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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LAMONT STERLING JOHNSON,

Defendant and Appellant.

A103544

(Contra Costa County  
Super. Ct. No. 9621954)

**I.**

**INTRODUCTION**

Appellant Lamont Sterling Johnson appeals from the judgment entered following a jury trial that resulted in his conviction for first degree murder (Pen. Code, § 187<sup>1</sup>) and robbery (§ 211). The jury also found that he was armed with a .40-caliber handgun during the commission of both offenses (§ 12022, subd. (a)(1)), and that he committed the murder during the commission of the robbery (§ 190.2, subd. (a)(17)). Appellant was sentenced to a total determinate prison term of four years<sup>2</sup> and a consecutive indeterminate term of life without possibility of parole plus one year for the arming enhancement.

This appeal is voluminous and appellant claims error at virtually every stage of the proceedings. His principal claims of error are that: 1) the suppression and destruction of

<sup>1</sup> All undesignated statutory references are to the Penal Code.

<sup>2</sup> The determinate four-year term consisted of three years for the robbery and one year for the arming enhancement.

exculpatory evidence required dismissal of the charges against him; 2) the court erred in admitting expert testimony on gangs; 3) the court improperly allowed the prosecution to impeach appellant with evidence of an escape attempt that lacked probative value and was highly prejudicial; 4) the prosecutor rendered his trial fundamentally unfair by taking opposite positions on the credibility of a prosecution witness at appellant's trial and at his codefendant's separate trial; 5) the court improperly overruled defense objection to the prosecutor's misstatement of the law as to special circumstance murder in closing argument; and 6) consecutive sentencing was inappropriate for the robbery and gun use.

We hold that section 654, as applied here, prohibited separate sentences for both the special circumstance murder committed during the course of a robbery and the robbery, plus corresponding arming enhancements. We will, therefore, stay the sentence for the robbery and the firearm use enhancement, which we can correct by modifying the judgment. We find no other prejudicial error; accordingly, we affirm the judgment as modified.

## II.

### FACTS AND PROCEDURAL HISTORY

The issues raised on appeal do not require a detailed recitation of the facts. Viewed in the light most favorable to judgment (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329), the evidence established the following.

On May 28, 1996, at approximately 4:20 p.m., Roy Loewenfels, an East Bay Municipal Utility District ranger, was on duty at a trailhead at the Bear Creek staging area, several miles north of Lafayette. While parked in one of the lots, Loewenfels heard six to eight gunshots and then saw two men coming into the parking lot from the trail area. Loewenfels described the men as "jovial." One of the men ran towards Loewenfels and fired several shots that hit his vehicle and nearly struck him. Loewenfels was forced to hide behind his truck. The men then drove away in two cars—a small blue station wagon and a white two-door sports car. Loewenfels was unable to identify any of the persons involved.

When the police arrived, they discovered the body of a white male, later identified as 21-year-old Stephen “Snoo” Harless, who had been shot multiple times. Harless was a drug dealer who had provided marijuana to members of a criminal street gang known as All Kickin’ It Posse (hereafter AKP). Appellant and his codefendant, Lemar Harrison, were AKP members, and appellant had suggested robbing Harless to other AKP members on more than one occasion. On the morning of the murder, appellant and codefendant Harrison met at the apartment of another AKP member, Alex Wada. The prosecution’s theory was that an agreement was made that appellant and Harrison would meet Harless later that day for the ostensible purpose of buying marijuana. The real plan that day, however, was to rob and kill Harless because “[t]hey know that if he comes up alive, he’ll tell who did it. . . . They know he can identify.”

The jury was read certain portions of codefendant Harrison’s testimony from a prior proceeding.<sup>3</sup> Harrison denied he was part of a plan to rob and/or murder Harless, and he had no idea that there was going to be a fatal shooting on May 28, 1996, when he and appellant met Harless. Harrison testified he was “shocked” and “stunned” when appellant pulled out a gun and shot Harless several times. Appellant then handed the gun to Harrison and told him to shoot Harless. Harrison fired a shot at Harless, who was lying on the ground. Appellant and Harrison ran back to the parking lot, where they came upon Loewenfels sitting in his truck. At appellant’s urging, Harrison fired the gun several times at the truck.

Eyewitness evidence revealed that at this point, appellant and Harrison fled—Harrison in Harless’s white two-door sports car, and appellant in the blue station wagon. A Pinole assistant chief fire marshal, Jim Parrot, was in the area and heard the radio broadcast describing the vehicles involved in the shooting. Upon seeing the white sports car traveling at a high rate of speed, he gave chase. During the pursuit, he was able to

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<sup>3</sup> Appellant and his codefendant Harrison were tried separately. On February 2, 2000, in a nonjury trial, Harrison was convicted of robbery with use of a firearm and first degree murder. On September 15, 2000, Harrison was sentenced to prison for an indeterminate term of 25 years to life. His conviction has been affirmed by this division in an unpublished opinion filed August 22, 2002 (*People v. Harrison* (A092690)).

observe both the white sports car and the small blue station wagon stop next to each other as the drivers had a conversation. Both of the drivers were able to elude capture, although Parrott eventually found the blue car abandoned with the driver door open. The abandoned blue 1977 Toyota station wagon was registered to appellant.

The robbery netted a substantial amount of marijuana and large amount cash. After escaping, Harrison went back to Wada's apartment, driving Harless's white RX-7 sports car. Harrison told Wada he had "ganked [robbed] some dude."<sup>4</sup> Wada helped Harrison retrieve two backpacks filled with marijuana from Harless's car. Later, some of Harless's clothes were found on the side of Wada's house.

Harrison then took appellant to Khari Reichling's house. Reichling had known Harrison since 1994, when Reichling's mother lived with Harrison's father. They brought a large quantity of cash and bags of marijuana with them. Reichling testified he "had never seen that much [marijuana] in my life." Appellant showed Reichling's roommate, Leroy Brock, a semiautomatic handgun. Brock testified that appellant told him that it "shoots nice." The next day, Reichling and appellant went to pick up Harrison at his girlfriend's house. However, the police were there and arrested appellant, who had the semiautomatic handgun on the floor of the car near where he was sitting. Ballistics revealed that the gun in his possession was the same gun used to kill Harless.<sup>5</sup> When arrested, appellant possessed \$505 in cash, even though he was unemployed at the time.

Appellant, who was 19 years old at the time of the crime, testified on his own behalf. He admitted that he was present with Harrison at the scene of the murder, but claimed that Harrison had only told him that they were going to hang out with "Snoo" and smoke marijuana. Appellant insisted he did not plan to rob Harless nor did he participate in the robbery or shooting, which he claimed were both done solely by Harrison.

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<sup>4</sup> Wada was declared an unavailable witness, and his testimony in another proceeding was read to the jury.

<sup>5</sup> It was stipulated that on May 29, 1996, the Santa Clara police found a .40-caliber Smith and Wesson semiautomatic handgun in a car near where appellant was sitting. It was determined to be the gun that was used to kill Stephen Harless on May 28, 1996.

The jury was instructed on both premeditated/deliberate first degree murder and felony-murder, with robbery as the underlying felony. The jury convicted appellant of murder, set the degree at first degree, and found that the murder “was committed while defendant . . . was engaged in the commission and attempted commission of, or the immediate flight after committing or attempting to commit, Robbery . . . .” The jury also found appellant guilty of robbery. Each of the firearm arming allegations was found true.

Jury trial on the penalty phase began on March 11, 2003. On March 27, 2003, the jury set the penalty at life without the possibility of parole. On July 18, 2003, the trial court sentenced appellant to a determinate prison term of four years for robbery with the arming enhancement, and a consecutive indeterminate prison term of life without possibility of parole for felony murder plus an additional year for the arming enhancement. Appellant filed a notice of appeal on July 31, 2003.

### **III.**

#### **DISCUSSION<sup>6</sup>**

##### **A. Issues Relating to the Suppression and Destruction of Evidence**

###### ***1. Appropriate Sanctions***

Appellant first claims that numerous discovery abuses affected his case preparation and the outcome of his trial, and thus, the charges against him should have been dismissed. This is the second time appellant has been convicted of these crimes. At the conclusion of appellant’s first trial, on March 31, 1999, the jury found appellant guilty of murder and robbery, with an arming enhancement, and found a robbery-murder special circumstance true. After conviction but before the penalty phase, defense counsel first learned, through counsel for appellant’s codefendant, of material evidence that had never been disclosed to the defense.

Months of motions and procedural wrangling followed. Finally, on December 13, 2000, after six days of evidentiary hearing, the trial court granted appellant’s motion for a

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<sup>6</sup> We have taken substantial liberty in reordering the issues on appeal to enhance the organization of this opinion.

new trial. The trial court based its ruling on law enforcement's failure to disclose material exculpatory evidence pursuant to *Brady v. Maryland* (1963) 373 U.S. 83.

There were several discovery violations that formed the basis for appellant being granted a new trial. Specifically, after appellant was convicted in the first trial, the defense learned for the first time that the police and/or the prosecution had failed to divulge material evidence, including that 1) Harless had been in possession of a large sum of money, \$15,000 to \$30,000, shortly before his death that was never recovered; 2) Harless had a life insurance policy and that one of the beneficiaries had left for Mexico shortly after Harless's death; and 3) there were initial reports of a possible third suspect, a Caucasian male with blond hair.

In his reply brief, appellant has clarified that the only discovery violation that is pertinent to this issue is the trial court's finding that law enforcement officials failed to disclose early press releases identifying a possible third suspect who was a Caucasian male with blond hair, and who may have been involved in, or witnessed, the murder.<sup>7</sup> Consequently, given the parameters of this issue as defined by appellant, we confine our discussion to the pertinent facts surrounding this discovery violation.

By way of background, during the first trial, the trial court issued an order to the East Bay Regional Park District Police Department (hereafter EBRPD) to preserve all computer files relating to the Harless murder investigation. In proving evidence had been destroyed, Darrell Lane, a computer consultant hired by the defense, examined the EBRPD office network server for files related to the Harless investigation. On an old server, which had been disassembled in preparation for disposal, Lane found a press release by the EBRPD dated June 2, 1996. The press release described two suspects as "Black male adults." The press release further stated that "Detectives are trying to identify a possible third suspect."

The press release, along with all other Harless investigation files, was transferred to a new computer server in late 1997 or early 1998. However, the file was modified on

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<sup>7</sup> Appellant indicates in his opening brief that he and his codefendant Harrison "are young [B]lack men."

