising from the manner in which counsel cross-examined Gordin concerning his sentencing exposure arising from the offenses resolved in the plea agreement. Even without specifics concerning each of the potential sentences, the jury was aware that Gordin could have been sentenced for all these alleged offenses had he not entered into the plea agreement and had he been found guilty of all charges. Further, on cross-examination, defense counsel elicited testimony indicating that Gordin understood he obtained a significant sentencing benefit from the plea

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22 It appears Gordin actually pled guilty to assault by means of force likely to produce great bodily injury rather than assault with a deadly weapon.

agreement, i.e., a promised nine-year sentence rather than a potential sentence of "[s]ixteen [years] to life."

As to the Harville incident, defendant's habeas petition includes documents showing that for this offense Gordin was arrested for attempted murder, but he was charged with assault with a deadly weapon and felony criminal threats. As part of his plea agreement, Gordin resolved the Harville incident charges, pleading guilty to felony assault and misdemeanor criminal threats. We are not persuaded by defendant's assertion that reasonably competent counsel would have cross-examined Gordin concerning his *arrest* for attempted murder for the Harville incident. Because Gordin was charged merely with assault with a deadly weapon, the arrest charge was not an accurate reflection of his prior misconduct. (See *People v. Lopez*, *supra*, 129 Cal.App.4th at p. 1523.)

As to defendant's contention that defense counsel should have cross-examined Gordin concerning the details of the Harville incident, the record includes the following factual description of the offense (which was not provided to the jury). Gordin assaulted Harville on January 11, 2004, about three weeks before the February 2 shooting. Gordin and several others entered an unoccupied home, but were then confronted by Harville who had been keeping an eye on the house for his absent neighbor. Harville told Gordin and the others to leave or he would call the police. Gordin moved aggressively towards Harville, while yelling "'shut the fuck up bitch.'" Fearing an attack by Gordin, Harville hit Gordin once in his upper body area with a bat. Gordin and the others fled. Later, Gordin confronted Harville in Harville's front yard and said he was going to kill Harville

for hitting him with the bat. Still later, Gordin chased Harville down several streets while trying to hit him with a bat. When apprehended by the police, Gordin stated that he was acting out of revenge, and "he did not want to kill the victim, but he just wanted to hit him a few times with the bat."

The facts of the Harville incident would have augmented the impeachment of Gordin. Although it has long been established that impeachment of a witness with a felony conviction is limited to reference to the conviction itself and examination concerning the facts underlying the conviction is impermissible (see *People v. Smith* (2003) 30 Cal.4th 581, 633), it is arguable that the enactment of Proposition 8 has changed this rule. (See *People v. Wheeler*, *supra*, 4 Cal.4th at pp. 291-292, 297 & fn. 7; *People v. Chatman* (2006) 38 Cal.4th 344, 373; *People v. Harris*, *supra*, 47 Cal.3d at pp. 1080-1081; *People v. Smith*, *supra*, 30 Cal.4th at p. 633 [declining to decide continued viability of rule that "impeachment does not extend to the facts underlying the [felony] convictions" because record showed no use of underlying facts].)

Assuming arguendo defense counsel should have attempted to elicit more details about the Harville incident, this deficiency was harmless. The jurors knew from the evidence presented that Gordin had been convicted of a violent assault, and this provided them with information relevant to impeach Gordin's credibility as a witness on the basis of his use of violence. Although the description of the crime included a statement that Gordin cursed at Harville and moved aggressively towards him when Harville threatened to call the police, Gordin's threat to kill Harville arose after Harville hit Gordin with a bat and (according to Harville) Gordin stated "he was going to kill him for hitting him with

the bat." Thus, the proffered details showed that Gordin made a threat to kill in response to Harville's assault, not in response to Harville's threat to call the police. Under these circumstances, there is no reasonable probability the elicitation of the details of the incident would have substantially altered the jury's view of Gordin so as to affect the outcome of the trial.

VI. *Cumulative Error*

Defendant asserts the cumulative effect of the errors at his trial requires reversal. We are not persuaded. The Pullins assault evidence was cumulative to other admissible evidence reflecting defendant's motive, intent and consciousness of guilt. The testimony concerning defendant's post-*Miranda* silence, and the argument concerning the victim's fear of testifying and medical condition, were brief, provided the jury merely passing information on these points, and were not a pivotal part of the case. Finally, the possible error arising from the omission of details concerning Gordin's assault conviction did not deprive the jury of any highly relevant information concerning Gordin's credibility.

DISPOSITION

The judgment is affirmed and the petition for writ of habeas corpus is denied.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.