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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.

DARIO LAFIEL CANNON,

Defendant and Appellant.

A127518

(Alameda County  
Super. Ct. No. 161178)

A jury convicted appellant Dario Lafiel Cannon of first degree murder, assault with a semiautomatic firearm and possession of a firearm by an ex-felon. It also found two enhancement allegations to be true. (Pen. Code,<sup>1</sup> §§ 187, subd. (a), 245, subd. (b); former §§ 12021, subd. (a)(1) [now § 29800, subd. (a)(1)], 12022.5, subd. (a), 12022.53, subd. (d).)<sup>2</sup> Sentenced to 54 years to life in state prison, Cannon appeals. He contends that the trial court erred by (1) denying his motion challenging the prosecutor's discriminatory use of peremptory challenges. He makes three attacks on the testimony of the key prosecution witness, contending that the trial court erred by (2) admitting her testimony, which he reasons was coerced because she was held in custody until she testified against him; (3) denying his motion to reopen evidence to undermine her

<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> These three provisions and section 12022.7, subdivision (a) have been amended, repealed and added since October 2008, when the underlying offenses were committed. The former and current versions of these statutes are substantially the same, for our purposes. (See Stats. 2006, ch. 538, § 526, pp. 4395-4400; Stats. 2008, ch. 599, § 4; Stats. 2010, ch. 711, §§ 5-6, 9, No. 5E Deering's Adv. Legis. Service, pp. 326-329, 437-438, 531-532.)

evidence against him; and (4) denying his motion for new trial to again challenge that testimony. Cannon also (5) criticizes the trial court's admission of opinion testimony about his motive and his guilt and (6) asserts that his trial counsel was ineffective. We affirm the conviction.

## I. FACTS

### A. *Crime and Investigation*

On October 3, 2008, Germaine Galloway was shot multiple times while seated in a parked car on 90th Avenue in Oakland. Sitting beside him, Rhonika "Summer" Johnson was also shot in the leg. Alvin Jackson and Keneth Maxwell had been nearby at the time of the shooting. Galloway's car had a stereo in it with a small television screen and they had been watching a movie. Galloway was hospitalized, gravely wounded.

Adrienne Ard was also seated in the car during the shooting. During the next week, Ard described the shooter to Oakland police in two telephone conversations, naming him as "Dario." In a videotaped statement to police on October 10, 2008, she repeated much of what she had said on the telephone and identified Cannon as the shooter from a photographic lineup. (See pt. III.B., *post.*) A warrant was issued for Cannon's arrest on October 14, 2008, charging him with assault with a deadly weapon.

On October 23, 2008, Galloway died as the result of multiple gunshot wounds. The following day, police took a statement from Rhonika Johnson about the shooting. She could not identify the shooter. In December 2008, Cannon was arrested by Fresno police, who learned of the outstanding Oakland homicide warrant for his arrest. A complaint formally charging Cannon with Galloway's murder and the assault on Johnson was filed in January 2009.

### B. *Pretrial Matters*

At the June 2009 preliminary hearing, Ard denied both witnessing the shooting and reporting the circumstances of it to police. The videotape of her police interview and a transcript of it contradicting her denials were admitted into evidence. Cannon was held over for trial. An information was filed charging him with Galloway's murder, enhanced by allegations of discharge of a firearm and infliction of great bodily injury. He was also

charged with assaulting Johnson with a semiautomatic firearm, enhanced by a firearm use allegation. Finally, he was charged with possession of a firearm by an ex-felon. (§§ 187, subd. (a), 245, subd. (b) 1203.06, subd. (a)(1); former §§ 12021, subd. (a)(1) [now § 29800, subd. (a)(1)], 12022.5, subd. (a), 12022.53, subds. (b)-(d), 12022.7, subd. (a).) In August 2009, Cannon entered a not guilty plea and denied the special allegations.

In October 2009, Ard was arrested as a material witness and was again confronted in court with her October 2008 statement. Before trial, she admitted that she saw Cannon shoot Galloway at least eight times with a gray-colored gun. Ard was held without bail as a material witness from October 9 until November 9, 2009, when she completed her trial testimony.<sup>3</sup>

### C. *Case-in-chief at Trial*

Trial of the prior conviction allegation was bifurcated from trial of the charges. During jury selection, Cannon challenged the prosecution's use of its peremptory challenges, contending that the prosecution acted with discriminatory intent to exclude African-American women from his jury. That motion was denied.

Before the jury, the circumstances of the shooting were put into evidence.<sup>4</sup> The jury learned that Galloway sold crack cocaine near the place where he was shot. There was evidence that the shooter said "Get out [of] the car," and that Galloway told the man to "quit playing" before multiple shots were fired. Eyewitness Alfred Romain identified Cannon to police and again in court as one of a group of men who had been at the scene of the shooting minutes before shots were fired.

Romain appears to have been a credible witness, but he did not witness the shooting itself. Adrienne Ard was the key witness who had told police that she witnessed the shooting, but she was very reluctant to testify. At trial, the jury learned that she was being held in custody as a material witness. When she first testified at trial, she

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<sup>3</sup> See part III.B., *post*, for a fuller discussion of Ard's varying reports about the shooting.

<sup>4</sup> The focus of the trial was on the Galloway shooting. Assault victim Rhonika Johnson did not testify, but there was evidence that she suffered a gunshot wound on the night of the shooting.

repeatedly denied knowing who shot Galloway. The videotape of her October 2008 interview with Oakland police was played for the jury. From it, the jurors learned that she had identified Cannon as shooter. The jury also learned that Ard repeated her identification of Cannon as the man who shot Galloway when he was in court a month before trial.

Ard denied having told Galloway's mother who shot him or offering a description of the shooter to the mother. She testified that she only named the shooter after Galloway's girlfriend—Falisa Fullard—told her who had shot Galloway. The girlfriend described the shooter to Ard, who “kind of agreed” with the description. Ard told the jury that before her October 2008 interview with police, Galloway's mother Fetecia Tokes also told her who had shot Galloway.<sup>5</sup> She testified that the information that she had passed on to police by telephone had been given to her by Tokes and Fullard.<sup>6</sup>

Eventually, Ard testified that she saw Cannon shoot Galloway. She admitted on the stand that she had changed her story about this identification many times. She admitted that she had lied about the shooting many times since that time. She was frightened and did not want to be seen as helping the police. She explained that during a break in the proceedings, the prosecutor told her that if she told the truth, she would be released from custody.<sup>7</sup> Ard interpreted the prosecutor to mean that if Ard testified that Cannon was the shooter, that would be the truth. When asked what she would tell the jury if she were promised that she would be released if she testified that Cannon was not the shooter, Ard admitted that she would have said that. She was eager to be released from custody.

The jury heard other witnesses explain why Ard might have a motive to deny the substance of her October 2008 statement. Witnesses testified that Ard and other possible witnesses received calls from Cannon in October 2008, after Ard made her statement to

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<sup>5</sup> Tokes denied telling Ard that Cannon was the shooter.

<sup>6</sup> Fullard also denied that she told Ard anything about the shooting or the shooter.

<sup>7</sup> Later, the prosecutor's investigator testified that the prosecutor did *not* meet privately with Ard and promise that she would be released if she testified truthfully.

police. In some calls, Cannon merely denied that he had shot Galloway. In others, he threatened his callers. Ard told Galloway's mother—Fetecia Tokes—that she told Cannon that she would not testify against him. Cannon frightened Ard. For her own part, Tokes told the jury that every time she spoke with Ard, the young woman told her a consistent story about witnessing the shooting and describing the shooter.

Alvin Jackson had been interviewed by Oakland police in January 2009. He told the police that the shooter was a light-skinned African-American male. He reviewed a photographic lineup, but could not identify anyone. Six months later at the preliminary hearing, Jackson was unable to identify Cannon as the shooter. At trial, Jackson told the jury that he did not see the shooter well enough to identify him. He testified that he saw the shooting but was unable to even determine the shooter's race. He was impeached with evidence of his earlier statement to police, which included his description of the shooter.

Jackson testified at trial that he did not believe that Cannon looked like the man he described to police. He could not say who was the shooter, because he did not know, having only glanced at the gunman. On cross-examination, Jackson said that he had repeatedly ruled out Cannon as the shooter. He was impeached with his preliminary hearing testimony, when he testified that he was unable to say that Cannon was not the shooter because he did not know who had shot Galloway.

The jury also learned that Hafid "Ali" Kaid had sold an expensive car stereo to Cannon. Later, when Kaid wanted it back, Cannon had refused to return it. A few months before the shooting, Cannon reported that his stereo had been stolen while his vehicle was at a car repair shop. There was evidence that the stereo in Galloway's car was the one that had been stolen from Cannon. The police believed that Kaid and Galloway stole the stereo from Cannon's car a few months before the shooting. To the police, the theft provided a motive for the killing—if Cannon felt "disrespected" by Galloway's theft. Many people in Oakland were killed as a result of "disrespect."

Finally, the prosecution offered evidence that Cannon attempted to evade police at the time of his arrest. Found in Fresno in December 2008 at a residence where suspects

in an unrelated shooting were thought to be located, Cannon initially refused to identify himself to police. When he did give police a name, it was a false one. Only after he was fingerprinted were Fresno police able to determine his true name and to learn that there was a warrant for his arrest for homicide. Oakland police came to Fresno to escort Cannon back to Oakland.

#### *D. Defense Evidence*

The defense strongly suggested that Kaid—not Cannon—was the shooter. Galloway and Kaid had been close friends. A month before Galloway died, they had an argument. They continued to feel animosity toward each other afterward. Kaid came to the hospital soon after Galloway was shot. He had been beaten up. He told Galloway’s mother that she knew who shot Galloway, but he declined to name anyone.

Cannon’s brother Yonus Davis provided his brother with an alibi, telling the jury that Cannon was in San Jose with him on the night of the Oakland shooting. Telephone calls recorded while Cannon was in jail awaiting trial tended to undermine his alibi. In those calls, Cannon and his callers stated that Davis was in Hawaii on the night of the shooting; that Davis’s girlfriend was at home that night; that Davis’s girlfriend did not recall where Cannon was on that night and was reluctant to testify otherwise; that Davis only recalled seeing Cannon the day after the shooting; and that the girlfriend could be provided with key dates so that she could “start to remember.” Five jailhouse telephone calls played in court tended to impeach Cannon’s alibi from Davis.

