

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ALEJANDRO ORTEGA,

Defendant and Appellant.

A131244

(San Mateo County
Super. Ct. No. SC071032A)

Appellant Joseph Alejandro Ortega was charged by information with assault on a peace officer with a deadly weapon (a vehicle) or by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (c); Count 1)¹ and assault with a deadly weapon (§ 245, subd. (a)(1); Count 2). The information further alleged that Ortega was ineligible for probation, pursuant to section 1203, subdivision (e)(4), in that he served a prior prison term, within the meaning of section 667.5, subdivision (b), and that he had a strike prior felony conviction within the meaning of section 1170.12, subdivision (c)(1). Ortega was convicted, by jury, on Count 2 and was placed on probation for three years. Ortega contends that his conviction must be reversed because it is not supported by substantial evidence. He also argues: (1) that the trial court erred by denying his motion for discovery; (2) that the trial court erred by refusing to give an adverse inference instruction to the jury; and (3) that the trial court abused its discretion by denying his motion for new trial without conducting an evidentiary hearing. We affirm.

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

I. BACKGROUND

On August 13, 2009, San Mateo Police Sergeant Todd Mefford and several other officers were preparing to execute a search warrant upon the person and residence of Hector Ramirez at 1448 Newbridge Avenue in San Mateo. Between about 6:00 and 8:00 a.m., the officers took up positions near Ramirez's house. Mefford was driving an unmarked Ford Explorer that belonged to the San Mateo Police Department. Officer Mikhail Venikov was a passenger.² At about 8:00 a.m., they parked in the area of Newbridge and Rand Street, about two and a half or three blocks away from Ramirez's house. Mefford monitored the police radio, waiting for a message to activate the takedown plan.³

San Mateo Police Sergeant Arthur Sanchez and three other officers—Lethin, Reyna, and Rodenspiel—were in an unmarked Ford Windstar minivan. They parked along the curb on Newbridge, about 100 to 150 feet west of the residence and on the opposite side of the street. They were wearing jackets with distinctive patches and badges identifying themselves as police.

² Both Mefford and Venikov were wearing special weapons and tactics (SWAT) team battle dress uniforms. The uniforms had SWAT patches on the sleeve. The uniforms also identified their wearers as being part of the San Mateo Police Department. On the front of their tactical vests were the words "Police" written in large white lettering on a black background. There was a smaller patch with "Police" and "SWAT" on the back. There was a black San Mateo Police SWAT patch on the right side. The Ford Explorer did not have any police markings or lights on its exterior. The dashboard of the Ford Explorer rose to the level of the driver's chest, so, depending upon the angles from which an outside observer might be looking, the uniforms and the gear that the officers inside were wearing might be obscured by the dashboard.

³ If Ramirez were to exit the house and get into a vehicle, whether as the driver or as a passenger, one of the contingency plans called for Mefford and Venikov to drive from a position up the street and to block the front of the vehicle which Ramirez had entered, and simultaneously, four other officers would drive to a position to the rear of the vehicle containing Ramirez and would block it from behind. At that point, officers would detain Ramirez and execute the search warrant.

A few minutes after 10:00 a.m., Sanchez saw a Mitsubishi Eclipse pull up in front of Ramirez's house. A van was parked in front of the Eclipse. The driver of the Eclipse, later identified as Ortega, exited the car and walked toward the front door of Ramirez's house.⁴ After a few minutes, Ortega returned to the car and sat down in the driver's seat. A short while later, Ramirez came out of his residence and entered the passenger seat of the Eclipse. After waiting a few minutes, Sanchez directed Mefford and Venikov to proceed with the operation.

Lethin drove the Windstar very slowly toward the rear of the Eclipse. Meanwhile, Mefford drove the Explorer westward down Newbridge toward the Eclipse. The Windstar stopped about 10 feet short of the Eclipse's rear bumper, blocking it from behind. Sanchez got out of the Windstar after it stopped, but before the driver, Lethin, exited. As the officers exited the Windstar, they approached the rear of the Eclipse on foot.

Sanchez walked toward the driver's side of the Eclipse with a shotgun, which was visible, strapped around him. He held it in an upraised "low, ready" position. Rodenspiel was positioned to Sanchez's right carrying a MP-5 assault weapon. Sanchez and the other officers were yelling, "Police, Police," as they came alongside the Eclipse.

When Sanchez was near the rear bumper of the Eclipse, he saw the Explorer pull up and stop in front of the Eclipse. At that point, Sanchez saw the Eclipse leave its parking space parallel to the curb, quickly accelerate at a high rate of speed, and make a sharp left turn in one fluid motion to avoid the van which was parked directly in front of the Eclipse. The Eclipse then collided with the Explorer.⁵ Sanchez testified that, as a result of the collision, he saw the bodies of Mefford and Venikov jerking around inside

⁴ Ortega was not identified as a target or a suspect in the search warrant, and a Mitsubishi Eclipse was not identified in the warrant as involved in the matter under investigation.

⁵ Lethin testified that about a second after he got out of the Windstar, Ortega began to accelerate. Before trial, Lethin had said that he saw the Eclipse begin to accelerate as the officers were exiting the Windstar.

the Explorer. When Sanchez looked at Ortega's face after the collision, he saw "a look of shock." Sanchez also testified that Mefford's driving up in the Explorer and turning to the left, and Ortega's act of leaving the curb in the Eclipse occurred very quickly. He did not see the Eclipse moving while the Explorer was also moving.

