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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ANDREW VASQUEZ et al.,<br><br>Defendants and Appellants. | B159379<br><br>(Los Angeles County<br>Super. Ct. No. BA200494) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Larry Paul Fidler, Judge. Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Appellant Andrew Vasquez.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Appellant Anthony Fregoso.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, and Herbert S. Tetef, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II through VII.

A tagging crew member was stabbed to death in retaliation for having disrespected a female associate of a rival tagging crew. After the first trial ended in a hung jury the second jury convicted the defendants of second-degree murder. The jury also found true the allegations the defendants personally used deadly weapons during the commission of the offense.

The defendants raise a variety of issues on appeal. We find error in failing to recuse the district attorney's office but conclude it was harmless on review after judgment. We conclude the claim of *Wheeler*[1] error lacks merit. We further find any error in admitting, as well as excluding, evidence of gang membership harmless. Finally, we find error in providing an outdated instruction on the intent element for a conviction of voluntary manslaughter also to be harmless, and reject the defendants' other claims of instructional error. Accordingly, we affirm.

## FACTS AND PROCEEDINGS BELOW

P.A.L. and C.N.E. are local tagging crews.[2] They are also rivals. Both female and male members of these groups often engaged in after-school fistfights. Appellants, Andrew Vasquez and Anthony Fregoso, are members of P.A.L. The homicide victim in this case was a C.N.E. member.

On March 20, 2000, Cynthia Mendez left Fairfax High School at 3:00 p.m. and walked to the bus stop. Armando Ayala, the victim in this case, approached Cynthia accompanied by two other males. Armando said, "Fuck you, Bitch." One of the young men sprayed Cynthia's face with mace. As she covered her face, the males started hitting her in the head. She saw Armando hit her once before covering her face again. The men

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[1] *People v. Wheeler* (1978) 22 Cal.3d 258.

[2] According to the witnesses, P.A.L. stands for "Psycho As Life," "Passing All Limits," and "Psycho Ass Lunatics." C.N.E. stands for "Crying Never Ends" and "Crazy 'N Evil."

hit and kicked Cynthia as many as six or seven times before leaving on the bus. As Armando left he told Cynthia, "Bitch, don't fuck with C.N.E."

Cynthia went to her job at her mother's cell phone and pager business. Later in the day Fregoso came into the store and Cynthia told him about the beating.

The day after Cynthia's beating Armando and several other students were standing outside the main gate of the school after class. The students noticed Vasquez and Fregoso standing on the opposite side of the street across from the school gate. The students noticed them because they were already outside when school let out and were not wearing school uniforms.

Armando left the group of students and started walking toward Fairfax Boulevard. When Armando started walking Fregoso tracked him from across the street. Fregoso then crossed over and positioned himself in front of Armando to cut him off. Vasquez crossed the street diagonally in a sort of crouching stance and approached Armando from behind. The student witnesses testified they saw Vasquez holding either a knife or something in his hand as he approached Armando.

Hideshi Valle was one of the students standing at the school gate. Armando was her best friend. She recognized Vasquez and Fregoso as members of the rival P.A.L. tagging crew. When she saw Vasquez approach with the knife, she yelled out to Armando to "watch out." Almost instantaneously, Armando turned around and sprayed pepper spray as Vasquez in a side-arm motion plunged his knife into Armando's chest.[3]

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[3] Devon Harris testified Vasquez already had his knife out and open as he crossed the street to Armando. Harris further testified the spraying and stabbing occurred simultaneously.

Jose Amaya testified Vasquez already had his knife out as he crossed the street. He further testified Vasquez stabbed Armando before Armando sprayed the pepper spray.

Hideshi Valle testified Armando tried to pepper spray Vasquez but missed and was stabbed.

Melissa Garcia did not see the stabbing itself. However, she did see an object in Vasquez's hand as he crossed the street to meet up with Armando. She testified she saw Armando bleeding as he tried to spray Vasquez with pepper spray.

The two men fell to the ground with the blow. Fregoso had a baseball bat. He raised his arm as if preparing to hit Armando but then stopped.

Valle ran to Armando's aid. She pulled him up and the two ran back onto the school campus and into the principal's office. Fregoso helped Vasquez up and the two men chased Armando onto the school grounds. Vasquez ran up to the principal's office but then retreated. As Vasquez and Fregoso left the school one of the students, Melissa Garcia, challenged them to a fight by asking, "Where you from." Fregoso yelled out something like "P.A.L.," or "It's a P.A.L. thing." They also said something like "because he hit a girl the day before." Fregoso and Vasquez threw P.A.L. hand signs as they walked down the street away from the school.

Armando died from the stab wound which had severed an artery as it penetrated his lung. The knife wound was one inch wide and four to five inches deep.

An information charged Vasquez and Fregoso with Armando's murder.[4] The information alleged Vasquez personally used a knife and Fregoso personally used a deadly weapon (a baseball bat) in the commission of the offense.[5]

The first jury could not reach a verdict. The court ultimately declared a mistrial.

Separate juries retried Vasquez and Fregoso. Neither testified at their second trial. The separate juries found each of them guilty of second-degree murder. Both juries also found true the allegations they had personally used a deadly weapon in the commission of the offense. The court sentenced both Vasquez and Fregoso to the statutory term of 15-years-to-life, plus an additional year each on the deadly weapon enhancement allegations found true by the juries.

They appeal from the ensuing judgments of conviction.[6]

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[4] Penal Code section 187, subdivision (a).

[5] Penal Code section 12022, subdivision (b)(1).

[6] To the extent relevant in this appeal, Vasquez joins in Fregoso's arguments and Fregoso joins in Vasquez's arguments.

## DISCUSSION

### I. ERROR IN DENYING VASQUEZ'S MOTION TO RECUSE THE DISTRICT ATTORNEY'S OFFICE WAS NOT PREJUDICIAL.

Vasquez and Fregoso contend the trial court erred in failing to grant their motion to recuse the district attorney's office.

Judge Norman Shapiro was assigned to oversee the first trial. Just before jury selection defense counsel orally moved to recuse the district attorney's office. Counsel pointed out Vasquez's stepfather had been a prosecutor with the district attorney's office for many years. Vasquez's mother had been an administrator in the same office for then 13 years. Apparently, the district attorney had initially requested the attorney general's office to take over prosecution of the case. When the attorney general declined the request, the district attorney assigned a prosecutor who worked in the same office as Vasquez's parents, but claimed to be unfamiliar with either of them.

Vasquez's counsel initially perceived no discrimination in the district attorney's handling of the case. However, he became concerned after learning of the prosecutor's reasons for declining defense counsels' offer of a bench trial. At the hearing on his oral motion Vasquez's counsel explained the basis for his motion. After discussing the matter with defense counsel for Fregoso he spoke to the prosecutor and proposed waiving jury and having the case heard by the court. The prosecutor's initial response was to state she was willing to take the matter up with her supervisor. However, before discussing it with her supervisor the prosecutor spoke to Vasquez's counsel again. She told him she did not feel comfortable discussing the matter of waiving jury with her supervisor, "because she felt she didn't want to do anything that could make it look like there had been any kind of favor toward Mr. Vasquez because of his father being [] in the district attorney's office."

Vasquez's counsel explained the prosecutor's response was the first indication, and demonstrable evidence, Vasquez was being treated differently from how some other defendant would be treated simply because his stepfather was a prosecutor in the district

attorney's office. Counsel opined if the attorney general's office was prosecuting the case, any attorney with that office would have gladly welcomed the opportunity for a bench trial.

The court interjected a few comments before permitting the prosecutor to respond. Judge Shapiro commented, "I like to think of myself as kind of in the middle of things and that I don't favor the district attorney, and that on some close issues, I have ruled for the defense." The court noted he is considered a judge who, "might be inclined to give a little edge on some issues to the defense."

Vasquez's counsel responded if the prosecutor's motive for declining a bench trial was purely the court's inclination to rule for the defense then he would have no problem. He stated it was instead the prosecutor's other motivations and influences which led him to believe the prosecutor was treating Vasquez differently, and all because of his familial connections to the district attorney's office.

The prosecutor replied, "Well, first of all, I have done trials in front of Your Honor, and I have always gotten what I considered to be a very fair trial. [¶] Part of my concern is, also, your prior career with the district attorney's office. And my victim['s] family is a little upset because I'm the third lawyer on this case, and they were very concerned that perhaps we were not pursuing things. So—

"THE COURT: That's from the victim's standpoint. [¶] [¶]

"[THE PROSECUTOR]: So their position and my evaluation, also, the evidence is that this is a first degree murder; I did not wish to put this court in a position of having its integrity questioned regarding a ruling that would either be something that perhaps we didn't feel the evidence showed. [¶] And, also, I wanted to insure that there was no appearance of any improprietary [sic] on the part of our office in handling this."

In reply, Vasquez's counsel made clear his concern was over the prosecutor's fear of creating an appearance of impropriety in the victim's family's eyes. Counsel pointed out, "That means there is an extra layer that's being looked through in terms of him, that that's what would cause me to make this motion."

The court denied the defense motion to recuse the district attorney's office. In so ruling the court commented, "I think what was the most important part of [the prosecutor's] remark was that, based on this court's long experience as a prosecutor and with this particular office, that it wasn't necessarily the current state of the case, but rather the court's position, that she felt it would be—well, she didn't feel it would be wise to take the particular approach suggested by the defense. [¶] And based on that, I find that an adequate reason for the way she proceeded on the matter, or you might say did not proceed on the matter. And, therefore, that is really the key basis for the court's ruling."

Jury trial began before Judge Shapiro in March 2001. Jury deliberations continued for more than a week, interspersed with readback of witness testimony and jury questions. Finally, the court found the jury was hopelessly deadlocked and declared a mistrial. Apparently, the jury split as follows: two voted for first-degree murder, six for second-degree murder, three for voluntary manslaughter and one for not guilty.

