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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT A. CAMPOS, Defendant and Appellant.	B191256 (Los Angeles County Super. Ct. No. MA027171)
THE PEOPLE, Plaintiff and Respondent, v. WILLIAM EDWARD HOGAN, Defendant and Appellant.	B192771 (Los Angeles County Super. Ct. No. MA027171)

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for partial publication. The portions directed to be published are the Introductory paragraphs, Factual Background, part 2 of the Discussion, and the Disposition.

APPEALS from judgments of the Superior Court of Los Angeles County. Michael B. Johnson, Judge. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant, Robert A. Campos.

Susan E. Nash, under appointment by the Court of Appeal, for Defendant and Appellant, William Edward Hogan.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Shawn McGahey Webb and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Robert A. Campos (Campos) and William Edward Hogan, also known as Billy Hogan (Hogan), appeal from the judgments entered upon their convictions by jury of two counts of first degree murder (Pen. Code, § 187, subd. (a))[1] (counts 1 & 2), and one count of attempted murder (§§ 664, 187, subd. (a)) (count 3). Campos also appeals from his conviction of one count of being a felon in possession of a firearm (§ 12021, subd. (a)(1)) (count 6), and Hogan appeals from his conviction of one count of evading a peace officer (Veh. Code, § 2800.2, subd. (a)) (count 4). In connection with the murder counts, the jury found the drive-by special circumstance (§ 190.2, subd. (a)(21)) and the multiple murder special circumstance (§ 190.2, subd. (a)(3)) to be true. In connection with the attempted murder count, the jury found that the crime was committed willfully, deliberately and with premeditation (§ 664, subd. (a)). In connection with the murder and attempted murder counts, the jury found that Campos personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (d).

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

The trial court sentenced Campos to consecutive terms of life without the possibility of parole (LWOP) on the murder convictions, a consecutive life term with a minimum of seven years with the possibility of parole on the attempted murder conviction, and a term of 25 years to life on each of those convictions for the firearm use enhancement. It sentenced Hogan to two consecutive LWOP terms on the murder convictions, a consecutive life term with a minimum of seven years with the possibility of parole on the attempted murder conviction, and to a concurrent term of two years on the willful evasion conviction.

Defendants contend that (1) CALCRIM No. 220 lowers the reasonable doubt standard below that required by due process by precluding the jury from considering the lack of evidence. Campos further contends that (2) CALCRIM No. 220 also lowers the reasonable doubt standard by failing to define the term "abiding conviction," (3) the "drive-by" special circumstance is unconstitutional on its face and as applied under the due process and cruel and unusual punishment clauses of the United States Constitution, (4) the multiple murder special circumstance is unconstitutional under the due process and cruel and unusual punishment clauses, (5) CALCRIM No. 226 invites jurors to consider matters outside the record by telling them to use their common sense and experience, in violation of defendant's constitutional rights to due process, a fair trial and confrontation, (6) CALCRIM No. 600 (a) erroneously states the law regarding the "kill zone" theory of attempted murder, and (b) is argumentative, (7) the district attorney committed prosecutorial misconduct, (8) the trial court deprived defendant of his constitutional right to counsel and abused its discretion by denying (a) his *Marsden*[2] motion, and (b) his *Faretta*[3] motion, (9) he suffered ineffective assistance of counsel by virtue of his counsel's (a) arguing against the competence and credibility of his own expert witness, and (b) failing to request expanded eyewitness jury instructions, (10) he

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2 *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

3 *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

was deprived of his due process right to a fair trial by virtue of cumulative error, and (11) imposition of the court security fee under section 1465.8 (a) violates the ex post facto clauses of the United States and California Constitutions, and (b) cannot be applied retroactively in the absence of a retroactivity provision. Additionally, Hogan contends that (12) the trial court prejudicially erred in admitting into evidence without foundation a note allegedly written by Hogan during a jailhouse visit, and (13) the trial court erred in denying his pretrial motion for severance and postconviction motion for new trial on the same grounds, thereby depriving him of due process and a fair trial.

We affirm.

FACTUAL BACKGROUND

The prosecution's evidence

The shooting

On the evening of August 6, 2003, Amalia Rodriguez (Rodriguez) was out with her friend, Richard House (House), and House's friend, James Madden (Madden). House was driving Rodriguez's 1991 Ford Taurus, Rodriguez was in the front passenger seat and Madden sat in the back behind her. At approximately 11:00 p.m., they drove by the corner of Avenue J-8 and 12th Street West, in the city of Lancaster. Near that corner, Rodriguez noticed two men standing in the driveway of a house with a sheet hanging where the garage door should have been. A light was shining inside. Madden said to stop at the house, but House parked up the street instead. He made a telephone call and then made a U-turn and drove back the way they had come.

Living in the house with the hanging sheet was Randall Bramlett (Bramlett). On the evening of August 6, 2003, his friend, Hogan, stopped by and shot pool. At some point, they heard yelling outside. Bramlett looked outside and saw a man who resembled Campos, and whom he knew by the name "Mousy," yelling at a passing car. Madden, inside the car, was yelling at "Mousy." Bramlett was aware that Hogan and Madden had had some kind of dispute, but heard that they had resolved it and were on friendly terms. Hogan left the garage and stood in the driveway with "Mousy." Hogan then returned to the garage, grabbed his backpack and ran outside. When the car made a U-turn and came

back down the street, Bramlett told Hogan, “Not here.” Hogan and “Mousy” entered a truck and followed the car to the end of the street, with Hogan driving and “Mousy” in the front passenger seat.

When House turned north on 12th Street West, a white pickup truck followed. When he slowed at a stop sign at Avenue J-8, Madden said, “You should have stopped because there they come.” Rodriguez turned, looked over her shoulder and saw the headlights of a truck quickly approaching, with Campos hanging out of the front passenger window, wearing glasses and holding a gun. Hogan, who Rodriguez saw driving the truck, stopped within four to six feet of the rear of Rodriguez’s car. Campos looked into the back seat of the car, then into the front seat, and again into the back seat and then began shooting. Rodriguez saw a gun flash, ducked under the glove compartment and covered her head with her hands. House tried to depress the gas pedal, but the car stalled and coasted to the next block.

When the shooting stopped, House said that he could not move and needed to go to the hospital. Rodriguez saw a bullet hole in the front of his temple and one behind his left ear. Madden was dead and covered with blood. Rodriguez was shot in her left arm, left side and right ankle. House died of multiple gunshot wounds to the head, lower back and right arm. Madden also died of multiple gunshot wounds, having been hit six times. Small bullet fragments were recovered from his body during the autopsy.

Forensic evidence

A Los Angeles County Sheriff’s criminalist determined that the cartridge cases, bullets and bullet fragments recovered from the scene of the shooting, from Rodriguez’s vehicle, and from the victims were fired from the gun subsequently confiscated from Campos.

Campos’s admissions

In early 2003, Cynthia Moore (Moore) met Campos, whom she referred to as “Mousy,” when she and a friend purchased drugs from him. In August or September 2003, after Moore learned of House and Madden’s murders, Campos entered a house where she was staying and tried to change the ballistics on his gun by scraping the inside

of the barrel. On a second occasion, Moore saw Campos at a "flop house." He got into an argument with someone, waved his gun and boasted that he had already killed House and Madden and did not care about killing anyone else. Later, Campos became angry when he learned that Moore was telling people that he had killed House and Madden. He approached her while she was sleeping, and sprayed mace on her. When she awoke, he was waving the gun and threatening to shoot her if she did not leave.

On August 30, 2003, Campos was taken into custody for possessing a firearm at the Pitchess Detention Center. When Deputy Sheriff, Sergeant Scott Gibson, interviewed him, Campos admitted that the gun found in his car was his. He claimed to have purchased it a month earlier for $200, from a man on a street in Lancaster. The parties stipulated that Campos had a prior felony conviction.

Hogan's apprehension

After Hogan was identified as being involved in the shooting, as detailed in part VB1, *post*, law enforcement authorities were advised to be on the lookout for him. On August 15, 2003, at approximately 1:20 p.m., Deputy Sheriff Mark Dunkel, in a marked patrol car in Lancaster, received a call regarding a nearby pursuit of a black Volkswagen. He saw the car coming towards him, did a U-turn, turned on his lights and siren and followed. The car ran a stop sign and drove at a high rate of speed through a residential area. The car abruptly stopped, and Hogan exited with a gun in his hand. He ran between some houses, dropping the gun on the way. Deputy Dunkel lost sight of him. Shortly after, he saw Hogan walking towards two deputies. When arrested, Hogan had two loaded guns in his possession, a .38 caliber revolver, which he dropped when he ran, and a Derringer found in his car. At trial, Deputy Dunkel identified a picture of Hogan as the person who was arrested, but could not identify him in court because Hogan "look[ed] totally different."

The defense's evidence

Kimi Scudder (Scudder) testified for Campos as a gang expert. She claimed to be familiar with gang members' habits in disposing of guns. She testified that Campos admitted gang membership. After using a gun in a violent crime, gang members "pass

them off or sell them" like a "hot potato" within one to three days. She opined that it was highly unlikely that a gang member would retain a gun he used to commit a violent crime.

Hogan called Dr. Mitchell Eisen, a Ph.D. in psychology, as an expert witness on memory and eyewitness identifications. Dr. Eisen testified about the fallibility of memory, and how people remember major features of important events and use inferences, which are sometimes inaccurate, to fill in the gaps. When they reconstruct or recall memories, they recall the most recently reconstructed version. The likelihood of memory error increases if a person is given misinformation shortly after the memory-causing incident because, as time passes, the person will mix the misinformation with the memory. Stress and trauma also affect the accuracy of a person's memory, intensifying the focus on some things, while causing a loss of focus on others.