Mefford testified that, after proceeding westerly down the right lane of traffic, he and Venikov passed the intersection of Newbridge and Norfolk. They were traveling at about 25 miles per hour. From there, he could see the Eclipse parked at the curb in front of 1448 Newbridge. Mefford then steered the Explorer partially into the center of the street, taking up part of the east-bound lane—the opposite lane—of traffic. He slowed down. He approached the Eclipse, and when the front of the Explorer was about even with the rear of the van which was parked in front of the Eclipse, Mefford turned slightly to the left, in order to block the Eclipse in from the front.

After turning left, while slowing, and just before coming to a complete stop, Mefford made eye contact with Ortega, who was looking out the front windshield directly at him. Mefford said that Ortega had "a wide-eyed look."⁶ Mefford testified that he was in the process of stopping the Explorer, in the center of Newbridge, when the Eclipse started accelerating and pulling away from the curb. He testified: "The Mitsubishi had started from the curb prior to me coming to a complete stop." According to Mefford, even before he turned the Explorer into the lane of oncoming traffic, Ortega did not have enough room to drive around the van in front of his car and then to pass by the Explorer.

Mefford explained that both vehicles were moving simultaneously for only about a second or less before he brought the Explorer to a complete stop. About a second elapsed from the time he stopped the Explorer until the collision occurred. Mefford had been preparing to jump out of the Explorer, in order to detain the person sitting on the passenger side of the Eclipse, as he had been assigned. However, Mefford paused before exiting the Explorer because he saw the Eclipse accelerating away from the curb and

⁶ According to Mefford, Ortega could have been panicked, scared, angry, or shocked.

toward the Explorer. The Eclipse then crashed into the front of the Explorer. It did not appear to Mefford that the Eclipse ever braked.⁷

Venikov testified that Mefford stopped the Explorer when it was about 10 to 15 feet from Ortega's car. Venikov saw Mefford gesture with his hand, as if he was putting the Explorer in park. Venikov testified: "As I'm opening the door, I'm looking at [Ortega]. He's looking at me and I kind of see [Ortega had his eyes open wide and put his hands out and open his palms outward]. And then I hear the acceleration of the Eclipse, and then we were impacted, and [at] that point I exited my vehicle." Venikov also said: "As I'm opening the door and I saw [Ortega's] eyes get big, he made a movement towards the center console. And at that point, that's when I heard the acceleration of the vehicle and the collision occurred." Venikov braced himself, felt a moderate jerk, and then exited the Explorer.

When Rodenspiel saw Ortega accelerating towards the Explorer, he raised his gun, put his finger on the trigger, and then tripped on the curb. His weapon discharged. The bullet entered the rear of Ortega's vehicle, passed through the back seat, the front seat and into Ortega's back.⁸

After the collision and shooting, the scene was frozen. No one touched anything until after photographs were taken.

The Investigation

San Mateo County Sheriff's Department Criminalist Amanda Munemitsu arrived at about 11:30 a.m., on August 13, 2009, to investigate the scene. She noted that the windows of the Eclipse were down on both sides and that music was playing on the radio. The ignition key was on. The gear shift lever of the Eclipse was in the center console.

⁷ Mefford also testified that, although ramming a vehicle may be an appropriate police tactic under some circumstances, he did not ram the Eclipse, and it would have been inappropriate to do so in this situation.

⁸ As we discuss *post*, Rodenspiel testified only in connection with certain motions, and did not testify before the jury.

The transmission was still in the drive position. She did not note any skid marks at the scene.⁹

California Highway Patrol Officer Jeffrey Egeline also responded to the scene. He looked for tire marks, skid marks, or friction marks, but did not find any that corresponded to the involved cars.

Within days, Detective Kimber Joyce sent the Eclipse to an automotive shop to see if it had an event data recording system (EDRS), similar to the “black boxes” that are on aircraft. The vehicle was determined to have such a system, and was then sent to a dealership to see if any data on the EDRS could be downloaded. Meanwhile, the Explorer was repaired. Joyce did not attempt to determine if it was equipped with an EDRS.

Defense Expert Testimony

Toby Gloekler testified as an expert in traffic collision reconstruction. After being retained by the defense, in January 2010, Gloekler examined the photographs and diagrams of the scene of the collision. He also examined the Eclipse at the police department. On May 11, 2010, he examined the Explorer and downloaded information from its EDRS.

Gloekler concluded that a mark, shown in photographs of the scene, was a skid mark made by the right front wheel of the Eclipse. This mark, he opined, was probably made as the Eclipse was decelerating right before the collision occurred. However, Gloekler also said it could have been an acceleration mark. He also identified a “scrub mark,” a type of tire mark left on the road surface when a vehicle is pushed sideways. The direction of the scrub mark, Gloekler said, was toward the curb.

Gloekler opined that both vehicles were moving at the time of the collision. The Explorer was moving at a speed of about five to ten miles per hour at the time of impact,

⁹ When Munemitsu was shown photographs taken at the scene she testified that “it’s possible” that certain marks shown in the photographs were tire skid marks.

probably closer to five miles per hour, and the Eclipse was moving about the same speed, probably a little faster.

Gloekler said that from the curb to the point of impact, the Eclipse could have accelerated to a speed of five to ten miles per hour, applied the brakes, and left a skid mark as long as the one pictured in the photographs that he examined. The two cars collided corner to corner. Gloekler opined that the damage to the Eclipse's left front and its hood resulted from its having been pushed by Explorer, a heavier vehicle. The Explorer, he said, struck the front and left side of the Eclipse. The Eclipse was pushed to the right.