The case was reassigned to Judge Larry P. Fidler. Prior to retrial Vasquez filed a formal motion to recuse the district attorney's office. His motion included the information regarding the prosecutor's reasons for declining a bench trial before Judge Shapiro. In addition, Vasquez's counsel noted the prosecutor had refused to consider a plea bargain for anything less than second-degree murder and was still aggressively pursuing her theories of first-degree murder of premeditation and lying-in-wait. Counsel stated the prosecutor refused to consider a proposed plea bargain to the lesser crime of voluntary manslaughter. He argued this was so despite the ambiguous facts of appellants' intent, and despite a hung jury in the first trial, whose members obviously had wide-ranging views on their level of culpability. Counsel also noted because the district attorney's office was in the same building numerous deputy district attorneys watched the proceedings, and this apparently created an atmosphere of bias against Vasquez during the first trial. Counsel stated he would be calling [Vasquez's stepfather] as a witness at the second trial, and argued this fact was yet another reason for recusal of the district attorney's office.

Vasquez's counsel argued the prosecutor's attitude demonstrated an "over-zealous approach to avoid the appearance of impropriety because of the status of defendant's father." In counsel's view, a "neutral detached objective prosecution of this case is not possible by the very office that employs both of the defendant's parents."

The attorney general filed a formal response, arguing there was no conflict so disabling it warranted recusal.

At the hearing on the motion, Vasquez's counsel elaborated on the arguments made in his motion. Usually after a hung jury, counsel argued, the district attorney's office tries to settle the case by offering a plea to a lesser charge. Counsel noted, "Instead of coming to us [after the hung jury] with an offer below second degree murder with a voluntary offer, which is what I've offered to plead to from day one of the case, high-term plus the knife use, [the prosecutor] has not tendered any other offer than second degree murder. We feel that is due in part to the fact that Mr. Vasquez is [a deputy district attorney's] son and they feel they cannot make any kind of offer which will look like they're showing leniency, which they may do to a defendant who is not the son of a deputy district attorney."

The court heard argument from a deputy from the attorney general's office. The prosecutor also offered her comments as follows: "With respect to the recusal motion or the grounds stated on the record for the recusal motion in front of Judge Shapiro because when I refused to waive jury to Judge Shapiro, counsel put this before Judge Shapiro by way of a recusal motion. And I did put on the record that in light of the judge's prior relationship with the office I felt that it will be best not to waive jury to him to avoid the appearance of impropriety and also I did not wish to put him in that position of making a decision and ultimately having his decision perhaps questioned."

The prosecutor noted both of her predecessors had also only offered second-degree murder as a possible plea. Vasquez's counsel agreed this was true, which indicated to him it was a policy decision by the district attorney's office not to offer less than second-degree murder.

At the conclusion of the hearing, Judge Fidler denied Vasquez's motion to recuse the district attorney's office. In so ruling the court commented, "I think at best what's been presented—and it doesn't make any difference under existing law whether it's apparent or natural [sic] conflict. The standard is still the same, and that is the motion may not be granted unless the conflicts would render it unlikely the defendant will receive a fair trial under [Penal Code section] 1424, subdivision A, subdivision 1.

"It appears that what you have is really vague speculation. First of all, the fact [Vasquez's stepfather] himself may be a witness in the matter is not a reason to recuse and case law set forth in the attorney general's brief clearly points that out, and my guess is I wouldn't speak for when the case is tried that [Vasquez's stepfather's] occupation will not be allowed [into] evidence. It may, may not. But my speculation it's not relevant and probably would not come in.

"The one fact that you bring forward that is interesting is really almost all the existing case law, in fact all of it tends to go when the victim has a relationship with the prosecuting agency and therefore because of the existing relationship with the victim somehow the defendant will be treated differently, unfairly. Here you have the exact 180 degree opposite.

"Now, you raise an interesting proposition that because the People—because of Judge Shapiro's past employment would not waive jury in front of him, of course they're not required to waive jury at all. No one has the right to a court trial. I don't—you haven't shown me that it's because the district attorney as the prosecutor, if the attorney general was to come in this because of all the problems attendant with his past position. And I'd added in I don't think it's raised in the papers that Judge Shapiro's brother is a sitting [deputy] district attorney highly unlikely he will get a waiver in front of Judge Shapiro.

"If the People took the position we will never waive jury with any judge because of who the defendant is, vis-à-vis his stepfather and his mother, your argument might be a little more interesting. But that's not the position they're taking. The facts have not

shown that so I cannot find that you have met the statutory burden that you need and therefore the recusal motion is denied.

"You know, parenthetically I can say if I were the district attorney, which I do not wish to be nor am I, I might just as a matter of principle as opposed to law say why are we prosecuting this case, but that's not the standard. And as long as the district attorney's office chooses to stay in the case, I think that is an appropriate decision under existing case law so therefore the motion to recuse is denied."

### A. A Prosecutor Has An Obligation To Execute His Or Her Discretionary Functions With The Highest Degree of Integrity And Impartiality.

In 1977, in the case of *People v. Superior Court (Greer)*,[7] the Supreme Court held a trial court has the power and duty to recuse the prosecutor when warranted to ensure an accused a fair and impartial trial.[8] "In all [a prosecutor's] activities, his duties are conditioned by the fact that he 'is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' [Citations.]"[9]

The *Greer* court reasoned, "it is precisely because the prosecutor enjoys such broad discretion that the public he serves and those he accuses may justifiably demand that he [or she] perform his [or her] functions with the highest degree of integrity and

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[7] *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255.

[8] *People v. Superior Court (Greer), supra*, 19 Cal.3d 255, 266.

[9] *People v. Superior Court (Greer), supra*, 19 Cal.3d 255, 266.

impartiality, and with the appearance thereof. . . . [The] advantage of public prosecution is lost if those exercising the discretionary duties of the district attorney are subject to conflicting personal interests which might tend to compromise their impartiality. In short, the prosecuting attorney "'is the representative of the public in whom is lodged a discretion which is not to be controlled by the courts, or *by an interested individual*. . . . "' (Italics added.) [Citation.]"[10]

The court noted a district attorney makes numerous discretionary decisions which are not confined to those made pretrial of whom to charge and what charges to bring.[11] In making each of these discretionary decisions the court directed "[a] district attorney may . . . prosecute vigorously, but both the accused and the public have a legitimate expectation that his [or her] zeal, as reflected in his [or her] tactics at trial, will be born of objective and impartial consideration of each individual case."[12]

The Supreme Court has reiterated these concerns and directives in subsequent decisions.[13]

*Greer* involved a murder prosecution in which the victim of the homicide was the son of a member of the district attorney's staff who worked in the very office in which the prosecution was being prepared. Sympathy for the victim permeated the office. On these facts, the *Greer* court concluded the trial court had not abused its discretion in

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[10] *People v. Superior Court (Greer), supra*, 19 Cal.3d 255, 266-267.

[11] *People v. Superior Court (Greer), supra*, 19 Cal.3d 255, 267 [giving as examples the manner of conducting voir dire examination, the decision whether to grant immunity, the use of particular witnesses or tests, choice of argument, and negotiating plea bargains]; see also, *Dix v. Superior Court* (1991) 53 Cal.3d 442, 452 ["whether to seek, oppose, accept, or challenge judicial actions and rulings."].

[12] *People v. Superior Court (Greer), supra*, 19 Cal.3d 255, 267.

[13] See, e.g., *People v. Eubanks* (1996) 14 Cal.4th 580, 588-590; *People v. Conner* (1983) 34 Cal.3d 141, 146-147.

finding the apparent conflict of interest required disqualification of the entire district attorney's office.[14]

### B. Under The Statutory Standard Recusal Is Warranted If Either An Actual Or Apparent Conflict Is So Grave It Is Unlikely The Defendant Will Receive Fair Treatment During All Portions Of The Criminal Proceeding.

Three years later, the Legislature enacted Penal Code section 1424 partly in response to the *Greer* decision. This section provides in pertinent part, "The motion [to recuse] may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial."

The Supreme Court interpreted this statutory provision in *People v. Conner*.[15] The court concluded the statutory phrase "conflict of interest" included both "actual" and "apparent" conflicts of interest. "While it is conceivable that an 'appearance' of conflict could signal the existence of an 'actual' conflict which, although prejudicial to the defendant, might be extremely difficult to prove, we think that the additional statutory requirement (that a conflict exist such as would render it unlikely that the defendant would receive a fair trial) renders the distinction between 'actual' and 'appearance' of conflict less crucial."[16]

The *Conner* court thus held a "conflict" within the meaning of the statute exists, "whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner. Thus, there is no need to determine whether a conflict is 'actual,' or only gives an 'appearance' of conflict."[17]

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[14] *People v. Superior Court (Greer), supra*, 19 Cal.3d 255, 269.

[15] *People v. Conner, supra*, 34 Cal.3d 141.

[16] *People v. Conner, supra*, 34 Cal.3d 141, 147.

[17] *People v. Conner, supra*, 34 Cal.3d 141, 148.

However, whether recusal is required depends on whether the conflict—actual or apparent—is "so grave as to render it unlikely that defendant will receive fair treatment during *all portions of the criminal proceedings*."[18] In other words, because the prosecutor's discretionary functions are not limited to the trial proper, the Supreme Court recognized the need for prosecutorial impartiality extends to "all portions of the proceedings," not only to the trial.[19]

The Supreme Court in *Eubanks* further explained the circumstances under which a conflict may be deemed "disabling." Regardless how the conflict is characterized, the potential for prejudice to the defendant "must be real, not merely apparent, and must rise to the level of a *likelihood* of unfairness. Thus section 1424, unlike the *Greer* standard, does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system. (Accord, *People v. McPartland* (1988) 198 Cal.App.3d 569, 574 ['recusal cannot be warranted solely by how a case may appear to the public']; *People v. Lopez* [(1984)] 155 Cal.App.3d [813] at pp. 827-828.)"[20]

As explained in *Eubanks*, the *Conner* analysis essentially established a two-part test for resolving motions to recuse: "(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting?"[21]

The following section applies this test to the case at bar.