Dr. Eisen further testified about the Federal Department of Justice guidelines for conducting eyewitness identifications. Those guidelines recommend that a witness to a crime receive unbiased admonishments before attempting to identify a suspect's photograph in a six-pack lineup, stating that the perpetrator's photograph may not be in the six-pack, and that it is just as important that the witness not select a photograph if the witness does not recognize the perpetrator as it is to identify a person believed to be the perpetrator. The identification should be conducted by an officer who does not know who the suspect is in order to avoid the officer inadvertently transmitting clues to the witness. The identification of the perpetrator is more likely to be accurate if made shortly after the incident. The more time that passes, the greater the opportunity for inaccurate postevent information to intrude. There is no correlation between the accuracy of a person's memory and a person's confidence in the accuracy of the memory.

Hogan also called Henry Hall, his initial public defender in this case, who testified that the dark handwriting on a note confiscated from Hogan after his jailhouse visit with his girlfriend, summarizing the case name and number and charges, was Hall's. He gave the document to Hogan, but did not recognize the additional writing on the note that was in pencil.

DISCUSSION

I

CONSTITUTIONALITY OF SPECIAL CIRCUMSTANCES

A. *The "drive-by" special circumstance*

The jury found Campos guilty of the murder of House and Madden. It also found to be true the drive-by special circumstance which authorizes a death or LWOP sentence when "[t]he murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death." (§ 190.2, subd. (a)(21).)

Campos contends that the "drive-by" special circumstance is unconstitutional on its face and as applied under the due process and cruel and unusual punishment clauses of the United States Constitution. With respect to the due process clause, he argues that the purpose of this special circumstance is to punish cold-blooded, first-degree murderers. "Thus, to the extent that the drive-by shooting special circumstance extends to instances of non-premeditated, drive-by shootings, . . . section 190.2, subdivision (a)(21) is unconstitutionally over-inclusive and must be invalidated." "[It] penalizes a factual circumstance of an offense, being in a vehicle, which is not necessarily related to culpability. In essence, this special circumstance permits more severe punishment for a classic second degree murder than the punishment invariably imposed for premeditated, first-degree murder." With respect to the cruel and unusual punishment clause, Campos argues that the drive-by special circumstance does not function as intended; the function of special circumstances is to "furnish the '"meaningful basis [required by the Eighth Amendment] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'"" Because it conditions eligibility for LWOP on being in a car at the time of the offense, which is unconnected to culpability, it does not identify a subclass of murderers who are more culpable than the "ordinary premeditated murder[er]."

We must initially consider whether Campos, who was not sentenced to death, has standing to raise this claim under the cruel and unusual punishment clause. While the People do not contest Campos's assertion that he has standing because he received an LWOP sentence as a result of it, we nonetheless conclude that he lacks standing. "The Eighth Amendment requires that state sentencing guidelines clearly distinguish between criminals sentenced to death and those not sentenced to death. [Citation.] However, the Supreme Court has refused to extend this rule to require states to distinguish between criminals sentenced to LWOP and those sentenced to LWP [life with parole]. [Citation.]" (*Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 906 ["We therefore hold that the California Penal Code does not violate the Eighth Amendment by failing to extend the *Godfrey*[4] doctrine to LWOP crimes"].) (See *In re Cregler* (1961) 56 Cal.2d 308, 313 ["[O]ne will not be heard to attack a statute on grounds that are not shown to be applicable to himself"].) The narrowing-and-selecting requirement of the cruel and unusual punishment clause does not extend beyond death sentences. (See *Harmelin v. Michigan* (1991) 501 U.S. 957, 995–996.)[5]

We also reject Campos's cruel and unusual punishment claims on the merits, along with his due process claims. In *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 162 (*Rodriguez*), we held that the drive-by shooting special circumstance was constitutional as against challenges virtually identical to those Campos mounts here. That decision is controlling with respect to Campos's facial challenges, which focus on the text of the law itself. (*People v. McCray* (2006) 144 Cal.App.4th 258, 265.) We find no compelling reason to revisit those issues.

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4 *Godfrey v. Georgia* (1980) 446 U.S. 420, 428.

5 Defendant's reliance on *People v. Dillon* (1983) 34 Cal.3d 441, 478 as support for his contention that he has standing to assert this claim is misplaced. There, the defendant's Eighth Amendment challenge was based on a claim that the punishment was disproportionate to the crime, a claim that defendant does not raise here. It was not based on a contention that a special circumstance does not adequately perform the narrowing function it is supposed to perform, the issue defendant does raise.

Campos's as applied challenges to the drive-by special circumstance, however, "contemplate[] analysis of the facts of a particular case or cases to determine the circumstances in which the statute . . . has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right. [Citations.]" (*People v. Hagedorn* (2005) 127 Cal.App.4th 734, 744–745.) As a result, our rejection of the as applied challenge in *Rodriguez* does not automatically apply here to a different set of facts. Nonetheless, *Rodriguez* is instructive.

In that case, the defendant, driving a van and attempting to enter a parking lot, became angry by being blocked by the victim's vehicle. A verbal exchange ensued until the victim drove away. The defendant pursued his victim into an alley, entering from the opposite direction. They met in the alley, side by side, facing in opposite directions. Shots were fired, and the defendant turned off his headlights and sped off at a high rate of speed. The victim had been shot four times. We concluded that the drive-by shooting special circumstance was not unconstitutional as applied. (*Rodriguez, supra,* 66 Cal.App.4th at p. 162.)

The facts of *Rodriguez* are strikingly similar to those before us. Here, after a verbal exchange with Madden as the victims' vehicle passed by, Campos entered a vehicle, waited for the victim's car to stop, drove up to it, surveyed the people inside and laced the car with approximately a dozen bullets, hitting each of the occupants multiple times. These facts create a strong, if not overwhelming, inference that the shooting was a cold-blooded, premeditated murder, rather than the "classic second degree murder" Campos hypothesizes. There is no unfairness in subjecting Campos to the increased punishment imposed by virtue of the drive-by special circumstance for committing such a heinous crime.

B. *The multiple-murder special circumstance*

In connection with the murder convictions, the jury also found to be true the multiple-murder special circumstance embodied in section 190.2, subdivision (a)(3), which authorizes a death or LWOP sentence when "[t]he defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree."

Campos contends that this circumstance is overbroad, violating the Eighth and Fourteenth Amendments to the United States Constitution. He argues that it does not consider the mental state of the actor but focuses only on the act, as a result permitting the death or LWOP sentence to be imposed for disparate levels of culpability. For example, he asserts, a multiple murderer is less culpable when a second murder is accidental and the first murder is based upon felony murder than one who commits a single, premeditated, cold-blooded murder. This contention is meritless.

For the reasons set forth in the preceding section, Campos lacks standing to challenge the multiple-murder special circumstance as overbroad under the cruel and unusual punishment clause. Moreover, on the merits, the multiple-murder special circumstance has been upheld by our Supreme Court on numerous occasions. (See *People v. Sapp* (2003) 31 Cal.4th 240, 287 [holding multiple-murder special circumstance constitutional as against Eighth Amendment challenge]; *People v. Boyette* (2002) 29 Cal.4th 381, 440 ["Defendant did not commit two accidental murders or two murders lacking malice. In any event, categorizing as especially deserving of the ultimate penalty those offenders who kill two or more victims in one criminal event is not arbitrary, unfair or irrational, and performs the necessary narrowing of the pool of potential offenders required by the Eighth Amendment to the United States Constitution"]; *People v. Boyer* (2006) 38 Cal.4th 412, 483 ["The multiple-murder special circumstance (§ 190.2, subd. (a)(3)) is not unconstitutionally overbroad insofar as it encompasses a wide range of culpable conduct, theoretically including two accidental felony murders. Categorizing those who commit two or more murders subject to a single prosecution as especially deserving of the death penalty is not arbitrary or irrational, and it adequately narrows the pool of death-eligible offenders"].) We are bound by these controlling decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

II

INSTRUCTIONAL ERRORS

A. *Forfeiture*[6]

Defendants challenge CALCRIM No. 220 on the ground that it limited the jury's consideration of the lack of evidence. Campos additionally challenges it on the ground that it insufficiently defines reasonable doubt as "abiding conviction." He also challenges CALCRIM No. 226 on the ground that it encourages jurors to consider matters outside of the evidence, and CALCRIM No. 600 on the grounds that it erroneously defines the "kill zone" concept and is argumentative. At no time did defendants object in the trial court to any of the jury instructions or request any limitation, modification or clarification of them. The People contend that these issues have been forfeited for failure to raise them in the trial court. We agree.

Generally, '"[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language."' (*People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Guerra* (2006) 37 Cal.4th 1067, 1134; *People v. Gonzalez* (2002) 99 Cal.App.4th 475, 483.) Defendants' challenges to the clarity and completeness of the instructions are therefore forfeited. Moreover, as discussed below, even if the objections had been preserved for appeal, we would nonetheless reject them.

B. *CALCRIM No. 220*

The trial court instructed the jury in accordance with CALCRIM No. 220 that the defendant is presumed innocent unless each element of the crime is proven beyond a reasonable doubt. It defined proof beyond a reasonable doubt as proof that leaves the jury with an "abiding conviction" that the charge is true, and that such doubt is

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6 While the People use the term "waiver" in reference to defendants' failures to preserve their instructional claims for appeal because they did not raise them in the court below, the correct term which we use in this opinion is "'forfeiture.'" "'Waiver'" is the express relinquishment of a known right whereas "'forfeiture'" is the failure to object or to invoke a right. (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1.)

determined by "compar[ing] and consider[ing] all the evidence that was received throughout the entire trial."[7] The trial court also instructed in accordance with CALCRIM No. 222 that evidence is witnesses' testimony, admitted exhibits, and what the judge says may be considered.