Gloekler said the Eclipse would have passed between the Explorer and the van, and the collision would not have occurred, if the driver of the Explorer had not turned abruptly to the left, crashed into the Eclipse, and pushed it rightward, to the position in which the Eclipse ended up only about a foot from the rear of the van which had been parked in front of it. He said: “[B]ut for the left turn of the [Explorer], the vehicles would have passed by each other and there wouldn't have been a collision.”

Gloekler downloaded information from the airbag control module (ACM) and the powertrain control module (PCM) of the Explorer. Gloekler explained that, among other things, the ACM would record data related to the airbag, while the PCM would record engine RPM's, vehicle speed, braking, steering angle, and whether seatbelts were fastened. These systems would record and retain data for the 60-second period just before any collision. Over time, the information on the two modules will routinely be overwritten, either as a function of the passage of time, or as a function of the vehicle being driven on successive occasions. Gloekler said that the ACM data on the Explorer would probably have been available for three months after the August 13, 2009 collision. The PCM data on the Explorer would have remained available for between one and seven days after the collision. Gloekler testified that he did not recover any information about the August 13, 2009 collision from the Explorer. If any data had been recorded about the August 13, 2009 collision, it had been overwritten by the time that Gloekler downloaded it.

No data from the recording systems on the Eclipse was accessible with the equipment available to Gloekler. Gloekler said that data from the August 13, 2009 collision could easily have been downloaded from the Explorer if the police had taken certain steps to avoid the data recording systems being overwritten, such as quickly downloading the information at the scene of the collision, or by not starting the vehicle until the information could be downloaded. However, Gloekler did not know if the data recorders on either the Explorer or the Eclipse were working correctly on the date of the August 13, 2009 collision.

Rebuttal Testimony

San Mateo County District Attorney Inspector, and retired San Mateo Police Department Captain, Kevin Raffaelli testified that he was in charge of investigating the charged incident. He responded to the scene on the day of the collision. Raffaelli asked whether the Eclipse had an EDRS, and he made the decision to see if it contained any data regarding whether the Eclipse had accelerated, whether it was still running after the collision, and whether, at any time, the Eclipse had been placed in reverse.

Raffaelli did not inquire whether the Explorer had an EDRS. He had received information that the Explorer was stopped when the Eclipse ran into it.¹⁰ He concluded that no useful information would be obtained by downloading information from any event data recording device that might be on the Explorer.

Verdict

The jury convicted Ortega on Count 2 (§ 245, subd. (a)(1)), but found him not guilty of Count 1 (§ 245, subd. (c)). Ortega waived his right to a jury trial on the prior and special allegations and the trial court found them all true. Ortega filed a motion for new trial, on the grounds of alleged juror misconduct (§ 1181, subd. 3) and that the verdict was contrary to the evidence (§ 1181, subd. 6). The trial court later denied the

¹⁰ The jury was instructed that this testimony “is being offered not for the truth of it, but only to explain what [Raffaelli] did. And you’re only to consider it as his explanation of his own actions and not anything else.”

motion for a new trial but granted Ortega's motion, pursuant *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, to strike the priors alleged under section 1170.12. The trial court suspended imposition of sentence and granted Ortega three years formal probation. Ortega filed a timely notice of appeal.

II. DISCUSSION

Ortega contends that his conviction must be reversed because it is not supported by substantial evidence. He also argues: (1) that the trial court erred by denying his motion for discovery of Rodenspiel's statements during a related internal police department investigation; (2) that the trial court erred by refusing to instruct the jury that it could draw an adverse inference from the prosecution's alleged destruction of evidence; and (3) that the trial court abused its discretion by denying Ortega's motion for new trial without conducting an evidentiary hearing. We find Ortega's claims are without merit.

A. *Sufficiency of the Evidence*

Ortega was convicted of using his vehicle as a deadly weapon to commit an assault. Our Supreme Court has held that "assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.) "In other words, a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur. [¶] . . . [¶] [M]ere recklessness or criminal negligence is still not enough . . . because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know. [Citation.]" (*Id.* at p. 788.)

Consistent with these principles, the jury was instructed, pursuant to CALCRIM No. 875, that to find Ortega guilty of assault with a deadly weapon, the People were

required to prove beyond a reasonable doubt that: “1. Mr. Ortega did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person; [¶] 2. Mr. Ortega did that act willfully; [¶] 3. When Mr. Ortega acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] AND [¶] 4. When Mr. Ortega acted, he had the present ability to apply force with a deadly weapon.”

The jury was also told: “Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage. [¶] The terms application of force and apply force mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind. [¶] The touching can be done indirectly by causing an object or someone else to touch the other person. [¶] The People are not required to prove that Mr. Ortega actually touched someone. [¶] The People are not required to prove that Mr. Ortega actually intended to use force against someone when [he] acted. [¶] No one needs to actually have been injured by Mr. Ortega’s act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether Mr. Ortega committed an assault, and if so, what kind of assault it was. [¶] A deadly weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.”

Ortega maintains the evidence is insufficient to establish that his acceleration away from the curb was an act that would directly and probably result in the application of force to another person. He argues that when he accelerated he was not aware of any facts that would lead a reasonable person to conclude that said act would by its nature, result in the application of force. Ortega contends that his conduct was, at most, reckless. We conclude that the record contains substantial evidence to support the jury’s implicit findings.

In determining the sufficiency of the evidence on appeal, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) “In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] . . . [¶] The same standard governs in cases where the prosecution relies primarily on circumstantial evidence. [Citation.] We ‘must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]’ [Citation.] . . . Where the circumstances reasonably justify the trier of fact’s findings, a reviewing court’s conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment’s reversal. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357–358.)