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[18] *People v. Conner, supra*, 34 Cal.3d 141, 148, italics added.

[19] *People v. Conner, supra*, 34 Cal.3d 141, 148.

[20] *People v. Eubanks, supra*, 14 Cal.3d 580, 592.

[21] *People v. Eubanks, supra*, 14 Cal.3d 580, 594.

C. The Conflict Of Interest Created The Likelihood Of Unfair Treatment And Thus Was Sufficiently Grave The Trial Court Should Have Granted Vasquez's Motion To Recuse The District Attorney's Office.

Following the hearing on the request to recuse the district attorney's office the trial court found (1) the motion was "vague speculation;" (2) the fact [Vasquez's stepfather] may be a witness at retrial did not create a disabling conflict; and (3) the prosecutor was within her right to refuse a bench trial before Judge Shapiro. Thus, the court concluded Vasquez had not produced sufficient evidence to satisfy the statutory burden of proof and denied the motion.

An appellate court's role "is to determine whether there is substantial evidence to support the findings (*People v. Conner* (1983) 34 Cal.3d 141) and, based on those findings, whether the trial court abused its discretion in denying the motion. (*People v. Hamilton* (1988) 46 Cal.3d 123, 140; *Love v. Superior Court* (1980) 111 Cal.App.3d 367, 371; *People v. Battin* (1978) 77 Cal.App.3d 635, 671.)"[22]

As an initial matter, the record makes clear the court failed to make either necessary finding regarding the existence of a conflict, and if one existed, whether the conflict was so grave as to render fair treatment unlikely, as is required by the Supreme Court's decisions in *Conner* and *Eubanks*.[23] This court is thus deprived of the trial court's insights on these separate questions.

In addition, it appears from the evidence adduced at the hearings only one of the trial court's three findings is supported by the evidence. The possibility [Vasquez's stepfather] might be called as a witness, without further evidence of why this circumstance might prejudice the defense, is not alone sufficient to order recusal.

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[22] *People v. Breaux* (1991) 1 Cal.4th 281, 293-294; accord, *People v. Griffin* (2004) 33 Cal.4th 536, 769.

[23] *People v. Conner, supra*, 34 Cal.3d 141, 148-149 [addressing each element separately]; *People v. Eubanks, supra*, 14 Cal.3d 580, 594 [finding trial court erred by addressing only the first part of the test, the existence of a conflict, without deciding whether the conflict was so grave as to make fair treatment unlikely].

Appellate decisions uniformly hold the bare fact a deputy district attorney may be a witness at trial is generally insufficient to disqualify the entire district attorney's office.[24] Thus, this finding finds support in the record.

The same cannot be said for the court's other findings: the evidence Vasquez was being treated differently was only "speculative" and there was nothing improper about the prosecutor's decision to refuse a bench trial before Judge Shapiro. Instead, the record evidence shows a reasonable possibility the prosecutor was not exercising her discretionary functions in an evenhanded manner.

It may be true a defendant has no absolute right to a bench trial, but this is not the point. The prosecutor refused a bench trial before Judge Shapiro for fear he might treat Vasquez more leniently than the victim's family wished, with the result the victim's family would attribute this leniency to a showing of favoritism to the child of a district attorney because of the judge's former employment by the district attorney's office.

In most cases appellate courts are required to deal with the *possibility* a prosecutor might not be impartial and with the *likelihood* of unfair treatment. In the present case there was direct evidence showing Vasquez was *in fact being treated differently*—and was being so treated because of the conflict. At the hearing, the prosecutor stated she had done many trials before Judge Shapiro and always felt the People had received a fair trial. The prosecutor did not, however, want a bench trial before Judge Shapiro in Vasquez's case. She admitted her decision to decline a bench trial had been influenced by what the victim's family's reaction would be to likely favorable rulings for Vasquez. She told Judge Shapiro, "Part of my concern is, also, your prior career with the district attorney's

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[24] See, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 86-87 [recusal was not required although two deputy district attorneys testified at trial]; *People v. Merritt* (1993) 19 Cal.App.4th 1573, 1580 ["merely because an employee may be a potential witness and credibility of that witness may have to be argued by the prosecuting attorney, there is no sufficient basis for that reason alone to recuse an entire prosecutorial office."]; *Love v. Superior Court* (1980) 111 Cal.App.3d 367, 372 ["The general rule is that an entire office should not be recused merely because one or more of its members might be called as witnesses for the defense."].

office. And my victim[’s] family is a little upset because I’m the third lawyer on this case, and they were very concerned that perhaps we were not pursuing things.” The prosecutor further explained why in her view the judge’s connection to the district attorney’s office created a problem in trying Vasquez. “So their [the victim’s family’s] position and my evaluation, also, the evidence is that this is a first degree murder; I did not wish to put this court in a position of having its integrity questioned regarding a ruling that would either be something that perhaps we didn’t feel the evidence showed. [¶] And, also, I wanted to insure that there was no appearance of any improprietary [sic] on the part of our office in handling this.”

From her comments it appears the prosecutor would likely have accepted the offer of a bench trial had the case involved a defendant other than a child of a deputy district attorney, and had she not been so concerned about the victim’s family’s reaction to possible rulings favoring the accused from a former member of the district attorney’s office.

The evidence the prosecutor would not consider a plea of voluntary manslaughter is further evidence Vasquez was being treated differently than the prosecutor would possibly have treated some other defendant. Vasquez had no prior criminal record. The evidence of Vasquez’s intent was arguably ambiguous. The evidence showed the P.A.L. and C.N.E. tagging crews were rivals but that their usual mode of confrontation was fistfights. The tagging crews had no history of using deadly weapons, or any weapons for that matter, beyond mace or pepper spray. The jury at the first trial obviously could not agree on the crime committed. It is possible several of these jurors believed Vasquez and Fregoso merely intended to assault and scare the victim rather than kill him.

However, even after the first jury hung, the prosecutor insisted the facts showed first-degree, premeditated murder and lying-in-wait. She thus continued to offer second-degree murder (as had her two predecessors, suggesting the offer of second-degree murder might have been an institutional decision). In any event, after a jury fails to reach a verdict in a case it is common for a prosecutor to offer a plea to a lesser crime to avoid retrial. The prosecutor made no such offer in this case and instead insisted on pursuing

first-degree murder. The prosecutor's decision not to offer a more favorable plea bargain evidences a reasonable possibility the prosecutor was treating Vasquez less favorably.

The foregoing is substantial evidence of the possibility the prosecutor was not exercising her discretionary functions in an evenhanded manner. Moreover, and assuming counsel's representations at the hearing are accurate, the fact the district attorney's office requested the attorney general to handle the prosecution indicates that office knew from the beginning the case presented at minimum an appearance of a conflict of interest.

Thus, on this record the trial court should have found either an actual or apparent conflict within the meaning of Penal Code section 1424.

The next question is whether this conflict was so grave as to render it unlikely Vasquez would receive fair treatment during all portions of the criminal proceedings.

As already noted, he was deprived of the opportunity of a trial before an even-handed judge but who himself was a former deputy district attorney. The prosecutor declined Vasquez's offer of a bench trial because when or if rulings favorable to the accused occurred the victim's family would blame it on the district attorney's office as evidence of favoring and protecting its own.

Evidence a prosecutor is influenced or controlled by outside sources when making discretionary decisions can be evidence of a disabling conflict.[25] From the record it appears the victim's family had an unusually strong influence on the prosecutor's decision-making process in this case. This outside pressure, in turn, created the potential for unfairness in this case where the prosecutor felt an obligation to treat Vasquez more harshly in order to avoid a charge of favoritism.

Despite the fact the first jury hung, the prosecutor refused to offer any plea less than second-degree murder. Again, this is some evidence the prosecutor possibly treated

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[25] See, e.g., *People v. Eubanks, supra*, 14 Cal.4th 580, 596 [a conflict may exist if a prosecutor is influenced or controlled by a victim who has a personal interest in the defendant's prosecution and conviction].

Vasquez more harshly in the plea bargaining process.[26] Given the prosecutor's earlier comments, the record suggests the prosecutor offered nothing less than second-degree murder so as not to alienate the victim's family by making it appear he received a lesser charge than first-degree murder simply because of his familial connection to the district attorney's office.

From the record evidence alone, it appears the conflict in this case was sufficiently grave it was likely Vasquez would not receive fair treatment at all stages of the criminal proceedings within the meaning of Penal Code section 1424.

There are no reported decisions presenting a similar or analogous factual situation to assist in this analysis. Many of the published decisions involve a challenge to a particular prosecutor because of a prior relationship to the accused.[27] Orders denying recusal in these situations have been upheld where the evidence demonstrated the district attorney's office had taken effective and extreme measures to ensure the affected prosecutor was utterly removed from any aspect of the prosecution.[28]

Recusing an entire office is a very serious matter and for this reason requires a particularly strong showing it is unlikely a defendant will be treated fairly in all aspects

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[26] Compare, *People v. Neely* (1999) 70 Cal.App.4th 767, 777 [although the prosecutor in his campaign for office had used the defendant's case as an example of one deserving the death penalty, the undisputed evidence showed the prosecutor had nevertheless acted in an evenhanded manner by offering the defendant a plea bargain of life without the possibility of parole].

[27] See discussion in Annotation, Disqualification of Prosecuting Attorney in State Criminal Case on Account of Relationship with Accused (1996) 42 A.L.R. 5th 581.