April 2, 1999, by someone using the unique user ID and password of Detective Tim Anderson of the EBRPD, who was the lead investigator in the Harless murder investigation. The modified file contained a “joke wanted” poster about an employee in the parks department. The original press release of June 2, 1996, was overwritten and deleted. The modification to the file occurred at 4:27 p.m., approximately three hours after the public defender’s office sent a fax to the Contra Costa County District Attorney’s Office, complaining of discovery violations in the trial of codefendant Harrison.<sup>8</sup>

The defense also located a press release by the EBRPD, dated May 30, 1996, which described two suspects: “Suspect one is described as a Black male adult, late teens to early twenties, no further. Suspect two is described as a White male adult, late teens to early twenties with curly blonde hair.” The original of that press release was contained in Detective Anderson’s file. Detective Anderson did not author the press release and claimed not to know if it was actually released to the media. Detective Anderson also claimed not to know the source of the information regarding the blond suspect, who was not mentioned in any of the police reports.

Yet more press releases surfaced that had not been disclosed to the defense. In May 1996, Steven Abbors managed the East Bay Municipal Utility District watershed area. On May 29, 1996, Abbors received two faxed press releases from the EBRPD regarding suspects involved in the murder. In May 2002, after reading about this case in the newspaper, Abbors contacted the EBRPD and provided those faxed press releases. On one press release was a handwritten description of a White male suspect with curly blond hair wearing a beanie.

The court found that evidence of a potential third suspect should have been disclosed to the defense. More troubling, the court observed that “Detective Anderson has repeatedly denied not only the existence of a third person at the scene of the homicide but also that there was ever any information regarding a third person. . . .” In granting

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<sup>8</sup> Detective Anderson admitted authoring the joke wanted poster. He denied intentionally saving the joke file over the press release from the Harless case.

appellant a new trial, the court found that the overwritten press release and the dismantled EBRPD network computer were “in total and complete disregard for this Court’s order to preserve evidence.”

Prior to the commencement of appellant’s second trial, appellant filed repeated motions to dismiss the charges, alleging that his Fifth, Eighth, and Fourteenth Amendment rights to due process and a fair determination of guilt was violated by the EBRPD’s “bad faith destruction of exculpatory evidence” under *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*) and *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*)<sup>9</sup>. After considering additional evidence, the trial court denied appellant’s motion to dismiss the charges. However, in fashioning an appropriate sanction, the court allowed appellant to present evidence to the jury about the discovery violations and the undisclosed evidence about a third suspect. The court found appellant was also entitled to an instruction whereby the jury was told that they could consider the evidence of misconduct in determining the truth of the charges against him.

By appellant’s own admission, during the second trial, “the issue of governmental misconduct was a central portion of his defense.” The defense presented numerous witnesses to testify about the suppression and/or destruction of evidence with respect to initial reports seeking a third suspect. During closing argument, the defense argued extensively about the significance of the misconduct, and maintained that the information about the blond suspect had been deliberately suppressed by the police and prosecution. The defense also argued that the blond suspect could have been an eyewitness who would have corroborated appellant’s account of the murder.

Furthermore, the jury was instructed that if they believed the prosecution had “knowingly and willfully” failed to produce exculpatory evidence, the jury could, but was not required, to infer that other undisclosed exculpatory evidence existed. The instruction

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<sup>9</sup> *Trombetta* and *Youngblood* present in-depth discussions of the constitutional duty to preserve physical evidence and the consequences of the destruction of evidence by law enforcement personnel. Our Supreme Court has expressly adopted the holdings in *Trombetta* and *Youngblood*. (*People v. Frye* (1998) 18 Cal.4th 894, 942-943; *People v. Zapien* (1993) 4 Cal.4th 929, 964.)

further permitted the jury, if they determined that other exculpatory evidence may exist, to consider that fact in evaluating whether the prosecution proved the charges beyond a reasonable doubt. The jury was further instructed that if they found a witness had knowingly failed to disclose evidence, they could find that witness was biased against appellant.<sup>10</sup>

Nevertheless, appellant contends that the trial court's sanctions did not go far enough to remedy the discovery abuse in this case. Even though appellant was granted a new trial during which he was given great liberty to exploit the earlier discovery violations, he claims that under the reasoning in *Trombetta* and *Youngblood*, "the government's bad faith efforts to destroy evidence" required dismissal of the charges against him or, at the very least, suppression of the prosecution's most probative evidence. We conclude, however, that the trial court did not abuse its " " "large measure of discretion" ' ' in determining it would be inappropriate to impose such a drastic sanction. (*People v. Memro* (1995) 11 Cal.4th 786, 831; *People v. Zapien*, *supra*, 4 Cal.4th at p. 964.)

Neither *Trombetta* nor *Youngblood* supports appellant's assertion that, in this case, the due process violation was so egregious that "dismissal is the only appropriate remedy." Those cases examined the actions of the law enforcement agencies and/or agents in either failing to preserve or destroying evidence during an investigation and then asked the important question whether the lost evidence was available in some other form. (*Trombetta*, *supra*, 467 U.S. at p. 489 ["To meet this standard of constitutional materiality" the missing evidence "must be of such a nature that the defendant would be

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<sup>10</sup> Appellant requested that the trial court instruct the jury that: 1) they could draw an adverse inference from the prosecution's destruction of evidence; 2) they could presume the destroyed evidence was unfavorable to the prosecution's case; and 3) the destruction of evidence could be used by the jury as a circumstance tending to show appellant was not guilty. Appellant claims the court erred in not giving his "defense-requested pinpoint" instruction; however, we find no error. The jury was properly instructed on how to evaluate the evidence of the discovery violations in this case, and appellant's proposed instructions could properly be rejected as argumentative. (*People v. Wright* (1988) 45 Cal.3d 1126, 1137, 1143.)

unable to obtain comparable evidence by other reasonably available means”]; *Youngblood, supra*, 488 U.S. at p. 56 [questioning whether defendants had “ ‘alternative means of demonstrating their innocence.’ ”].)

As concisely stated in *U.S. v. Mannarino* (D.Mass. 1994) 850 F.Supp. 57, 72-73, “In bare constitutional analysis of evidence destruction claims, a defendant is obligated to show that the lost evidence was irreplaceable. . . . If it is possible to reconstruct the lost material, that should be done in order to permit a fact finder to determine the case on its merits, and avoid the ultimate sanction of dismissal or judgment notwithstanding a verdict on misconduct grounds.” (See, e.g., *U.S. v. Mannarino, supra*, at pp. 72-73 [where witness statement illegally destroyed, court refused to dismiss case but allowed deposition of the witness and police officers who took statement]; see also *DiBenedetto v. Hall* (1st Cir. 2001) 272 F.3d 1, 12-13 [sneaker with blood spot destroyed; no constitutional violation where test results existed and defendant free to cross-examine expert who conducted test].)

In denying appellant’s motion to dismiss the charges, the court below astutely observed, the missing evidence “appears to have been all produced” and that there was “really no proof that [the appellant has not] received everything of an exculpatory nature.” The record bears out this observation. The deleted press release referring to the possibility of a third suspect was eventually recovered from the junked computer server, and the circumstances surrounding its destruction and suppression were fully explored at trial. Moreover, as appellant acknowledges, “[o]nce that buried press release emerged, other press releases also came to light . . . . Thus, at trial, the defense was in possession of the press releases identifying a third blond young man seen at the scene.”

The cases relied on by appellant do not require dismissal of the charges against him and are factually distinguishable from the instant case. In those cases, there clearly were no alternative sources of information. For example, in *U.S. v. Bohl* (10th Cir. 1994) 25 F.3d 904, 913-914, a conviction was dismissed on a charge of using nonconforming steel in the fabrication of radio transmission towers for the Federal Aviation Administration, where the steel samples “whose chemical composition was the central

issue in the criminal trial” were destroyed, and the only available substitute evidence were photos, minimal samples which were too small to test, and the government’s test results, which were based on challenged methodologies. In *U.S. v. Cooper* (9th Cir. 1993) 983 F.2d 928, equipment that was allegedly used to manufacture methamphetamine was destroyed. The defendants had argued continuously that they ran a legitimate laboratory, and that the equipment was structurally incapable of methamphetamine manufacture. The court ruled that general descriptions and photographs of the equipment, which would not provide the needed detail to address the legitimate, technical defense raised by the defendants, was not an “adequate substitute for the laboratory equipment.” (*Id.* at p. 932.)

In sharp contrast to those cases, at his new trial, appellant could introduce the re-created press release and could argue the involvement of this third person in the crimes alleged. He was also able to challenge the motives of the police who destroyed the press release. In addition, he could argue to the jury, in conformance with the instructions, that they could infer that there was other exculpatory evidence not produced, and consider it in evaluating whether the prosecution had proven the charges beyond a reasonable doubt. No further sanction, besides the severe ones the trial court had already imposed, was warranted.

## ***2. Refusal to Recuse the Prosecutor***

Because of the “serious and substantial ongoing issues regarding discovery,” appellant claims that the trial court should have recused the prosecutor in this case for a conflict of interest and that the court’s failure to do so requires reversal of his conviction and remand for a new trial prosecuted by a different attorney. “On appeal, a trial court’s ruling on a motion for an order recusing a member of the district attorney’s office, or the office as a whole, for a conflict of interest is reviewed for abuse of discretion, and its findings as to any underlying facts are reviewed for substantial evidence. [Citation.]” (*People v. Griffin* (2004) 33 Cal.4th 536, 570; see also *People v. Breaux* (1991) 1 Cal.4th 281, 293-294.)

After appellant's motion for a new trial was granted, appellant moved to recuse the Contra Costa County District Attorney's Office, or, in the alternative, Deputy District Attorney David Brown, who was the prosecutor in the first trial. The motion was predicated on the following grounds: Appellant argued that Brown's misconduct throughout the proceedings, including his role in the suppression of evidence, rendered it impossible for appellant to receive fair treatment if Brown remained on the case. Appellant also argued that Brown must be recused because he would be called as a witness at both the guilt and penalty phases. As regards recusal of the Contra Costa County District Attorney's Office, appellant argued that because Brown's supervisors had knowledge of Brown's misconduct, yet failed to take any remedial action, appellant could not receive fair treatment if any prosecutor in the office handled the case.