Testifying for the defense, eyewitness Kenneth Maxwell told the jury that he did not get a good look at the shooter. He knew Cannon well and did not believe that he was the gunman. Maxwell admitted that he could not say that Cannon was *not* the gunman. After he opined that Cannon did not shoot Galloway, the prosecution cross-examined Maxwell about whether he knew of Cannon’s record of arrests for at least two instances of being in possession of loaded firearms, one of them a semiautomatic weapon; an instance of pistol-whipping an uncle; and two arrests for beating up the mother of his child. When Maxwell dismissed some of these arrest reports as false, the prosecution

also offered evidence that Cannon had pled guilty to a charge of domestic violence and was placed on probation as a result.

Lawrence Ward had originally served as Cannon's defense counsel before withdrawing from the case for health reasons. He testified for the defense that he had encountered Ard outside a courtroom in October 2009. She was in custody and seemed to recognize him as Cannon's attorney. At that time, Ard told Ward that she did not want to come to court. "They want me to lie," she told Ward.

#### *E. Verdict and Sentence*

Cannon's motion for acquittal was denied. (§ 1118.1.) At the request of the prosecution, some of the firearm and great bodily injury enhancement allegations of the murder charge were stricken. (Former §§ 12022.5, subd. (a), 12022.53, subds. (b)-(c).) In December 2009, the jury found Cannon guilty of first degree murder, assault with a semiautomatic firearm and possession of a firearm by an ex-felon. It also found two enhancement allegations—that he personally and intentionally discharged a firearm to kill Galloway and that he personally used a firearm against Johnson—to be true. (§§ 187, subd. (a), 245, subd. (b); former §§ 12021, subd. (a)(1) [now § 29800, subd. (a)(1)], 12022.5, subd. (a), 12022.53, subd. (d).)

Cannon's motion for new trial based inter alia on assertions of newly discovered evidence was denied in January 2010. (§ 1181, subds. 6, 8.) He was sentenced to a total term of 54 years to life in state prison. This term was composed of an indeterminate term of 50 years to life—25 years to life for first degree murder, plus 25 years to life for the Galloway firearm enhancement. Cannon was also sentenced to a determinate term of four years—a consecutive one-third midterm of two years for the Johnson assault with a semiautomatic firearm; a consecutive one-third enhancement term of 16 months for firearm use during that assault; and a consecutive one-third midterm of eight months for being an ex-felon in possession of a firearm.<sup>8</sup>

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<sup>8</sup> Cannon has also filed an unrelated petition for writ of habeas corpus which we decide by separate order. (Case No. A134104.)

## II. PEREMPTORY CHALLENGES

### A. *Legal Principles*

First, Cannon contends that the trial court erred by denying his motion challenging the prosecution's use of its peremptory challenges. He reasons that the prosecution peremptorily challenged five Black female prospective jurors for improper, race-based reasons. The trial court denied his motion because it found the reasons offered by the prosecution for its exercises of its peremptory challenges to be truthful and race-neutral.

A prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group membership rather than reasons specific to the individual prospective juror violates a criminal defendant's state constitutional right to trial by a jury drawn from a representative cross-section of the community and the federal right to equal protection. (*People v. Mills* (2010) 48 Cal.4th 158, 173 (*Mills*); *People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*); *People v. Lancaster* (2007) 41 Cal.4th 50, 74; *People v. Wheeler* (1978) 22 Cal.3d 258, 265 (*Wheeler*), overruled in part in *Johnson v. California* (2005) 545 U.S. 162, 166-168; see *Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*); see also U.S. Const., 14th Amend.; Cal. Const., art. I, § 16.) On a motion challenging the prosecution's exercise of peremptory challenges, the defendant must make a prima facie case showing that the totality of relevant facts gives rise to an inference of discriminatory purpose. Once the defendant has made this prima facie case, the burden shifts to the prosecution to explain the exclusion by offering permissible race-neutral justifications for its challenges. If a race-neutral explanation is tendered, the trial court then decides whether the defendant has proved purposeful racial discrimination. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 476-477 (*Snyder*); *Miller-El v. Dretke* (2005) 545 U.S. 231, 239; *Johnson v. California, supra*, 545 U.S. at p. 168; *Mills, supra*, 48 Cal.4th at p. 173; *Lenix, supra*, 44 Cal.4th at pp. 612-613.) The ultimate burden of persuasion about the existence of purposeful discrimination rests with the party challenging the exercise of the peremptory challenge. (*Johnson v. California, supra*, 545 U.S. at p. 171; *Lenix, supra*, 44 Cal.4th at pp. 612-613.)

## B. *Standard of Review*

### 1. *Selection of Standard*

Initially, Cannon contends that the trial court applied the wrong legal standard when evaluating his motion. Our determination of this underlying issue sets the standard of review that we apply to evaluate the trial court's ruling on the *Batson-Wheeler* motion. On appeal, we typically review a trial court's denial of this motion in a deferential manner, asking only whether substantial evidence supports its conclusion. Under those circumstances, our review of a trial court's determination of the sufficiency of a prosecutor's reasons requires us to exercise great restraint. We presume that the prosecution used its peremptory challenges in a constitutional manner and defer to the trial court's ability to distinguish bad faith reasons from sham excuses. If the trial court made a sincere, reasoned effort to evaluate the nondiscriminatory reasons offered, on appeal, those conclusions are entitled to our deference. (*Mills, supra*, 48 Cal.4th at pp. 175, 184-185; *Lenix, supra*, 44 Cal.4th at pp. 613-614, 626; *People v. Avila* (2006) 38 Cal.4th 491, 541; see *Snyder, supra*, 552 U.S. at p. 477; *Hernandez v. New York* (1991) 500 U.S. 352, 364-365 (plur. opn. of Kennedy, J.).)

By contrast, if the trial court applied an incorrect legal standard or if the record is unclear whether it applied the correct standard, we review the record de novo to apply the correct standard and resolve the legal question at issue. (See, e.g., *People v. Bell* (2007) 40 Cal.4th 582, 596-597; see also *Snyder, supra*, 552 U.S. at p. 479.) On appeal, Cannon points to isolated references in the transcript of the *Batson-Wheeler* hearing in support of his claim that the trial court applied outdated, incorrect legal principles when determining the motion. He reads these few trial court comments to mean that it believed that if it found one race-neutral reason to support the prosecutor's exercise of her peremptory challenges, that would be sufficient to uphold the prosecution, even if other reasons were race-based and thus, pretextual. Cannon argues that the United States Supreme Court has recently held that if the prosecution offers both race-based and race-neutral reasons, the trial court cannot rely on the race-neutral reason, but must determine if the peremptory challenge was substantially motivated by race. (See *Snyder, supra*, 552 U.S. at p. 485.)

Even if we were to assume *arguendo* that the trial court's comments could be construed in the manner that he suggests, no possible error occurred. The trial court did not identify *any* pretextual reasons, apparently finding *all* reasons offered by the prosecution to be genuine. As the factual predicate of Cannon's analysis did not occur, no possible misapplication of the law could have occurred.

On the underlying legal question of whether the trial court applied the correct legal standard, we find Cannon's construction of the trial record to be strained. Rather than relying on a few snippets of the record, we evaluate it in its entirety. (See *Lenix, supra*, 44 Cal.4th at p. 621; see also *Miller-El v. Dretke, supra*, 545 U.S. at p. 252.) Our review of the whole record of the *Batson-Wheeler* hearing compels the conclusion that the trial court was well aware of the legal principles that it was bound to apply. At the hearing, it set out the procedure it would follow to determine the motion. In so doing, it expressly cited three of the most recent United States Supreme Court cases and a recent California Supreme Court decision setting out current law. If anything, the trial court appeared to be more aware of the proper scope of the motion than was trial counsel. Cannon's attorney attempted to challenge the exclusion of a juror who had been excluded for cause by the trial court rather than by the exercise of a peremptory challenge and failed to include in his initial challenge two prospective jurors that the trial court believed fell within the cognizable group of excluded African-American female prospective jurors. The trial court understood that a comparative juror analysis might be appropriate even before defense counsel argued that it should be done. It offered a lengthy explanation of its own observations of the challenged jurors and its assessment of the credibility of the prosecution's reasons. When doing so, it applied the legal standards that it had set out early in the hearing.

From the trial court's recitation of the case law it was required to apply, the attention it paid to the resolution of the motion, and its reasoning when determining that motion, it is clear to us that the trial court understood the currently applicable legal principles guiding the correct analysis of the issues raised by Cannon's motion. Thus, we give the trial court's ruling the deference to which it is due. (See, e.g., *Snyder, supra*,

552 U.S. at p. 477; *Mills, supra*, 48 Cal.4th at pp. 175, 184-185; *Lenix, supra*, 44 Cal.4th at pp. 613-614, 626.)

## 2. Principles Guiding Application of Standard

This deferential standard of review gives the trial court great responsibility for ferreting out discrimination. At voir dire, the trial court personally witnesses the totality of the factual inquiry, including the demeanor and tone of voice of both the prosecutor and the prospective juror. It observes the unspoken atmosphere in the courtroom. Thus, the trial court is best able to place the prospective jurors' responses in context. (*Lenix, supra*, 44 Cal.4th at pp. 626-627; see *Snyder, supra*, 552 U.S. at p. 477.) The trial court makes credibility determinations based on verbal and nonverbal communications. (See *Mills, supra*, 48 Cal.4th at p. 176; *Lenix, supra*, 44 Cal.4th at pp. 613, 622.) We defer to those credibility determinations, whether express or implied. (See *Mills, supra*, 48 Cal.4th at pp. 175-176; *Lenix, supra*, 44 Cal.4th at p. 614.) Even so, this deferential standard of review remains a meaningful one on appeal. The reasons given by a prosecutor for the exercise of a peremptory challenge stand or fall on their plausibility. (*Miller-El v. Dretke, supra*, 545 U.S. at p. 252; *Lenix, supra*, 44 Cal.4th at p. 621.) We review the plausibility of the stated reasons on the basis of the entire record. (*Lenix, supra*, 44 Cal.4th at p. 621; see *Miller-El v. Dretke, supra*, 545 U.S. at p. 252.)