[28] See, e.g., *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108, 112-113 [district attorney's office took affirmative steps to isolate former public defender from any prosecutorial involvement in his former clients' cases: he received a six-month assignment to exclusively handle juvenile cases, his office was in a separate building, he reported to a supervisor from another area, he had no supervisory or policymaking role in the prosecutor's office, and he swore not to discuss his prior cases with prosecutorial personnel].

of a trial.[29] Recusal of an entire district attorney's office has nevertheless been held appropriate when there was substantial evidence personal animosity, bias or personal emotions had affected the office.[30]

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[29] *People v. Hamilton* (1988) 46 Cal.3d 123, 139; *Love v. Superior Court, supra*, 111 Cal.App.3d 367, 371.

As an alternative to recusing the entire district attorney's office, courts have affirmed or crafted orders for only partial recusal of a district attorney's office when satisfied the effects of the conflict could be successfully eliminated through isolation or segregation measures. (See, e.g., *Love v. Superior Court, supra*, 111 Cal.App.3d 367, 374-375 [defendant moved to recuse the entire district attorney's office because the office had recently hired a person who had worked as a research assistant with the public defender while a law student; court ordered recusal of only the major crimes section to which the former law student was assigned].)

[30] *People v. Eubanks, supra*, 14 Cal.4th 580, 599-600 [fact district attorney requested substantial financial assistance from the private victim created a substantial risk of bias and of being under the influence or control of the victim]; *People v. Choi* (2000) 80 Cal.App.4th 476, 481-482 [district attorney was a close friend of the murder victim and had made public statements regarding the murder of his friend and a connected case]; *Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277 [every employee of the district attorney's office was necessarily a victim of and affected by the county's auditor/controller's misconduct resulting in the county's bankruptcy]; *People v. Lepe* (1985) 164 Cal.App.3d 685 [district attorney had previously represented the defendant in the same matter and necessarily had privileged information regarding the case]; *Younger v. Superior Court* (1978) 77 Cal.App.3d 892 [private attorney with extensive criminal law practice was appointed to the third ranking position in the district attorney's office; because of his policy-making and supervisory position it was likely his decisions would affect his former clients' cases prosecuted in his office]; *People v. Conner, supra*, 34 Cal.3d 141, 148-149 [defendant tried to escape by shooting and stabbing deputy sheriff and then shot at deputy district attorney who witnessed the scene; deputy district attorney reported the incident to his superiors, discussed the incident with the majority of the prosecutors in his office and gave interviews to the media. Recusal regarding the escape charges was upheld as proper because the prosecutor was both a victim of, and a witness to, the incident]; *People v. Greer, supra*, 19 Cal.3d 255 [recusal of entire office upheld as proper where murder victim's mother worked in the same district attorney's office as a clerical employee and many other employees of the office had an emotional stake in the outcome].

Vasquez was prosecuted by the very office and in the very building in which both his mother and stepfather worked. This created too much pressure from, and scrutiny by, colleagues in the office. Moreover, as noted, pressure from the victim's family overly influenced the prosecutor's decisions with the result Vasquez was likely treated more harshly than some other defendant would likely have been treated.

For these reasons in combination, we find the trial court abused its discretion in denying recusal in this case.

### D. The Erroneous Denial Of Vasquez's Motion To Recuse The District Attorney's Office Was Not Prejudicial.

The next questions concern whether the erroneous denial of the motion to recuse the district attorney's office requires reversal of the judgment, and the appropriate standard for reversible error in this context.

In *People v. Superior Court (Greer*) the court expressed the view reversal of a judgment would be commonplace if trial courts were powerless to recuse the district attorney's office where a conflict required the office's disqualification. Thus, in *Greer* the Supreme Court rejected the attorney general's argument it would violate the separation of powers doctrine for a trial court to have the authority to disqualify a district attorney. The court found it anomalous for the attorney general to concede "a prosecutorial conflict of interest in criminal cases may require reversal of a conviction in the appellate courts. Yet if the trial judge has no authority to recuse a district attorney, in such a case he could do no more, short of outright dismissal, than helplessly preside over a criminal proceeding which he finds improper and which appears destined for reversal on appeal."[31] The court reasoned to avoid "inevitable reversals on appeal" trial courts should have as much authority as appellate courts to determine when recusal of the district attorney's office is justified.[32]

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[31] *People v. Superior Court (Greer), supra*, 19 Cal.3d 255, 264.

[32] *People v. Superior Court (Greer), supra*, 19 Cal.3d 255, 264.

Had Vasquez sought pretrial review of the courts' erroneous denials of his motions to recuse the district attorney's office the showing of a *likelihood* of unfair treatment would have sufficed for reversal.[33] Apparently, Vasquez did not seek pretrial review by filing a writ petition in this case. Had he done so, and in light of our previous discussion, this court would have surely granted the requested relief.

The parties have not cited, and this court has discovered no cases stating the standard for reversible error in this context where the issue is raised for the first time on appeal from the judgment. However, in other contexts courts have held reversal requires a showing of prejudice to the complaining party before a judgment may be reversed for the erroneous failure to disqualify a conflicted counsel where the complaining party raises the issue for the first time on appeal.

For example, in *In re Sophia B*.[34] the mother of a dependent child moved to disqualify county counsel from representing the Department of Social Services. The mother argued county counsel should be disqualified because county counsel had also represented her conservator, the public guardian, and was thus privy to confidential information about her. The mother did not seek pretrial review of the court's ruling denying her motion.[35] On appeal the court framed the issue for decision as follows: "where a party does not seek pretrial review of an order refusing to disqualify opposing counsel and raises the issue only on appeal from the final judgment in the action, is that party obligated to demonstrate that the denial of the motion in some way affected the outcome of the case?"[36] The court concluded a showing of prejudice was required in

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[33] See, e.g., *Lewis v. Superior Court, supra,* 53 Cal.App.4th 1277, 1286; compare, *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529 [when error occurs at a preliminary examination, the right to relief without a showing of prejudice is limited to pretrial challenges to irregularities; on appeal such errors will require reversal only if the defendant can show he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary hearing].

[34] *In re Sophia B*. (1988) 203 Cal.App.3d 1436.

[35] *In re Sophia B., supra*, 203 Cal.App.3d 1436, 1438.

[36] *In re Sophia B., supra*, 203 Cal.App.3d 1436, 1439.

accordance with the usual principles of appellate procedure. The court noted an attorney can be disqualified based on only the *potential* for causing harm, whereas the California Constitution mandates a judgment may not be reversed absent a showing the error affected the outcome.[37] The court noted by the end of trial court proceedings it will be clear whether the potential for harm from the conflict materialized or whether no harm occurred and the parties received a fair trial despite the conflict. The court thus "infer[red] a rule that on appeal from a final judgment, an issue of attorney disqualification may not be raised unless it is accompanied by a showing that the erroneous granting or denying of a motion to disqualify affected the outcome of the proceeding to the prejudice of the complaining party."[38]

In applying this standard, we conclude Vasquez cannot demonstrate actual harm from the conflict as a result of the trial court's erroneous denial of his motion to recuse the district attorney's office.

Initially we note, Vasquez was not harmed by the loss of a bench trial before Judge Shapiro. This trial resulted in a hung jury and mistrial. Because his first trial was a nullity, it necessarily had no affect on the outcome of his case.

Similarly, Vasquez cannot demonstrate harm from the fact the deputy district attorneys consistently offered him plea bargains of only second-degree murder. While these offers were not as *favorable* as would have been an offer of voluntary manslaughter, the result of the case demonstrates second-degree murder was in fact a *fair* offer. A majority of the jurors in the first trial voted for murder. Vasquez's second jury found the evidence showed beyond a reasonable doubt the crime he committed was second-degree murder. Accordingly, Vasquez cannot demonstrate he was actually

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[37] *In re Sophia B., supra*, 203 Cal.App.3d 1436, 1439, citing California Constitution, article VI, section 13.

[38] *In re Sophia B., supra*, 203 Cal.App.3d 1436, 1439; compare, *People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1009 [to reverse a judgment based on a claim of judicial bias requires an affirmative showing of prejudice]; but see, *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 461-463 [obvious judicial bias so tainted the trial unfairness was presumed without a showing of actual prejudice].

harmed from the district attorney's alleged inability to make reasonable offers because of the conflict. Finally, the *probability* (versus possibility) a nonconflicted attorney might have made him a plea offer of voluntary manslaughter is necessarily speculative in the absence of any evidence to support the assertion.

Because the record facts establish Vasquez received *fair*, if not favorable, treatment during the proceedings, we conclude he has not demonstrated the requisite prejudice necessary to reverse the judgment in this case.

## II. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S DECISION TO DENY FREGOSO'S *WHEELER* MOTION ON THE GROUND HE FAILED TO MAKE A PRIMA FACIE SHOWING THE PROSECUTOR HAD DISCRIMINATED IN HER USE OF PEREMPTORY CHALLENGES.

In selecting Fregoso's jury the prosecutor exercised three of her six peremptory challenges to excuse Black individuals. When the prosecutor excused the third potential Black juror Fregoso made a *Wheeler*[39] motion, contending the prosecutor excused the potential jurors because of their race. Fregoso contends the court erred in denying his motion. We conclude substantial evidence supports the trial court's conclusion Fregoso failed to make a prima facie showing of discrimination and accordingly find no error.

After her fifth peremptory challenge, and third against a Black venire person, defense counsel moved for mistrial.

"[DEFENSE COUNSEL]: At this time, your Honor, I would like to make a *Wheeler* motion.

"THE COURT: Based on what?

"[DEFENSE COUNSEL]: The People have exercised five peremptories. One, two—three of the five has [sic] been African-Americans.

"THE COURT: Uh-huh.

"[DEFENSE COUNSEL]: Number 1, 4 and 5.

"THE COURT: Well, let's point out a few things. You certainly can raise a challenge as to any cognizable group that's being in your mind singled out. Of course, your client is Hispanic. [¶] I would note that of the three challenges we've had two male African-Americans, one female African-American, the other—we've had a female Caucasian and a male Hispanic by the prosecutor. [¶] I've listened to the reasons. I don't think you've made a prima facie case at this point. I would also point out, somebody asked for a justification, that there are still several African-American members of the jury panel left.