On December 31, 2001, the court denied appellant's motion, observing "[t]here have obviously been a lot of issues, mainly concerning discovery and items either not being turned over, items being turned over late, [and] difficulties in getting items that have been ordered actually in the hands of the defense. . . . But what the record does not reflect . . . it does not reflect that there is a demonstrated animosity between—or by Mr. Brown in this case towards Mr. Johnson personally." The court also noted that the remedy "for the type of discovery issues that have plagued this case" was to grant appellant a new trial and impose other sanctions, not to recuse the district attorney's office or Brown personally.

Appellant claims on appeal, as he did below, that the court abused its discretion because the prosecutor's continued presence in this case amounted to a form of vouching that "there was no discovery violation, or that the prosecutor's behavior was, in the court's view, acceptable." Basically, he argues that Brown's continued prosecution of this case rendered his trial fundamentally unfair.

At the outset, respondent urges us not to consider this contention on the ground that it has already been resolved against appellant by this court. On February 27, 2002, appellant filed a petition for writ of prohibition and/or mandate from the trial court's December 31, 2001 order denying his motion to recuse the prosecutor. By an order

issued April 18, 2002, this court denied appellant’s writ petition, finding “substantial evidence supports the trial court’s decision to deny the petitioner and defendant’s Motion to Recuse District Attorney.”<sup>11</sup> Respondent argues, by implied analogy to cases involving intermediate appeals, that our decision is binding under the law of the case doctrine because the issue here was already presented to and determined on its merits by this court. (See *People v. Shuey* (1975) 13 Cal.3d 835, 842, disapproved on another point in *People v. Bennett* (1998) 17 Cal.4th 373, 389, fn. 4; *Price v. Civil Service Com.* (1980) 26 Cal.3d 257, 267, fn. 5.)

Appellant does not question the applicability of the law of the case doctrine. Thus, appellant implicitly concedes that by his February 27, 2002 writ petition he thoroughly presented the issues regarding the suppression and destruction of material evidence in this case and thoroughly criticized the prosecutor for his alleged complicity in failing to turn over this information to the defense. Instead, relying on *People v. Mattson* (1990) 50 Cal.3d 826, 852 (*Mattson*), appellant argues that we should not be bound by our prior decision in the writ proceeding because the law of the case doctrine “controls the outcome *only if* the evidence on retrial or rehearing of an issue is substantially the same as that upon which the appellate ruling was based.” (Italics added; accord, *People v. Barragan* (2004) 32 Cal.4th 236, 246.)

After appellant’s request for writ relief was denied, appellant proceeded to trial with Brown as prosecutor. Defense counsel renewed the recusal motion “with new testimony adding weight to it” after the prosecutor rested his case but before the defense started its case. The renewed recusal motion was based on two pieces of ostensibly new evidence that had developed at trial: 1) The EBRPD’s chief of police, Norman Lopera, testified that he provided the prosecutor with two press releases instead of one; and 2) Elizabeth Wallace, the victim’s stepmother, testified, without impeachment, regarding

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<sup>11</sup> At respondent’s request, this court has granted judicial notice of appellant’s petition in *Johnson v. Superior Court* (A097907), the Attorney General’s opposition, and the minute-order denial of the writ. (Order, April 18, 2002, Kay, P.J.; Reardon, J. and Rivera, J. joined in the decision; Evid. Code, §§ 452, subd. (d), 459, subd. (a); *People v. Preslie* (1977) 70 Cal.App.3d 486, 494-495.)

her conversation with the prosecutor in the fall of 1996 about a third suspect and the victim's possession of unexplained money. Defense counsel argued, "as each piece of new evidence comes, it makes the problem and the unfairness to Lamont Johnson greater. And that is why we are once again raising it." In denying the renewed motion to recuse, the trial court did not see that any of the developments at trial "add[ed] anything more to the motion. If there was a problem that exists, it's the same problem that existed from day one here."

Appellant contends that, not only was the evidence at trial different from the evidence before this court in the writ petition, but that it was "distinctly different." Consequently, "under *Mattson* the doctrine of law of the case should not apply." (Underscoring omitted, italics added.) Our review of the record of the writ proceeding reveals that the ostensibly new information was known to the trial court at the time of the first recusal motion, and was before this court in the writ proceeding. Consequently, the evidence presented by Chief Lopera and Elizabeth Wallace at trial was, in all relevant respects, " 'substantially the same as that upon which the appellate ruling was based. . . . ' " (*People v. Barragan, supra*, 32 Cal.4th at p. 246, quoting *Mattson, supra*, 50 Cal.3d at p. 850.) Thus, appellant has failed to show the court abused its discretion in denying his renewed recusal motion because there has been no showing that the "evidence . . . produced at a subsequent trial . . . is 'materially,' 'essentially,' or 'substantially' " different from that reviewed by this court in the writ proceeding. (*Bank of America v. Superior Court* (1990) 220 Cal.App.3d 613, 621, fn. 3.)

### **B. Inconsistent Theories of Prosecution**

Appellant next claims his trial was rendered fundamentally unfair and he was deprived of due process because the prosecution relied upon factually inconsistent and irreconcilable theories of guilt at his trial and at the separate trial of his codefendant, Harrison. Appellant's argument centers on the testimony of Paul Stelly, who first was a

defense witness at codefendant Harrison's trial and then became a prosecution witness at appellant's trial.<sup>12</sup>

During codefendant Harrison's trial, Stelly was called as a witness for the defense to support the theory that appellant acted alone in shooting and robbing Harless, and that any aid provided by Harrison was done under duress. Stelly testified that early in the summer of 1999 he met appellant when they were both incarcerated in the Contra Costa County jail. Stelly sometimes acted as a "jail house lawyer," and appellant sought Stelly's advice about his upcoming trial and the evidence against him. Appellant said that he was being charged with murder and that when he was arrested, he had kicked the murder weapon under the seat of the car in which he was riding. Appellant disclosed that there was another person involved, but appellant admitted that *he* was the one who committed the murder. Appellant expressed the belief that "he shouldn't have to go down by himself" and that his codefendant should take the rap because "his record was pretty clean."

Subsequently, Stelly was transferred to B Module where he met Harrison and realized Harrison was the other person appellant spoke about. Stelly talked to Harrison's investigator, but he never contacted the prosecution or law enforcement with this information.

At codefendant Harrison's trial, the prosecutor attempted to discredit Stelly's testimony through cross-examination by questioning him about his arrest record and about the context in which appellant's statements were supposedly made. In his closing and rebuttal arguments in Harrison's trial, the prosecutor never mentioned Stelly or Stelly's testimony. However, the prosecutor argued that there was no corroboration for Harrison's testimony that appellant was solely responsible for the robbery and murder, thereby implying that Stelly's testimony was not credible.

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<sup>12</sup> On December 1, 2004, this court granted appellant's request for judicial notice of the record in Harrison's appeal, *People v. Harrison*, Case No. A092690 (Contra Costa County Superior Court Case No. 9621954).

After hearing all of the evidence and arguments, the court found Harrison guilty of felony murder under an aiding and abetting theory. At a later stage in the proceedings, the court had an opportunity to explain its view of the evidence, stating “the evidence does not prove to me beyond a reasonable doubt that Mr. Harrison was the actual killer of Mr. Harless, or that he acted with intent to kill Mr. Harless.” The court indicated it reached its verdict “by following an aider and abettor analysis.”

After Harrison was convicted, appellant’s second trial began and the prosecutor sought to present Paul Stelly as its own witness. Appellant filed two pretrial motions with respect to Stelly. In one of the motions, appellant asked for an evidentiary hearing “on the question of prosecutorial inconsistency” and moved to preclude Stelly’s testimony because “in Lemar Harrison’s trial the District Attorney attempted to show that Stelly’s testimony was false.” The other motion sought to introduce the prosecutor’s cross-examination of Stelly at Harrison’s trial. The trial court denied each of appellant’s motions.

During the course of the extensive argument held on the admissibility of Stelly’s testimony<sup>13</sup>, the prosecutor explained that he did not know about Stelly during appellant’s first trial and that he first learned about him when he testified for the defense at Harrison’s trial. Moreover, the court’s analysis of the evidence at Harrison’s trial, finding Harrison guilty as an aider and abettor and exonerating him as the actual shooter, bolstered the prosecution’s theory that appellant was the actual shooter and gave more credence to Stelly’s testimony. The court allowed the prosecution to call Stelly as its own witness, concluding that “it is difficult to see how there can be misconduct under these circumstances.”

During its case-in-chief in appellant’s trial, the prosecution called Stelly. Stelly testified, in conformance with his former testimony at Harrison’s trial, that appellant had

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<sup>13</sup> The record reveals appellant was provided an opportunity for full and fair litigation of his pretrial motions, and we have an adequate record to review. (Compare *People v. Waidla* (2000) 22 Cal.4th 690, 745; *People v. Sakarias* (2000) 22 Cal.4th 596, 635.) Hence, we find the court did not abuse its discretion in failing to hold an “evidentiary hearing” with respect to this claim.

told him that he had acted alone in killing Harless, but that his codefendant Harrison should “take the case” because appellant had a worse record. In closing argument, the prosecutor briefly referred to Stelly’s testimony as “a factor” but not a “crucial factor” in the prosecution’s case against appellant.

Appellant claims that it was an abuse of prosecutorial authority to argue “at codefendant Harrison’s trial that Harrison was the actual killer, just as he argued in appellant’s trial that appellant was the actual killer.” Moreover, in advocating these “irreconcilable theories,” it was an abuse of prosecutorial authority to attempt to undermine Stelly’s testimony in Harrison’s trial and vouch for the truth of Stelly’s testimony in appellant’s trial. Appellant claims that “the inconsistent theories violated appellant’s due process rights . . . and requires dismissal of the charges or reversal of the convictions.”

After appellant’s opening brief was filed, the California Supreme Court decided *In re Sakarias* (2005) 35 Cal.4th 140 (*Sakarias*). *Sakarias* provides an example of the type of case where the prosecutor’s adoption of inconsistent positions in separate trials can rise to the level of a due process violation. In *Sakarias*, the two assailants, Sakarias and Waidla, broke into the victim’s unoccupied residence and waited for her to return. When the victim arrived, they immediately attacked her using a knife and a hatchet. “They bludgeoned her with the blunt end of the hatchet, stabbed her with the knife, and chopped at her with the hatchet blade.” (*Id.* at p. 146.) The victim received five blunt force impacts to her head, four stab wounds to her chest, and three chopping wounds to her upper head. One of these chopping wounds was fatal and was struck with such force that it completely penetrated the victim’s skull. The other two chopping wounds were inflicted after or around the time of death. At some point, the victim was dragged down the hall to a bedroom where her body was later found. (*Ibid.*)

Sakarias told the police he used the knife during the attack but, at Waidla’s direction, chopped the victim’s head twice with the hatchet after she was moved to the bedroom. Waidla gave a statement admitting only one bludgeoning blow with the

hatchet at the outset of the attack and denied any memory of the rest of the attack. (*Sakarias, supra*, 35 Cal.4th at p. 146.)