## C. Trial Court Analysis

In his motion, Cannon initially challenged the prosecution's exercise of its peremptory challenges to excuse three prospective jurors.<sup>9</sup> After the trial court noted that the prosecutor had also exercised peremptory challenges against two other women who may have been African-American, defense counsel expanded his motion to include them,

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<sup>9</sup> He also challenged the excusing of two potential alternate jurors. On appeal, Cannon has abandoned this aspect of his motion. No alternates ultimately served on his jury, rendering any error in excluding them harmless. (See *Mills, supra*, 48 Cal.4th at p. 182; *People v. Roldan* (2005) 35 Cal.4th 646, 703.) At trial, Cannon also purported to challenge the prosecution's excusing of a sixth potential juror, until the trial court reminded defense counsel that she had been excused by the trial court. We set out the facts relating to the aspect of the motion that Cannon continues to raise on appeal.

as well. The trial court concluded that these African-American women were a cognizable group for purposes of the *Batson-Wheeler* motion.

Cannon argued that the exclusion of the African-American female prospective jurors raised an inference of discriminatory purpose. The trial court found that he had made a prima facie case. This is the first step in the *Batson-Wheeler* analysis. (*Johnson v. California, supra*, 545 U.S. at p. 168; *Mills, supra*, 48 Cal.4th at p. 173; *Lenix, supra*, 44 Cal.4th at p. 612.) At this stage, the defendant need only produce substantial evidence permitting the trial court to draw an inference that discrimination has occurred. (*Johnson v. California, supra*, 545 U.S. at p. 170; *People v. Lancaster, supra*, 41 Cal.4th at p. 74.)

Once a prima facie case is established, the prosecution must adequately explain the racial exclusion in a manner that offers permissible race-neutral justifications for the peremptory challenges. (*Johnson v. California, supra*, 545 U.S. at p. 168; *Mills, supra*, 48 Cal.4th at p. 173; *Lenix, supra*, 44 Cal.4th at p. 612.) The trial court requested the prosecutor's reasons for exercising his or her peremptory challenges. The explanation offered for the legitimate exercise of a peremptory challenge must be clear and reasonably specific. (*Lenix, supra*, at p. 613.) A prosecutor's justification for exercising a peremptory challenge need not rise to the level of that needed to support a challenge for cause. If genuine and neutral, even a trivial reason will support the proper exercise of a peremptory challenge. A prospective juror may be excused based on facial expressions, gestures, or hunches. Even arbitrary or idiosyncratic reasons will suffice. (*Mills, supra*, 48 Cal.4th at p. 176; *Lenix, supra*, 44 Cal.4th at p. 613.) In some cases, the manner of a prospective juror's response is more indicative of the real character of his or her opinion than the words used. Attitude, attention, interest, body language, voice inflection and eye contact may change the meaning of the words of a prospective juror's answer as shown in a cold record. (*Lenix, supra*, 44 Cal.4th at p. 622.)

In the case before us, the prosecutor explained the reasons for her exercise of peremptory challenges against these jurors—reasons that did not bear on race or gender. (See pt. II.D., *post.*) Cannon dismissed the propriety of these reasons in his rebuttal, noting that every woman who had been excluded from the jury was African-American.

The prosecutor also noted that she had exercised 14 peremptory challenges—half of which were not exercised against the five jurors and two alternates that were the subject of Cannon’s motion.

Once the prosecutor offers a race-neutral explanation, the trial court decides whether the defendant has proven intentional racial discrimination. (*Johnson v. California, supra*, 545 U.S. at p. 168; *Mills, supra*, 48 Cal.4th at p. 173; *Lenix, supra*, 44 Cal.4th at p. 612.) At this stage, the trial court determines the credibility of the prosecutor’s race-neutral explanations. Credibility can be measured by many factors, including the prosecutor’s demeanor; the reasonableness or improbability of the stated reasons; and whether the proffered rationale has some basis in accepted trial strategy. When assessing credibility, the trial court also draws on its observations of voir dire and the demeanor of the challenged prospective juror. It may rely on its own experiences as a lawyer and the common practices of the prosecutor’s office. (*Mills, supra*, 48 Cal.4th at pp. 174-175; *Lenix, supra*, 44 Cal.4th at pp. 613, 625; see *Snyder, supra*, 552 U.S. at p. 477; *Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.)

In the case before us, the trial court found that Cannon had not shown that the prosecution acted with a discriminatory purpose. It noted that many of the observations of the prosecutor about the challenged jurors were consistent with its own. Ultimately, the trial court found the prosecution’s proffered reasons to be both credible and race-neutral. Thus, the court denied the *Batson-Wheeler* motion.

As the trial court ruled on the ultimate issue of whether a discriminatory intent was shown, the question of whether or not Cannon established a prima facie case has become moot.<sup>10</sup> (*Hernandez v. New York, supra*, 500 U.S. at p. 359 (plur. opn. of Kennedy, J.); *Mills, supra*, 48 Cal.4th at p. 174; *Lenix, supra*, 44 Cal.4th at p. 613 fn. 8.) On appeal, we review only the trial court’s third stage evaluation of the prosecutor’s reasons for

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<sup>10</sup> Cannon also argues that the prosecutor excused all African-American prospective jurors, leaving no African-Americans on the jury. This argument is more relevant to whether he demonstrated a prima facie case than whether the prosecution’s stated reasons for exercising its peremptory challenges were pretextual. (See *Mills, supra*, 48 Cal.4th at p. 174 fn. 4.)

dismissing the African-American prospective jurors. (*Mills, supra*, 48 Cal.4th at p. 174.) With these principles in mind, we turn to the specifics relating to each of the five challenged prospective jurors.

D. *Evaluation of Rulings*

1. *Ms. A.*

Cannon contends that the prosecutor acted improperly when she exercised her first peremptory challenge against an African-American female, Ms. A. At the hearing, the prosecutor explained that Ms. A. was 72 years old and seemed to take a long time to get through the trial court's preliminary questions. Ms. A.'s responses about family arrests were extremely vague, suggesting that she had unexplained experiences of the criminal justice system. The prospective juror had also raised health concerns about her ability to serve as a juror. On rebuttal, Cannon noted another juror with similar age issues who was still on the jury panel.

The trial court's own observations were consistent with the prosecutor's—that Ms. A. had difficulty responding to questions, that she gave vague answers and that her family had had extensive, negative contacts with the criminal justice system. One brother had been convicted of manslaughter and she did not believe that he had been fairly treated. A negative experience of the criminal justice system is a valid reason for a prosecutor to exclude a prospective juror. (See *Lenix, supra*, 44 Cal.4th at p. 628.)

Concern about a prospective juror's ability to perform the duties of a juror is clearly another race-neutral reason for exclusion. Ms. A.'s manner is the sort of nonverbal cue that is best evaluated by a judge observing voir dire. (*Mills, supra*, 48 Cal.4th at p. 176; *Lenix, supra*, 44 Cal.4th at pp. 613, 622.) The trial court's assessment of Ms. A.'s conduct and of the sincerity of the prosecutor's race-neutral reasons for excluding her from the jury are entitled to deference on appeal. (See, e.g., *Mills, supra*, 48 Cal.4th at pp. 175, 184-185; *Lenix, supra*, 44 Cal.4th at pp. 613-614, 626.) Substantial evidence supports its denial of the *Batson-Wheeler* motion as to Ms. A. (See, e.g., *Mills, supra*, 48 Cal.4th at p. 185.)

## 2. *Ms. J.*

Cannon also contends that the prosecutor used a second peremptory challenge improperly against Ms. J.<sup>11</sup> The prosecutor explained that members of Ms. J.’s family had had negative experiences with the criminal justice system. She criticized the involvement of her nephew—a convicted felon—in a drug deal involving firearm use as “stupid,” which struck the prosecution as odd. It seemed to the prosecutor that Ms. J. was discounting the objectionable nature of her nephew’s lifestyle, posing the possibility that she was too tolerant of criminality. The prosecutor also observed that this prospective juror was very opinionated, strong-willed and loud.

The prosecution noted that another juror who was not challenged was also outspoken and had a brother who had been arrested for a drug offense. However, that juror disapproved of his brother’s conduct. The prosecutor left this man on the jury, and exercised peremptory challenges against Ms. J. and another strong-willed man who was Caucasian because she did not want more than one opinionated person on the jury. The prosecutor had also exercised a peremptory challenge against another non-African-American juror who had some connection to criminals in her history.

The trial court had also observed that Ms. J. was opinionated, strong-willed and loud, which could legitimately concern any trial attorney. She had family members who had been convicted of robbery, drug offenses and driving without a license. The trial court also noted that Ms. J. did not express any feeling that their conduct was wrong or reprehensible, which it concluded was a valid basis for excluding a prospective juror.

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<sup>11</sup> The trial judge, the prosecutor and defense counsel were each uncertain whether Ms. J. was African-American and thus, a member of the class of African-American women. The prosecutor and the trial court recalled that she had self-identified as a light-skinned African-American. However, the record on appeal does not show such a characterization from Ms. J. Cannon’s attorney opined that someone who had attended Castlemont High School was probably Black. Ms. J. did state that she had attended this predominantly African-American high school, but it was not clear from the context of her voir dire responses whether she was African-American or not. We assume for purposes of this appeal that Ms. J. was a member of the cognizable class.

Again, negative criminal justice experiences are a valid reason to exclude a prospective juror. (See *Lenix, supra*, 44 Cal.4th at p. 628.) The strength of Ms. J.’s opinions and their possible affect on other jurors could also form a valid concern for a prosecutor during the jury selection process. (*Id.* at pp. 623-624 [race-neutral reason may be based on mix of jurors].) The trial court’s assessment of Ms. J.’s attitude and of the sincerity of the prosecution’s reasons for excluding her are both entitled to deference on appeal. (See, e.g., *Mills, supra*, 48 Cal.4th at pp. 175, 184-185; *Lenix, supra*, 44 Cal.4th at pp. 613-614, 626.) Substantial evidence supports the trial court’s denial of Cannon’s motion challenging the exclusion of Ms. J. (See, e.g., *Mills, supra*, 48 Cal.4th at p. 185.)

### 3. Ms. N.

Cannon challenges the prosecutor’s exercise of a third peremptory challenge against another African-American woman, Ms. N. The prosecutor stated that Ms. N. did not have a great attitude and had negative experiences with the criminal justice system. Her brother had been in prison most of his life, where she had visited him. When asked if he had been fairly treated, Ms. N. replied “For the most part, I guess so.” Ms. N. had been arrested herself because of something done by a third party who stole her identity. She was upset about the manner in which she—the victim of identity theft—had been treated. When asked how this experience might affect her ability to be fair to both sides, Ms. N. replied that the prosecution had the burden of proof and would have to prove the case to her satisfaction. The prosecutor found this to be an odd response to the question asked. Something about Ms. N.’s “in your face” attitude gave her pause.