"[DEFENSE COUNSEL]: I agree, your Honor. It was just reaching a point where I was getting a little concerned.

"THE COURT: All right. That's fine. Thank you. All right. Challenge disallowed."

"Under *Wheeler*, there is a presumption that a prosecutor who employs a peremptory challenge against a prospective juror who is a member of a cognizable group does so for a purpose other than to discriminate. (*People v. Wheeler, supra*, 22 Cal.3d at p. 278.) If a defendant believes that the prosecutor is using a peremptory challenge for a discriminatory purpose, the defendant 'must raise the point in a timely fashion.' (*Id*. at p. 280.) At the threshold, the defendant must establish a 'prima facie case of [purposeful] discrimination.' (*Ibid*.) 'First, . . . [the defendant] should make as complete a record of the circumstances as is feasible.' (*Ibid*.) 'Second, [the defendant] must establish that the persons excluded are members of a cognizable group . . . ' (*Ibid*.) 'Third, from all the circumstances of the case [the defendant] must show a strong likelihood' (*ibid*.)—or stated in other terms, must raise a 'reasonable inference' (*id*. at p. 281; accord, *People v. Johnson* (2003) 30 Cal.4th 1302, 1306 . . . )—'that such persons are being challenged because of their group association rather than because of any specific bias' (*People v. Wheeler, supra*, 22 Cal.3d at p. 280). In order to demonstrate such a 'strong likelihood,' or raise such a 'reasonable inference,' the defendant 'must show that it is more likely than

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[39] *People v. Wheeler, supra,* 22 Cal.3d 258.

not the [prosecutor's] peremptory challenges, if unexplained, were based on impermissible group bias' or purposeful discrimination. (*People v. Johnson, supra*, 30 Cal.4th at p. 1306; accord, *id*. at p. 1318.) If the defendant succeeds in establishing a prima facie case of such discrimination, the prosecutor must articulate neutral reasons explaining the peremptory challenges in question. (*People v. Wheeler, supra*, 22 Cal.3d at pp. 281-282.) Ultimately, the defendant must prove purposeful discrimination. (See *id*. at pp. 278-282 [placing the 'burden of proof' on the defendant].) If the defendant succeeds in proving such discrimination, the trial court must dismiss any jurors thus far selected and sworn, and quash any remaining venire. (*Id*. at p. 282.)

". . . . . .

"When a trial court denies a *Wheeler* motion with a finding that the defendant failed to establish a prima facie case of purposeful discrimination, we review the record on appeal to determine whether there is substantial evidence to support the ruling. [Citations.] The record includes voir dire [citations] as well as any juror questionnaires [citations]. We sustain the ruling when the record discloses grounds upon which the prosecutor properly might have exercised the peremptory challenges against the prospective jurors in question. [Citations.]"[40]

Having reviewed the record on appeal, we find substantial evidence supports the trial court's finding Fregoso failed to establish a prima facie case of purposeful discrimination. First, Fregoso failed to make a record suggesting the possibility of purposeful discrimination. For example, he did not attempt to show, except for their race, how these potential jurors were otherwise similar to jurors the prosecutor chose to retain.[41] Nor did Fregoso show removing these potential jurors would mean removing all,

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[40] *People v. Griffin* (2004) 33 Cal.4th 536, 554-555.

[41] See, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 137 ["Defendant did not demonstrate that the challenged jurors share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole."].

or nearly all, Black jurors from the venire.[42] Indeed, the record evidence suggests the contrary was true. In denying his motion, the court noted, even after the prosecutor's challenges to these three Black potential jurors, several Black potential jurors remained on the jury panel. Fregoso's only showing in support of his *Wheeler* motion was his statement the prosecutor had used three of her six peremptories to challenge Black potential jurors. This single observation, standing alone, is insufficient to establish a prima facie case of group bias.[43]

Second, the record discloses grounds upon which the prosecutor properly might have made her peremptory challenges to these three potential jurors.

T.M. had prior jury experience in a criminal matter in which the jury returned a not guilty verdict. On voir dire the prosecutor questioned T.M. about the case. T.M. thought the case might have involved a charge of battery. The prosecutor inquired whether the alleged battery involved use of a weapon. T.M. said yes, and suggested the weapon allegedly used became the critical issue in the case. "—The stick I was saying they thought—somebody thought it was a gun, they didn't really know if it was a stick or a gun. That was the thing there." The prosecutor then asked questions designed to reveal T.M.'s attitudes about aider and abettor liability. She inquired whether he could find a person guilty of murder if the person had not been the one who actually did the killing. T.M. replied, "Well, depends on how much they were a part of helping."

Concern about a prospective juror who acquitted an accused of battery because of some evidentiary discrepancy about the weapon used is a reasonable, race-neutral reason to exercise a peremptory challenge. More importantly, however, this juror gave an

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[42] See, e.g., *People v. Garceau* (1993) 6 Cal.4th 140, 171-173 [court held defendant failed to show group bias although prosecutor had exercised a peremptory challenge against all six Hispanic-surnamed females]; *People v. Sanders* (1990) 51 Cal.3d 471, 501 [although prosecutor struck all four Hispanic-surnamed prospective jurors from the panel, this fact was "not dispositive"].

[43] See, e.g., *People v. Yeoman* (2003) 31 Cal.4th 93, 115 ["Defense counsel's cursory reference to prospective jurors by name, number, occupation and race was insufficient" to establish a prima facie case of group discrimination].

equivocal response when asked whether he could follow and apply the law regarding aider and abettor liability. This circumstance would give most prosecutors pause in a prosecution, such as the one against Fregoso, where the defendant's liability was based solely on an aiding and abetting theory.

R.H. had been a juror in a criminal case which resulted in a hung jury. Prior jury experience on a hung jury is an adequate, race-neutral reason to challenge a prospective juror.[44]

C.C. marked in his juror questionnaire his education was limited to "grade school or less." He failed to answer some questions on the questionnaire and answered others inappropriately. C.C.'s apparent lack of education provided a legitimate, race-neutral reason to have concerns about his ability to understand and apply the legal concepts which would be required of him as a juror in this case.[45]

The foregoing constitutes substantial evidence supporting the trial court's finding Fregoso failed to make a prima facie case of purposeful discrimination.

Fregoso attempts to refute this conclusion. He urges this court to compare the voir dire and questionnaires of the challenged jurors with those of other prospective jurors. The Supreme Court in *People v. Johnson*[46] made clear the rule in this state is an appellate court should not conduct comparative juror analyses for the first time on appeal. As the court reiterated in *People v. Heard*,[47] "We recently addressed the subject of employing comparative juror analysis in the *Wheeler-Batson* context. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1318-1325.) After thorough consideration of both our own precedents and federal authority, including *Miller-El v. Cockrell* (2003) 537 U.S. 322, we held in *Johnson* 'that engaging in comparative juror analysis *for the first time on appeal* is

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[44] See, e.g., *People v. Farnam, supra,* 28 Cal.4th 107, 138; *United States v. Rudas* (2d Cir. 1990) 905 F.2d 38, 41.

[45] See, e.g., *People v. Turner* (1994) 8 Cal.4th 137, 168-169 [inability to understand legal concepts]; *United States v. Lane* (4th Cir. 1989) 866 F.2d 103, 106 [lack of education].

[46] *People v. Johnson* (2003) 30 Cal.4th 1302, 1318-1325.

unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts. . . .' (*Johnson, supra*, 30 Cal.4th at p. 1318.) Although the trial court and the objecting party may rely at trial on comparative juror analysis in evaluating whether a prima facie case has been established and whether the prosecutor's proffered reasons are legitimate and genuine (*id*. at pp. 1324-1325), in the absence of any reliance upon comparative juror analysis in the trial court it is inappropriate for a reviewing court to second-guess *Wheeler-Batson* rulings on that basis. (*Ibid*.; see also, *id*. at p. 1331 (dis. opn. of Kennard, J.).) Here, neither the trial court nor defense counsel engaged in any comparative analysis at trial, and thus defendant may not raise this claim on appeal."[48]

So too in the present case, there was no comparison of juror characteristics as a part of Fregoso's *Wheeler* motion in the trial court. Accordingly, he may not raise this issue for the first time on appeal.[49]

## III. VASQUEZ CAN DEMONSTRATE NEITHER ERROR NOR PREJUDICE IN THE COURT'S RULING CONCERNING EVIDENCE OF HIS ARREST FOR GUN POSSESSION.

One of Vasquez's defenses was misidentification: There was no physical evidence linking him to the P.A.L. tagging crew. He did not have a P.A.L. tattoo. Law enforcement did not have his name listed in the P.A.L. book of members and associates. Police did not even have a field identification card reflecting any previous encounter, consensual or otherwise, with Vasquez which might have linked him to any gang or

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[47] *People v. Heard* (2003) 31 Cal.4th 946.

[48] *People v. Heard, supra*, 31 Cal.4th 946, 971.

[49] Fregoso claims retroactive application of this "new and unforeseen requirement" would be unfair. We disagree with his characterization of the rule as "new." The *Johnson* and *Heard* courts made clear they relied on existing precedent to reiterate and/or clarify, appellate courts should not engage in comparative juror analysis for the first time on appeal and thus refused to do so in those very cases. (*People v. Heard, supra*, 31 Cal.4th 946, 971; *People v. Johnson, supra,* 30 Cal.4th 1302, 1318-1325.)

tagging crew. For this reason, police used a Fairfax High School yearbook when asking witnesses to identify Vasquez's photo.

There was also some evidence Fregoso, not he, was the stabber. At one point, Hideshi Valle described Fregoso as the stabber. However, when Valle reviewed photographs from the Fairfax High School yearbook, she picked Vasquez's picture as depicting the person who had done the stabbing. Based on the lack of evidence of a connection to the P.A.L. gang, and Valle's statement identifying Fregoso as the stabber, Vasquez intended to present a misidentification defense to the jury.