Thus, the evidence strongly suggested the first and fatal chopping blow with the hatchet was struck by Waidla, while the other two chopping blows were delivered postmortem by Sakarias. (*Sakarias, supra*, 35 Cal.4th at p. 147.) However, at each defendant's trial, the prosecution argued the defendant on trial at the time had inflicted *all* the hatchet chopping wounds, including the fatal one. (*Ibid.*) At Waidla's trial, the prosecutor introduced Waidla's admission that he had initially used the hatchet. Sakarias's statement that he had inflicted the last two hatchet chops in the bedroom was not introduced. (*Ibid.*)

Moreover, in Waidla's trial, the prosecutor introduced the opinion of Dr. James Ribe, the medical examiner, that an abrasion on the victim's lower back, caused by her being dragged to the bedroom, occurred postmortem. Hence, the victim was killed as a result of the initial attack, in which Waidla wielded the hatchet. However, in Sakarias's trial, the prosecution did not introduce Dr. Ribe's opinion about the lower back abrasion. (*Sakarias, supra*, 35 Cal.4th at p. 148.) "Due to this omission, no evidence was before Sakarias's jury that [the victim] was dead by the time Sakarias, as he admitted, struck her with the hatchet in the bedroom." (*Ibid.*) Thus, the prosecutor was able to argue Sakarias delivered all three hatchet blade blows, including the fatal one, in the bedroom. (*Ibid.*)

Given the state of the evidence at each of their trials, "the prosecutor attributed the three hatchet-edge blows to each defendant in turn in order to establish an aggravating circumstance of the crime [citation] on the basis of which the jury was urged to sentence each defendant to death." (*Sakarias, supra*, 35 Cal.4th at p. 160.) This strategy proved successful. Both Waidla and Sakarias were found guilty of first degree murder with special circumstances, and both were sentenced to death. (*Id.* at p. 144.)

The Supreme Court found this "manipulation of the evidence for the purpose of pursuing inconsistent theories establishe[d] the prosecutor's *bad* faith" and violated due process. (*Sakarias, supra*, 35 Cal.4th at p. 162.) The court explained: "[F]undamental fairness does not permit the People, without a good justification, to attribute to two

defendants, in separate trials, a criminal act only one defendant could have committed. By doing so, the state necessarily urges conviction or an increase in culpability in one of the cases on a false factual basis, a result inconsistent with the goal of the criminal trial as a search for truth. At least where, as in *Sakarias*'s case, the change in theories between the two trials is achieved partly through deliberate manipulation of the evidence put before the jury, the use of such inconsistent and irreconcilable theories impermissibly undermines the reliability of the convictions or sentences thereby obtained.” (*Id.* at pp. 155-156.)

Relying on *Sakarias*, appellant argues that the prosecutor's conduct in this case also violated fundamental fairness because the prosecutor “use[d] irreconcilable theories, i.e., in the first trial, that codefendant Harrison was the shooter, and in the second trial, that appellant was the shooter.” Appellant also claims the prosecutor presented inconsistent evidence because “in the first trial the defense presented Stelly's testimony, and in appellant's case the prosecutor presented it.” Appellant further claims, “[t]here was no good faith justification for this inconsistency, and thus, under *Sakarias*, the inconsistency amounts to a due process violation.”

In making this argument, we believe appellant overstates the holding in *Sakarias*. In *Sakarias* the prosecution manipulated the available evidence to the detriment of whichever defendant was on trial in order to secure findings that each defendant was death-eligible. Thus, it was not just the prosecution arguing inconsistent theories based on the same evidence, but presenting different evidence in the separate trials to support different underlying theories to the significant prejudice of the defendants. It is this type of inconsistency that renders a trial fundamentally unfair, thus violating due process “because in those circumstances the state has necessarily convicted or sentenced a person on a false factual basis.” (*Sakarias, supra*, 35 Cal.4th at p. 164.)

In our case, there was no concealment and deception practiced upon the jury, as there was by the *Sakarias* prosecutor. The evidence presented at the two trials, including Stelly's testimony, was basically the same. Also, here the prosecutor only presented the evidence in appellant's second trial, while the defense presented it in the Harrison trial.

While *Sakarias* was the type of case “where the probable truth of the situation can be determined” from the physical evidence, on the record before us, the prosecutor had no way of knowing which version of the facts was true or false as there were several possible scenarios supported by reasonable inferences from the evidence. (*Sakarias, supra*, 35 Cal.4th at p. 164.) Consequently, as distinguished from *Sakarias*, appellant cannot argue that any of the prosecutor’s evidence or argument in his trial was based on a demonstrably false premise.

Also, unlike *Sakarias*, no mutually inconsistent, irreconcilable theories were used to convict appellant and his codefendant. The result in Harrison’s trial was predicated on the finding that appellant fired the fatal shot, so the prosecutor’s theory of the same crime in appellant’s subsequent trial, and the use of Stelly’s testimony to establish appellant was the shooter, was totally consistent with the result of his codefendant’s trial. In other words, there was no “ ‘flip flopping of theories of the offense [which] was inherently unfair’ . . . .” (*Sakarias, supra*, 35 Cal.4th at p. 156, quoting *Drake v. Kemp* (11th Cir. 1985) 762 F.2d 1449, 1479, conc. opn. of Clark, J.)

Significantly, the *Sakarias* court was careful to distinguish the facts in its case from those “in which the prosecutor’s theories were held fundamentally consistent because any variation did not concern a fact used to convict the defendant or increase his or her punishment. [Citation.]” (*Sakarias, supra*, 35 Cal.4th at p. 161, fn. omitted.) As an example of the type of case where the prosecutor’s use of inconsistent theories was not improper because it did not effect the outcome of the trials, the *Sakarias* court cited *Nichols v. Scott* (5th Cir. 1995) 69 F.3d 1255 (*Nichols*), a case remarkably like our own. (*Sakarias, supra*, at p. 161, fn. 3.) In *Nichols*, the evidence showed that both defendants were acting together to commit an armed robbery, that both fired at the victim, that one of these shots was fatal, but it was not clearly established which defendant fired the fatal shot. (*Nichols, supra*, at p. 1271.) The court found that where the facts support the conclusion that either defendant could have fired the fatal shot, the prosecutor did not violate due process by arguing at separate trials that the man on trial was the one responsible. The court reasoned that the two theories advanced by the prosecution were

not inconsistent because both defendants could have been convicted under the felony-murder rule. (*Id.* at pp. 1270-1271.)<sup>14</sup>

In seeking a murder conviction at the separate trials, the prosecutor proceeded not only on the theory that each defendant was the actual shooter, but also on theories of liability that implicated both men no matter who pulled the trigger, such as felony murder based on being an aider and abettor to robbery, and murder in furtherance of a conspiracy. Consequently, like *Nichols*, the core issue at each defendant's trial was *not* the identity of the shooter, and none of the differences in the two trials go to the prosecution's underlying theory of the case—which was that appellant and Harrison committed the murder and robbery together and that no matter who fired the fatal shots, they were equally culpable.

We view the situation profiled in *Sakarias* as an exception to the right of the prosecution to rely on alternate theories in criminal prosecutions, even though the theories might appear inconsistent, so long as the theories are supported by consistent underlying facts and do not produce unfair results. (See, e.g., *People v. Watts* (1999) 76 Cal.App.4th 1250, 1260-1261 [no due process violation where there was no evidence the prosecutor manufactured or manipulated the evidence even though the prosecutor secured

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<sup>14</sup> Other authorities, besides *Nichols*, have found inconsistencies in the state's case against two defendants at separate trials did not violate constitutional principles in cases similar to the one before us, in which the evidence is not clear concerning which of two persons is the active perpetrator of the crime and which of them is an aider and abettor. (See *Bradshaw v. Stumpf* (2005) 545 U.S. \_\_\_, 125 S.Ct. 2398, 2407-2408, 162 L.Ed.2d 143 [holding that where the "precise identity of the triggerman" was "immaterial" to petitioner's conviction for aggravated murder, the Court of Appeals erred in holding that prosecutorial inconsistencies between petitioner's case and a second man involved required voiding petitioner's guilty plea]; *U.S. v. Paul* (8th Cir. 2000) 217 F.3d 989, 998-999 ["When it cannot be determined which of two defendants' guns caused a fatal wound and either defendant could have been convicted under either theory, the prosecutor's argument at both trials that the defendant on trial pulled the trigger is not factually inconsistent."]; *Parker v. Singletary* (11th Cir. 1992) 974 F.2d 1562, 1578 ["Given the uncertainty of the evidence, it was proper for the prosecutors in the other co-defendants' cases to argue alternate theories as to the facts of the murder. The issue of whether the particular defendant on trial physically committed the murder was an appropriate question for each of the co-defendants' juries."].)

identical convictions in separate trials for crimes that could only have been committed by one person].) Given this distinction, in the circumstances presented in this case, we find no due process violation.

Appellant next claims that even if due process “did not prevent the prosecutor from switching his position as to who was the actual shooter in this case, appellant’s Sixth and Fourteenth Amendment right to defend and fundamental principles of fairness required that the jury knew that the prosecutor at one time believed something different from what he was currently arguing.” (Fn. and bolding omitted.) Accordingly, appellant believes that, under the evidentiary rule which allows use of admissions by a party-opponent (Evid. Code, § 1220), he should have been allowed to: 1) introduce the prosecutor’s cross-examination of Stelly from Harrison’s trial; and 2) make the jury aware of the prosecutor’s closing argument in Harrison’s trial in which he urged the jury to find Harrison was the shooter.