The prosecutor distinguished Ms. N. from another prospective juror with a bad attitude. The second juror—a Caucasian male—also had a strong history of prior jury service, including having convicted two murderers. The prosecutor mentioned that she exercised a peremptory challenge against a non-African-American juror who had a similar family connection to criminal conduct. On rebuttal, Cannon’s attorney argued that as a mature woman, Ms. N. had earned the right to have a certain attitude, because she had seen a lot in her life. That did not make her disrespectful, he argued.

The trial court noted Ms. N.'s strong, negative experience of the criminal justice system, who had visited her brother in prison several times. Other relatives had been convicted of drug offenses and burglary. It observed itself that she was offended by how she was personally mistreated by the court system. The trial court concluded that Ms. N. displayed a hostile attitude toward the prosecution. The prosecutor had excused Caucasian jurors with similarly poor attitudes. The trial court accepted that the prosecutor excused Ms. N. for the same reason it excused those other jurors.

Ms. N.'s personal and strong negative experience of the criminal justice system—being falsely arrested because of the acts of a third party who stole her identity—forms a proper race-neutral reason for a prosecutor to exercise a peremptory challenge against her. (See *Lenix, supra*, 44 Cal.4th at p. 628.) The trial court found that Ms. N. displayed an attitude hostile to the prosecution, another race-neutral reason for exclusion. On appeal, a trial court's assessment of a prospective juror's nonverbal attitude is entitled to deference on appeal. (*Mills, supra*, 48 Cal.4th at p. 176; *Lenix, supra*, 44 Cal.4th at pp. 613, 622.) Its finding that the prosecutor's reasons for excluding her from the jury were credible is also entitled to deference on appeal. (See, e.g., *Mills, supra*, 48 Cal.4th at pp. 175, 184-185; *Lenix, supra*, 44 Cal.4th at pp. 613-614, 626.) As substantial evidence supports the trial court's findings, it properly denied Cannon's *Batson-Wheeler* motion as to Ms. N. (See, e.g., *Mills, supra*, 48 Cal.4th at p. 185.)

#### 4. Ms. D.

Likewise, Cannon contends that the prosecutor's fourth exercise of a peremptory challenge against an African-American woman—Ms. D.—was improper. At trial, the prosecution denied basing her decision on either race or gender, and noted that the previous day, she had twice passed on the panel that included Ms. D. Five to six minutes after a break in the proceedings had ended, the prosecutor observed Ms. D. sauntering into court with a cup of coffee, apparently unconcerned that she had kept everyone waiting and had delayed the proceedings. That blasé attitude spilled over from her responses during voir dire, which lacked specificity. The prosecution said that she was looking for hardworking jurors who could be fair to both sides and who oppose crime. In

the prosecutor's judgment, Ms. D.'s attitude suggested that she was not such a person. The prosecutor also expressed some concern that Ms. D. had been on disability for several years. The prosecutor compared Ms. D. to the sole remaining prospective juror in the venire, who was prompt and appeared to take the process very seriously. Finally, she noted that she had exercised a peremptory challenge against a non-African-American prospective juror who had a criminal connection. In his rebuttal, Cannon argued that many other jurors may have been late. He observed that Ms. D. was recovering from heart surgery but had indicated that she could serve on a jury.

The trial court's own observations of Ms. D.'s lack of concern about the effect that her tardiness had on others matched that of the prosecution. This was a valid reason for excluding her from the jury, it ruled. The fact that she accepted her family's extensive contacts with the criminal justice system also warranted her exclusion. The trial court found the prosecution concern about criminal justice system contacts to be genuine. It considered as evidence of the genuineness of the prosecutor's reasons that she had twice passed on a jury including Ms. D., so that if Cannon had passed on it, the jury would have included this prospective juror. It rejected Cannon's contention that the prosecution's reasons for excluding Ms. D. were pretextual.

A trial court's assessment of a prospective juror's attitude may be based on in-court observations that do not appear in the record on appeal. (*Lenix, supra*, 44 Cal.4th at p. 622.) While the prosecutor initially concluded that Ms. D. would be an acceptable juror, her later-displayed blasé attitude changed that assessment as voir dire continued. (See *id.* at p. 623 [fluidity of jury selection process].) An evaluation of nonverbal cues is entitled to deference on appeal, as is the trial court's finding that the prosecution's reasons for excluding Ms. D. were race-neutral. (*Mills, supra*, 48 Cal.4th at pp. 175-176, 184-185; *Lenix, supra*, 44 Cal.4th at pp. 613-614, 622, 626.) Substantial evidence supports the trial court's findings. Thus, the trial court properly denied Cannon's motion challenging the exclusion of Ms. D. (See, e.g., *Mills, supra*, 48 Cal.4th at p. 185.)

5. *Ms. H.*

Finally, Cannon asserts that the prosecution excluded a fifth African-American woman—Ms. H.—based on her race. The prosecutor opined that Ms. H. had used poor judgment when she did not walk away from someone at a biker club who assaulted her, opting to slap her attacker instead. Ms. H. was fortunate that she was not more seriously injured. This prospective juror failed to answer a preliminary question from the trial court about whether she knew anyone who had been arrested, charged or convicted of a crime. Not until the prosecutor asked her about this omission did Ms. H. admit that her cousins had been arrested for driving under the influence.

The prosecutor was also concerned about Ms. H.'s attitude when a car belonging to her boyfriend—the father of her child—was carjacked at gunpoint by people he knew. Her boyfriend felt disrespected, but Ms. H. helped persuade him not to retaliate against them. She did not seem to be appalled that he had been the victim of a crime. His car was returned and he did not prosecute, which also displeased the prosecutor. Ms. H. did not mention the carjacking incident when questioned by the trial court, only disclosing it later under questioning. Her attitude did not seem to favor law enforcement. This incident raised particular concerns with the prosecutor, who noted her theory of Cannon's case—that he killed Galloway in retaliation for being disrespected about a car stereo. Finally, the prosecutor noted that Ms. H. was young—perhaps 24 or 25 years old. She noted that she had exercised a peremptory challenge against a young man who was about 21 years old. The prosecution had also exercised a peremptory challenge against another woman who was not African-American because of her connection to criminals.

Defense counsel was critical of the prosecution's reasoning on rebuttal, noting that Ms. H. was employed and law-abiding. He reasoned that when Ms. H. slapped her aggressor, she acted in her best interests. He also suggested that exclusion based on a sense that a prospective juror displayed an attitude was too subjective. However, the trial court agreed with the prosecutor that Ms. H. seemed extremely forgiving of her boyfriend's initial impulse to retaliation because he felt disrespected. Her attitude about this incident raised a legitimate concern on the part of the prosecution that she might be

inclined to forgive Cannon if he were in the same situation, as was suggested by the facts of the case yet to be tried. The prosecution had excused other prospective jurors who were relatively young and lacking in meaningful life experience, and who were not members of the class of African-American women. The trial court accepted that the prosecutor had excluded Ms. H. for these same, valid reasons.

The striking similarities between the circumstances of Ms. H.'s boyfriend's carjacking and the prosecution theory about why Cannon killed Galloway provide a sufficient nexus to this case to support the trial court's finding that the cited reason was race-neutral. (See *U.S. v. Bishop* (9th Cir. 1992) 959 F.2d 820, 825.) In addition, Ms. H.'s relative youth and lack of life experience also form a race-neutral reason for exclusion. The trial court found these reasons to be credible and we must defer to that finding on appeal. (See, e.g., *Mills, supra*, 48 Cal.4th at pp. 175, 184-185; *Lenix, supra*, 44 Cal.4th at pp. 613-614, 626.) Substantial evidence supports the trial court's denial of the *Batson-Wheeler* motion as to Ms. H., as well. (See, e.g., *Mills, supra*, 48 Cal.4th at p. 185.)

### **III. MATERIAL WITNESS**

#### *A. Contentions on Appeal*

Cannon raises three interrelated attacks on his conviction, all intended to undermine the credibility of Adrienne Ard, the key witness for the prosecution. First, he contends that the trial court erred by allowing Ard to be held in custody for a month without bail as a material witness. On her behalf, Cannon asserts that the statutory requirements of section 1332 were not met, violating Ard's due process rights. Asserting his own due process rights, Cannon contends that her testimony was given under compulsion and thus, should have been excluded.

After receiving proof under oath, if a trial court concludes that there is good cause to believe that a material witness will not appear to testify, the court may require that witness to execute an undertaking to forfeit an amount if the witness does not appear. (§ 1332, subd. (a).) If a witness required to enter into an undertaking refuses to do so, the court may commit the witness to the custody of the sheriff until the witness complies or is

legally discharged. (*Id.*, subd. (b).) Regular review of the witness’s custodial status is required. (*Id.*, subds. (c)-(d).)

The detention of a material witness allows a criminal defendant to be confronted by his or her accuser, at the cost of the witness’s liberty. (*People v. Bunyard* (2009) 45 Cal.4th 836, 848-850.) Procedural safeguards must be in place to allow both the interests of the material witness and those of the state to be heard. The unjustified deprivation of a material witness’s liberty is a violation of federal and state due process. (*Id.* at p. 850 [defendant challenges failure to detain material witness].) In order to determine the issues on appeal, we review the facts leading to Ard’s arrest as a material witness.

### B. *Factual Background*

In two telephone conversations on October 6 and 8, 2008, Ard described the Galloway-Johnson shooter to Oakland police and said that his name was “Dario.” In a videotaped<sup>12</sup> statement to police on October 10, 2008, she again described both the shooter and his gun. Ard positively identified Cannon from a photographic lineup as the man who shot Galloway. In that interview, she told police that she did not know the man’s name, but when listing those who were present at the shooting scene, she included “Dario.”

Before the June 2009 preliminary hearing, the prosecution made repeated efforts to interview Ard, who did not attend as expected. Ignoring a subpoena, she also failed to appear at Cannon’s preliminary hearing. A warrant was issued for her arrest. She was arrested and brought to court for the preliminary hearing. At that hearing, she denied that she had witnessed the shooting and that she had reported the circumstances of it to police. She would not identify Cannon in court as Galloway’s killer. At that time, she first learned that police had videotaped her October 2008 interview. That videotape and a transcript of it were placed into evidence. At the conclusion of the preliminary hearing, the court found sufficient evidence to hold Cannon over for trial. Ard was released.

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<sup>12</sup> Ard did not know that the interview was being videotaped, but she was advised that it was audiotaped.