1. *Limiting consideration of lack of evidence*

Defendants contend that CALCRIM No. 220 precluded the jury from considering the lack of evidence in determining whether a reasonable doubt existed, thereby violating due process by allowing the jury to find guilt by less than the beyond a reasonable doubt standard. They argue that read together, the language in CALCRIM No. 220, that the jury must consider "all the evidence that was received throughout the entire trial," and the language in CALCRIM No. 222, that evidence is sworn testimony, admitted exhibits and what the trial court tells the jury to consider, "limited the jury's determination of reasonable doubt to the evidence *received* at trial and precluded it from considering the lack of physical evidence tying [defendant] to the offenses, . . . " such as the lack of gunshot residue and fingerprints. This contention is without merit.

In determining the correctness of jury instructions, we consider the instructions as a whole. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061.) An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there

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[7] CALCRIM No. 220 as given states: "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendants just because they have been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of the crime and special allegation beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves each defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

is a reasonable likelihood that the jury misconstrued or misapplied its words. (*People v. Frye* (1998) 18 Cal.4th 894, 957.)

Reasonable doubt may arise from the lack of evidence at trial as well as from the evidence presented. (*People v. Simpson* (1954) 43 Cal.2d 553, 566 (*Simpson*).) The plain language of CALCRIM No. 220 does not instruct otherwise. The only reasonable understanding of the language, "[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty," is that a lack of evidence could lead to reasonable doubt. Contrary to defendants' claim, CALCRIM No. 220 did not tell the jury that reasonable doubt must arise from the evidence. The jury was likely "to understand by this instruction the almost self-evident principle that the determination of defendant's culpability beyond a reasonable doubt . . . must be based on a review of the evidence presented." (*People v. Hawkins* (1995) 10 Cal.4th 920, 963, abrogated on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110; see also *People v. Rios* (2007) 151 Cal.App.4th 1154, 1157.)

Defendants rely on *Simpson, supra,* 43 Cal.2d 553 and *People v. McCullough* (1979) 100 Cal.App.3d 169 (*McCullough*), which cites *Simpson*. These cases are inapposite. In *Simpson*, the defendant argued that the trial court's instruction on reasonable doubt had shifted the burden to him to prove his innocence. The trial court instructed, "'The term "reasonable doubt," as used in these instructions, means a doubt which has *some good reason* for its existence *arising out of evidence in the case*; such doubt as you are able to find a *reason for in the evidence*.'" (*Simpson*, *supra*, at p. 565, fns. omitted.) The Supreme Court held this language was "not necessary" and "could have been confusing" because "reasonable doubt . . . may well grow out of the lack of evidence in the case as well as the evidence adduced." (*Id*. at p. 566.) Similarly, in *McCullough*, the Court of Appeal found a supplemental instruction which stated that the doubt must arise from the evidence to be erroneous. (*McCullough, supra,* at p. 182.)

Here, unlike in *Simpson or McCullough*, the instruction did not tell the jury that the reasonable doubt had to arise out of the evidence in the case. It merely said that the jury was to consider all of the evidence presented.

2. *Abiding Conviction*

CALCRIM No. 220 defines proof beyond a reasonable doubt as proof that leaves one with an "abiding conviction." Campos contends that a clarifying instruction defining "abiding conviction" was required because "the phrase 'abiding conviction' is . . . so archaic and generally disused, it is likely to be beyond the understanding of the average juror." The jury therefore lacked guidance as to the standard of proof necessary to establish guilt, leaving open the possibility that it deprived Campos of due process by finding him guilty by less than the beyond a reasonable doubt standard. This contention is meritless.

The definition of reasonable doubt in CALCRIM No. 220 is derived from CALJIC No. 2.90 which in turn was taken directly from the language of section 1096 which, when given, requires "no further instruction . . . defining reasonable doubt . . . ." (§ 1096a.) In *Victor v. Nebraska* (1994) 511 U.S. 1, 14–15, the United States Supreme Court sustained the then language of CALJIC No. 2.90, and stated: "An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof."

The California Supreme Court has also rejected similar challenges to the "abiding conviction" language. Just last year, in *People v. Cook* (2006) 39 Cal.4th 566, 601, it rejected a claim that CALJIC No. 2.90's "'an abiding conviction to a moral certainty'" language eroded the reasonable doubt standard. (See also *People v. Heard* (2003) 31 Cal.4th 946, 980 [rejecting defendant's claim that the reasonable doubt instruction in CALJIC No. 2.90 is "'hopelessly confusing'"]; *People v. Freeman* (1994) 8 Cal.4th 450, 501–505 (*Freeman*) [defining beyond a reasonable doubt by use of "abiding conviction" was proper].) *Freeman,* cautioned against departing from the "abiding conviction" language. (*Freeman, supra,* at p. 505.)

The Courts of Appeal in every appellate district have also consistently rejected similar claims (*People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286), leading one Court of Appeal to comment: "We regard the issue as conclusively settled adversely to

defendant's position. [Citation.] [¶] The time has come for appellate attorneys to take this frivolous contention off of their menus." (*Id.* at p. 1287.)

In light of this impressive and controlling array of legal authority, we find no compelling reason to revisit this issue. Moreover, we caution the Bar that adoption of the Judicial Council of California Criminal Jury Instructions is not an excuse for advocates to dust off the old, hackneyed arguments that were thoroughly discredited under similarly worded CALJIC instructions and recycle them before this court.

C. *CALCRIM No. 226*

The trial court instructed the jury in accordance with CALCRIM No. 226, in part, as follows: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's gender, race, religion, or national origin. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe."

Campos contends that CALCRIM No. 226 invites the jury to consider matters outside the record in violation of his constitutional rights to due process, a fair trial and confrontation. He argues that the language, "use your common sense and experience," is subjective and encourages consideration of outside evidence and/or employment of a standard less than proof beyond a reasonable doubt, as "common sense" "can be used as a substitute for objective (and substantial) evidence of guilt." We disagree. When the instructions here are considered as a whole, it is not reasonably likely that the jury would understand CALCRIM No. 226 to mean what Campos claims. (*People v. Frye, supra,* 18 Cal.4th at p. 957.)

To tell a juror to use common sense and experience is little more than telling the juror to do what the juror cannot help but do. In approaching any issue, a juror's background, experience and reasoning must necessarily provide the backdrop for the juror's decision making, whether instructed or not. CALCRIM No. 226 does not tell

jurors to consider evidence outside of the record, but merely tells them that the prism through which witnesses' credibility should be evaluated is common sense and experience. Unlike *People v. Bickerstaff* (1920) 46 Cal.App. 764, 773 and *People v. Paulsell* (1896) 115 Cal. 6, 7, cited by Campos, CALCRIM No. 226 does not instruct jurors to use their common sense and experience in finding reasonable doubt, which could potentially conflict with the beyond a reasonable doubt standard, but only in assessing a witnesses' credibility.

Furthermore, other instructions given to jurors make clear that the term "common sense and experience" is not a license to consider matters outside of the evidence. Jurors were instructed that they must decide the facts based on the evidence presented (CALCRIM No. 200), that they were not to conduct research or investigate the crime (CALCRIM No. 201), that their determination of guilt had to be based on evidence received at trial (CALCRIM No. 220), that they were only to consider evidence (sworn testimony and exhibits) presented in the courtroom (CALCRIM No. 222), that they had to decide whether facts have been proved based on "all the evidence" (CALCRIM No. 223), that they should review all the evidence before concluding that the testimony of one witness proves a fact (CALCRIM No. 301) and other instructions emphasizing the exclusive significance of the evidence. (CALCRIM No. 302.)

D. *CALCRIM No. 600*

The jury was instructed in accordance with CALCRIM No. 600, in part, as follows: "A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or 'kill zone.' In order to convict a defendant of the attempted murder of Amalia Rodriguez, the People must prove that the defendant or perpetrator not only intended to kill Richard House or James Madden but also either intended to kill Rodriguez or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Rodriguez or

intended to kill House or Madden by harming everyone in the kill zone, then you must find the defendant not guilty of attempted murder."[8]

1. *Improper "kill zone" definition*

Campos contends that the quoted portion of CALCRIM No. 600 is erroneous. He argues that *People v. Bland* (2002) 28 Cal.4th 313, 330 (*Bland*), which established the "kill zone" concept, defined "kill zone" as a zone in which the defendant intends to kill "*everyone*" to ensure harm to a target victim. CALCRIM No. 600, defines the "kill zone" as the zone in which the defendant intends to kill "*anyone*." By using the word "anyone" instead of "everyone," Campos claims that the instruction improperly expanded the *Bland* "kill zone" concept and permits finding guilt of attempted murder without proof that all members of the group were subjected to the risk of death, and, consequently, without the intent to kill all group members. This contention is meritless.

Attempted murder requires proof of a direct but ineffectual act done towards killing another human being and the specific intent to unlawfully kill another human

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8 CALCRIM No. 600 as given, states in its entirety: "The defendants are charged in Count 3 with attempted murder, a violation of Penal Code 664/187(a). To prove that a defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant or perpetrator took at least one direct but ineffective step toward killing another person; and [¶] 2. The defendant or perpetrator intended to kill that person. [¶] A *direct step* requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. [¶] A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or 'kill zone.' In order to convict a defendant of the attempted murder of Amalia Rodriguez, the People must prove that the defendant or perpetrator not only intended to kill Richard House or James Madden but also either intended to kill Rodriguez or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Rodriguez or intended to kill House or Madden by harming everyone in the kill zone, then you must find the defendant not guilty of attempted murder."

being. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466–1467 [citing CALJIC No. 8.66 with approval].) Unlike the mental state for murder, which does not require an intent to kill but only a conscious disregard for life (implied malice), "[a]ttempted murder requires the specific intent to kill . . . ." (*People v. Smith* (2005) 37 Cal.4th 733, 739.) The doctrine of "transferred intent," transferring the intent to kill an intended target to an unintended victim, applies to murder but not to attempted murder. (*Bland, supra*, 28 Cal.4th at pp. 320–321, 331.)