The jury could reasonably infer, from the testimony of the officers, that Ortega was aware that the occupied Explorer was blocking his path and that awareness of these facts would lead a reasonable person to see a collision as the direct, natural and probable result of Ortega’s willful act of accelerating away from the curb. Venikov testified that the Explorer had stopped in a position blocking Ortega’s travel before Ortega began accelerating. Venikov also testified that he braced himself when he saw Ortega accelerating towards the Explorer—suggesting a collision was obvious.¹¹ Mefford

¹¹ On cross-examination, Venikov denied having received voicemail messages from an investigator working on Ortega’s behalf. Defense investigator Kenneth Henriot

testified that he had pulled the Explorer into the center of the road and made eye contact with Ortega before Ortega began accelerating and, even at that point, there was no way that Ortega could have driven between the Explorer and the van. Thus, the jury reasonably concluded that when Ortega accelerated away from the curb, he was “aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct.” (*People v. Williams, supra*, 26 Cal.4th at p. 788.) The jury was not compelled to credit Ortega’s theory that he pulled away from the curb with plenty of room to pass and that the Explorer drove into the Eclipse.

We are not persuaded by Ortega’s citation to *People v. Cotton* (1980) 113 Cal.App.3d 294 (*Cotton*) and *People v. Jones* (1981) 123 Cal.App.3d 83 (*Jones*). *Cotton* and *Jones* were decided before the Supreme Court’s decision in *Williams*. Furthermore, the facts involved in both *Cotton* and *Jones* are not comparable to those presented here.

Both *Cotton* and *Jones* involved high-speed police pursuits. In *Cotton*, the defendant collided with a police car while the defendant was crossing an intersection, at about 100 miles per hour. The defendant made efforts to avoid hitting the police car. (*Cotton, supra*, 113 Cal.App.3d at pp. 297–298, 301.) The reviewing court reversed the defendant’s conviction for assault with a deadly weapon because the judge, in the bench trial, erroneously relied on the doctrine of transferred intent and, in so doing, “simply transposed an intent to drive recklessly into an intent to commit a battery” and “precluded a meaningful examination of the nature of defendant’s intent towards [the police officer].” (*Id.* at p. 302.)

In *Jones*, the defendant, who had been driving recklessly in excess of 110 miles per hour, rear-ended another car. Witnesses testified that the defendant’s vehicle decelerated at the time of the collision. (*Jones, supra*, 123 Cal.App.3d at pp. 87, 96.)

testified that he left five messages on Venikov’s voicemail. Contrary to Ortega’s assertion, the jury was not compelled to discredit Venikov’s testimony because he denied having received the voicemail messages.

The reviewing court found “no evidence to show or infer defendant drove his vehicle at the other car involved in the collision. The overwhelming evidence is defendant drove his car in a gross reckless manner which resulted in bodily injury to another. And as such, his driving, under the given circumstances of this case, constituted a violation of Vehicle Code section 23104, not . . . section 245, subdivision (a).” (*Id.* at p. 96.) Relying on *Cotton*, the *Jones* court held that “in each case, evidence was lacking to show the drivers intended to commit a battery *or an act the natural consequences of which is the application of force on the person of another.*” (*Ibid.*, italics added.)

In this case, in contrast, there was no evidence that Ortega lost control of his car. Instead, there was substantial evidence that Ortega was aware of the presence of the Explorer in his path of travel before he intentionally accelerated away from the curb and continued into the Explorer. Contrary to Ortega’s assertion, *Cotton* and *Jones* do not establish “that when a person flees officers pursuing from behind, if that person collides with another vehicle during the chase, an assault with a deadly weapon is not proven beyond a reasonable doubt.” Substantial evidence supports the jury’s conclusion that Ortega’s conduct constituted assault with a deadly weapon.

B. *Discovery*

Ortega argues that the trial court erred by denying his motion to discover statements made by Rodenspiel during a police internal affairs investigation of the shooting.

1. *Background*

On August 30, 2010, Ortega moved for discovery, pursuant to section 1054 et seq., “of documentary materials and other tangible evidence arising from and pertaining to the investigation of the shooting of [Ortega] by . . . Rodenspiel.” Ortega’s trial counsel’s declaration recounted the following: “Det. Joyce interviewed Sgts. Sanchez and Mefford, Officers Reyna and Venikov and Dets. Lethin and Rodenspiel. All stated that Sgt. Mefford’s vehicle came to a complete stop in the middle of Newbridge to block [Ortega]’s vehicle, *after which* [Ortega] gunned his Mitsubishi and sped to the left into Mefford. Det. Rodenspiel also stated the following during his interview: after he exited

the Ford van with the other three officers, he was holding his MP-5 assault weapon with his finger on the trigger while advancing toward the rear of [Ortega's] vehicle, when his foot struck the curb as [Ortega's] vehicle was leaving the curb and he stumbled, and while trying to regain his balance he accidentally discharged his weapon. The bullet entered the rear of [Ortega]'s vehicle, passed through the back seat, the front seat and into [Ortega]'s back, where it lodged in his heart. [¶] . . . [¶] . . . As a result of the shooting, an investigation of Det. Rodenspiel's conduct was conducted by the San Mateo Police Department and apparently he was cleared of wrongdoing Mr. Gloekler is also an expert regarding law enforcement officers' proper use of firearms, and I have learned from him and others having knowledge in this area that proper handling of a firearm by an officer requires that s/he not rest a finger on the trigger unless and until s/he intends to shoot, and until that moment, the finger is to rest instead on the trigger guard. Therefore, given Sgt. Rodenspiel's admission that he was resting his finger on the trigger, the defense states on information and belief that he was not truthful when he told Det. Joyce that he accidentally discharged his weapon and instead that he intentionally and deliberately shot at [Ortega.] If such false statement can be shown, it would impeach Det. Rodenspiel generally and specifically regarding his statement that Sgt. Mefford's vehicle was fully stopped when [Ortega] sped into and rammed his Ford Explorer, which in turn would refute or raise a reasonable doubt as defendant's guilt for assault." The court denied the motion, without prejudice, after the prosecution represented that it had disclosed all such evidence.