On October 5, 2009, at the prosecution's request, an order issued for the arrest of Ard as a material witness. On October 6, 2009, police had received reports that Ard and Jackson may have been threatened by Cannon in the days between the shooting and Galloway's death. Reportedly, Ard told Cannon that she would not testify against him.

Several unsuccessful attempts were made to arrest Ard. On October 7, 2009, officials were told that she was not home, although they suspected that she was. On October 9, 2009, Ard was stopped by police. Initially, she denied her identity. When asked for some identification, she admitted to the prosecution investigator that she was Adrienne Ard. When she was arrested, she told the investigator that she would not testify again. Ard admitted that she would not have returned his telephone calls and would have ignored a subpoena to avoid having to return to court. During an interview with the prosecutor, Ard complained that she had been arrested rather than being given an opportunity to come to court on her own. When asked if she would come to court on request or under subpoena, she admitted that she would have gone into hiding to avoid the prosecution.<sup>13</sup> When questioned, Ard initially denied knowing anything about the murder. When confronted with her videotaped interview with police, she admitted that she witnessed Cannon shoot Galloway. Ard was ordered to be held without bail.

On October 13, 2009, Ard—who was represented by counsel—was ordered to be held as a material witness without bail. On October 15 and 16, 2009, the trial court conducted a hearing to review the propriety of the holding order. Ard testified under oath that while she sat in a car with Galloway in October 2008, she had witnessed Cannon shoot him many times.<sup>14</sup> Cannon was not present. Defense counsel listened to the hearing, but did not participate in it. Trial was scheduled to begin a few days later.

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<sup>13</sup> The investigator testified that Ard said this to him; she denied having said so. The trial court found that on this issue, the investigator was credible and that Ard was not.

<sup>14</sup> We have no transcript of this hearing, but parts of the missing transcript were read into the trial record. The trial court took judicial notice of Ard's earlier court testimony. We rely on that evidence.

Ard's counsel challenged the order for her arrest on various grounds, including failure to comply with the requirements of section 1332. The trial court found that Ard was a material witness who had extraordinarily important testimony to offer about Cannon's part in Galloway's murder. At the pretrial hearing, Ard's grandfather testified that if Ard were released, he would assist her to come back to court for the trial. He was willing to post \$1,000 bail. Ard had no substantial money of her own. She testified that if she were released, she would attend the trial and voluntarily testify truthfully. She denied being threatened by Cannon, but said that she was afraid to see him. She had refused to testify truthfully at the preliminary hearing, going so far as to deny giving the police the October 2008 statement.

Ultimately, the trial court determined that if Ard were released, it was unlikely that she would return to court to testify at trial. Thus, it found good cause to hold Ard in custody as a material witness without bail. The trial court took steps to ensure that her detention would be as short as possible. It conducted an expedited voir dire without using jury questionnaires. It required the prosecution to call Ard on the first day of trial. Once she completed her testimony, she would be released and would not be subject to recall. At one point, the trial court sought a family member to pick up Ard at the jail on her release.

The propriety of continuing to hold Ard was repeatedly considered over the next few weeks, at 10-day intervals. She again testified that she would appear in court if she were released from custody. Each time, the court found sufficient cause to continue to hold her without bail. These hearings were conducted without Cannon or any participation by his counsel.

Ard testified for the prosecution at trial in early November 2009. She admitted that at the preliminary hearing, she had refused to identify Cannon as the person who shot Galloway, although she knew that he had. Since the time of that hearing, she had apologized to Galloway's mother for testifying that she did not know who Cannon was. Initially reluctant to identify Cannon as the shooter at trial, Ard eventually told the jury that Cannon shot Galloway multiple times. The videotape of her October 2008 interview

with Oakland police was played for the jury. Testimony given at the pretrial hearing at which Ard identified Cannon as the gunman was also read into the record.

On cross-examination, Ard testified that she recanted her testimony that she was unable to identify the shooter because she wanted to go home. To be released, she had to “tell the truth.” She admitted that if she were promised that she would be released if she testified that Cannon was not the shooter, she would have said that. When her testimony was complete, Ard was released.

### *C. Ard’s Arrest and Detention as Material Witness*

On appeal, Cannon first asserts that the trial court erred by holding Ard in custody for a month as a material witness. He reasons that the trial court failed to comply with statutory prerequisites for the holding order. In this claim of error, Cannon asserts Ard’s due process rights.

A defendant has no standing to assert a third party’s right to be free of coercion, but may only raise his or her own due process rights to challenge unreliable, coerced trial evidence. (See *People v. Williams* (2010) 49 Cal.4th 405, 452-453.) In support of his claim that he has standing to assert Ard’s rights, Cannon cites a case in which the trial court *failed* to detain a material witness in custody. (See *People v. Bunyard, supra*, 45 Cal.4th at p. 850.) When a trial court fails to assure the presence of a key witness against a criminal defendant, the defendant’s constitutional right to confront witnesses is implicated. (See *id.* at pp. 848-849.) When—as in Cannon’s case—a trial court *does detain* a material witness, the witness becomes subject to confrontation and cross-examination. In these circumstances, no violation of a defendant’s right of confrontation arises. Thus, the authority he supports does not apply to the case before us. We conclude that Cannon has no standing to raise Ard’s rights on appeal.<sup>15</sup>

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<sup>15</sup> Ard was represented by counsel during her detention. (See, e.g., *People v. Douglas* (1990) 50 Cal.3d 468, 502.) Her attorney raised a myriad of procedural and substantive issues to obtain her release. A review of our records shows that Ard does not appear to have raised any appellate challenge to her detention.

#### D. *Exclusion of Coerced Testimony*

Cannon also claims that because Ard was held in jail without bail for a month, her trial testimony was coerced and inadmissible. In so doing, he asserts his own due process fair trial rights. He has standing to raise this challenge to the trial evidence, as it implicates his own right to be tried based on truthful and reliable evidence. (*People v. Williams, supra*, 49 Cal.4th at p. 452; *People v. Jenkins* (2000) 22 Cal.4th 900, 966; *People v. Badgett* (1995) 10 Cal.4th 330, 345.)

Defense counsel did not object to Ard's testimony in the trial court, which would ordinarily prevent Cannon from being able to raise this issue on appeal. (See, e.g., *People v. Demetrulias* (2006) 39 Cal.4th 1, 20-21; see also Evid. Code, § 353, subd. (a).) However, Cannon claims that his trial counsel's failure to make such an objection constituted ineffective assistance of counsel. A criminal defendant has a right to the effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) To prevail on this claim of error, Cannon must show both that his trial counsel's representation fell below an objective standard of reasonableness and that it is reasonably probable that, but for that error, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-688, 694-695 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218; see *People v. Benavides* (2005) 35 Cal.4th 69, 92-93.) As the underlying issue is properly before us indirectly on Cannon's ineffective assistance of counsel claim, we address its merits.

Third party trial testimony is not subject to exclusion simply because that testimony may have been coerced. Coercion alone does not necessarily render trial testimony unreliable. The defendant must demonstrate that the coercion impaired the reliability of the witness's testimony. Cannon must show that the month-long detention of Ard during October and November 2009 actually impaired the reliability of her trial testimony. (See *People v. Badgett, supra*, 10 Cal.4th at p. 348; see also *People v. Williams, supra*, 49 Cal.4th at pp. 452-453.) He bears the burden of proving coercion and the lack of reliability of Ard's trial testimony. (See *People v. Badgett, supra*, 10 Cal.4th at p. 348.)

Even if we assume *arguendo* that Ard's trial testimony was coerced because of her month-long detention,<sup>16</sup> Cannon must still persuade us that the detention rendered her trial testimony false and unreliable. He cannot do so. Cannon argues that Ard admitted on the stand that she would have lied to get out of jail. She did, but she also told the jury that she told the truth when she testified that he was the shooter. On many pivotal questions, Ard's testimony was admittedly inconsistent. Her credibility—the reliability of her testimony and which version of her story was more believable—was the pivotal question that was before the jury at trial. The evidence that Cannon cites undermining Ard's credibility goes to the weight to be given to her testimony, not its admissibility.

Cannon's more fundamental problem is that the key evidence against him was not Ard's trial testimony, but her initial statement to police, given before Galloway died. In October 2008—a year before she was held as a material witness in October and November 2009—Ard identified Cannon to police as the shooter. She later recanted that testimony, instead denying both that she witnessed the shooting and that Cannon was the shooter. At both the preliminary hearing and at trial, evidence of her October 2008 statement was admitted to explain her reluctance to testify against Cannon.

The jury heard both versions of Ard's testimony. The issue of which one was more credible—and was sufficiently reliable to find Cannon guilty beyond a reasonable doubt—was clearly before the jury at the time of trial. Impliedly, the jurors found that her initial October 2008 statement to police identifying Cannon as the gunman was true and that she had been frightened into recanting that identification. This pretrial statement—not her trial testimony—was the critical evidence resulting in Cannon's conviction.<sup>17</sup>

Cannon cannot demonstrate a nexus between the assumed coercion and the evidence that Ard gave against him at trial. Without proof of any adverse affect to him

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<sup>16</sup> We need not determine whether a material witness's detention authorized by statute can ever constitute illegal coercion. (See § 1332.)

<sup>17</sup> Cannon does not suggest that Ard's pretrial statement—given shortly after the shooting, before Galloway died, and before Cannon is thought to have frightened her against giving evidence against him—was coerced.

flowing from any coercion of Ard, he cannot establish a due process violation resulting from the admission of her trial testimony. An ineffective assistance of counsel claim fails on an insufficient showing of either incompetency or prejudice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) As he cannot show prejudice resulting from his defense counsel's failure to object, Cannon cannot establish ineffective assistance of counsel. Thus, his due process and ineffective assistance of counsel claims of error fail.

#### **IV. MOTION TO REOPEN**

##### *A. Legal Standard*

In a related challenge, Cannon argues that the trial court erred by denying his motion to reopen evidence. He had sought to offer new evidence that Ard admitted to a third party that she had lied when she identified Cannon as the killer. He reasons that the exclusion of this proffered evidence violated his federal and state due process rights to challenge coerced, unreliable evidence admitted against him and his constitutional right to present evidence relevant to his defense. (U.S. Const. 5th, 6th & 14th Amends.; Cal. Const., art. I, § 15.)