While holding that transferred intent does not apply to attempted murder, the California Supreme Court in *Bland* stated that there could still be a concurrent intent such that "a person who shoots at a group of people [may still] be punished for the actions towards everyone in the group even if the person primarily targeted only one of them. . . . " (*Bland, supra,* 28 Cal.4th at p. 329.) *Bland* concluded that a concurrent intent can be found when there is a "kill zone" created, that is, "'when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity.'" (*Ibid*.) But *Bland* did not suggest that the "kill zone" was the only way to establish concurrent intent to kill more than one person in a fired-upon group.

"The act of firing toward a victim at a close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . . '" (*People v. Smith, supra*, 37 Cal.4th at p. 741.) In *People v. Smith*, the defendant fired a single shot at a fleeing vehicle occupied by a male passenger, a female driver acquainted with the defendant, and a baby in a rear-facing car seat directly behind the driver. (*Id*. at p. 737.) "The bullet shattered the rear windshield, narrowly missed both [the female driver] and [her] baby, passed through the driver's headrest, and lodged in the driver's side door." (*Ibid*.) The defendant was convicted of the attempted murder of the female driver and of her baby. (*Id*. at p. 738.)

On appeal, the defendant argued that there was only proof of his specific intent to kill the female driver, but no proof of his specific intent to kill the baby. (*People v.*

Smith, supra, 37 Cal.4th at pp. 736, 738.) In rejecting that argument, the Court of Appeal explained that "in order for the jury to convict defendant of the attempted murder of the baby, it had to find, beyond a reasonable doubt, that he acted with intent to kill that victim, i.e., that he purposely shot into the vehicle with 'a deliberate intent to unlawfully take away [the baby's] life' [citation] or knowledge that his act of shooting into the vehicle would, '"'to a substantial certainty,'"' result in the baby's death. [Citation.] . . . Under the case law . . . , evidence that defendant purposefully discharged a lethal firearm at the victims, both of whom were seated in the vehicle, one behind the other, with each directly in his line of fire, can support an inference that he acted with intent to kill both. [Citations.]" (*Id*. at p. 743.)

We evaluate this challenge to CALCRIM No. 600 by determining whether there is a reasonable likelihood the jury misconstrued or misapplied its words. (*People v. Frye, supra,* 18 Cal.4th at p. 957.) There is no possibility that the jury here could have misapplied CALCRIM No. 600 so as to fail to find that defendant had the specific intent to kill Rodriguez. First, the jury was properly instructed on the elements of attempted murder, including the requirement of the specific intent to murder the person whose attempted murder is charged, and on express malice. (CALCRIM Nos. 520 & 600.) These instructions were sufficient on the elements of the offense. The "kill zone" portion of CALCRIM No. 600 was superfluous. That theory "is not a legal doctrine requiring special jury instructions, as is the doctrine of transferred intent. Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*Bland, supra,* 28 Cal. 4th at p. 331, fn. 6; *People v. Smith, supra,* 37 Cal.4th at p. 746.)

Second, the "kill zone" instruction as given here, while ambiguous, is not necessarily inconsistent with *Bland.* While it states that proving defendant guilty of the attempted murder of Rodriguez requires proof that he intended to kill not only House or Madden, but Rodriguez or "*anyone within the kill zone*" (italics added), it adds, "If you have a reasonable doubt whether the defendant intended to kill Rodriguez or intended to kill House or Madden by harming *everyone* in the kill zone, then you must find the

defendant not guilty of the attempted murder . . . . " (CALCRIM No. 600, italics added.) This language is consistent with *Bland* and directed the jury that it could not find Campos guilty of attempted murder of Rodriguez under a "kill zone" theory unless it found that he intended to harm "everyone" in the zone.

Third, in the context presented here, there is little difference between the words "kill anyone within the kill zone" and "kill everyone within the kill zone." In both cases, there exists the specific intent to kill each person in the group. A defendant who shoots into a crowd of people with the desire to kill anyone he happens to hit, but not everyone, surely has the specific intent to kill whomever he hits, as each person in the group is at risk of death due to the shooter's indifference as to who is his victim.

Even if the instruction was erroneous, the error was harmless in that it was not reasonably probable that if a correct instruction had been given a verdict more favorable to Campos would have resulted. (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1157 [misdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error are reviewed under the harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836].) The evidence of Campos's intent to kill Rodriguez was overwhelming under the "kill zone" theory or otherwise. His truck approached the victims' car and stopped only four or five feet from it. He looked in the back seat, the front seat and the back seat again. After doing so, he sprayed the car with nearly a dozen bullets, from close range. On this evidence the jury would almost certainly have found intent by defendant to kill everyone inside. Also, shooting Rodriguez from close, but not point-blank range, in a manner that could have inflicted a mortal wound is sufficient to form an inference of intent to kill her. (See *People v. Smith, supra,* 37 Cal.4th at p. 743 ["evidence that defendant purposefully discharged a lethal firearm at the victims, both of whom were seated in the vehicle, one behind the other, with each directly in his line of fire, can support an inference that he acted with intent to kill both"].)

2. *Argumentative*

Campos contends that CALCRIM No. 600 is argumentative. He argues that the term "kill zone," like the terms "execution style" or "serial killer," is argumentative and inflammatory and therefore inappropriate in a neutral instruction. We disagree.

An instruction is argumentative when it recites facts drawn from the evidence in such a manner as to constitute argument to the jury in the guise of a statement of law. (*People v. Rice* (1976) 59 Cal.App.3d 998, 1004.) "A jury instruction is [also] argumentative when it is '"of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." [Citations.]'" (*People v. Lewis* (2001) 26 Cal.4th 334, 380.)

CALCRIM No. 600 merely employs a term, "kill zone," which was coined by our Supreme Court in *Bland* and referred to in later California Supreme Court cases. (See *People v. Smith, supra,* 37 Cal.4th 733.) It does not invite inferences favorable to either party and does not integrate facts of this case as an argument to the jury. Other disparaging terms, including "flight" (CALJIC No. 2.52), "suppress[ion] of evidence" (CALJIC No. 2.06) and "consciousness of guilt" (CALJIC No. 2.03) have been used in approved, long-standing CALJIC instructions. We see nothing argumentative in this instruction.

III

PROSECUTORIAL MISCONDUCT

The husband of defense expert, Scudder, had a criminal record. Before trial, defendant moved to exclude any reference to it. When the trial court addressed the motion before opening statements, the prosecutor stated that he had no plans to question Scudder on that subject, and if defendant opened the door to such examination, he would first approach the trial court before pursuing it. The trial court responded, "Yes."

During her direct examination, Scudder testified that she was a "gang interventionist" who spoke daily, including on the morning of her testimony, with gang members. On cross-examination, the prosecutor asked her if she had spoken to gang members the preceding day, which was a Sunday, and Scudder said, "I was at a prison,

and I did talk to people, yes." The prosecutor then asked if she was meeting with anyone in particular at the prison, to which she responded that she was. The prosecutor asked, "A relative?" and Scudder said, "Yes I was." Defense counsel objected to this question, without stating the nature of the objection or asking for a curative admonition. Without ruling, the trial court stated, "Let's move on." Defense counsel later moved for a mistrial on the ground that the question violated the trial court's order. The trial court denied the motion, finding that the question merely clarified Scudder's testimony about visiting gang members daily and did not mention her husband.

Campos contends that this questioning constituted prosecutorial misconduct. He argues that the prosecutor attempted to introduce inadmissible evidence and that Campos's mistrial motion should have been granted because the questioning prevented him from receiving a fair trial by undermining the sole defense witness. The People contend that Campos forfeited this argument by failing to object and request an admonition in the trial court. We agree with the People.

"Generally, '"a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety."' [Citation.] This general rule, however, does not apply if a defendant's objection or request for admonition would have been futile or would not have cured the harm caused by the misconduct; nor does it apply when the trial court promptly overrules an objection and the defendant has no opportunity to request an admonition. [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 1001; *People v. Carter* (2005) 36 Cal.4th 1114, 1204.) Additionally, to preserve an objection for appeal, it must be accompanied by "the specific ground of the objection." (Evid. Code, § 353.)

When Campos's counsel objected to the prosecutor's question to Scudder, he failed to assert any grounds. He also failed to request an admonition. When he later moved for a mistrial, he did not assert prosecutorial misconduct, but claimed that the trial court's order had been violated, although there was no court order limiting the prosecutor's questioning. When the prosecutor stated that he did not intend to ask about

Scudder's husband, the trial court simply acknowledged the prosecution's representations, without issuing a court order to that effect. The claim that the prosecutor violated a court order did not focus the trial court's attention on the considerations involved in deciding if prosecutorial misconduct had occurred.

Even if Campos had not forfeited this claim, we would nonetheless reject it on the merits. The well-established federal and state standards for assessing a claim of prosecutorial misconduct were set forth by our Supreme Court in *People v. Samayoa* (1997) 15 Cal.4th 795, 841: "'"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' To support a claim of prosecutorial misconduct, a defendant must show either a pattern of egregious conduct or employment of persuasion methods so deceptive as to create a reasonable likelihood that such behavior prejudicially affected the jury. (See also *People v. Ochoa* (1998) 19 Cal.4th 353, 427.) The misconduct need not be intentional. (*People v. Bolton* (1979) 23 Cal.3d 208, 214.)