The trial court here did not abuse its discretion in refusing to admit this evidence. In briefing this issue, appellant has failed to cite any California authority that applies the doctrine of party admissions to a prosecutor’s closing argument or cross-examination in a criminal case, and our independent research has failed to uncover any. As appellant points out, a number of cases in federal courts have endorsed the admission of prosecutors’ statements in related cases as party admissions. (See, e.g., *U.S. v. DeLoach* (11th Cir. 1994) 34 F.3d 1001, 1005-1006 (*DeLoach*); *United States v. McKeon* (2d Cir. 1984) 738 F.2d 26, 33 (*McKeon*).) In *McKeon*, the court said that statements of a defendant’s attorney in a criminal case are admissible in a subsequent trial as an admission of a party opponent where they are: 1) “assertions of fact” that are the “equivalent of [a] testimonial statement[] by the [client]”; and 2) “inconsistent with similar assertions in a subsequent trial.” (*McKeon, supra*, 738 F.2d at p. 33; accord, *DeLoach, supra*, 34 F.3d at p. 1005; see also *U.S. v. Salerno* (2d Cir 1991) 937 F.2d 797, 811, rev’d. on other grounds (1992) 505 U.S. 317, 322.)

However, the *McKeon* court carved out an important limitation to admissibility for “[s]peculations of counsel, advocacy as to the credibility of witnesses, arguments as to

weaknesses in the [opponent's] case or invitations to a jury to draw certain inferences . . . ." (*McKeon, supra*, 738 F.2d at p. 33.) The court concluded that these types of statements were not statements of fact equivalent to testimonial statements by the client but instead was advocacy regarding witness credibility and inferences to be drawn from the evidence. *McKeon* cautioned against treating statements made during prosecutorial advocacy as admissions against the government. "The prosecutor, after all, [is] neither a participant nor a witness, and has no knowledge of the facts other than those gleaned from the witnesses and other available evidence. Thus, the prosecutor's argument is not that a particular set of facts is the true set of facts; but that the *evidence shows* that a particular set of facts is the true set of facts." (*People v. Watts, supra*, 76 Cal.App.4th at p. 1263.)

Consequently, we believe the trial judge did not abuse his discretion in ruling the prosecutor's statements during cross-examination and closing argument inadmissible. During these portions of Harrison's trial, the prosecutor was engaged in "advocacy as to the credibility of witnesses," and invited the "jury to draw certain inferences," two circumstances under which *McKeon* expressly stated an attorney's comments should not be admissible in a subsequent, related proceeding. (*McKeon, supra*, 738 F.2d at p. 33; see, e.g., *DeLoach, supra*, 34 F.3d at pp. 1005-1006 [affirming a lower court's decision to exclude statements made by an attorney during closing arguments]; *People v. Cruz* (Ill. 1994) 643 N.E.2d. 636, 664-665 [upholding a lower court's decision that prevented the defense from introducing the prosecution's strategy in an earlier related trial because of competing policy concerns]; *People v. Morrison* (Ill. App. Ct. 1988) 532 N.E.2d 1077, 1088 [refusing to admit the prosecutor's closing arguments in a codefendant's trial].)

## **C. Admissibility of Evidence**

### ***I. Overview***

Appellant alleges numerous errors in the court's admission of evidence. First, appellant claims the court erred in admitting the testimony of a gang expert because "this crime was not gang-related" and the court's ruling "allowed the prosecution to inject the prejudicial specter of a gang killing into this case." Next, he argues the court abused its

discretion in allowing the prosecutor to present the results of gunshot residue testing on appellant's clothing. Lastly, he claims the court erred in allowing the prosecutor to impeach appellant's testimony with evidence of an escape attempt during which appellant was quoted as saying he would have "to kill" a guard. Appellant argues that the cumulative effect of these trial errors deprived him of his right to have a fair trial and affected the verdict. We disagree.

We start with the proposition that "[a] trial court is vested with wide discretion in deciding the relevancy of evidence. [Citations.] Further, it is the exclusive province of the trial court to determine whether the probative value of the evidence outweighs its possible prejudicial effect. [Citation.] On appeal, the court's exercise of such discretion will not be disturbed absent a clear showing of abuse. [Citations.]" (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 402; accord, *People v. Mobley* (1999) 72 Cal.App.4th 761, 792-793.)

"When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. [Citation.]" (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) "[D]iscretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]" (*Ibid.*; see also *People v. Feaster* (2002) 102 Cal.App.4th 1084, 1091-1092 [appellate courts will uphold the exercise of discretion even if another court might have ruled otherwise].)

## **2. Gang Evidence**

Appellant contends there was no independent evidence linking the robbery/murder to gang activity, so that testimony by a gang expert that the AKP street gang, of which appellant was a member, had been involved in prior robberies, shootings, and marijuana sales, was flatly inadmissible, and amounted to prohibited evidence of criminal disposition. Appellant further asserts that, even if AKP evidence was relevant, its probative value was minimal in relation to its prejudicial effect. (Evid. Code, § 352.)

The prosecution was allowed to call Sue Ellen Todd, a former Hercules police officer, to testify about the AKP and its criminal activities.<sup>15</sup> Todd had spent hundreds of hours investigating the AKP, including investigating crimes committed by AKP members. She also testified she had come into contact with AKP members over 50 times.<sup>16</sup> Todd was allowed to testify that appellant and Harrison were members of the AKP at the time of the crime and that the AKP had been involved in prior robberies, shootings, carjackings and marijuana sales.<sup>17</sup>

Over appellant's objection, the court found that the above information was relevant on the question of identity. The court reasoned that since identity was a disputed issue, evidence of appellant's AKP membership, along with evidence of AKP activities that bore some relationship to the charged crimes, tended to show that appellant, as opposed to a third party not having any ties to the AKP, was one of the perpetrators. Specifically, the court observed that the gang evidence was relevant "to show . . . that this crime, the instant crime has all the earmarks of having been committed by someone involved with the AKP."

Evidence of a defendant's character is generally inadmissible to prove his or her conduct on a specific occasion. (Evid. Code, § 1101, subd. (a); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393; *People v. Kipp* (1998) 18 Cal.4th 349, 369.) Gang evidence is therefore inadmissible if introduced only to "show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged

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<sup>15</sup> Because gang membership, activities, dynamics and motivations are beyond the common experience and knowledge of jurors, gang evidence is a proper subject for expert testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.)

<sup>16</sup> Despite appellant's argument to the contrary, Todd's testimony was based on reliable evidence such as Todd's " 'personal observations of and discussions with gang members as well as information from other officers and the department's files.' [Citation.]" (*People v. Olquin* (1994) 31 Cal.App.4th 1355, 1370.)

<sup>17</sup> We must emphasize here that appellant does not claim that the prosecution revealed appellant's gang affiliation through Todd's testimony. Other witnesses had already testified that appellant was an AKP member, and, as appellant acknowledges, made Todd's testimony on this point cumulative.

offense. [Citations.]” (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449 (*Sanchez*).) However, it is well settled that gang evidence is admissible if it is logically relevant to some material issue in the case, such as identity or motive, and is not more prejudicial than probative. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194 (*Carter*); *People v. Ochoa* (2001) 26 Cal.4th 398, 438-439; *People v. Williams* (1997) 16 Cal.4th 153, 193 (*Williams*).) California courts routinely admit gang evidence “when the very reason for the crime, usually murder, is gang related. [Citations.]” (*Sanchez, supra*, 58 Cal.App.4th at p. 1449.)

Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. (*Williams, supra*, 16 Cal.4th at p. 193; *Carter, supra*, 30 Cal.4th at p. 1194; *People v. Gurule* (2002) 28 Cal.4th 557, 653.) Trial courts therefore should “carefully scrutinize such evidence” (*Williams, supra*, 16 Cal.4th at p. 193) and exclude it if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. (Evid. Code, § 352.)

Appellant claims that “there was no evidentiary link from the facts of this case to gangs—other than the expert’s testimony . . . .” Thus, he claims admission of the challenged evidence contravened Evidence Code sections 1101, subdivision (a) and 352. (See *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 343-344 [nothing to indicate offense was gang-related].)

To the contrary, evidence about appellant’s gang affiliation, as well as the AKP’s activities, was inextricably intertwined with the circumstances of the robbery/murder and was crucial to the jury’s understanding of the case. It was the prosecutor’s theory that the robbery-murder “was a gang-related offense. It was done for the benefit of the gang.” There was evidence to support this theory. Appellant and Harrison knew the victim, Harless, through the AKP, and Harless had provided gang members with marijuana. When in the company of other AKP members, appellant had mentioned, on more than one occasion, that they should rob Harless. Appellant and Harrison met at AKP member Wada’s house both before and after the robbery/murder. After Harless was killed, fellow

AKP members ended up with a large quantity of marijuana, some of which was sold. As the trial court put it, “we have the booty in the hands of members of the AKP.”

Thus, there was a sufficient connection between appellant’s gang affiliation and the robbery-murder to admit Todd’s expert testimony. Moreover, Todd’s testimony about gang dynamics and interpersonal loyalties was relevant to the assessment of bias and credibility of several witnesses who identified themselves as gang members. (See *People v. Ruiz* (1998) 62 Cal.App.4th 234, 240-241; *Sanchez, supra*, 58 Cal.App.4th at pp. 1449-1450; *People v. Maestas* (1993) 20 Cal.App.4th 1482.)

Yet, appellant argues the trial court abused its discretion in admitting certain gang-expert testimony, citing *People v. Killebrew* (2002) 103 Cal.App.4th 644. This case is distinguishable. In *Killebrew*, the gang evidence “was the only evidence offered by the People to establish the elements of the crime.” (*Id.* at p. 658.) As such, it was the type of evidence that “did nothing more than inform the jury how [the expert] believed the case should be decided. It was an improper opinion on the ultimate issue and should have been excluded. [Citation.]” (*Ibid.*) That is not the case here. The gang expert did not testify that appellant was the shooter or was guilty of murder. She did not offer opinions regarding appellant’s truthfulness or how the case ought to be decided. (*Id.* at p. 651, fn. 6.) She did not testify that appellant had specific knowledge or acted with a specific intent. (*Id.* at p. 658.) Todd was only allowed to testify in general terms that the AKP was a criminal street gang that engaged in certain kinds of criminal behavior and to identify members of that gang.

### **3. *Gunshot Residue Evidence***

Appellant’s next evidentiary claim is that the trial court abused its discretion in allowing the prosecution to introduce evidence establishing that one particle of gunshot residue was found on the right cuff of appellant’s shirt. This evidence was admitted, over appellant’s objection, in rebuttal to appellant’s testimony that he was nowhere near the gun when Harrison fired it, killing Harless. Appellant claims that “[w]hat the evidence tended to prove was that appellant was the shooter, and thus was a material part of the prosecution’s case that should have been introduced in the case-in-chief.”