A trial court has discretion to allow a party to reopen evidence for good cause. (§§ 1093, subd. (d), 1094; *People v. Green* (1980) 27 Cal.3d 1, 42, overruled on another point in *People v. Hall* (1986) 41 Cal.3d 826, 834 fn. 3.) Its refusal to allow a criminal defendant to reopen evidence is tested on appeal for an abuse of its discretion. (*People v. Jones* (2003) 30 Cal.4th 1084, 1110; *People v. Ayala* (2000) 23 Cal.4th 225, 282; *People v. Marshall* (1996) 13 Cal.4th 799, 836.) When determining whether the trial court abused its discretion, we consider four factors—the stage of the proceedings at the time of the motion, the defendant's diligence in presenting the new evidence, the prospect that the jury would give undue emphasis to the new evidence, and the significance of that evidence. (*People v. Jones, supra*, 30 Cal.4th at p. 1110; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1520.)

##### *B. Trial Court Ruling*

In the midst of closing argument, Cannon moved to reopen the defense case to allow admission of further evidence. Defense counsel explained that during a break in

that morning's proceedings, he encountered Daniel Hagler, who was being tried for carjacking. Hagler told Cannon's counsel that two or three days earlier, Ard told him that the prosecution was trying to force her to lie about what she saw of the Galloway shooting. Ard told Hagler that she did not know Cannon, but that Galloway's girlfriend had told her his name and had described him.

The trial court denied the motion to reopen, finding that the proffered evidence was more prejudicial than probative. (Evid. Code, § 352.) It found that the evidence had some probative value, but that that value was considerably outweighed by its prejudicial effect. On prejudice, it repeatedly stated that the proffered evidence was "entirely cumulative" of evidence already before the jury. The trial court also found that bringing Hagler's testimony to the jury would require considerable additional time, given delays that might be required because of his own trial needs and the additional time required to allow the prosecution to impeach Hagler's credibility.<sup>18</sup>

### C. Discussion

Cannon contends that the trial court erred by denying his motion to reopen evidence. Of the four factors to be considered when determining whether the trial court abused its discretion in making this ruling, only the defendant's diligence in presenting the new evidence weighs in favor of the motion. (See *People v. Jones, supra*, 30 Cal.4th at p. 1110; *People v. Funes, supra*, 23 Cal.App.4th at p. 1520.) The trial court noted that the case was in its last stages, after both sides had rested, some jury instructions had been given and most of the closing argument had been presented. The late stage of the proceedings tended to support the trial court's denial of the motion, as did the prospect that reopening the evidentiary portion of the case would give undue emphasis to Hagler's testimony. (See *People v. Jones, supra*, 30 Cal.4th at p. 1110; *People v. Funes, supra*, 23 Cal.App.4th at p. 1520.)

Of the four factors, the strongest one supporting the trial court's exercise of its discretion was the lack of significance of the proffered evidence. (See *People v. Jones,*

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<sup>18</sup> The prosecution characterized Hagler as a friend of Cannon's, but there was no evidence to support this factual assertion.

*supra*, 30 Cal.4th at p. 1110; *People v. Funes*, *supra*, 23 Cal.App.4th at p. 1520.)

Hagler's testimony would have been cumulative to other evidence already before the jury—specifically, that the prosecution was forcing her to lie about the circumstances of the shooting; and whether Ard's identification of Cannon and description of the shooter was based on evidence coming from Galloway's girlfriend or was the product of Ard's personal knowledge.

The record is clear that Ard was a reluctant witness who sought to distance herself from her October 2008 identification. Frightened of Cannon, she tried hard to convey to anyone who would listen that her earlier identification of him as Galloway's shooter was not credible. As nothing in the proffered evidence from Hagler was new, the evidence's lack of significance tends to support the trial court's exercise of its discretion to deny Cannon's motion to reopen evidence under the case law applicable to our determination on appeal. (See *People v. Jones*, *supra*, 30 Cal.4th at p. 1110; *People v. Funes*, *supra*, 23 Cal.App.4th at p. 1520.)

Evidence Code section 352 also supports the trial court's exercise of discretion. The trial court excluded the proffered evidence on the basis of this statute. Under section 352, it had discretion to exclude material evidence if the probative value of the evidence is substantially outweighed by the probability that its admission will require an undue consumption of time or create a substantial danger of undue prejudice. The weighing process undertaken by the trial court depends on the unique facts and circumstances of the specific case, not the mechanical application of rules. On appeal, we will not disturb a trial court's exercise of its discretion absent a manifest abuse of that discretion. To constitute an abuse of discretion, the trial court's ruling must be arbitrary, capricious or absurd. (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1192; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

Ard's statement to Hagler was clearly cumulative. She repeatedly told police and the jury that she did not see the shooter or could not identify him. The jury rejected this assertion, choosing instead to believe her earlier October 2008 statement and her

identification of Cannon's photograph.<sup>19</sup> The trial court later characterized the videotaped statement as "powerful evidence" refuting Ard's denials. Its conclusion that the Hagler evidence was clearly cumulative was not capricious. Thus, it acted within its authority when excluding it as more prejudicial than probative.<sup>20</sup>

On appeal, Cannon asserts that the trial court's ruling denied him his constitutional rights. He is incorrect. Even a defendant's constitutional right to present evidence relevant to the defense does not require the trial court to admit all proffered evidence. The evidence must have more than slight relevancy. (*People v. Marshall, supra*, 13 Cal.4th at p. 836.) In this matter, the trial court found that the proffered evidence had some probative value but that this was outweighed by a substantial danger of undue prejudice under Evidence Code section 352. Typically, applying ordinary rules of evidence does not impermissibly limit a defendant's right to present a defense. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) We are satisfied that the denial of the motion to reopen the evidence to allow Hagler to testify did not violate Cannon's constitutional right to present a defense.

## V. MOTION FOR NEW TRIAL

In his final challenge related to Ard's testimony, Cannon contends that the trial court should have granted him a new trial. (§ 1181, subs. 6, 8.) In January 2010, he filed a motion for new trial, arguing that newly discovered evidence cast doubt on Ard's trial testimony. The motion was supported by Ard's written, notarized statement asserting that she had never seen the shooter and that the prosecutor coerced her into

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<sup>19</sup> Cannon relies heavily on Ard's statement to Hagler, citing it as her "final answer" disputing her last testimony identifying him as Galloway's shooter. We disagree with his assessment of the significance of her final words. It is not the *last* words that a witness utters, but the *most convincing* testimony he or she gives to the trier of fact that matters.

<sup>20</sup> We are satisfied that the evidence was cumulative, so we need not consider whether the trial court's alternative basis for its ruling—that the proffered evidence would require the undue consumption of time—was proper. Cannon's related request for judicial notice offers evidence relevant only to this alternative basis for the trial court's denial of the motion to reopen. As we do not address that issue, we conclude that the matter offered to us in the request for judicial notice is not relevant to our determination.

lying on the stand. The People opposed the motion, arguing inter alia that the proffered evidence was not new. The trial court denied the motion, finding the statement to be cumulative.

After trial, a defendant may move for a new trial on the ground of newly discovered, material evidence that could not have been produced during trial with the exercise of due diligence. (§ 1181, subd. 8.) To entitle a party to a new trial, the motion must show inter alia that the newly discovered evidence was not merely cumulative and was such that it would render a different result probable if the case were retried. (*People v. Sutton* (1887) 73 Cal. 243, 247; *People v. Drake* (1992) 6 Cal.App.4th 92, 98.) A motion for new trial is a matter for the trial court's discretion. Once the court has denied the motion, that exercise of its discretion will not be overturned on appeal absent a manifest abuse of that discretion. When determining whether the trial court properly exercised its discretion, we judge the issue based on the facts and circumstances of the underlying case. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1159-1160, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151; *People v. Delgado* (1993) 5 Cal.4th 312, 328; *People v. Drake, supra*, 6 Cal.App.4th at pp. 97-98.) When the new evidence is a witness's recantation, the trial court's task is to determine whether the new evidence is credible and worthy of belief. (*People v. Minnick* (1989) 214 Cal.App.3d 1478, 1482.) Generally, a motion for new trial is viewed with disfavor. (*People v. Sutton, supra*, 73 Cal. at p. 248; *People v. Drake, supra*, 6 Cal.App.4th at p. 98.) Still, the motion should be granted if the new evidence makes it apparent that the defendant has not had a fair trial and reversible error has been shown. (*People v. Guerra, supra*, 37 Cal.4th at p. 1159; *People v. Drake, supra*, 6 Cal.App.4th at p. 98.)

Cannon's motion was properly denied for several reasons. Procedurally, the motion failed to comply with the requirement that it be supported by Ard's *affidavit*. (See § 1181, subd. 8.) An affidavit must be signed under penalty of perjury. (Code Civ.

Proc., §§ 2009, 2015.5.) Ard’s statement was not.<sup>21</sup> Her trial testimony—given before a jury under oath—had greater force than her subsequent statement recanting that testimony.

Even if we overlook this procedural defect, the trial court had substantive grounds to deny the motion for new trial. It rejected Ard’s recantation as lacking credibility. We agree that her statement was not worthy of belief. (See *People v. Minnick*, *supra*, 214 Cal.App.3d at p. 1482.) More significantly, the trial court found that the statement was cumulative of other evidence that had been before the jury. At trial, Ard had offered inconsistent testimony about whether Cannon shot Galloway. The jury heard these contrary statements and necessarily determined that Ard’s initial statement to police was more credible. The trial court ruled that the posttrial statement from Ard did not offer *new* evidence, but only evidence that was *cumulative* of that already considered and impliedly rejected by the jurors. We agree with this assessment. Ard’s credibility was clearly at issue before the jury. If the statement had been admitted at a new trial, it is not probable that the trial would have reached a different result. (See *People v. Sutton*, *supra*, 73 Cal. at p. 247 *People v. Drake*, *supra*, 6 Cal.App.4th at p. 98.) For each of these reasons, the trial court properly denied Cannon’s motion for new trial. (See *People v. Guerra*, *supra*, 37 Cal.4th at pp. 1159-1160; *People v. Delgado*, *supra*, 5 Cal.4th at p. 328; *People v. Drake*, *supra*, 6 Cal.App.4th at pp. 97-98.)

## VI. OPINION TESTIMONY

### A. Sergeant Parkinson

Cannon raises two other broad challenges to his conviction unrelated to Ard’s testimony. First, he contends that the trial court erred by admitting opinion testimony from three witnesses about his motive for killing Galloway. At trial, Cannon put on evidence that his car stereo was stolen while his car was at a repair shop and that he was satisfied when the shop owner paid him \$2,500 for the loss. This evidence tended to

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<sup>21</sup> The trial court treated Ard’s unsworn statement as if it was the procedural equivalent of a sworn affidavit for the purposes of the motion.

support Cannon's theory that the theft of his stereo did *not* provide him with a motive to kill.