According to the prosecutor's theory of the case, the stabbing was in retaliation for a rival C.N.E. tagging crew member having disrespected P.A.L. by punching and spraying Cynthia Mendez with pepper spray the previous day. To explain this theory and the relationships of the tagging crews to the jury the prosecutor intended to present expert gang testimony. To establish Vasquez was in fact an active member of P.A.L., the prosecutor proposed presenting evidence of his arrest which occurred while Vasquez was out on bail between the two trials.

Vasquez moved to suppress evidence of a gun seized during his arrest, claiming the warrantless search and seizure was presumptively unreasonable, and the officers lacked reasonable suspicion for the stop. The evidence presented at the suppression hearing revealed the following:

Around 1:45 A.M. on June 21, 2001, a woman flagged down two police officers on patrol. As the officers approached, she got out of her car, pointed to a nearby alley, and told them three young Hispanic males wearing baggy clothing were spray painting the alley wall. The officers drove through the alley, saw nothing, but two blocks away spotted three young male Hispanics walking down the street. The officers pulled their cruiser past them and turned around. As the officers approached, one of the three men, Vasquez, started walking off in a different direction. The officers followed Vasquez and ordered him to stop. The officers asked for identification. As the officer reviewed Vasquez's driver's license, Vasquez appeared to be anxious and nervous as he looked up and down the street. Because of his unusual behavior the officer believed Vasquez might

be hiding something in his baggy clothing. The officer conducted a pat-down search and felt a hard metal object in Vasquez's waistband. Vasquez became rigid and pulled out of the officer's grip. Vasquez tried to run away and the two men struggled. The officer grabbed Vasquez's upper body and the two men fell to the ground. As they fell, a blue steel semi-automatic handgun flew from Vasquez's waistband and landed on the sidewalk. Vasquez broke free from the officer's grasp and ran away. The officers ultimately chased him down and arrested him.

At the conclusion of the hearing and argument, the court denied Vasquez's motion to suppress evidence of the gun. The court stated, "In this case the police had legitimate information from a citizen informant, they had an absolute obligation to at least investigate. There are no other individuals even coming close to matching the description within a three block radius from where the citizen report[s] the criminal activity had taken place. It was absolutely not only appropriate but imperative they make an investigation, a temporary detention is unlawful [sic] and called for. As part of that temporary detention, given what the defendant's actions were, it not only was reasonable for the officer to pat him down, he would be incompetent if he did not."

New charges were filed against Vasquez because of this incident. Defense counsel represented Vasquez in connection with the new charges as well. However, it was not until a few days before trial the prosecutor informed both defense counsel of the fact ballistic testing and an investigation had revealed the gun Vasquez carried the evening of his arrest had been used by a P.A.L. member in a gang related murder.

Vasquez then sought to exclude all evidence of the gun as a discovery sanction for the prosecutor's delay in providing this information. The trial court agreed the prosecutor should have disclosed the information linking the gun to a P.A.L. related murder sooner. However, the court found Vasquez was not prejudiced by the late disclosure.

On the other hand, the court found the evidence Vasquez possessed a gun which had been linked to a gang murder more prejudicial than probative. Accordingly, the court tentatively ruled the evidence inadmissible. The court acknowledged the prosecutor had a right to prove her theory the motive for the stabbing was payback for a C.N.E. member

disrespecting a P.A.L. member. Thus, the court noted it would be unfair to exclude the evidence if it would give the jury the false impression Vasquez had no association with P.A.L. Accordingly, the court stated it would revisit its ruling in the event Vasquez either disputed or denied any connection to P.A.L.

Finally, Vasquez objected to the gang expert's testimony on the ground there was an inadequate evidentiary foundation for any opinion he might give about Vasquez's alleged membership in P.A.L. In addition, Vasquez and Fregoso asserted there was no evidentiary foundation for his opinion P.A.L. was at the time in this case in an evolutionary period and had since moved into hard-core crimes and had since developed connections to the Mexican Mafia.

The court permitted the gang expert to testify but precluded him from mentioning anything about Vasquez's recent arrest for gun possession and evading arrest.

For varying reasons and motives, none of the eyewitness students directly and unequivocally identified Vasquez as a member of P.A.L. At one point in her testimony, Cynthia Mendez stated only she had heard he was "supposedly" a member of P.A.L. Valle only testified when she saw Fregoso and Vasquez they reminded her of P.A.L. members.

The gang expert on P.A.L. gave his opinion tagger crews fit the definition of a gang because they were members of a common group with an identifiable name and mission and acted together to commit the crime of defacing property.

He explained P.A.L. had started out as a tagging crew whose members wrote graffiti on neighborhood walls. The expert explained C.N.E. was also a tagging crew and a P.A.L. rival. According to the expert, at the time of the crime in this case P.A.L. was in transition and was evolving into a gang, or tag banging crew. He formed this opinion after noticing P.A.L. graffiti had changed a few months before the crime in this case. He still saw "P.A.L." graffiti but with "WS," or "Westside" on the left, and with "13" to the right. The number "13" signified to him P.A.L. was associating with the prison gang known as the Mexican Mafia. The fact P.A.L. had added "13" to its tag indicated to him P.A.L. was becoming more serious or hard-core. The officer explained the Mexican

Mafia controls outside gangs through taxes on drug sales or by ordering actions on persons or groups on the outside. For the Mexican Mafia to agree to associate with a local gang, the local gang had to have earned its respect by carrying out orders or by taking other actions at its direction.

The expert opined Fregoso was a member of P.A.L. He based his opinion on information in a field information card which stated Fregoso openly admitted his membership in P.A.L. when questioned.

The expert stated he believed Vasquez was a member of P.A.L. as well. He based his opinion on the following facts: (1) the nature of the crime committed; (2) Vasquez accompanied Fregoso, an acknowledged and documented P.A.L. member, to seek out the rival; (3) a gang member would not take along a non-gang member to do a gang payback; (4) they went to the school looking for rival Armando who had hit Cynthia Mendez the day before telling her, "Don't mess with C.N.E.;" (5) they went to the school armed with weapons; (6) after the stabbing, Fregoso told eyewitnesses, "It's a P.A.L. thing," attributing Vasquez's act of stabbing the victim to P.A.L.; and (7) as they left the school Vasquez and Fregoso threw P.A.L. hand signs.

At the conclusion of the gang expert's testimony the court issued its final ruling and excluded all evidence of the gun which had been used in a P.A.L. related murder. The court found the gang expert's testimony provided all the evidence to which the prosecution was entitled in order to establish Vasquez's connection to P.A.L.

Vasquez claims the court's tentative rulings on the admissibility of the gun evidence presented him with a "Hobson's choice" of either submitting to the gang expert testimony with no argument or risk having his jury hear of his subsequent arrest for possession of a firearm used in a P.A.L. related murder. Vasquez argues he was deprived of the right to present his defense and should not have been put to this dilemma because the gun was not admissible in any event for at least three reasons: (1) as pointed out in his motion to suppress,[50] the gun was seized following a warrantless search without

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[50] Penal Code section 1538.5.

probable cause or reasonable suspicion for the stop; (2) the gun evidence should have been excluded as a discovery sanction[51] because the prosecutor did not reveal until the eve of trial the gun had been traced to a P.A.L. related murder; and (3) the gun evidence had no relevance to the present action, risked confusing the jury and should have been excluded as more prejudicial than probative.[52]

As noted, the court *did not admit* any of the evidence of the gun or of his arrest. The court *excluded* the evidence under Evidence Code section 352 as more prejudicial than probative in accordance with Vasquez's request. Accordingly, Vasquez can demonstrate neither error nor prejudice regarding the court's ruling on the gun evidence. "Just as review cannot occur in the absence of an actual evidentiary ruling [citations], a claim of error does not arise where no evidence was introduced as the result of a ruling allowing its admission."[53]

Perhaps Vasquez instead is arguing he was unable to disclaim any connection to P.A.L. because if he did he ran the risk of the court reversing its ruling absent alternative evidence of his P.A.L. membership. If so, then his assertion is correct but similarly without legal consequence. No defendant has the right to present perjured testimony.[54] In a similar vein, no defendant has the right to restrict the evidence to only those facts favorable to his side in order to present a knowingly distorted view of the case. Preventing Vasquez from disclaiming any association with P.A.L. was thus within the court's power in order to ensure the jury received as accurate a view of the circumstances

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[51] Penal Code section 1054.1.

[52] Evidence Code section 352.

[53] *People v. Millwee* (1998) 18 Cal.4th 96, 126.

[54] See, e.g., *Harris v. New York* (1971) 401 U.S. 222, 226 ["The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."]; *Walder v. United States* (1954) 347 U.S. 62, 65 ["there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility."]; *People v. Pokovich* (2004) 120 Cal.App.4th 436, 442 ["As a matter of sound public policy, the Fifth Amendment and California's judicially declared rule of immunity cannot be used by a defendant as a shield to commit perjury at trial."].

as reasonably possible. If Vasquez felt hamstrung in presenting an image of himself as a youth with no prior record, no gang tattoos, and no documented gang association, then it was a matter of his own doing, responsibility for which cannot be placed at the court's feet. As the High Court has noted, "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him."[55]

Contrary to his suggestion, the court did not prevent him from presenting his defense by restricting his cross-examination of the gang expert.[56] Indeed, the court expressly told Vasquez's counsel he should feel free to "attempt to destroy" the expert if he wished by attacking his credibility on cross-examination. The court simply made clear it would not countenance questioning the expert in a manner designed to suggest to the jury Vasquez had no connection to P.A.L. at all.

In sum, we find no error.

## IV. EVIDENCE VASQUEZ WAS A MEMBER OF P.A.L. DID NOT RESULT IN PREJUDICIAL ERROR.

Vasquez claims the trial court abused its discretion in admitting evidence he was a member of P.A.L.