Thereafter, Rodenspiel testified, at a hearing on Ortega's motion to suppress, that he provided a statement during an internal investigation into the shooting. Rodenspiel also testified that the Explorer "was basically just stopping as [he] was getting out of the [Windstar]." Then, Rodenspiel saw the Eclipse accelerate rapidly and run into the Explorer. When Rodenspiel saw Ortega accelerating towards the Explorer, Rodenspiel raised his gun, put his finger on the trigger, and then tripped on the curb. Rodenspiel unintentionally pulled the trigger on his gun. Ortega renewed his motion for discovery, stating: "I filed several motions for discovery. I think they were heard on September

27th and I specifically asked whether or not . . . Rodenspiel had made any statements to the police department or otherwise in the context of investigation as to the shooting; internal affairs; and I was told . . . that I had everything in discovery and it looks like there's now a separate interview about what happened during the scene and it's collectively relevant . . . and certainly discoverable with respect to the criminal case and so I would ask that it be produced." The prosecutor asked for time to investigate and the court continued the matter to November 15, 2010.

On November 15, 2010, the prosecutor informed the court: "Through my conversations with the police department and various research that I've done . . . two things have become apparent. First, . . . the only person who was contacted and actually interviewed during the internal affairs investigation was Officer Rodenspiel. So no other police officers were interviewed by the investigator according to the police department. The investigation consisted of Officer Rodenspiel's statement, plus a copy of the police report, which counsel already has. So . . . the only person's statement that we're talking about would be Officer Rodenspiel. [¶] Additionally, in speaking with the police department, it appears . . . that the statement given . . . during the internal affairs investigation was what's known as a compelled statement; meaning, that Officer Rodenspiel was given his Miranda admonition. He declined to make a statement invoking his 5th amendment rights and then he was read pursuant to [*Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822 (*Lybarger*)¹²] an admonition stating that . . . he was ordered as an employee of the department to answer all questions notwithstanding his

¹² "As a matter of constitutional law, it is well established that a public employee has no absolute right to refuse to answer potentially incriminating questions posed by his employer. Instead, his self-incrimination rights are deemed adequately protected by precluding any use of his statements at a subsequent criminal proceeding. [Citations.]" (*Lybarger, supra*, 40 Cal.3d at p. 827.) *Lybarger* held that a public employee, in such a situation, must be advised "that although he had the right to remain silent and not incriminate himself, (1) his silence could be deemed insubordination, leading to administrative discipline, and (2) any statement made under the compulsion of the threat of such discipline could not be used against him in any subsequent criminal proceeding. [Citations.]" (*Id.* at p. 829.)

invocation of Miranda. ¶ During that advisement, he was told that he is being ordered to answer questions despite his right to remain silent; that any statements given cannot be used in any criminal proceeding. That proposition has been upheld both by the United States Supreme Court in [*Garrity v. New Jersey* (1967) 385 U.S. 493 (*Garrity*)¹³] as well as [*Lybarger*]. ¶ Therefore at this time, the People are going to request that defense counsel's motion for discovery under 1054 be denied as any statements made by Officer Rodenspiel cannot be used in any criminal proceedings based upon the cases I've just cited." The court continued that matter, to December 3, 2010, to allow for further briefing.

On November 22, 2010, the People filed an opposition to Ortega's discovery motion, in which they argued that Rodenspiel's statements made during the course of the internal affairs investigation were protected from discovery because they were compelled after Rodenspiel had invoked his Fifth Amendment privilege against self-incrimination. The People also argued: "Because the statement was taken during an administrative process, it should be considered part of . . . Rodenspiel's personnel file, and thus only discoverable through the *Pitchess* procedure [(§ 832.7)]."¹⁴ In his reply brief, Ortega argued that Rodenspiel's interests against self-incrimination were not implicated in criminal proceedings against Ortega. Ortega also argued: "Whether or not Officer

¹³ In *Garrity, supra*, 385 U.S. 493, the U.S. Supreme Court held that the Fifth and Fourteenth Amendments prohibit use of a public employee's statements obtained under threat of discipline in subsequent criminal proceedings in which the public employee is a defendant. (*Id.* at pp. 495, 500.)

¹⁴ The City of San Mateo also filed a motion to quash Ortega's subpoena duces tecum, in which it argued: "Under section 832.7, police personnel records may only be obtained by a written noticed motion brought pursuant to Evidence Code sections 1043–1046. . . . The subpoena at issue does not qualify as a noticed motion showing the requisite materiality under Evidence Code section 1043." Section 832.7, subdivision (a), provides in relevant part: "Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code."