In response to prosecution inquiry, Oakland Police Sergeant John Parkinson testified that even if Cannon was compensated for the loss of his stereo, the theft might still provide a motive to kill Galloway. He explained that if Galloway had stolen Cannon's stereo, Cannon could not let him get away with that. In Oakland, those with a young lifestyle "don't let anyone disrespect [them]" without risking being known as "an easy mark" for future thefts. The trial court overruled Cannon's objection to this testimony as conjecture that was beyond Sergeant Parkinson's expertise.

The officer went on to testify that among Oakland youth, respect was very important. The sense that someone had been disrespected by another person was the motive behind many murder cases. Based on his law enforcement experience of nearly 20 years, he estimated that 70 percent of his caseload of 20 Oakland murders occurred because one person had disrespected another. During closing argument, the prosecutor twice reminded the jurors that Sergeant Parkinson had opined that the motive for Galloway's murder flowed from his theft of the car stereo, evidencing disrespect of Cannon.

On appeal, Cannon asserts that Sergeant Parkinson was improperly permitted to opine that he believed that Cannon killed Galloway. He contends that this testimony invaded the province of the jury to determine the ultimate issue of guilt or innocence. (See, e.g., *People v. Coddington* (2000) 23 Cal.4th 529, 582-583 [expert witness testimony on capacity to form intent barred by statute], overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 fn. 13.) A careful reading of the record satisfies us that Sergeant Parkinson did *not* opine that Cannon killed Galloway. He only testified that *if* Galloway stole Cannon's stereo, the disrespect inherent in that act would have provided Cannon with a motive to kill Galloway. Thus, Sergeant Parkinson's testimony did not trespass on the jury's function to determine Cannon's guilt or innocence.

Cannon also complains that the trial court erred by allowing Sergeant Parkinson to testify that Cannon's motive for the killing was Galloway's "disrespect" of him. He reasons that testimony about motive equates to testimony about intent. We disagree. Intent was an element of the crimes charged against Cannon. Motive was not. (See *People v. Solomon* (2010) 49 Cal.4th 792, 816; see also CALJIC No. 2.51.) The jury was so instructed in this case. Sergeant Parkinson's testimony about motive was not improper.

In his final challenge to Sergeant Parkinson's testimony, Cannon asserts that the officer was allowed to testify about motive as an expert, although he was not qualified to do so. Again, we disagree. Sergeant Parkinson did not testify as an expert, but as a lay witness. Lay opinion testimony is admissible when the issue before the jury is too complex or subtle to enable a witness to accurately convey them in any other manner. (*People v. Williams* (1988) 44 Cal.3d 883, 915.) Sergeant Parkinson's opinion that Oakland murders were commonly motivated by a perception that the victim treated the defendant with a lack of respect was such a subtle issue. The trial court has broad discretion to determine the relevance of evidence, although it has no discretion to admit irrelevant evidence. On appeal, a trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. (*People v. Benavides, supra*, 35 Cal.4th 69, 90.) We are satisfied that the trial court acted within its discretion when it allowed Sergeant Parkinson to testify about a potential motive for Cannon to kill Galloway.

*B. Deputy District Attorney Swalwell*

Deputy District Attorney Eric Swalwell prosecuted the case against Cannon at the preliminary hearing. At trial, defense counsel asked Swalwell about Hafid Kaid—the person that Cannon repeatedly suggested was the actual shooter responsible for Galloway's death. Swalwell told the jury that before the preliminary hearing, he had sought Kaid as a material witness.

On redirect examination by the prosecution, Swalwell explained without objection that he had reason to believe that the stereo in Galloway's car had belonged to Cannon. He wanted to question Kaid about how the stereo ended up in Galloway's car. If Kaid

could provide evidence of stereo theft, this might have provided a motive for the murder. That was why Swalwell had wanted Kaid to testify at Cannon's preliminary hearing—to establish a motive for the Galloway killing.

On appeal, Cannon contends that the trial court erred by allowing Swalwell to testify about Cannon's motive for the killing. He contends that this evidence constituted inadmissible lay opinion testimony. Cannon acknowledges that his trial counsel failed to object to the testimony about motive, which would ordinarily preclude him from being able to raise this issue on appeal. (See *People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 20-21; see also Evid. Code, § 353, subd. (a).) However, he argues that we may address this issue despite the lack of objection because the failure to object constituted ineffective assistance of counsel.<sup>22</sup> Cannon's ineffective assistance of counsel claim properly brings the underlying issue before us for our resolution on appeal. (See *Strickland*, *supra*, 466 U.S. at pp. 686-688, 694-695; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 215-218; see also *People v. Benavides*, *supra*, 35 Cal.4th at pp. 92-93.)

Cannon contends that Swalwell's testimony about his motive to kill Galloway should have been excluded for the same reasons that Sergeant Parkinson's testimony about his motive was inadmissible. We have already ruled that Sergeant Parkinson was properly permitted to testify about a possible motive for the Galloway killing. (See pt. I.A., *ante*.) (See *People v. Solomon*, *supra*, 49 Cal.4th at p. 816.) We also conclude that the trial court properly allowed Swalwell to testify as he did during redirect examination. One purpose of redirect examination is to explain or rebut adverse inferences developed on cross-examination. (*People v. Cleveland* (2004) 32 Cal.4th 704, 746; see 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 256, p. 328.) The evidence adduced by the defense that Swalwell viewed Kaid as a material witness raised the question of why the prosecution did so. Against the backdrop of Cannon's theory that Kaid was the actual shooter, the prosecution had the right to show that Swalwell sought Kaid's testimony not because he was suspected to be the shooter, but because he might

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<sup>22</sup> We need not address Cannon's alternative argument that trial counsel's objection would have been futile.

have known how what was believed to be Cannon's stereo ended up in Galloway's car. As Swalwell explained, that evidence was significant to the prosecution because it suggested a motive for Cannon to commit the shooting.

The extent of redirect examination is largely a matter of trial court discretion. (*People v. Hamilton* (2009) 45 Cal.4th 863, 921; *People v. Cleveland*, *supra*, 32 Cal.4th at p. 745; *People v. Steele* (2002) 27 Cal.4th 1230, 1247.) On redirect, the prosecution sought to explain its interest in Kaid in order to dispel any inference that it had once viewed him as the actual shooter. The trial court acted within its discretion to allow this testimony. (See *People v. Hamilton*, *supra*, 45 Cal.4th at p. 921.)

### C. Fetecia Tokes

In his final objection to prosecution evidence of motive, Cannon contends that the trial court improperly allowed Galloway's mother—Fetecia Tokes—to offer opinion testimony about the motive for her son's killing. Tokes testified for the prosecution, suggesting that Kaid knew who shot Galloway, but did not name the shooter. On cross-examination, Tokes testified that Kaid had phoned her, but that she refused to talk with him. On redirect examination, the prosecution asked why Tokes did not return his calls. She explained that she had heard that her son had been killed because of a stereo. She had heard that Kaid had sold Cannon a stereo, but that Kaid took it back later, with Galloway's help. The prosecutor asked why Tokes was upset with Kaid. Tokes opined that it was Kaid's idea to retrieve the stereo, prompting an objection from defense counsel about a lack of foundation for this response. The trial court ruled that Tokes was entitled to explain her understanding of an issue that defense counsel raised during cross-examination—specifically, why she was upset with Kaid. Tokes's testimony suggested that she held Kaid responsible for Galloway's death.

Tokes's testimony was admissible to explain her state of mind.<sup>23</sup> A statement justifying an inference about motive may be admissible as circumstantial evidence of a

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<sup>23</sup> The jury was instructed that certain evidence was admitted for a limited purpose, but was not admonished at the time of Tokes's testimony that it could only consider her testimony as evidence of her state of mind.

declarant's relevant state of mind. (*People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1305, overruled on another ground in *People v. Soto* (2011) 51 Cal.4th 229, 248 fn. 12; see Evid. Code, § 1250, subd. (a)(1).) It was also within the proper scope of redirect examination. As defense counsel elicited testimony during cross-examination from Tokes that she was unwilling to speak to Kaid after the shooting of her son, the prosecutor was entitled to question Tokes in order to rebut any adverse inferences arising from her cross-examination testimony. (See *People v. Cleveland, supra*, 32 Cal.4th at p. 746.) The defense suggested that Kaid—not Cannon—was the shooter. The prosecution could properly elicit from Tokes the reason that she refused to talk with Kaid—not because she believed that he killed her son, but because she believed that Kaid had enticed Galloway into stealing a stereo, thus providing Cannon with a motive to kill her son. Thus, the trial court acted within its discretion to allow the prosecution to question Tokes in this manner in order to rebut adverse inferences raised during cross-examination. (See *People v. Hamilton, supra*, 45 Cal.4th at p. 921.)

## VII. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. *Standard of Review*

Cannon also contends that he suffered ineffective assistance of counsel because defense counsel failed to object to five instances of opinion testimony or hearsay evidence. To succeed on an ineffective assistance of counsel claim, a criminal defendant must show both that trial counsel's representation fell below an objective standard of reasonableness and that it is reasonably probable that the result of the proceeding would have been different if counsel's error had not occurred. (*Strickland, supra*, 466 U.S. at pp. 686-688, 694-695; *People v. Ledesma, supra*, 43 Cal.3d at pp. 215-218; see *People v. Benavides, supra*, 35 Cal.4th at pp. 92-93.) Cannon must establish ineffective assistance of counsel by a preponderance of evidence. (See *People v. Ledesma, supra*, 43 Cal.3d at p. 218.)

An ineffective assistance of counsel claim fails on an insufficient showing of either incompetency or prejudice. (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1126.) On the first prong of the ineffective assistance of counsel test, our scrutiny of defense

counsel's performance must be highly deferential. We presume that defense counsel's conduct falls within a wide range of reasonable representation. (*Strickland, supra*, 466 U.S. at p. 689.) Cannon must overcome the presumption that under the circumstances, the challenged action might be considered a sound tactical decision. (*Ibid.*; see *In re Lucas* (2004) 33 Cal.4th 682, 722.) The California Supreme Court has held that, only rarely will a failure to object provide the basis for a successful ineffective assistance of counsel claim. Such matters are within counsel's discretion and rarely constitute ineffective assistance of counsel. (*People v. McDermott* (2002) 28 Cal.4th 946, 993.)