We find no prosecutorial misconduct here under either the federal or state standard. The alleged misconduct pertained essentially to one brief subject of questioning. It did not constitute an egregious pattern of conduct infecting the trial with unfairness. (*People v. Samayoa, supra,* 15 Cal.4th at p. 841.) Further, we do not find the prosecutor's question deceptive. As the trial court concluded, the prosecutor believed that the subject had been opened by misleading responses by Scudder suggesting that she had greater contact with gang members than was the case, and the prosecutor did not specifically ask about her husband. It cannot be said that such conduct created a reasonable likelihood that it prejudicially affected the jury, particularly in light of the overall weakness of Scudder's testimony.

Campos's reliance on *People v. Parsons* (1984) 156 Cal.App.3d 1165 (*Parsons)* and *People v. Bentley* (1955) 131 Cal.App.2d 687 (*Bentley*), disapproved on other grounds in *People v. White* (1958) 50 Cal.2d 428, 431, for the proposition that his mistrial motion should have been granted is misplaced. A mistrial motion should be granted only when a particular incident is incurably prejudicial. In *Parsons,* the Court of Appeal found reversible prosecutorial misconduct by virtue of the prosecutor allowing a police officer to testify regarding an unrelated arrest of defendant. Moreover, the trial court found that the prosecutor acted in bad faith in eliciting the evidence, a finding not made by the trial court here. (*Parsons, supra,* at pp. 1170–1171.) In *Bentley*, the Court of Appeal found reversible misconduct where a police officer intentionally testified that the defendant had been a suspect in a prior, similar case. (*Bentley, supra*, at p. 690.) In both cases, unlike here, the appellate court found misconduct, which we do not find. Further in both cases, the misconduct went directly to the character of the defendant based on extrinsic matters, thereby prejudicing the heart of the case. Here, the alleged misconduct went only to the credibility of an expert witness and was simply additional impeachment of an already thoroughly impeached witness.

IV

MARSDEN AND *FARETTA* MOTIONS

A. *Factual background*

On the day scheduled for trial, Campos claimed that he and his court-appointed attorney, Larry Sperber (Sperber), had a conflict of interest. The trial court conducted a *Marsden* hearing at which Campos said that Sperber had spoken with him "very little" about his case, had not given it adequate attention, and had not promptly provided him with documents he had been requesting for two years. When Sperber finally provided documents, they were "not exactly" what Campos had requested. When the trial court pointed out to Campos that he had been regularly appearing before the court since July 2004 and had never mentioned these problems, Campos said he wanted to give Sperber "that last chance." The trial court also commented that it had observed Campos and

Sperber regularly conversing in court and exchanging things, to which Campos responded that Sperber would walk away before Campos was finished talking.

In response to Campos's claims, Sperber admitted that he was busy, but said that he always provided his client with what he had requested, including police reports and copies of preliminary hearing transcripts. Campos responded that he received the transcripts only after one year and a half, and never received police reports. Sperber said that documents he provided Campos were taken from Campos during jail riots.

The trial court denied the *Marsden* motion. Campos then immediately requested to exercise his constitutional right to self-representation. The trial court asked more than once if Campos was ready to go to trial. Each time Campos responded that he was not. The trial court then asked, "If you were to represent yourself, you would not be prepared to start trial today?" Campos responded, "No, I would not, Your Honor." The trial court then denied the *Faretta* motion as untimely, adding that, "It does not appear to me to be a sincere request in all events."

B. Marsden *motion*

Campos contends that the trial court abused its discretion in denying his *Marsden* motion, depriving him of his right to counsel. He argues that there was a continuing conflict between him and his counsel which "resulted in the deterioration of the attorney-client relationship to the point where there was a complete breakdown in communication," requiring replacement of appointed counsel. This contention is without merit.

"A criminal defendant's appointed attorney should be the embodiment of the defendant's Sixth Amendment right to the effective assistance of counsel." (*People v. Vera* (2004) 122 Cal.App.4th 970, 978–979.) Consequently, "'"'[a] defendant is entitled to [substitute appointed counsel] if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].'"'" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085; *People v. Welch* (1999) 20 Cal.4th 701, 728.)

The trial court is required to hold a hearing on a defendant's request to discharge appointed counsel (*People v. Hill* (1983) 148 Cal.App.3d 744, 753) and "'"'"must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance."'"' [Citations.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 95.) "Once the defendant is afforded an opportunity to state the reasons for discharging an appointed attorney, the decision to allow a substitution of attorney is within the discretion of the trial judge unless defendant has made a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation." (*People v. Crandell* (1988) 46 Cal.3d 833, 859, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364–365.) "'"Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would 'substantially impair' the defendant's right to assistance of counsel." [Citations.]' [Citation.]" (*People v. Valdez, supra,* 32 Cal.4th at p. 95.)

In determining whether a trial court properly exercised its discretion in denying a *Marsden* motion, the reviewing court should consider all of the circumstances of the particular case (*People v. Panah* (2005) 35 Cal.4th 395, 426, including (1) the timeliness of the motion, (2) the adequacy of the court's inquiry into the defendant's complaint, and (3) whether the conflict between the defendant and counsel was so great that it resulted in a total lack of communication preventing an adequate defense (*People v. Smith* (2003) 30 Cal.4th 581, 606–607). The "defendant bears a very heavy burden to prevail on [a *Marsden*] motion." (*People v. Bills* (1995) 38 Cal.App.4th 953, 961.)

Campos makes no showing that Sperber's continued representation would impair his right to competent counsel. Other than his boilerplate assertion that Sperber was not giving his case adequate attention, Campos provides no facts to establish that his representation had been, or would be, compromised.

The thrust of Campos's claim is that because of his counsel's failure to communicate with him and provide him with documents, he had become "'"'"embroiled in such an irreconcilable conflict that ineffective representation was likely to result . . . ."'"' (*People v. Barnett, supra,* 17 Cal.4th at p. 1085.) But Sperber indicated that he had

provided Campos with the documents he requested. The trial court observed Campos and his attorney frequently conferring in court. It was entitled to believe defense counsel rather than Campos to the extent there was a credibility question. (*People v. Smith* (1993) 6 Cal.4th 684, 696.)

The trial court conducted a hearing at which Campos was accorded an adequate opportunity to describe his differences with his attorney. The trial court questioned him to elicit additional information and obtained counsel's responses, which it chose to believe. There was no indication that the conflict between Campos and his counsel was so great that it resulted in a total lack of communication that prevented an adequate defense.

Further, the trial court was understandably suspicious of the timing of Campos's motion, coming on the day set for trial, although the focus of the motion related to alleged failures by counsel that occurred months earlier. Such a belated request certainly would have required a continuance to assure Campos a fair trial, although he did not explicitly request one. '"It is within the trial court's discretion to deny a motion to substitute made on the eve of trial where substitution would require a continuance."' (*People v. Smith*, *supra*, 30 Cal.4th at p. 607.)

Campos argues that, "[w]here counsel and client can no longer effectively communicate with one another, it is likely that ineffective representation will result. This is particularly likely after the client has expressed serious dissatisfaction, and counsel has naturally sought to refute the points made by the client." To accept this argument is to effectively accord a defendant the absolute right to change appointed counsel at will by merely expressing serious dissatisfaction. The Constitution affords no such right.

C. Faretta *motion*

Campos contends that the trial court erred in denying his request for self-representation, denying him his right to counsel. He argues that the motion was timely and therefore the trial court was constitutionally required to grant it. He argues

alternatively that even if the motion was untimely, the trial court abused its discretion because it failed to consider the *Windham*[9] factors.

A criminal defendant is entitled under the federal and state Constitutions to the assistance of counsel at all critical stages of the proceedings. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Gideon v. Wainright* (1963) 372 U.S. 335, 344–345.) A federal constitutional right of a defendant to self-representation is implied in the Sixth Amendment. (*Faretta, supra,* 422 U.S. at p. 819.) This is because the Sixth Amendment gives a defendant, whose life and future are at stake, the right to control his own fate and not be forced to use counsel who may not present the case as the defendant wishes. (*Windham, supra,* 19 Cal.3d at p. 130.) "Accordingly, when a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be." (*Id.* at p. 128.) The trial court is without discretion to deny such motion. (*People v. White* (1992) 9 Cal.App.4th 1062, 1071.)

But the right to self-representation is sharply curtailed once trial has begun. (See *Windham, supra,* 19 Cal.3d at p. 124; see also *People v. White, supra,* 9 Cal.App.4th at p. 1071.) "[O]nce a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court. When such a midtrial request for self-representation is presented the trial court shall inquire *sua sponte* into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required. Among other factors to be considered by the court in assessing such requests are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Windham, supra,* at pp. 124, 128.)

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9 *People v. Windham* (1977) 19 Cal.3d 121, 128 (*Windham*).

1. *The motion was untimely*

Campos's motion for self-representation was not timely, being made on the day set for trial based on a purported conflict with counsel that had existed for months. This supported the trial court's finding that defendant's request was insincere and made for ulterior motives. A plethora of cases have found that motions to self-represent on the day of trial, or even a few days before, are untimely. (See, e.g., *People v. Leonard* (2000) 78 Cal.App.4th 776, 788–789 [no error to deny motion made on first day of trial]; *People v. Howze* (2001) 85 Cal.App.4th 1380, 1396–1399 [no abuse to deny motion made two days before trial where motion was manipulative]; *People v. Hawkins, supra,* 10 Cal.4th at p. 963, abrogated on another ground in *People v. Lasko, supra,* 23 Cal.4th at p. 110; *People v. Carlisle* (2001) 86 Cal.App.4th 1382, 1390 [no error denying request made on day of trial]; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1205 [no error denying equivocal request made four days before trial]; *People v. Hall* (1978) 87 Cal.App.3d 125, 132 [no error to deny motion made on morning of trial accompanied by request for continuance]; cf. *People v. Tyner* (1977) 76 Cal.App.3d 352, 356 (*Tyner*) [motion on first day of trial not untimely if not accompanied by request for continuance].)