In making this argument, appellant principally relies upon *People v. Carter* (1957) 48 Cal.2d 737. In that case, our Supreme Court stated “proper rebuttal evidence does not include a material part of the case in the prosecution’s possession that tends to establish the defendant’s commission of the crime. It is restricted to evidence made necessary by the defendant’s case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt. [Citations.]” (*Id.* at pp. 753-754.) Restrictions are imposed on rebuttal evidence to: 1) ensure the presentation of evidence is orderly and avoids confusion of the jury; 2) prevent the prosecution from unduly emphasizing the importance of certain evidence by introducing it at the end of the trial; and 3) avoid “unfair surprise” to the defendant from confrontation with crucial evidence late in the trial. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1211; *People v. Carter*, *supra*, 48 Cal.2d at pp. 753-754.)

The trial court did not abuse its discretion in allowing the prosecution to introduce the gun residue evidence on rebuttal despite appellant’s contentions that the prosecution could have presented the evidence as part of its case-in-chief. The prosecutor explained that he did not introduce the gunshot residue evidence in his case-in-chief because he believed the evidence added very little to the prosecution’s case. Gunshot residue was described as being very fragile and falling off “like pepper.” Consequently, it may be deposited in many ways, and is easily transferred from item to item. Originally, the prosecutor did not feel the gunshot residue evidence was very important because there were too many ways the defense could explain away this evidence. Its probative value was diminished because appellant admitted being at the scene at the time of the shooting, and the evidence showed he was in possession of the murder weapon after Harless was killed. Accordingly, while the gunshot residue evidence could have been presented as part of the prosecution’s case-in-chief, there was no compelling reason for the prosecution to have done so. (See *People v. Carrera* (1989) 49 Cal.3d 291, 322-323.)

The evidentiary equation changed when appellant took the stand and testified that he was not in close proximity to Harrison when he shot Harless. After presentation of this evidence, the prosecution could reasonably conclude the gunshot residue evidence

increased in probative value because it tended to impeach appellant's testimony that he was not in close proximity to the shooter.

Thus, the trial court did not abuse its discretion when it permitted the prosecution to use the gunshot residue evidence in rebuttal, even though it was known to the prosecution before trial and could have been used during the prosecution's case-in-chief. "Testimony that repeats or fortifies a part of the prosecution's case that has been impeached by defense evidence may properly be admitted in rebuttal. [Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1199.) Moreover, when all of the evidence is taken into account, the gunshot residue evidence was insignificant when compared to the other evidence establishing appellant's guilt. Therefore, the prosecutor did not "sandbag" appellant by intentionally holding back crucial evidence more appropriately presented in its case-in-chief in an effort to give that evidence greater emphasis. (*People v. Carter, supra*, 48 Cal.2d at pp. 753-754; accord, *People v. Carrera, supra*, 49 Cal.3d at pp. 322-323.) On this record, we find no abuse of discretion in permitting the rebuttal testimony.

#### ***4. Escape Attempt***

Appellant contends that his federal constitutional due process rights were violated by the erroneous admission into evidence, for impeachment purposes, of irrelevant and prejudicial facts relating to his recent escape attempt, which had not yet resulted in a conviction but for which charges were pending at the time of trial. Appellant claims that "[b]ecause the escape attempt evidence as admitted included a threat or statement of intent to kill" one of the correctional officers, it was error to admit it because "its probative value as to appellant's credibility was slight and its prejudicial impact as to appellant's character for violence was great."

Prior to appellant testifying, the trial court ruled that he could be impeached with two prior bad acts—a 1994 attempted carjacking, introduced through stipulation<sup>18</sup> and a 1999 escape attempt after the guilty verdict in the first trial, introduced through live

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<sup>18</sup> The following stipulation was read to the jury: "On January 22, 1994, [appellant] was involved in an attempted carjacking; that is, he and other individuals, through force or fear, removed a woman from her vehicle and attempted to drive it away."

testimony. In accordance with the court's ruling, after appellant testified, the prosecution presented the testimony of Robert Croswell, a guard at the Martinez Detention Facility. Croswell testified that on June 4, 1999, at about 9:15 p.m., he was checking appellant's cell, which he shared with another inmate. Croswell noticed that the metal screen that covered the window had been peeled back, and there was almost enough room for a person to climb out.

Croswell exited the cell and attempted to close the door, but appellant stuck his foot and hand in the doorway so he could not shut it. Croswell decided he needed assistance, and he started to go down the stairs to find his partner. Appellant and the other inmate followed him, even though Croswell ordered them to return to their cell. When Croswell reached the deputy station and picked up a telephone, appellant said, "Don't make that call." As Croswell continued dialing, appellant said, "Now it's on. Now, I got to kill you." Croswell took off running and appellant began chasing Croswell. Croswell threw a chair down between him and appellant in order to get away. Correctional personnel arrived and wrestled appellant to the ground.

On appeal, appellant resurrects the arguments he made below, contending it was improper to permit impeachment with evidence of the underlying facts of the escape attempt which had not yet resulted in a conviction. He contends that the trial court abused its discretion by not requiring, pursuant to Evidence Code section 352, that the inquiry be "sanitize[d]" according to a proposed stipulation that would have outlined the basic facts of the escape attempt for the jury without the jury hearing the "more dramatic" testimony of the guard whose life was threatened by appellant.<sup>19</sup>

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<sup>19</sup> The proposed stipulation as to the escape attempt was as follows: "On [date], Lamont Johnson attempted to escape from the Martinez detention facility. A correctional officer named Robert Croswell ordered him to remain in his cell. Lamont Johnson did not, [and] instead followed the guard down the stairs to the guard station. When the guard attempted to use the phone to call for assistance, Lamont Johnson prevented him from doing so. [¶] Lamont Johnson said, . . . 'You shouldn't have done that. Now I'm going to have to kill you.' [¶] He then chased the guard around the module and up a flight of stairs. Lamont Johnson was shortly thereafter returned to custody status."

In *People v. Wheeler* (1992) 4 Cal.4th 284 (*Wheeler*), our Supreme Court held that Proposition 8's "Truth-in-Evidence" amendment to the California Constitution, "makes immoral conduct admissible for impeachment whether or not it produced any conviction, felony or misdemeanor." (*Id.* at p. 297, fn. 7.) The past misconduct must manifest the actor's moral turpitude, defined as "moral depravity." (*Id.* at p. 295.) The court reasoned that "[m]isconduct involving moral turpitude may suggest a willingness to lie [citations], and this inference is not limited to conduct which resulted in a felony conviction." (*Id.* at pp. 295-296.) *Wheeler* explained that "impeaching misconduct now may, and sometimes must, be proven by direct evidence of the acts committed. These acts might not even constitute criminal offenses. Under such circumstances, fairness, efficiency, and moral turpitude become more complicated issues." (*Id.* at p. 297, fn. 7.) The *Wheeler* court held that evidence of conduct is admissible if it has a logical bearing on the veracity of a witness in a criminal proceeding, subject to the trial court's discretion to exclude evidence where the probative value is substantially outweighed by its potential for prejudice, confusion, or undue consumption of time. (Evid. Code, § 352.) (*Id.* at pp. 295-296.)

Consequently, as our Supreme Court later clarified, " '[w]hether the trial court admits evidence of past misconduct should be determined solely on the basis that that conduct evinces moral turpitude. The label is not important [i.e., what type of statutorily defined offense, if any, the conduct constitutes]—the conduct is.' . . ." (*People v. Ayala* (2000) 23 Cal.4th 225, 273 (*Ayala*), quoting *People v. Lepolo* (1997) 55 Cal.App.4th 85, 89-90 (*Lepolo*).)<sup>20</sup>

Appellant does not dispute that the conduct revealed to the jury through Crosswell's impeachment testimony involved moral turpitude, and, therefore, evidence of such conduct would, in general, be relevant to his credibility. (*People v. Waldecker*

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<sup>20</sup> This is different from impeaching a witness with the fact the witness was convicted of a felony. (Evid. Code, § 788.) There, the "least adjudicated elements of the conviction [must] necessarily involve moral turpitude." (*People v. Castro* (1985) 38 Cal.3d 301, 317 (*Castro*).) The least-adjudicated-elements test does not apply to the admission of evidence of the circumstances of prior criminal conduct under *Wheeler*, which does not involve convictions, but instead involves conduct. (*Lepolo, supra*, 55 Cal.App.4th at pp. 89-90.)

(1987) 195 Cal.App.3d 1152, 1158 [escape is a crime of moral turpitude, even when it does not involve violence]; *People v. Williams* (1985) 169 Cal.App.3d 951, 957 [“battery by a jail inmate upon a noninmate, a crime of violence, demonstrates ‘a general readiness to do evil,’ and thus moral turpitude”]; *People v. Williams* (1999) 72 Cal.App.4th 1460, 1465 [“cases involving the threat or use of force against peace officers, are held to be crimes of moral turpitude”]; *Lepolo, supra*, 55 Cal.App.4th at p. 91 [brandishing a machete and threatening an officer involves moral turpitude]; *People v. Lindsay* (1989) 209 Cal.App.3d 849, 857 [battery on a peace officer is a crime of moral turpitude].) Accordingly, appellant’s escape attempt and threat to kill a correctional officer was a proper subject of cross-examination, as tending to impeach appellant’s credibility.

The inquiry does not stop, however, simply because the conduct involves moral turpitude. (*Wheeler, supra*, 4 Cal.4th at p. 296.) Indeed, the court should evaluate unadjudicated misconduct evidence with particular care to determine whether its admission might involve undue time or confusion, or prejudice that outweighs its probative value, making it a less forceful indicator of immoral character or dishonesty. (*Id.* at pp. 296-297.)