The second prong—prejudice—is established if counsel's failings render the jury's verdict unreliable or the trial fundamentally unfair. Counsel's failings must have undermined the proper functioning of the adversarial process that we cannot rely on the trial as having produced a just result. (*Strickland, supra*, 466 U.S. at p. 686; *In re Cudjo* (1999) 20 Cal.4th 673, 687.) The failure must be such that it undermines our confidence in the outcome of the trial. (See *People v. Majors* (1998) 18 Cal.4th 385, 403; *In re Ross* (1995) 10 Cal.4th 184, 201.) The deficiency must be egregious. (See *People v. Hart* (1999) 20 Cal.4th 546, 633.) With these legal standards in mind, we turn to the claims of ineffective assistance of counsel.

#### B. *Fleming on Ard Identification of Shooter*

Cannon first asserts that Oakland Police Sergeant Sean Fleming offered improper opinion testimony about Ard's identification of the shooter. Sergeant Fleming was the initial investigator on the shooting, before it became a homicide. He conducted the interview that resulted in Ard's October 2008 statement. During direct examination, the prosecutor asked the officer how confident Ard seemed about her identification of Cannon during that interview. Instead of responding to the question asked, Sergeant Fleming replied: "I was very confident that she had—that was the person she saw shoot Germaine Galloway."

On appeal, Cannon argues that trial counsel failed to object that Sergeant Fleming's answer was unresponsive—that he had been asked about Ard's confidence, but offered evidence of his own view of the truthfulness of her identification. To have raised

this objection would have brought his testimony to the jury's attention a second time, such that a reasonably competent attorney could have made a tactical decision to forego an objection. Coming as it did at the close of direct examination, defense counsel may have considered it more prudent to move on to cross-examination and to questioning Sergeant Fleming about matters that might have brought more benefit to the defense. Cannon has not overcome the presumption that counsel's failure to object was a sound tactical decision. (*Strickland, supra*, 466 U.S. at p. 689; see *In re Lucas, supra*, 33 Cal.4th at p. 722.)

### C. *Fleming on Ard Credibility*

Cannon also contends that Sergeant Fleming repeatedly opined that Ard was telling the truth when she identified him as the shooter in October 2008. In response to repeated questions, Sergeant Fleming told the jury three times that at the time that he interviewed Ard, he believed that she told him the truth. In his opening brief, Cannon argues that the prosecution elicited this testimony and that trial counsel was ineffective for failing to object to this prosecution questioning. As he concedes in his reply brief, the challenged exchange actually occurred during cross-examination, the result of questions asked by defense counsel.

Cannon now contends that this was also ineffective assistance of counsel, because trial counsel would have no reasonable tactical reason to invite a police officer to testify that the prosecution's sole identification witness was being truthful. We cannot review this claim on appeal, because the record before us does not allow us to ascertain whether any reasonable tactical explanation exists. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *People v. Milner* (1988) 45 Cal.3d 227, 241.) When—as here—the record on appeal sheds no light on why defense counsel acted in the challenged manner, trial counsel must be asked for an explanation and must fail to provide one, or there must be no satisfactory explanation. This ineffective assistance of counsel claim must be addressed by means of a habeas corpus petition. (See *People v. Mendoza Tello, supra*, 15 Cal.4th at pp. 266-267.)

#### D. *Swalwell on Ard Lying*

Cannon also criticizes Deputy District Attorney Swalwell for offering improper opinion testimony about Ard’s credibility at the preliminary examination. On direct examination, Swalwell explained how difficult it had been to obtain Ard’s presence at the preliminary hearing and that she was an uncooperative witness after she was arrested and brought to court. He testified that at the preliminary hearing, Ard denied giving her October 2008 statement to police until the videotape of it was produced. She also denied that the photograph that she selected in October 2008 was actually a photograph of Cannon, although Swalwell opined that it clearly was a picture of the defendant. During cross-examination, Swalwell admitted that at the preliminary examination, Ard denied everything she had said in her October 2008 statement. On redirect, the first question that the prosecutor asked Swalwell was whether it was “fair to say that Ms. Ard was not truthful when she testified at the preliminary hearing.” Without objection, Swalwell replied: “Yes.”

On appeal, Cannon asserts that Swalwell improperly opined that Ard lied when she said at the preliminary hearing that he was not the shooter. He contends that trial counsel was ineffective for failing to object to this opinion testimony. In our view, the testimony that Swalwell offered was a much more general denunciation of Ard’s truthfulness than Cannon now claims on appeal. This appears to have been a preliminary question that did little more than tell the jury what they already knew—that Ard’s preliminary hearing responses to Swalwell’s questions denied both the fact of her October 2008 statement and her photographic identification of Cannon. Even if we were to construe the response to be a more specific opinion about the credibility of Ard’s identification of Cannon during the photographic lineup, he has not overcome the presumption that this failure to object was a sound tactical decision. (*Strickland, supra*, 466 U.S. at p. 689; see *In re Lucas, supra*, 33 Cal.4th at p. 722; see *People v. McDermott, supra*, 28 Cal.4th at p. 993 [failure to object rarely constitutes ineffective assistance of counsel].)

### *E. Fullard on Cannon Denial*

Cannon argues that Alameda County District Attorney Inspector Jeffrey Jouanicot offered improper opinion testimony when he testified that Falisa Fullard did not believe Cannon's denial that he shot Galloway. When she testified for the prosecution, Fullard told the jury that Cannon had called her and had denied shooting Galloway. When asked if she believed him, Fullard replied: "I don't know."

During Inspector Jouanicot's testimony, the prosecutor asked if Fullard had spoken of this call from Cannon. Defense counsel's hearsay objection was overruled; trial court found that the response elicited by this question would be admissible under the prior inconsistent statement exception to the hearsay rule. (Evid. Code, § 1235.) The inspector then testified that Fullard had told them that Cannon had contacted her shortly after the shooting and had told her that he was not the person who shot Galloway. Asked about Fullard's response to Cannon's denial, Inspector Jouanicot testified that Fullard told him that she had told Cannon that she did not believe him. Fullard seemed indignant that Cannon would deny being the shooter. She was very confident when she spoke with the prosecutor and the inspector about it.

On appeal, Cannon contends that Fullard's opinion that Cannon was lying was improperly admitted as opinion testimony. The evidence was admissible despite the hearsay rule, because it was a prior inconsistent statement. (Evid. Code, § 1235.) On Cannon's claim of error that trial counsel failed to object to the evidence as also eliciting an improper opinion, we observe that Fullard's assertive statement that she told Cannon that she did not believe him was the crux of the inconsistency with her prior testimony. She told the jury at trial that she did not know if she believed that Cannon was the shooter, but when she spoke with the prosecution, she had been adamant that he was and that she had told him that she did not believe his denials. Under these circumstances, the trial court acted within its discretion to admit this evidence and thus, no error arose from failing to object.

Even if the evidence would have been excluded as opinion testimony if a proper objection had been raised, it is also reasonably possible that trial counsel failed to object

as a tactical choice. An objection would have distracted the jury from Jouanicot's testimony that Cannon had protested his innocence to Fullard—evidence that tended to favor the defense. (*Strickland, supra*, 466 U.S. at p. 689; see *In re Lucas, supra*, 33 Cal.4th at p. 722; see *People v. McDermott, supra*, 28 Cal.4th at p. 993 [failure to object rarely constitutes ineffective assistance of counsel].) Even if trial counsel could have made a successful objection on opinion grounds, his failure to object to minor, collateral evidence is not the sort of egregious error that undermines confidence in the outcome of the trial. (See *People v. Majors, supra*, 18 Cal.4th at p. 403; *In re Ross, supra*, 10 Cal.4th at p. 201; see also *People v. Hart, supra*, 20 Cal.4th at p. 633.) With error unlikely and prejudice nonexistent, Cannon cannot demonstrate ineffective assistance of counsel.

#### F. Hearsay About Alibi Evidence

Finally, Cannon contends that the prosecution elicited improper hearsay testimony from Inspector Jouanicot. At trial, Cannon's brother Yonus Davis testified as a defense witness. Davis told the jury that on the night when Galloway was shot—on Friday, October 3, 2008—Cannon was at home with him. He explained that he and the other members of the San Jose State University football team had played a game in Hawaii the previous weekend, but that no game had been scheduled on the weekend of the shooting. Davis testified that he flew home from Hawaii on the 27th or 28th of September, very soon after that game. On Friday, October 3, 2008, he did not eat with his team as he usually did on Friday nights, because there was no game the next day. Instead, he was certain that he was home in San Jose with Cannon all evening.<sup>24</sup> Davis was absolutely positive that Cannon was not in Oakland at the time of the shooting, because if Davis did not have a game on Saturday, he was always home on Friday nights.

Davis testified that he had given this information to Inspector Jouanicot. During rebuttal, the inspector testified that he verified that the San Jose State football team played in Hawaii on the weekend before the shooting and had no game the weekend when the crime occurred. In response to a prosecution inquiry, Inspector Jouanicot stated

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<sup>24</sup> We take judicial notice of these 2008 calendar dates. (See Evid. Code, §§ 451, subd. (f), 459, subd. (a)(2).)

that he had been unable to determine whether Davis was in Hawaii or in San Jose on the night of the shooting. The evidence was inconclusive, although one coach recalled that Davis was one of a group of players who remained in Hawaii after others returned to San Jose.

On appeal, Cannon contends that the evidence of the coach’s recollection repeated by Inspector Jouanicot was hearsay evidence. He contends that trial counsel was ineffective for failing to object to this evidence on those grounds. After the inspector offered this evidence, trial counsel questioned him again, prompting the inspector to admit again that he was unable to say whether Davis remained in Hawaii or returned home on Sunday, September 28, 2008. This admission came at the end of the inspector’s testimony. Rather than objecting, trial counsel chose to explore the issue on cross-examination—leaving the jury with a final admission that Inspector Jouanicot was unable to undermine the credibility of Davis’s alibi for Cannon. This would have been a reasonable tactical choice for trial counsel to make. As Cannon has not overcome the presumption that trial counsel made a tactical choice, he cannot establish that counsel’s conduct fell below an objective standard of reasonableness. (See *Strickland, supra*, 466 U.S. at pp. 686-688, 694-695; *People v. Ledesma, supra*, 43 Cal.3d at pp. 215-218; see *People v. Benavides, supra*, 35 Cal.4th at pp. 92-93.) Thus, his ineffective assistance of counsel claim fails.

The judgment is affirmed.

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Reardon, J.

We concur:

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Ruvolo, P.J.

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Sepulveda, J.\*

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\* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.