2. *The trial court did not abuse its discretion*

Campos made the motion for self-representation immediately after his *Marsden* motion was denied, suggesting that its real purpose was not to obtain self-representation but was an alternative means of getting rid of appointed counsel. (See *People v. Barnett, supra,* 17 Cal.4th at p. 1087 [motion for self-representation denied when defendant's single request to proceed pro se was an impulsive response to magistrate's refusal to immediately consider substituting counsel].)

Although Campos did not specifically request a continuance, he indicated that he would be unable to immediately proceed to trial if his motion were granted. Thus, the trial court was faced with the Hobson's choice of forcing a defendant to trial unprepared or granting a continuance. Where a defendant seeks self-representation on the eve of trial, stating that he or she is not prepared to start trial, the balance is in favor of not granting the motion. (See *Tyner, supra,* 76 Cal.App.3d at p. 356.)

Additionally, a continuance here would have caused a substantial delay and disruption in the trial. Campos claimed he had not received certain documents and hence would have required time to obtain them and to prepare for the trial of the serious charges against him. Also, the matter was scheduled for trial with Hogan, and hence a continuance might have disrupted Hogan's trial or necessitated a severance of the cases. As discussed in part IVB, *ante*, the record does not indicate any deficiency in the quality of Sperber's representation.

Relying on *Tyner, supra*, 76 Cal.App.3d at page 354, defendant argues that although the motion was made on the day of trial, it was timely because it was made before jury selection. *Tyner* is inapposite. There, the defendant stated at the time of his request for self-representation that he was ready to proceed forthwith, indicated a "mistaken identity" theory of his defense and stated that he was ready to cross-examine, having prepared 50 cross-examination questions. At no time had the defendant requested to have a new attorney appointed. These facts distinguish *Tyner* from the matter before us. Campos requested self-representation immediately after his *Marsden* motion was denied and stated that he was not ready to begin trial. Despite his claim that he never requested a continuance, it is nonetheless likely that if his motion was granted he would have done so.

3. *Harmless error*

Even if the trial court erred in denying appellant's *Faretta* motion, any error was harmless in that it is not reasonably probable that had the motion been granted Campos would have achieved a more favorable result. Unlike an error in denying a timely *Faretta* motion, which is reversible per se, the erroneous denial of an untimely *Faretta* motion is reviewed under the harmless error test of *People v. Watson, supra*, 46 Cal.2d at p. 836. (*People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058; *People v. Nicholson* (1994) 24 Cal.App.4th 584, 594–595.)

The record fails to indicate incompetence or lack of preparation by defense counsel. The evidence against Campos is strong. Despite the asserted shortcomings in the witness identifications of him, he was nonetheless identified in a six-pack and at trial

by Rodriguez and Bramlett. Moore testified that Campos bragged about committing the murders and attempted to change the ballistics of his gun. Rodriguez told officers that the shooter wore what appeared to be prescription glasses, and Moore confirmed that Campos wore such glasses. Most significantly, Campos was unlikely to overcome the compelling evidence that the gun he admitted owning at the time of the murders was established by forensics as the murder weapon.

V

INEFFECTIVE ASSISTANCE OF COUNSEL

A. *Arguing against the defense expert*

Campos's gang expert, Scudder, testified that Campos was a gang member, and if a gang member used a gun in a violent crime, he would promptly dispose of it. In closing argument, Sperber argued regarding Campos's expert, Scudder: "But if you think about what Kimi Scudder said regarding the hot potato, and the district attorney commented in his opening argument about I don't even know why Kimi Scudder was here, and when he cross-examined her, he did a real good job of ripping her apart, showing that she doesn't know much about gangs, as you might expect a gang expert to know, but that's not the issue." Sperber then continued that "the issue is what everybody knows, and that is that a hot potato is a real term and a real thing. And if [defendant] had used that . . . gun it would have been a hot potato for him. . . . Do you think if he knew that that was the gun that was used, that he would have said, 'Oh, yeah, I had it about a month?'"

Campos contends that he suffered ineffective assistance of counsel. He argues that by undermining the credibility of his own expert, counsel effectively abandoned his primary trial defense; that if he had known the gun was used in a murder he would have gotten rid of it like a "hot potato." He claims that his counsel could have had no tactical reason for such action. This contention is without merit.

The standard for establishing ineffective assistance of counsel is well settled. The "'defendant bears the burden of showing, first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably

probable that the verdict would have been more favorable to him.'" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052–1053; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 (*Strickland*).) It is presumed that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. (*Strickland, supra,* at p. 689; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.) "'"[W]e accord great deference to counsel's tactical decisions" [citation], and we have explained that "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation]. "Tactical errors are generally not deemed reversible, and counsel's decision-making must be evaluated in the context of the available facts." [Citation.]'" (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266; *People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

The record here does not reflect that counsel was contacted about why he criticized his own expert, and we cannot say that there could have been no conceivable tactical reason for his doing so. Scudder was thoroughly impeached and was a weak witness, as she appeared to lack information one would expect of a gang expert. That being the case, defense counsel's conceding the obvious did not give up his theory that the gun taken from Campos was a "hot potato," but sought to save it from the poor witness who introduced it. (See *Yarborough v. Gentry* (2003) 540 U.S. 1, 9–10.) Sometimes good trial tactics require complete candor with the jury. (*People v. Gurule* (2002) 28 Cal.4th 557, 612.) After undermining Scudder's testimony, Sperber immediately proceeded to vigorously argue the "hot potato" theory.

Furthermore, conduct during closing argument rarely affords a basis for reversal for ineffective assistance of counsel. (*People v. Moore* (1988) 201 Cal.App.3d 51, 57.) Reversal for things said during closing argument have generally been the result of

counsel conceding his client's guilt, withdrawing a crucial defense or relying on an illegal defense. (*Ibid.*) Sperber did none of these things. He simply acknowledged that which the jury already knew; Scudder was a weak witness and unimpressive advocate of defendant's "hot potato" defense. '"Under these circumstances we cannot equate such candor with incompetence."' (*People v. Gurule, supra,* 28 Cal.4th at p. 612.)

B. *Failure to request expanded eyewitness jury instructions*

1. *Identification evidence*

The morning after the shooting, Detective Richard Ramirez attempted to interview Rodriguez at the hospital. She was uncooperative and lied, fearing for her safety. Five days later, she cooperated, but only after being taken into custody and told that she would be released if she cooperated. She then identified Hogan in a photographic six-pack as the shooter. She again identified him at his preliminary hearing, correcting her prior statement that he was the shooter. She later identified Marcial Ordaz (Ordaz), another suspect, from a photographic six-pack, circling his photograph and writing, "This is the guy that shot." She also identified him at his preliminary hearing.[10] After that hearing, she asked the district attorney if Ordaz wore glasses because the shooter wore "John Lennon type" prescription glasses.[11] Finally, Rodriguez identified Campos in a photographic six-pack containing photographs of men, all of whom were wearing glasses, but only Campos was without a shirt. She wrote, "I picked [Campos] as the person who shot in the vehicle." Rodriguez also identified him as the shooter at his preliminary hearing and later at trial.

Bramlett was also initially uncooperative with detectives. He nonetheless later identified Ordaz, as "Mousy." He testified at Ordaz's preliminary hearing that it could have been, or could not have been, Ordaz who entered the car with Hogan on the

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10 After being identified, Ordaz was taken into custody. He was released, however, when defendant was identified, when evidence was obtained from Moore and the gun evidence was received.

11 Moore testified that Campos wore prescription glasses.

passenger side. He was uncertain because he had met "Mousy" only once, for five minutes, several weeks earlier, and only saw him at the end of the driveway on the night of the murder. Before trial, he also identified Campos as "Mousy," selecting him from a photographic six-pack. Bramlett was unable to positively identify Campos in court, testifying "I guess, yeah" when asked whether Campos was "Mousy."

In his opening statement and in argument, Campos's counsel argued that the prosecution's two eyewitnesses, Rodriguez and Bramlett, initially identified a man named Ordaz as the gunman. He pointed out that Rodriguez had also identified Hogan as the shooter on one occasion, and that she cooperated with the police to obtain her release from jail.

The trial court instructed the jury with CALCRIM No. 315, the standard eyewitness instruction that replaced CALJIC No. 2.92. That instruction listed factors to be considered in evaluating eyewitness identification.[12]

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[12] CALCRIM No. 315 as given states: "You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. [¶] In evaluating identification testimony, consider the following questions: [¶] Did the witness know or have contact with the defendant before the event? [¶] How well could the witness see the perpetrator? [¶] What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, [and] duration of observation? [¶] How closely was the witness paying attention? [¶] Was the witness under stress when he or she made the observation? [¶] Did the witness give a description and how does that description compare to the defendant? [¶] How much time passed between the event and the time when the witness identified the defendant? [¶] Was the witness asked to pick the perpetrator out of a group? [¶] Did the witness ever fail to identify the defendant? [¶] Did the witness ever change his or her mind about the identification? [¶] How certain was the witness when he or she made an identification? [¶] Are the witness and the defendant of different races? [¶] Were there any other circumstances affecting the witness's ability to make an accurate identification? [¶] Was the witness able to identify other participants in the crime? [¶] Was the witness able to identify the defendant in a photographic or physical lineup? [¶] The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find that the defendant [is] not guilty."

2. *Campos's contention*

Campos contends that his attorney could, and should, have requested an additional factor to be included in CALCRIM No. 315; namely, whether the witness had, at any other time, identified another person as the perpetrator? That instruction provided a bracketed paragraph at the end for the addition of any other factors germane to the evidence presented in the case. Campos argues that this was a significant factor because both eyewitnesses had identified Ordaz as the shooter.