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[55] *Michelson v. United States* (1948) 335 U.S. 469, 479.

[56] The record does not support Vasquez's assertion he was prevented from presenting his defenses in the second trial as a result of the court's ruling on the gun evidence. His defenses in both trials were remarkably similar. In closing arguments in the first trial Vasquez urged the jury to find the evidence did not show an intent to kill; the stabbing was simply a reflexive response to the disabling effects of the pepper spray; and he had been misidentified as the stabber. At his second trial, Vasquez similarly argued the lack of evidence of intent to kill. He also argued the disabling effects of the pepper spray provoked him to stab blindly in response, making the crime no more than voluntary manslaughter. He also directly attacked the gang evidence, calling the expert a "puppet" for the prosecution, while thoroughly demolishing the expert's credibility.

Cynthia Mendez—Victim of the Assault by the C.N.E. Members:

Vasquez claims it was error to permit the prosecutor to impeach Cynthia Mendez's testimony with her out of court statement he was "supposedly" a member of P.A.L. He claims this evidence should have been excluded because it lacked the basic requirement of personal knowledge necessary to admit the evidence.[57] Because her testimony could not establish the preliminary fact of P.A.L. membership, he argues the court should have excluded her out of court statement as irrelevant.[58]

At trial, Cynthia Mendez testified she saw Fregoso frequently but did not know him to be a member of P.A.L. She explained, she did not "associate with him that way." Cynthia Mendez claimed she did not really know what the letters "P.A.L." meant, or what they represented, except "maybe a tagging crew from Fairfax." She said she recognized Vasquez only because they attended the same high school. She said she did not know, or was not sure, whether Vasquez had any relationship to P.A.L. The prosecutor then confronted Cynthia Mendez with her earlier statement Vasquez was "supposedly" in P.A.L. Cynthia Mendez admitted making the statement but explained by using the word "supposedly" she meant she was not sure whether Vasquez was associated with P.A.L. The court permitted the prosecutor to use Cynthia Mendez's out of court statement to impeach her testimony because the court personally found her testimony unbelievable.

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[57] Evidence Code section 702, subdivision (a) provides in pertinent part: "[T]he testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter."

[58] Evidence Code section 403 provides in pertinent part:

"(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

"(1) The relevance of the proffered evidence depends on the existence of the preliminary fact;

"(2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony; . . ."

Cynthia Mendez's claimed lack of knowledge whether Vasquez was associated with P.A.L. made her out of court statement potentially inadmissible for lack of personal knowledge and thus subject to a motion to strike.[59] If error, it was nevertheless harmless. During most of her testimony Cynthia Mendez *denied* knowing whether Vasquez was a member of P.A.L. Thus, her overall testimony assisted rather than harmed Vasquez. Moreover, there was substantial other properly admitted evidence which established Vasquez in fact had a connection to P.A.L.[60] Thus, error, if any, in permitting Cynthia Mendez's testimony to be impeached with her earlier statement Vasquez was "supposedly" a member of P.A.L. must be deemed harmless.

Gang Expert Testimony:

Vasquez contends the trial court abused its discretion in permitting the gang expert to testify. In his view, the expert offered no more than prohibited profile evidence by testifying gang members assault other gang members for gang related reasons and thus the crime in the present case must have been gang related.

Vasquez cites the decision in *People v. Robbie* in support of his argument the gang expert's testimony constituted inadmissible profile evidence.[61] *Robbie* concerned a prosecution for kidnapping and sex crimes. An expert testified to typical characteristics and behavior of persons who commit sexual assaults. Through hypothetical questions the expert opined the defendant's conduct was consistent with the profile of a typical rapist.[62] The appellate court held the trial court had abused its discretion by admitting "profile

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[59] *State Compensation Ins. Fund v. Industrial Accident Commission of California* (1931) 112 Cal.App. 329 [witness who testified he had no knowledge of the subject matter disqualified himself on that subject]; see also, Law Revision Commission Comment to Evidence Code section 702 and cases cited.

[60] Compare, *People v. Warren* (1988) 45 Cal.3d 471, 480 [*absent a good faith belief such facts exist*, it is improper for a prosecutor to ask witnesses questions suggesting facts harmful to the defendant].

[61] *People v. Robbie* (2001) 92 Cal.App.4th 1075.

[62] *People v. Robbie, supra*, 92 Cal.App.4th 1075, 1083.

evidence" which could be "unfairly relied upon to affirmatively prove a defendant's guilt based on his match with the profile."[63] The *Robbie* court stated expert profile testimony is improper because the jury "is improperly invited to conclude that, because the defendant manifested some characteristics, he committed a crime."[64]

We are not persuaded by Vasquez's attempt to label the expert testimony in this case as profile evidence. In contrast to the testimony presented in *Robbie*, the expert here did not testify about "an offender whose behavioral pattern exactly matched defendant's . . . to guide the jury to the conclusion that defendant was guilty because he fit the profile."[65] One purpose of the expert's testimony was instead to establish Vasquez was a member of P.A.L. The other purpose of his testimony was to explain to the jury the rivalry between the two tagging crews and thus why, in his opinion, the crime in the present case was to retaliate for a C.N.E. member having attacked a P.A.L. member.

In discussing both points the expert relied exclusively on the facts peculiar to this case, and not on some general profile of a typical gang member: after beating Cynthia Mendez and spraying her with pepper spray the victim said, "Bitch, don't fuck with C.N.E." She, in turn, told Fregoso, a documented member of rival P.A.L., about the beating. Vasquez accompanied Fregoso to confront the P.A.L. rival armed with weapons. After the stabbing Fregoso stated, "It's a P.A.L. thing," and explained, "Because he hit a girl the day before." As Fregoso and Vasquez walked away from the school they threw P.A.L. hand signs. From this evidence regarding the facts of this case only, the expert opined the crime was a gang payback. Also, because Vasquez acted in concert with Fregoso in carrying out the punishment on the rival tagging crew member, the expert further opined Vasquez was also a member of P.A.L. The expert testified this was so because Vasquez would not otherwise have been permitted to participate in such a significant retaliatory act on behalf of P.A.L.

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[63] *People v. Robbie, supra*, 92 Cal.App.4th 1075, 1084.

[64] *People v. Robbie, supra*, 92 Cal.App.4th 1075, 1086-1087.

[65] *People v. Robbie, supra*, 92 Cal.App.4th 1075, 1087.

"In cases *not* involving the gang enhancement, [the Supreme Court has] held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]"[66]

Vasquez and Fregoso injected their gang status into the crime by (1) identifying P.A.L. as responsible for the crime; (2) throwing P.A.L. hand signs; and (3) retaliating against a member of a rival gang. Thus, the expert's testimony was relevant and probative to show why they were acting together in committing the crime and this evidence in turn buttressed such guilt issues as motive, intent and premeditation.[67]

On the other hand, we agree with Vasquez the expert's testimony regarding P.A.L.'s recent association with the notorious Mexican Mafia prison gang was somewhat extreme and, as it turned out, unnecessary in this particular prosecution. In both trials Melissa Garcia, a true gang expert and proud and loyal member of the equally notorious Mara Salvatarucha gang, provided enough information to prove the point P.A.L. had become more than a tagging crew. She testified P.A.L. "started as a tagger crew. Now they want to be [] gangbangers like tag bangers." This testimony should have been enough to make the point.

Nevertheless, the likely impact on the jury from this Mexican Mafia evidence was minimal. The expert had no direct proof of P.A.L.'s connection to the Mexican Mafia. He had never documented any of the critical graffiti which allegedly showed the connection, and on which he relied for his opinion. In addition, the expert could barely remember where he had even seen an example of the graffiti. Defense counsel seized on

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[66] *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.

[67] *People v. Hernandez, supra,* 33 Cal.4th 1040, 1051.

this seeming lack of foundation regarding the Mexican Mafia link, and were thus able to destroy the expert's credibility on this point on cross-examination. Indeed, in closing argument Vasquez's counsel told the jury the expert's testimony should be rejected in toto. He argued the expert was nothing more than a "puppet" for the prosecution, willing to say whatever the prosecution wanted him to say, whether or not based on fact. In these circumstances, any negative effect of the evidence was minimal, if not neutralized entirely.

## V. THE TRIAL COURT DID NOT ERR IN REJECTING INSTRUCTIONS ON IMPERFECT SELF-DEFENSE.

Vasquez requested self-defense as well as *Flannel*[68] instructions regarding an actual but unreasonable belief in the need to act in self-defense. The theory underlying his request for these instructions was his claim he swung out in an act of self-defense while being sprayed with pepper spray.

The court rejected the proposed instructions, stating, "And that's the problem in this case. There is no evidence to support what his belief was. You want me to take the facts as they objectively are, and then infer that any reasonable person in the same circumstances would do the same thing. And based on that, I in essence, on your request, have a duty to give the instruction but that's not true. By not having the defendant testify, there is lots of good reason[s] why he chose not to testify, that's not a criticism in any way. But I believe the facts are insubstantial to support giving any self-defense instruction . . . . [¶] It's very clear. I would not do this if I was not satisfied in my own mind this is the correct call. If I had any doubts, I would give the benefit of the doubt to the defendant. But the evidence in this case does not support self-defense. There is no testimony number one to support what any, what his belief was, whether it was reasonable, vis-à-vis a reasonable person standard. And in this case the objective facts

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[68] *People v. Flannel* (1979) 25 Cal.3d 668, 674-680.

are not strong enough, not substantial enough to say that even without such testimony the court is under an obligation to give them."

Vasquez contends the court erred in refusing voluntary manslaughter instructions based on an imperfect self-defense theory. Whether we agree with the court's ruling is immaterial because we find Vasquez, as the initial aggressor, was not entitled to claim imperfect self-defense in any event.