Rodenspiel's statements are admitted in defendant's trial does not entitle the People pretrial to refuse disclosure under Section 1054.1(f) or any other statute. Admissibility will be addressed by the trial judge"

On December 3, 2010, Judge Mallach denied Ortega's motion to compel discovery and granted the City's motion to quash the subpoena. In her ruling, Judge Mallach stated: "I don't think it's as simple as the fact that it's a criminal case I don't think it is a *Pitchess* and I don't think . . . it rises to the kind of constitutional dimension that the defense thinks it does. [¶] . . . I think we're all getting caught up in the fact that there was a shooting, obviously, by Detective Rodenspiel of the defendant. But that isn't what this case is about; that may be what some other case is about in terms of . . . civil litigation. That isn't what this is about. What this is about is whether or not the defendant is guilty of the crimes with which he's charged. [¶] And in that respect, the shooting isn't the main part of that. What the main part of if it is is that Detective Rodenspiel is a witness to the defendant's actions, but he's not the only witness. There's . . . a lot of witnesses who saw various things and so I'm not seeing the critical nature of his testimony as an internal affairs investigation into the shooting. It may be that he would testify to something at trial and . . . the defense is arguing well, if he testifies differently than he did at the internal affairs investigation that you could impeach him with that and that may be true, but I'm just not seeing the fact that you might be able to impeach him with something rises to the kind of constitutional dimension. [¶] . . . [T]he defense's desire to have the transcript to potentially impeach Detective Rodenspiel does not rise to the level that it goes against his privilege to have his personnel file be confidential. I just think that's the bottom line. [¶] . . . [¶] . . . We never make the decision whether it's admissible. It's whether or not it's discoverable. And . . . I'm weighing the different privileges here versus the right of the defendant to have a fair trial and I'm saying that . . . , at best, all it does is possibly impeach [Rodenspiel's] testimony. And you have so many people saying so many different things, I'm not sure that is critical here. [¶] . . . [¶] . . . I'll take your assumption for argument sake that there is something that would impeach his testimony. I'll just assume that and I still don't see it

as being compelling.” The court did not review, in camera or otherwise, Rodenspiel’s statement before making its ruling. Neither side called Rodenspiel as witness at trial.

2. *Analysis*

Ortega argues that Rodenspiel’s statements during the internal investigation were discoverable, under section 1054.1, subdivisions (e) or (f), because “they bore directly on the circumstances surrounding the crimes charged against [Ortega.]”¹⁵ The People argue, in response, that “[a]ny statement(s) that Officer Rodenspiel gave during the internal affairs investigation were privileged and beyond discovery.”

The question of whether a police officer’s compelled statement, made under the threat of discipline, is immune from discovery in a criminal proceeding involving a third party defendant is one we need not decide here. Because, even if we assume for the sake of argument, that the prosecution had a duty to produce Rodenspiel’s internal affairs statement and that Judge Mallach did err, Ortega has failed to show prejudice. Ortega never argued to the trial court that the evidence would be relevant for any purpose other than to impeach Rodenspiel’s proposed testimony regarding the chain of events leading up to the collision. “Failure to disclose relevant impeachment evidence requires reversal ‘only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.’ [Citation.] Otherwise stated, reversal is required “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the

¹⁵ Section 1054.1 provides: “The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial. [¶] (b) Statements of all defendants. [¶] (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged. [¶] (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. [¶] (e) Any exculpatory evidence. [¶] (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.”

result of the proceeding would have been different.” [Citation.]’ [Citation.]” (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1245; accord, *People v. Johnson* (2004) 118 Cal.App.4th 292, 305.) Since Rodenspiel was never called to testify at trial, there was no testimony to impeach, and thus, under any standard of prejudice, the prosecution’s failure to disclose was harmless.¹⁶

C. *Refusal of Special Instruction Regarding Destruction of Evidence*

Next, Ortega challenges the trial court’s refusal to instruct the jury that it could draw an adverse inference from the prosecution’s “improper destruction of evidence.” “Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence ‘that might be expected to play a significant role in the suspect’s defense.’ (*California v. Trombetta* (1984) 467 U.S. 479, 488; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 976.) To fall within the scope of this duty, the evidence ‘must both possess an exculpatory value *that was apparent before the evidence was destroyed*, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.’ (*California v. Trombetta, supra*, 467 U.S. at p. 489; *People v. Beeler, supra*, 9 Cal.4th at p. 976.) The state’s responsibility is further limited when the defendant’s challenge is to ‘the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.’

¹⁶ Ortega suggests, in his reply brief, that he may have called Rodenspiel to testify, if he had obtained the discovery he requested. We need not address arguments raised for the first time in a reply brief. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4; *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 864, fn. 12.) In any event, the testimony of Sanchez, Lethin, Venikov, and Mefford was largely consistent with Rodenspiel’s testimony, at the hearing on the motion to suppress, regarding the movement of the vehicles. And, even without the discovery, Ortega was able present his defense—that, but for the left turn of the moving Explorer, there would have been no collision. Thus, we do not think it is reasonably probable that, if Ortega had received the requested discovery, Ortega’s counsel would have called Rodenspiel to testify to the same chain of events only so he could be collaterally impeached about the shooting, or that Rodenspiel’s testimony would have led to a different result.

(*Arizona v. Youngblood* (1988) 488 U.S. 51, 57.) In such case, ‘*unless a criminal defendant can show bad faith* on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.’ (*Id.* at p. 58; accord, *People v. Beeler, supra*, 9 Cal.4th at p. 976.)” (*People v. Roybal* (1998) 19 Cal.4th 481, 509–510, italics added & parallel citations omitted.) “The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police’s knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.” (*Arizona v. Youngblood, supra*, 488 U.S. at pp. 56–57, fn. *; accord, *People v. DePriest* (2007) 42 Cal.4th 1, 42.) “On review, we must determine whether, viewing the evidence in the light most favorable to the superior court’s finding, there was substantial evidence to support its ruling. [Citation.]” (*People v. Roybal, supra*, 19 Cal.4th at p. 510.)