3. No ineffective assistance

We need not decide whether Campos's counsel's performance in failing to request this additional factor was deficient because we conclude that even if he had done so, it is not reasonably probable that the verdict would have been more favorable to his client.

Had defense counsel requested the additional factor, it would most likely been given. (*People v. Wright* (1988) 45 Cal.3d 1126, 1139 (*Wright*).) While the trial court has no obligation to modify CALCRIM No. 315 sua sponte, it was required to do so upon request when supported by the evidence. (*Wright, supra*, at pp. 1143–1144; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110.) *Wright* held that it was error to refuse a defendant's request to add as an additional factor to the eyewitness identification instruction, whether any inconsistent or erroneous identifications were made by the witness before trial, the same factor Campos claims his attorney should have requested. (*Wright, supra,* at p. 1139.)

But if the additional factor had been included in CALCRIM No. 315, it is unlikely to have affected the verdict for several reasons. First, defense counsel emphasized in his opening statement and closing argument that Rodriguez had identified Ordaz as the shooter and Bramlett identified him as "Mousy" in photographic six-packs and at Ordaz's preliminary hearing, before identifying Campos. Counsel also highlighted that Rodriguez had initially identified Hogan as the shooter. Thus, these facts could not have escaped jury consideration, even without an instruction relating to them.

Second, Rodriguez and Bramlett were both thoroughly impeached; Bramlett had only seen the person named "Mousy" one previous time, three weeks earlier, for five

minutes, he could not see him very well at the end of the driveway in the dark, and his subsequent identification of Campos at trial was equivocating; Rodriguez was a methamphetamine user, had a criminal record, and had identified Hogan and Ordaz as the shooter initially and cooperated with police as a way to get out of jail. In spite of this significant impeachment, the jury still chose to believe the eyewitnesses and found defendant guilty. It is unlikely that adding one additional identification factor, already highlighted in testimony and argument, to the lengthy CALCRIM No. 315 instruction would have led to a different result.

Third, CALCRIM No. 315 did not tell jurors that they could *only* consider the listed factors. It merely stated that those factors should be considered.

Finally, some of the factors listed in CALCRIM No. 315 impliedly suggest that prior eyewitness misidentifications should be considered by the jury. For example, selection of another person appears subsumed in the listed factors of whether "the witness ever fail[ed] to identify the defendant" and whether the witness "ever changed his or her mind about the identification."

VI

CUMULATIVE ERROR

Campos contends that the cumulative effect of the preceding errors so prejudiced his case as to deny him a fair trial and require reversal. This contention is without merit.

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844.) "Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*Ibid*.) Because we have concluded that all of Campos's contentions are without merit, it follows that there were no multiple errors to cumulate.

VII

ERRONEOUS ADMISSION OF EVIDENCE

On September 12, 2003, Marilee Tobias (Tobias), Hogan's girlfriend, visited him in jail. Hogan's jail visits were tape-recorded. In the recording of this meeting, Hogan

told Tobias that he needed her to telephone his attorney. He then told her to read something, after which, he asked if she wrote down the name and number. She told him to "[f]ind somebody else." Hogan then asked, "Can you do that for me though? Call my lawyer and tell him? Or you don't wanna be caught in the middle . . . ?" He told her he was "[t]rying to build my fuckin' alibis . . . ."

After the visit, supervising Deputy Sheriff Rudy Sikman recovered a note from Hogan. It contained a list of the charges against him and the case name and number handwritten in ink. Handwritten in pencil, the note said: '"I need you to call this person and tell them you were with me that night at Mark and Nicky's, like we were'—[followed by a drawing of a happy face], 'Henry J. Hall, (818) 838-2735. If not, don't [trip]—I'll find someone else to do this for me. I'm sorry I put you through all this. Maybe you'll be better off without me."'

Deputy Sikman testified that it is common for inmates who know they might be recorded to pass notes, although there was no indication Hogan knew his conversation with Tobias was being recorded. During this testimony, the People introduced the handwritten note. At a sidebar conference, Hogan's attorney objected and the following colloquy took place: "[HOGAN'S COUNSEL]: I would object to this part coming in, because I don't think there's been any witness that talked about whose handwriting that is on the document. [PROSECUTOR]: That goes to weight. [HOGAN'S COUNSEL]: No, I don't think so. I think you've got to lay a foundation for—he just said he recovered a note. It doesn't tell us from whom. So whether this is a different handwriting that that and the printing, I think it's objectionable on those grounds. [TRIAL COURT]: Well, the objection is overruled."

After the conference, when the prosecutor began questioning the deputy about the contents of the note, the trial court sustained an objection as to foundation, stating, "We don't know where this note came from, whether it's anything that he recovered or not. You need to lay a foundation." The prosecutor than elicited from the deputy that he obtained the note from Hogan.

Hogan contends that the trial court erred in admitting the alibi request portion of the note, violating his rights to due process and to a fair trial. He argues that there was no evidence that appellant authored the penciled portion of the note, and the People failed to establish that he showed the note to Tobias. This contention is without merit.

We review admission and exclusion of evidence for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1198.) "Authentication of a writing is required before it may be received in evidence." (Evid. Code, § 1401, subd. (a).) "Authentication . . . means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is, or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) Authentication may be accomplished by a variety of means. It is not limited to those set forth in the Evidence Code and can be derived from the content of the writing itself. (*People v. Abelson* (1980) 104 Cal.App.3d Supp. 16, 19.)

The portion of the handwritten note in pencil was sufficiently authenticated by its content, the tape recording of Hogan's visit with Tobias and the attendant circumstances. The note was confiscated from Hogan right after the visit, supporting an inference that he possessed it during the visit. In the recording of Hogan's visit, after telling Tobias that he needed her to contact his attorney, Hogan told her to, "Read that." There was then a 28 to 30 second "silence" on the recording, apparently the time when Tobias was reading something. The comments after she did the reading strongly suggest that it was the challenged note that she read. It contained the name and telephone number of Hogan's attorney, Henry J. Hall, who he had asked her to call just before the 30 second silence. When the conversation resumed after the pause, Hogan asked if she wrote down the name and number, by inference referring to his attorney. The note states that the purpose of the call was "to call this person an[d] tell them you were with me that night at Mark and Nikki's . . . ." After the pause, Tobias immediately protested and told Hogan to "find someone else," an apparent reference to the request in the note that she tell the attorney where Hogan was on the night of the shooting, and that if she did not want to do it, he would "find someone else to do this for [him]." The contents of the note so perfectly

dovetail with Hogan's conversation with Tobias, that the inference that it was the writing he showed to her is inescapable. It was the showing of the contents of the note, not whether Hogan wrote it, which authenticated the note for the purpose for which it was used. The trial court therefore did not abuse its discretion in admitting it.

VIII

SEVERANCE

Before trial, Hogan moved for a separate jury, or, in the alternative, a separate trial because Campos was going to call Scudder, a gang expert, to testify that he was a gang member and that gang members promptly dispose of guns used in violent crimes. Hogan claimed that this evidence would violate his right to a fair trial and allow the jury to find him guilty by association. The trial court denied the motion, and instructed the jury before Scudder testified that her testimony was only relevant to Campos.

Scudder then testified that Campos admitted to her that he was a gang member. She further testified that gang members typically treat a gun used in a violent crime as a "hot potato" and promptly dispose of it. The prosecutor also elicited other testimony regarding gangs, including, for example, that Campos's gang showed allegiance to the Mexican Mafia, and that Campos would have been in the type of gang that actually commit crimes, not merely a tagging crew.

After the jury verdict, Hogan moved for a new trial on the ground that the gang evidence was prejudicial and deprived him of the right to present a complete defense. The trial court denied the motion because "the testimony itself had no bearing as to Mr. Hogan or any of his activities."

Hogan contends that the trial court erred in denying his pretrial motion to be tried separately from Campos and post trial motion for new trial on that ground, thereby denying him due process and the right to fully present a defense. He argues that the introduction of gang evidence, including Campos's gang affiliation, subjected Hogan to guilt by association when there was no evidence that he had any gang affiliation. This prejudice was exacerbated, he argues, because Hogan had a tattoo in large block letters on his neck visible to the jury. This contention is without merit.

Section 1098 creates a statutory preference for joint trials for defendants jointly charged.[13] (*People v. Pinholster* (1992) 1 Cal.4th 865, 932.) Joint trials are the rule and severance is the exception. (*People v. Alvarez* (1996) 14 Cal.4th 155, 190.) "Joint trials are favored because they 'promote economy and efficiency' and "'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'"" (*People v. Coffman* (2004) 34 Cal.4th 1, 40 (*Coffman*).) When defendants are charged with "'common crimes involving common events and victims[,]'" a "'classic case'" for a joint trial is presented. (*Ibid.*; *People v. Hardy* (1992) 2 Cal.4th 86, 168.)

Nonetheless, trial courts may order separate trials "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Massie* (1967) 66 Cal.2d 899, 917, fns. omitted (*Massie*).) An appellate court reviews a trial court ruling on a motion for separate trials for an abuse of discretion. (*People v. Alvarez, supra,* 14 Cal.4th at p. 189.) Whether a trial court's denial of a severance motion constitutes an abuse of that discretion is judged on the facts as they appeared at the time the court ruled on the motion. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 998; *People v. Hardy, supra,* 2 Cal.4th at p. 167.)