Thus, as defined by appellant, the issue boils down to “whether it was proper to allow impeachment of appellant with the underlying facts of unadjudicated felonious conduct” under Evidence Code section 352. We emphasize again that we will not disturb a trial court’s ruling “*except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]” (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

The record shows the trial court carefully considered exclusion of live testimony about the escape attempt under Evidence Code section 352, but concluded in its discretion that the evidence was highly probative as to appellant’s credibility and was not outweighed by a danger of undue prejudice. The court reasoned, “this escape assault evidence is extremely probative on the issue of—credibility, as I see it. . . . The fact that a person will resort to violence, especially violence directed against a law enforcement individual representing the law, in an effort to escape jail, supports an inference that such

a person would easily violate the testimonial oath in order to escape the conviction. Very strong probative, in my view, evidence on credibility.” The court further held “that the full impact of the escape assault and its impact on credibility is [*sic*] best relayed by the witness involved, Mr. Croswell testifying . . . . That gives all the nuances, all the details involved from which the jury can derive about its evil nature as it reflects on credibility.”

We conclude the trial court did not exceed the bounds of reason, but instead, reasonably concluded that in such circumstances that evidence properly relating to appellant’s credibility was highly probative and essential to the jury’s consideration of the case, and not outweighed by a substantial danger that the jury would consider it for improper purposes. (See *Lepolo, supra*, 55 Cal.App.4th at pp. 88, 91-92 [facts of unadjudicated incident during which defendant raised a machete over his head, pointed to a police officer, and said “I want that officer” properly admitted as impeachment evidence in subsequent trial].)

We are not persuaded to the contrary by appellant’s citations to *Ayala, supra*, 23 Cal.4th at pages 300-301. *Ayala* did not concern whether a court abused its discretion by *allowing* impeachment of a criminal defendant through the admission of evidence of past misconduct; but instead addressed whether a trial court abused its discretion by *excluding*, during a capital trial penalty phase, evidence that a prosecution witness had committed murder and assaults in prison. The California Supreme Court found that the trial court had not abused its discretion by excluding this evidence under Evidence Code section 352 as that statute “ ‘empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.’ . . .” (*Id.* at p. 301, quoting *Wheeler, supra*, 4 Cal.4th at p. 296.) Thus, the situations presented in *Ayala* and in the present case are not at all similar.

In any event, assuming arguendo the court erred in admitting this evidence, the error was manifestly harmless. By the time Croswell testified, the fact appellant had attempted to escape from jail was already before the jury in the form of a stipulation for

purposes of showing consciousness of guilt and therefore, that information would not have come as a surprise to the jury.<sup>21</sup>

Additionally, through the introduction of facts underlying the escape, appellant was given an opportunity to explain his actions. Counsel argued that just two months before the escape attempt, appellant had found out about law enforcement's discovery violations in this case, and appellant was acting out of frustration and anger. Consequently, appellant was given wide latitude in countering adverse inferences or impressions that might arise from his escape attempt.

Lastly, to the extent appellant argues that the "prejudicial impact as to appellant's character for violence was great," the harm was already done. As noted, in addition to evidence regarding appellant's escape attempt, the trial court allowed the prosecution to impeach appellant's testimony with his stipulation that he was involved in a violent carjacking. We therefore conclude that there is no reasonable likelihood, even if the evidence of appellant's escape attempt was omitted, that it would have resulted in a more favorable outcome at trial. (*Castro, supra*, 38 Cal.3d at pp. 317-319 [improper impeachment with drug possession conviction held harmless, where the defendant was properly impeached with another felony conviction].)

#### **D. Prosecutor's Misstatement of the Law in Closing Argument**

Appellant claims the prosecutor engaged in prejudicial misconduct during final argument by misstating the law on the felony murder special circumstance allegation, thereby violating his rights to a fair trial and to due process.

In order to support a finding of special circumstances murder based on murder committed in the course of robbery against an aider and abettor who is not the actual killer, the prosecution must show that the aider and abettor had intent to kill or acted with reckless indifference to human life while acting as a *major participant* in the underlying

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<sup>21</sup> The parties agreed to the following stipulation, which was presented as part of the prosecution's case-in-chief to show consciousness of guilt: "On June 4th, 1999, Lamont Johnson attempted to escape from the Contra Costa County jail main detention facility."

felony. (§ 190.2, subs. (c), (d);<sup>22</sup> see *Tison v. Arizona* (1987) 481 U.S. 137, 152, 158 [“major participation in the felony committed, combined with reckless indifference to human life,” is sufficient to satisfy constitutional requirements for imposition of a capital sentence.].)

Here, the prosecution’s theory was that if not the actual killer, appellant was a major participant who acted with reckless indifference to human life. In accordance with this theory, the jury was instructed on appellant’s liability for first degree murder as an aider and abettor under the felony-murder rule, and was instructed that a defendant who is not the actual killer may be found liable for the special circumstance of felony murder if he acted “with reckless indifference to human life and *as a major participant* aided, abetted, counseled, commanded, induced, solicited, requested or assisted in the commission of the crime of robbery which resulted in the death of a human being.” (Italics added.) However, the jury was given no definitional instruction for “major participant.” In *People v. Proby* (1998) 60 Cal.App.4th 922, the court held that “major participant” has no peculiar meaning in the law and is thus within the common understanding of reasonable people. (*Id.* at p. 933.) Therefore, the phrase need not be defined further for the jury. (*Id.* at p. 934.)

The prosecutor’s closing argument advanced the theory, set out in the instructions, that if the jury did not find appellant was the shooter, he was nevertheless liable on the

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<sup>22</sup> Section 190.2 provides in part: “(c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) [e.g., murder during commission of robbery] has been found to be true under Section 190.4.

“(d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4. . . .”

theory that he aided and abetted the Harless robbery as a major participant with reckless indifference to human life. The prosecutor argued to the jury, “What constitutes a major participant? Planning, with the intent to facilitate the commission of the crime, participating in conduct integral to, for the purpose of facilitating the commission of the crime. All those things act as major participant.” Defense counsel objected that this argument misstated the law, but the objection was overruled.

Appellant argues that the prosecutor’s argument misstated the law because a finding of major participation requires “more than a simple aider and abettor” and the prosecutor’s misleading “premise seems to be that if one is an aider and abettor he is necessarily a ‘major participant.’ ” According to respondent, the prosecutor made no misstatement of law but was “merely arguing . . . the particular facts” that showed appellant to be a major participant.

We agree with respondent. The prosecutor’s remarks, when taken in context, sought to convey that the evidence sufficed for a finding that appellant was a major participant in the Harless robbery, as required for the special circumstance alleged in this case. Indeed, the factors cited by the prosecutor, such as planning the underlying felony and participating in conduct integral to the commission of the felony, are the very factors found by appellate courts to support a finding of major participation. (See, e.g., *People v. Hodgson* (2003) 111 Cal.App.4th 566, 579-580 [defendant held open electric garage gate to facilitate shooter’s escape; he was aware his accomplice had used a gun, the victim was severely injured and unconscious, but he failed to come to her aid and instead facilitated escape]; *People v. Mora* (1995) 39 Cal.App.4th 607, 617 [defendant helped plan robbery, was instrumental in arranging for accomplice to enter the victim’s home with a rifle, did not aid the victim after the shooting but instead carried out the robbery plan and threatened another victim]; *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754-1755 [defendant helped plan the robbery with an accomplice; both men struggled with victim; and the defendant left her to die when his accomplice fatally stabbed her]; *People v. Proby, supra*, 60 Cal.App.4th at p. 930 [defendant provided a gun to the shooter and made no attempt to assist the shooting victim but instead continued looting the safe].) No

doubt, in making the objected-to comments, the prosecutor sought to convey that many of these same factors exist in this case.

Although we have focused on the prosecutor's closing argument, we have not overlooked the presumption that "the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade. [Citation.]" (*People v. Sanchez* (1995) 12 Cal.4th 1, 70.) Here, as appellant concedes, the court's instructions "correctly stated the law." The court also directed the jury: "You must accept and follow the law as I state it to you[,] regardless of whether you agree with the law. If anything concerning the law is said by the attorneys in their argument[s] or at any other time during trial conflicts with my instructions on the law, you must follow my instructions." The jury was also told that "[s]tatements made by the attorneys during the trial are not evidence." Consequently, there is no reasonable likelihood any juror would have applied the prosecutor's comments erroneously. (*People v. Frye* (1998) 18 Cal.4th 894, 970; *People v. Coffman* (2004) 34 Cal.4th 1, 93.)

#### **E. Unanimous Agreement on Theory of Liability**

Appellant next claims the court erroneously instructed the jury that it need not unanimously agree on whether appellant was a direct perpetrator or an aider and abettor.<sup>23</sup> The jury was instructed that as long as they agreed unanimously that appellant was guilty of first degree murder, they did not have to unanimously agree on whether appellant was guilty "of such crime by reason of being the actual perpetrator, aider and abettor or conspirator, or by reason of principles of robbery felony murder." This particular aspect of the instruction was derived from *People v. Santamaria* (1994) 8 Cal.4th 903, in which the Supreme Court said: "Not only is there no unanimity requirement as to the theory of guilt, the individual jurors themselves need not choose among the theories, so long as each is convinced of guilt. Sometimes, as probably occurred here, the jury simply cannot decide beyond a reasonable doubt exactly who did

<sup>23</sup> Respondent claims that appellant made no objection to this instruction below. However, our record review indicates that when asked by the court whether this instruction was a "correct statement on the law," defense counsel replied, "I'm not disagreeing, but I'm not agreeing. I'm not sure."

what. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other.” (*Id.* at p. 919.) The court concluded it would be “absurd . . . to let the defendant go free because each individual juror had a reasonable doubt as to his exact role.” (*Id.* at p. 920, fn. 8; accord, *People v. Maury* (2003) 30 Cal.4th 342, 423; *People v. Majors* (1998) 18 Cal.4th 385, 408 (*Majors*).)

Appellant acknowledges that our Supreme Court has held that jurors need *not* unanimously decide whether a defendant is guilty as a direct perpetrator or as an aider and abettor. Nevertheless, he contends that decisions of the United States Supreme Court in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), “call this rule into question” and require jury unanimity on this issue.

We do not agree. As appellant notes, these cases stand for the proposition that all criminal *charges* must be confirmed by unanimous vote. But none of the cases holds that jurors must unanimously agree on the *theory* underlying the defendant’s guilt. Our Supreme Court has held that under both California and federal law, there is no such requirement. (*People v. Millwee* (1998) 18 Cal.4th 96, 160 [“It is settled, however, that unanimity as to the theory under which a killing is deemed culpable is not compelled as a matter of state or federal law.”]; accord, *Majors, supra*, 18 Cal.4th at p. 408.)