"A person who wrongfully attacks, or who voluntarily engages in a fight, and is met by a counter-attack, has no privilege to stand his ground and defend."[69] In *In re Christian S.*, the Supreme Court agreed, noting self-defense "may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified. [Citations.] It follows, a fortiori, that the imperfect self-defense doctrine would not permit a fleeing felon who shoots a pursuing police officer to escape a murder conviction even if the felon killed his pursuer with an actual belief in the need for self-defense."[70]

Vasquez initiated the deadly confrontation with Armando which justified the latter's use of the pepper spray. Vasquez came with Fregoso to the school armed and prepared for the attack. They waited for Armando to exit the campus and tracked his path as he walked down the street. Vasquez approached Armando from behind with his knife already out and in hand. When Valle yelled for Armando to "watch out," Armando turned around and Vasquez plunged his knife into his chest. Because Vasquez's deliberate actions provoked Armando to use the pepper spray, Vasquez was not entitled to defend against his victim's futile efforts at self-preservation.[71] Stated differently, the

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[69] 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, section 75, page 409.

[70] *In re Christian S.* (1994) 7 Cal.4th 768, 773, footnote 1.

[71] See, e.g., *People v. Bolton* (1979) 23 Cal.3d 208, 214-215 [defendant's theory of self-defense was insufficient as a matter of law because he "was clearly the aggressor in the evening's quarrel."].

theory of imperfect self-defense was not available to Vasquez because he wrongfully created the circumstances which made his adversary's attack legally justified.[72]

We therefore find no error.

## VI. IT WAS HARMLESS ERROR TO GIVE A PRE-*LASKO* INSTRUCTION WHICH MISSTATED THE INTENT ELEMENT FOR VOLUNTARY MANSLAUGHTER BASED ON ADEQUATE PROVOCATION/HEAT OF PASSION.

The court instructed the jury with the version of CALJIC No. 8.40 which predated the Supreme Court's decision in *People v. Lasko*.[73] This instruction stated a conviction of voluntary manslaughter required an intent to kill. However, in *Lasko*, the Supreme Court held intent to kill is not a necessary element of voluntary manslaughter. The *Lasko* court explained, a person who acts with conscious disregard for life, knowing the conduct endangers the life of another, and kills in a sudden quarrel or heat of passion is guilty of voluntary manslaughter, regardless whether there was an intent to kill.[74]

When considering Vasquez's motion for new trial the trial court acknowledged it had mistakenly given the wrong instruction. The trial court nevertheless found the error harmless. The court explained, "If I thought—and I have read Lasko and Blakely several times now, when I got the motion for the new trial from [Vasquez]. Had those cases obviously held that it's—it's error, harmful error in any situation, post a decision because those cases recognized it they were going to the place where the law had not gone before, I wouldn't hesitate to set aside the jury's verdict. It's there.

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[72] *People v. Hardin* (2000) 85 Cal.App.4th 625 [the defendant ran into an elderly woman's home in the mistaken belief he was being pursued by killers. The woman tried to evict the defendant by threatening him with a hammer and the defendant used the hammer to bludgeon her to death. The defendant was not entitled to claim imperfect self-defense because he created the circumstances which prompted his adversary's attack.]

[73] *People v. Lasko* (2000) 23 Cal.4th 101.

[74] *People v. Lasko, supra*, 23 Cal.4th 101, 109-110.

"However, I do agree totally with the People's position. This is a parallel. This case is an absolute parallel with Lasko. I checked again to make sure what instructions were given, and I note the court did give 8.50 which the Lasko court, Supreme Court points out that is the saving grace that had they not found the elements that were necessary, they would have gone off in a different direction. [¶] And I believe that although there was error, it was harmless within the meaning of the constitution, and for that, and I find the other reason not persuasive, the motion for new trial is denied."

Vasquez acknowledges the *Lasko* court did find the instructional error harmless largely because the jury had been instructed with CALJIC No. 8.50. He nevertheless argues the error was harmful in the present case. He asserts, in contrast with *Lasko*, there was virtually no evidence of an intentional killing "making it next to certain the jury settled on second degree [murder] based upon a conscious disregard and implied malice."

In *Lasko*, the Supreme Court determined the *Watson*[75] standard of prejudice applied to instructional error on lesser-included offenses.[76] In applying this standard, here as in *Lasko*, we find the instructional error did not result in prejudice.

As in *Lasko*, the court in the present case instructed the jury with CALJIC No. 8.50 which explained the difference between murder and manslaughter. This instruction told the jury in pertinent part, "To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death *was not done in the heat of passion or upon a sudden quarrel*."[77]

Thus, this instruction told the jury they could not return a murder conviction unless the prosecution proved Vasquez was not acting in a heat of passion when he stabbed Armando. Under the instruction, this was true whether the jury found the killing was intentional or unintentional. The fact the jury returned a verdict of second-degree

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[75] *People v. Watson* (1956) 46 Cal.2d 818, 836.

[76] *People v. Lasko, supra*, 23 Cal.4th 101, 111.

[77] Italics added.

murder indicates they did not believe Vasquez killed Armando in a heat of passion.[78] Thus, the factual question posed by the omitted instruction was necessarily resolved adversely to Vasquez under CALJIC No. 8.50.[79]

In addition, the court's instruction on unpremeditated second-degree murder required the jury to find express malice, or the intent to kill. Although the court's instruction on malice aforethought defined both express and implied malice, CALJIC No. 8.30 told the jury in order to convict Vasquez of second degree murder they had to find he "*intended unlawfully to kill* a human being but the evidence is insufficient to prove deliberation and premeditation." The court did not instruct the jury with CALJIC No. 8.31 on implied malice second-degree murder.[80]

Finally, the evidence of planning, arming, tracking down their victim and then after the stabbing chasing after the victim as he sought refuge in the school, suggests an intent to kill.

In these overall circumstances, we conclude it is not reasonably probable a properly instructed jury would have convicted Vasquez of voluntary manslaughter.[81]

## VII. VASQUEZ CANNOT DEMONSTRATE PREJUDICE FROM THE INSTRUCTION ON ADOPTIVE ADMISSIONS.

As Vasquez and Fregoso left the school after the stabbing Melissa Garcia asked Fregoso "where [he was] from?" Fregoso replied, "It's a P.A.L. thing." One witness testified Fregoso then threw P.A.L. hand signs. Jose Amaya testified both Vasquez and

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[78] Notably, the jury also rejected involuntary manslaughter, a lesser offense included within the crime of murder, on which the jury was also instructed. (See, e.g., *People v. Lasko, supra*, 23 Cal.4th 101, 112.) However, unlike in *Lasko*, the jury did not also have the opportunity to reject voluntary manslaughter on an imperfect self-defense theory.

[79] *People v. Sedeno* (1974) 10 Cal.3d 703, 721; *People v. Flood* (1998) 18 Cal.4th 470, 497.

[80] The prosecutor nevertheless suggested this theory of second-degree murder to the jury as part of her closing argument.

[81] *People v. Watson, supra,* 46 Cal.2d 818, 836.

Fregoso threw P.A.L. hand signs as they walked away down the street. Based on this evidence, and on its own motion, the court decided to instruct the jury regarding adoptive admissions. The court stated, "that's the statement 'this is a P.A.L. thing' which can certainly be viewed as an admission. Is coming in as an adoptive admission against Mr. Vasquez. He was present, he didn't do anything, didn't say anything. So the whole admission series, . . . the court believes are necessary."

Over Vasquez's objection the court instructed the jury with CALJIC No. 2.71.5 as follows:

"If you should find from the evidence that there was an occasion when a defendant (1) under conditions which reasonably afforded him an opportunity to reply; (2) failed to make a denial to a statement, expressed directly to him or in his presence, concerning the crime for which this defendant now is on trial tending to connect him with its commission; and (3) that he heard the accusation and understood its nature, then the circumstance of his silence and conduct on that occasion may be considered against him as indicating an admission that the accusation thus made was true. Evidence of an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the face of it. *Unless you find that a defendant's silence and conduct at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement*."[82]

"To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide. [Citation.]"[83]

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[82] Italics added.

[83] *People v. Edelbacher* (1989) 47 Cal.3d 983, 1012; see also, *People v. Carter* (2003) 30 Cal.4th 1166, 1198.

Vasquez claims there was no evidence showing he either heard Fregoso's comment or was sufficiently nearby for a jury to infer he heard the comment. He thus asserts the foundational requirements were not met and thus the instruction was erroneous and prejudicial.[84]

If Jose Amaya's testimony is credited, it provided more than an adequate foundation for the instruction on adoptive admissions. He testified both Vasquez and Fregoso threw P.A.L. hand signs as they walked away after Fregoso made the statement. If the jury accepted his testimony, Vasquez can demonstrate no error because his conduct showed he had adopted Fregoso's assertion of the stabbing being "a P.A.L. thing."

If, on the other hand, the jury chose to ignore this testimony because they found Vasquez had not heard Fregoso's statement and/or did not have a reasonable opportunity to deny attributing the stabbing to P.A.L., then under the instruction the jury was directed to "entirely disregard the statement."[85] If this was the case, the jury presumably followed the instruction and disregarded the statement entirely.[86] In this scenario, Vasquez can similarly demonstrate no harm.[87]

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[84] Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content, thereof, has by words or other conduct manifested his adoption or his belief in its truth."

[85] CALJIC No. 2.71.5.

[86] *People v. Holt* (1997) 15 Cal.4th 619, 662 [jurors are presumed to follow instructions].

[87] Vasquez contends the cumulative effect of the numerous errors justifies reversal of the judgment. We disagree. The errors which occurred during his trial were harmless, whether considered individually or collectively. "Defendant was entitled to a fair trial, not a perfect one. [Citation.]" (*People v. Box* (2000) 23 Cal.4th 1153, 1214.)

## DISPOSITION

The judgments of conviction are affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

JOHNSON, J.

We concur:

PERLUSS, P.J.

WOODS, J.