1. *Background*

Before the taking of testimony, Ortega moved to dismiss the information or, in the alternative, for sanctions, citing the police’s failure to preserve data from the Explorer’s EDRS. Testimony from Gloekler, Joyce, and Raffaelli, similar to that presented at trial, was heard on the motions. The court denied the motion, reasoning as follows: “I’m satisfied that under [*Arizona v. Youngblood, supra*, 488 U.S. 51] that this was speculative. This evidence, if it had any value at all, was speculative exculpatory value only. Based on then Captain Raffaelli’s testimony, the exculpatory value was not apparent before the evidence was lost. [¶] . . . [¶] I do find that there is no evidence of bad faith on the part of the police, and that it was not apparent that the evidence that was lost had any exculpatory value.”

During trial, Ortega asked the court to give the jury the following special instruction: “The failure by the San Mateo Police Department to preserve of [*sic*] evidence can support an inference adverse to the prosecution which may be sufficient to raise a reasonable doubt with respect to the charges against Mr. Ortega. [¶] In this case the defense contends that the Police Department failed to preserve information from the event recording device in the Ford Explorer involved in the collision.” In support of his

request, Ortega argued: “The data stored on the Ford Explorer’s two event recording systems . . . for the vehicle’s movements leading up to and at the time of the collision in this case unquestionably was discoverable to the defense, and directly material and relevant to the merits of the charges A reasonable doubt as to the truth of the charges would be more likely if this data supported [Ortega]’s theory that the Explorer was moving at the time of the collision.”

The People opposed Ortega’s request for the instruction, arguing: “[T]he data was not ‘gathered,’ therefore there was no duty to preserve. Because no due process violation [has been] found, any sanction, including any special instruction, is inappropriate.”

The court denied the motions, reasoning as follows: “I think it’s a big step that if I rule in this case the way you ask, I think that it sets a standard that the police always must download that black box whenever a vehicle is involved, and I just don’t see that as being logical or based on anything I’m reading in any of these cases about the police duty to collective evidence. [¶] . . . I feel, in reading and understanding the evidence in this case, that there’s a failure to collect evidence in this case, as opposed to a failure to preserve. That would be an issue of first impression, and I don’t think this court needs to make that particular finding. . . . [¶] . . . [¶] And in this case, it’s my ruling that a sanction is not warranted. I have heard in the pretrial motions the testimony of Detective Joyce and Inspector Raffaelli, and so I have actual testimony upon which I can base this ruling. . . . [¶] And based upon all of that and these cases that you’ve cited, I’m going to deny your request for the special instruction and not reach the issue of whether this was collected or preserved evidence. That we’ll leave for another day. I will allow you to argue to the jury that they can consider this when they evaluate the reasonable doubt instruction.” But, the court allowed Ortega’s counsel to argue to the jury “the effect that not having this evidence has on their consideration of reasonable doubt.”

2. *Analysis*

The trial court’s findings—that the data did not possess apparent exculpatory value before it was overwritten and that the police did not act in bad faith—are supported by substantial evidence. Ortega argues that “[a] reasonable doubt as to the truth of the

charges would have been more likely *if* [the Explorer’s recorded data] supported [his] theory that the Explorer was moving at the time of the collision.” (Italics added.) But, we simply do not know that the data would have been exculpatory. We agree with the People that it is speculative to assume as much.

Thus, the *Youngblood* bad faith test applies because the data contained on the Explorer’s EDRS was merely “potentially useful evidence.” (*Arizona v. Youngblood*, *supra*, 488 U.S. at p. 58.) Raffaelli testified that he did not inquire about the Explorer’s “black box” because he had been told that the Explorer was stopped at the time of the collision. Gloekler was not retained by the defense until many months later and, thus, the trial court properly concluded that the EDRS data had no apparent exculpatory value before it was overwritten. Ortega has not shown a due process violation.

Nor do we agree with Ortega that he was necessarily entitled to an adverse inference instruction, even in the absence of a due process violation. Reviewing courts have uniformly rejected claims of error grounded on the failure to give similar instructions when police negligently failed to preserve evidence whose exculpatory value was unapparent. (See *People v. Medina* (1990) 51 Cal.3d 870, 894; *People v. Huston* (1989) 210 Cal.App.3d 192, 215; *People v. Gonzales* (1989) 209 Cal.App.3d 1228, 1233–1234; *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1218.)

Ortega’s attempt to find statutory support for his position fares no better. He cites Evidence Code section 413, which provides: “In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party’s failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.” We know of no authority that suggests this code section mandates an adverse inference instruction when the requirements of *Trombetta* and *Youngblood* are not established. In fact, the only authority we have located suggests the section is inapplicable. (See *People v. Saddler* (1979) 24 Cal.3d 671, 681 [“[s]ince the only testifying ‘party’ in a criminal case is the defendant, [Evidence Code section 413] can have reference only to [the defendant]” (fn. omitted)].) In any event, the record

shows only that the police failed to collect the Explorer’s EDRS data, not that the police willfully suppressed such evidence. And, Ortega was able to present his theory, that the Explorer was moving at the time of the collision, through Gloekler’s testimony. Ortega was also permitted to argue to the jury that they should consider the police’s failure to retrieve the Explorer’s EDRS data. The trial court did not abuse its discretion by refusing the instruction.

D. *Motion for New Trial*

Ortega contends the trial court abused its discretion by denying his motion for new trial, on the grounds of juror misconduct, without conducting an evidentiary hearing. We disagree.

“ ‘The determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.’ [Citations.]” (*People v. Williams* (1988) 45 Cal.3d 1268, 1318.)