Because *Blakely*, *Apprendi*, and *Ring* do not address the issue, nor lead us to believe the United States Supreme Court would require jury unanimity in this context, we will follow our Supreme Court’s precedent and reject appellant’s assertions to the contrary. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

#### **F. Systematic Exclusion of African-Americans From Venire**

Appellant filed a motion to quash the jury venire on the ground that the Contra Costa County jury selection process does not produce a representative cross-section of jurors in his community, in violation of his state and federal constitutional rights (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16) and in violation of state statutory requirements (Code Civ. Proc., §§ 197-198). He resurrects these claims in this appeal.

The Sixth Amendment and the California Constitution both guarantee an accused the right to trial by a jury drawn from a representative cross-section of the community. (*People v. Bell* (1989) 49 Cal.3d 502, 525 & fn. 10 (*Bell*)). “That guarantee mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community. [Citation.]” (*People v. Horton* (1995) 11 Cal.4th 1068, 1087-1088 (*Horton*)). In challenging a jury venire, the defendant must first establish a prima facie violation of the fair cross-section right. (*Bell, supra*, at p. 525.) If the defendant succeeds in making this prima facie showing, “the burden shifts to the prosecution to provide either a more precise statistical showing that no constitutionally significant disparity exists or a compelling justification for the procedure that has resulted in the disparity in the jury venire. [Citation.]” (*Horton, supra*, at p. 1088.)

“In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” (*Duren v. Missouri* (1979) 439 U.S. 357, 364 (*Duren*); *Bell, supra*, 49 Cal.3d at p. 525.) “A defendant cannot establish a prima facie case of systematic exclusion of a distinctive group merely by presenting statistical evidence that the group is underrepresented in the jury pool, venire, or panel. Rather, the defendant must show that the underrepresentation ‘is the result of an improper feature of the jury selection process.’ [Citations.]” (*People v. Massie* (1998) 19 Cal.4th 550, 580, fn. omitted.)

In denying appellant’s motion to quash the jury, the trial court noted that it had considered the parties’ pleadings, oral arguments, exhibits, and stipulations on this issue. The court found that the first and second prongs of *Duren* had been met, but the “third prong still lacks evidence to support it.” The court explained, “the jury selection process of this county has been the subject of intensive historical review and recent scrutiny, and it has been concluded at every turn that there is no evidence . . . that to the extent that jury

panels are not proportionate to the African-[A]merican population in this county . . . it's the product of systematic action on the part of the county.”<sup>24</sup> Thus, the court concluded appellant had failed to satisfy his burden of showing that the underrepresentation of African-Americans in jury venires in Contra Costa County resulted from a systematic exclusion of this group in the county's selection process.

In *People v. Currie* (2001) 87 Cal.App.4th 225, review denied May 16, 2001 (*Currie*), the court upheld the constitutionality of Contra Costa County's jury selection system because Currie failed to demonstrate that the underrepresentation of African-Americans in the venire was due to the systematic exclusion of this group in the jury-selection process. Appellant concedes that the jury commissioner in his case “summoned jurors for service . . . in substantially the same manner” as in *Currie*, and that he is making essentially the same arguments that were made in that case. Consequently, we conclude Division Five's opinion in *Currie* to be fully dispositive of this issue, and we adopt the following conclusion of this issue as set forth in that opinion: “In the final analysis, appellant has established nothing more than statistical evidence of disparity; he has not associated the underrepresentation of African-Americans with any constitutionally impermissible feature of the Contra Costa County jury selection process. The procedures employed by the county to summon and select persons for jury service are, according to the undisputed evidence, entirely race-neutral. The lower court found that the disparity in representation is attributable to the disproportionately high rate of failure to appear by those summoned for service from the Bay Judicial District. . . . [¶] The evidence presented by appellant fails to establish a prima facie case of systematic exclusion of a cognizable class in the jury selection process.” (*Id.* at p. 237.)

Appellant claims the “collective action by county officials” in failing to implement race-conscious practices aimed at correcting the chronic underrepresentation of African-Americans on jury venires in Contra Costa County should be sufficient to establish a

<sup>24</sup> The underrepresentation of African-Americans on the jury venires in Contra Costa County has been the subject of several reported cases. (See, e.g., *People v. Jones* (1984) 151 Cal.App.3d 1029; *People v. Buford* (1982) 132 Cal.App.3d 288; *People v. Black* (1984) 160 Cal.App.3d 480; *People v. Simmons* (1985) 164 Cal.App.3d 1070.)

prima facie case of systematic exclusion. However, our Supreme Court has held that “[s]o long as the state uses criteria that are neutral with respect to the underrepresented group, a defendant cannot satisfy *Duren*’s third prong by showing the state could have adopted other measures to improve further the group’s representation. . . .” (*People v. Ochoa* (2001) 26 Cal.4th 398, 427-428, citing *Currie, supra*, 87 Cal.App.4th at pp. 235-237.) Because appellant failed to present a prima facie case of a constitutional violation, the trial court correctly denied his motion to quash the jury venire.

### **G. Special Circumstance Finding Impermissibly Overbroad**

Appellant next challenges the constitutionality California’s special circumstance statute, set forth in section 190.2, and particularly the felony-murder special circumstance, claiming the statute is overbroad because it “fails to perform the constitutionally required narrowing function, thus rendering his special circumstance finding under that statute invalid.”

Under the black letter principles of the Eighth Amendment, the legislative definitions of offenders eligible for the death penalty must circumscribe the class in a sufficiently objective manner to distinguish it from the remainder for whom death is inappropriate. (*People v. Crittenden* (1994) 9 Cal.4th 83, 154.) Nevertheless, the California Supreme Court has “consistently rejected the claim that the statutory special circumstances, including the felony-murder special circumstance, do not adequately narrow the class of persons subject to the death penalty [or LWOP]. [Citations.]” (*People v. Pollock* (2004) 32 Cal.4th 1153, 1195; *People v. Samuels* (2005) 36 Cal.4th 96, 138.) The court explained in *People v. Anderson* (2001) 25 Cal.4th 543, 601, that the underlying felony murder special circumstance in section 190.2, subdivision (a)(17), does not violate the Eighth Amendment even though it includes unintentional killings within its ambit. (*Id.* at p. 601.) As for the inclusion of accomplices of the actual felony murderer in subdivision (d) of the statute, this provision is constitutionally proportionate under the Eighth Amendment by virtue of its verbatim inclusion of the “ ‘reckless indifference’ ” and “ ‘major participant’ ” criteria of *Tison v. Arizona, supra*, 481 U.S. 137. (*People v. Estrada* (1995) 11 Cal.4th 568, 575.) This court is bound to follow the

California Supreme Court's rulings on this issue. (*Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d at p. 455.)

### H. Sentencing Error

The trial court sentenced appellant to life without possibility of parole for the special circumstance felony-murder with an additional one-year sentence for the arming enhancement. In addition, over appellant's objection, the court imposed a consecutive three-year term for the robbery underlying the felony murder, and a further one-year sentence on the arming enhancements. Appellant claims, "[t]he sentence and enhancement on the robbery count violates Penal Code section 654 and should have been stayed."

Section 654<sup>25</sup> prohibits punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1208 (*Latimer*); *People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*). "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; but see *Latimer, supra*, 5 Cal.4th at pp. 1208-1211.) On the other hand, if the defendant entertained multiple criminal objectives that were independent and not incidental to each other, he or she "may be punished for each statutory violation committed in pursuit of each objective" even though the violations were otherwise part of an indivisible course of conduct. (*Harrison, supra*, 48 Cal.3d at p. 335.) The determination whether facts and circumstances reveal a single intent and objective is generally a factual matter reviewed on appeal for substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) The scope and dimension of section 654

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<sup>25</sup> Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

as applied to undisputed evidence, however, is a legal question. (*Harrison, supra*, 48 Cal.3d at p. 335; *People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5.)

Appellant argues the jury necessarily found the murder was committed in the course of the robbery and that, in light of the felony-murder theory advanced by the prosecution, multiple punishments for the two offenses are impermissible.<sup>26</sup> Respondent insists the intent and objective of the murder and the robbery were separate and distinct and that imposing consecutive terms of imprisonment for the two offenses is not barred by section 654.

We agree with appellant. Because appellant's conviction for first degree murder was grounded on the fact that the murder occurred during the commission of the robbery, section 654 prohibits punishment for both offenses. "The robbery was a necessary ingredient of the first degree murder. Therefore, to punish defendants for the robbery and also for first degree murder would be inflicting double punishment for the same act." (*People v. Magee* (1963) 217 Cal.App.2d 443, 471; accord, *People v. Boyd* (1990) 222 Cal.App.3d 541, 576 ["a felony, here robbery, is a statutorily defined element of the crime of felony murder . . . . The separate sentences violate section 654"]; see *People v. Mulqueen* (1970) 9 Cal.App.3d 532, 540, 547 [defendant could have been convicted of murder on either premeditation and deliberation theory or robbery-murder theory; sentence on underlying robbery had to be stayed because "the act of robbery is the same act which made the homicide first degree murder"]; see also *People v. Wader* (1993) 5 Cal.4th 610, 670 [concluding that the defendant there "was sentenced for robbery . . . and robbery-felony-murder" and that the Fifth Amendment's double jeopardy clause prohibits multiple punishments for the felony murder and the underlying crime of robbery].)

The remaining issue—whether the firearm enhancement under section 12022, subdivision (a)(1) on the robbery count should be stayed—is answered by our decision that the sentence imposed for the robbery conviction must be stayed. An enhancement is

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<sup>26</sup> The jury was allowed to find appellant guilty of first degree murder on a felony-murder theory or, alternatively, on a premeditation and deliberation theory. Nevertheless, by finding the robbery-murder special circumstances to be true, they necessarily found that the felony-murder theory did apply.

properly stayed where the sentence on the count to which it is added is required to be stayed. (*People v. Cole* (1985) 165 Cal.App.3d 41, 53; *People v. Guilford* (1984) 151 Cal.App.3d 406, 411-412.)

**IV.**  
**DISPOSITION**

The judgment is modified pursuant to section 654 to stay the three-year term for the robbery conviction together with the one-year term for the accompanying arming enhancement. In all other respects, the judgment is affirmed. The trial court is directed to amend the abstract of judgment and its minute order so as to reflect this modification and to forward a certified copy of the amended abstract of judgment to the Director of the Department of Corrections. (§§ 1213, 1216.)

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Ruvolo, P.J.

We concur:

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Sepulveda, J.

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Rivera, J.