A. *Abuse of discretion*

The trial court did not abuse its discretion in denying Hogan's motion to sever. He fails to advance sufficient grounds to disturb that ruling. None of the *Massie* factors are applicable here, other than prejudicial association with Campos, an admitted member of a violent gang. However, that factor was mitigated by the trial court's instruction to the jury before admission of the evidence of Campos's gang affiliation that that evidence was only to be considered against him, and not against Hogan. (*Coffman, supra,* 34 Cal.4th at

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13 Section 1098 provides in part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they *must be tried jointly*, unless the court orders separate trials. . . ." (Italics added.)

p. 40 [less drastic measures than severance, such as limiting instructions, will often suffice to cure any risk of prejudice]; see also *People v. Taylor* (2001) 26 Cal.4th 1155, 1174.) We presume the jury followed the trial court's instruction. (*People v. Horton* (1995) 11 Cal.4th 1068, 1121.) Additionally, this was a classic case for a joint trial. Defendants were charged with common crimes involving common events and victims. Both defendants denied committing the crimes, faced essentially the same charges and allegations, bore equal criminal responsibility, and relied on a defense of mistaken identity. There was no indication either defendant would have given exonerating testimony at a separate trial. Hogan's claim that the prejudice from the gang evidence was aggravated by his having large, block-letter, gang tattoos on his neck and arms appears to be overblown. At the hearing on the new trial motion, the prosecutor commented that Hogan wore a long sleeve, collared shirt during trial "effectively covering his tattoos." The trial court added that no attention was give to Hogan's tattoos during trial.

But even when denial of a severance motion is not an abuse of discretion, "'the reviewing court may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of the law.'" (*People v. Morganti* (1996) 43 Cal.App.4th 643, 672.) Given the limiting instruction, the strong factual bases for a joint trial and the evidence against Hogan, as discussed below, Hogan's claims that the joint trial deprived him of his federal constitutional rights to due process and a fair trial must fail.

B. *Harmless error*

Even if the trial court abused its discretion in failing to grant severance, reversal is only required upon a showing of a reasonable probability that the defendant would have received a more favorable result in a separate trial. (*Coffman, supra,* 34 Cal.4th at p. 41; *People v. Morganti, supra,* 43 Cal.App.4th at p. 675.) Several factors convince us that that would not have been the case here. The independent evidence against Hogan was compelling. Rodriguez identified him as involved in the shooting. While she initially misidentified him as the shooter, she always placed him in the car with Campos and

corrected her erroneous testimony at his preliminary hearing, testifying that he was the driver. Further, Bramlett, with whom Hogan appeared to be friends, had been playing pool with him during the evening of the shooting, and identified him as entering the vehicle from which the shots were fired minutes later, with "Mousy." Further, while a separate trial might have kept out evidence of Campos's gang affiliation, it is difficult to believe that the jury would not suspect that the shooting was a gang shooting given the pervasive media coverage of gang shootings to which this shooting bore significant similarity: two men enter a car and follow another vehicle with little apparent reason; and one of the two men shoots a barrage of bullets into the victims' vehicle killing two of the three occupants and seriously injuring the third. Even without the gang testimony, the gang nature of the attack was evident.

IX

COURT SECURITY FEE

Section 1465.8,[14] establishing a $20 court security fee, was adopted by the Legislature, effective August 2, 2003, and became operative August 17, 2003. The charged offenses were committed on August 6, 2003.[15]

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[14] Section 1465.8 provides: "(a)(1) To ensure and maintain adequate funding for court security, a fee of twenty dollars ($20) shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. [¶] (2) For the purposes of this section, 'conviction' includes the dismissal of a traffic violation on the condition that the defendant attend a court-ordered traffic violator school, as authorized by Sections 41501 and 42005 of the Vehicle Code. This security fee shall be deposited in accordance with subdivision (d), and may not be included with the fee calculated and distributed pursuant to Section 42007 of the Vehicle Code. [¶] (b) This fee shall be in addition to the state penalty assessed pursuant to Section 1464 and may not be included in the base fine to calculate the state penalty assessment as specified in subdivision (a) of Section 1464. [¶] (c) When bail is deposited for an offense to which this section applies, and for which a court appearance is not necessary, the person making the deposit shall also deposit a sufficient amount to include the fee prescribed by this section. [¶] (d) Notwithstanding any other provision of law, the fees collected pursuant to subdivision (a) shall all be deposited in a special account in the county treasury and transmitted

A. *Ex Post Facto Law*

Campos contends that application of the $20 court security fee violates the ex post facto clauses of the United States and California Constitutions.[16] He argues that the fee constitutes an increased punishment that could not have been imposed on defendant at the time of his offenses. (U.S. Const., art I, § 9; Cal.Const., art. I, § 9.) This contention is without merit.

A statute that creates a punishment or makes an existing punishment more severe may not be applied to crimes committed before the date that the statute became effective. (See *Carmell v. Texas* (2000) 529 U.S. 513, 522–525.) The questions to be resolved under an ex post facto challenge are "whether the Legislature intended the provision to constitute punishment and, if not, whether the provision is so punitive in nature or effect that it must be found to constitute punishment despite the Legislature's contrary intent." (*People v. Castellanos* (1999) 21 Cal.4th 785, 795, fn. omitted; *Kansas v. Hendricks* (1997) 521 U.S. 346, 361.)

After a thorough review of section 1465.8 and its legislative history, our colleagues in Division Five, in *People v. Wallace* (2004) 120 Cal.App.4th 867 (*Wallace*), held that the security fee could be imposed on defendants, whose crimes were committed prior to the statute's August 2003 effective date without violating the ex post facto clauses. (*Id*. at p. 870.) It concluded that the Legislature imposed the $20 fee for the nonpunitive purpose of ensuring and maintaining adequate funding for court security and designated it a "fee" as opposed to a "fine." (*Id*. at pp. 875–876.) The enactment of the

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therefrom monthly to the Controller for deposit in the Trial Court Trust Fund. [¶] (e) The Judicial Council shall provide for the administration of this section."

15 Although the charged offenses occurred between the effective and operative dates of section 1465.8, given our conclusions here, we need not decide which of those dates is the applicable one for determining whether the ex post facto clauses are implicated.

16 This issue is currently pending before the California Supreme Court in *People v. Carmichael*, review granted May 10, 2006, S141415 and *People v. Alford*, review granted May 10, 2006, S142508.

fee depended on the adoption of specified trial court funding levels and was imposed in civil, probate and traffic cases as well as criminal cases. (*Id.* at p. 877.) Moreover, there was not "'"'the clearest proof'"'" the court security fee was so punitive that its purpose or effect was to override the Legislature's treatment of it as a nonpunitive measure. (*Id*. at p. 876, quoting *Smith v. Doe* (2003) 538 U.S. 84, 92.) The amount of the fee is small and, therefore, does not evince a legislative intent to punish the defendant. (*Wallace, supra,* at p. 878.) In addition, the fee does not promote the traditional aims of punishment and has a rational relationship to a nonpunitive purpose. (*Id*. at pp. 877–878.)

We agree with *Wallace* and conclude that applying the security fee to defendant does not violate the ex post facto clauses of the federal or state Constitutions.

B. *Lack of retroactivity provision*

Campos further argues that imposition of the security fee is unauthorized because section 1465.8 does not contain a retroactivity provision.[17] He argues that such a provision is made necessary by section 3 which provides that, "No part [of the Penal Code] is retroactive, unless expressly so declared." Section 1465.8 does not expressly declare that it is to operate retroactively. This contention is without merit.

Section 3 "applies to penal measures which increase the punishment for particular crimes. [Citations.]" (*People v. Teron* (1979) 23 Cal.3d 103, 116–117, disapproved on other grounds in *People v. Chadd* (1981) 28 Cal.3d 739, 750, fn. 7.) Laws that "define[] past conduct as a crime, increase[] the punishment for such conduct, or eliminate[] a defense to a criminal charge based on such conduct" cannot be applied to crimes committed before the measure's effective date. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288.) But even as to legislation that increases punishment, section 3 is merely a rule of statutory construction and is not to be applied blindly, but is to be applied only if after considering everything else it is impossible to glean the Legislature's intent. (*In re Estrada* (1965) 63 Cal.2d 740, 746.) The paramount concern is to

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17 See footnote 16, *ante*.

determine whether the Legislature intended for the law to operate retroactively. (See *People v. Nasalga* (1996) 12 Cal.4th 784, 791.)

Even though the offense in this case was committed prior to the operative date of the statute, the court security fee may be applied. As previously stated, section 1465.8 is nonpunitive, being "primarily . . . a budget measure" with an "unambiguously . . . nonpunitive objective." (*Wallace, supra,* 120 Cal.App.4th at pp. 873, 875–876.) It therefore does not increase punishment.

Additionally, "[A] law addressing the conduct of trials still addresses conduct in the future. . . . Such a statute '"is not made retroactive merely because it draws upon facts existing prior to its enactment . . . . [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future." (*Tapia v. Superior Court, supra,* 53 Cal.3d at p. 288.) "In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date. [Citations.] Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. [Citations.]" (*People v. Grant* (1999) 20 Cal.4th 150, 157.)

The security fee does not address past conduct. Its purpose is unrelated to the offenses that a defendant may have committed and is not intended to punish the defendant. (See *Wallace, supra,* 120 Cal.App.4th at p. 875.) As *Wallace* states: "A court security fee can logically be viewed as a nonpunitive fee assessed for the use of court facilities which is designed to make them safer. This is particularly true when the same fee is imposed in limited and unlimited civil and probate cases as well." (*Id.* at p. 877.) Given this purpose of the security fee, to see that those who use the courts shoulder the financial cost of making them safe, the last act for assessing the fee is the use of the court, which in this case occurred long after section 1465.8 became operative.

We therefore conclude that application of the security fee under section 1465.8 to an offense occurring before its adoption but tried after is not a retroactive application of that fee.

DISPOSITION

The judgments are affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