1. *Background*

Ortega filed a motion for new trial, on the grounds of alleged juror misconduct (§ 1181, subd. 3) and that the verdict was contrary to the evidence (§ 1181, subd. 6)). In support of his motion, Ortega provided a declaration from Jacqueline Tully, a private investigator retained by Ortega’s counsel, which states: “3. On January 9, 2011, I spoke on the telephone with [Juror No.] 12 He told me that during the deliberations the jurors were kind of suspicious [of] why Mr. Ortega did not testify during trial and that they talked about this a little. [Juror No. 12] also told me that during the deliberations he wondered why Mr. Ortega did not testify. [¶] 4. I have not been able to get a signed declaration from [Juror No. 12.]”¹⁷ The People opposed Ortega’s motion for a new trial,

¹⁷ The jury had been instructed as follows: “A defendant has an absolute constitutional right not to testify. He or she may rely on the state of evidence and argue that the People have failed to prove the charge beyond a reasonable doubt. Do not consider for any reason at all the fact that Mr. Ortega did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.”

arguing that Tully’s declaration contained inadmissible hearsay and that there was no evidence that the verdict was materially affected by Juror No. 12’s curiosity regarding Ortega’s failure to testify. In connection with his reply brief, Ortega submitted a supplemental declaration from Tully, which states: “3. After my telephone interview with [Juror No. 12], I have tried unsuccessfully to make further contact with him.

[¶] 4. During my interview of him, I was not able to ask him to sign an affidavit. To date I have not had an opportunity to ask him to sign an affidavit recounting what he told me, nor has he refused to provide an affidavit.”

In denying the motion for a new trial, with respect to alleged juror misconduct, the trial court stated: “[Ortega] has failed to submit any admissible evidence of misconduct. [¶] I do find that your suggestion as to exception to the hearsay rule is not persuasive. . . . [¶] . . . The court would require an affidavit from the juror recounting the juror’s personal observation of the alleged misconduct or his personal involvement in such misconduct. [¶] The court has reviewed [*Grobesson v. City of Los Angeles* (2010) 190 Cal.App.4th 778 (*Grobesson*)] . . . The [*Grobesson*] court cites with approval . . . cases which allow the admissibility of juror and bystander declarations that evidence that the declarant was present and personally heard the statement that constituted the misconduct. [¶] That’s not what we have here. In this case, all we have is the investigator’s declaration which . . . I find to be hearsay. The court relies on [*People v. Cox* (1991) 53 Cal.3d 618, 697 (*Cox*), disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22], where our Supreme Court held that the trial court did not abuse its discretion by refusing to admit a defense investigator’s affidavit recounting a juror statement and the juror’s unsworn statement. [¶] . . . [¶] The Supreme Court has further stated, in [*People v. Hedgecock* (1990) 51 Cal.3d 395, 414–415 (*Hedgecock*),] that . . . section 1181 does allow for an evidentiary hearing. But the court has held that when a criminal defendant moves for new trial based on allegations of jury misconduct, the trial court has discretion to conduct an evidentiary hearing to determine the truth of the allegations. [¶] And I am quoting from the Supreme Court. ‘We stress, however, that the defendant is not entitled to such a hearing as a matter of right. Rather, such a hearing should be held only when

the trial court, in its discretion, concludes that an evidentiary hearing is necessary to resolve materially disputed issues of fact.’ [¶] Based on the foregoing, the court finds that it has no admissible evidence of jury misconduct. And I do exercise my discretion by disallowing an evidentiary hearing on the matter. No juror has submitted a declaration on the matter and the court will not compel any juror to come to court under this situation. [¶] Additionally, under [*People v. Avila* (2009) 46 Cal.4th 680, 727], the court finds that it has nothing more than a hearsay statement of an expression of wonderment and curiosity. And that alone is not sufficient. Therefore, the motion for new trial is denied.”

2. *Analysis*

“ ‘When a party seeks a new trial based upon jury misconduct, a court must undertake a three-step inquiry. The court must first determine whether the affidavits supporting the motion are admissible. (See Evid. Code, § 1150, subd. (a).)^[18] If the evidence is admissible, the court must then consider whether the facts establish misconduct. [Citation.] Finally, assuming misconduct, the court must determine whether the misconduct was prejudicial. [Citations.]’ ” (*People v. Bryant* (2011) 191 Cal.App.4th 1457, 1467.)

Our Supreme Court has stated: “The trial court has the discretion to conduct an evidentiary hearing to determine the truth or falsity of allegations of jury misconduct, and to permit the parties to call jurors to testify at such a hearing. [Citation.] Defendant is not, however, entitled to an evidentiary hearing as a matter of right. Such a hearing should be held only when the court concludes an evidentiary hearing is ‘necessary to resolve material, disputed issues of fact.’ [Citation.] ‘The hearing should not be used as a “fishing expedition” to search for possible misconduct, but should be held only when the

¹⁸ Evidence Code section 1150, subdivision (a) provides: “Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.”

defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing. [Citations.]” (*People v. Avila* (2006) 38 Cal.4th 491, 604; accord, *People v. Dykes* (2009) 46 Cal.4th 731, 809–810; *Hedgecock, supra*, 51 Cal.3d at pp. 415–419.)

Ortega contends that “[t]he juror misconduct disclosed in [Juror No. 12’s] declaration adversely impacted [Ortega]’s constitutional rights not to testify and to a fair trial under the Fifth and Sixth Amendments, as well as his rights under state law, all of which required a new trial.” He relies on *Grobesson, supra*, 190 Cal.App.4th 778, in which the defendant presented a sworn declaration from a juror. (*Id.* at pp. 784–786, 795.) But, here, the only evidence of juror misconduct was the defense investigator’s declaration containing multiple levels of hearsay. (See Evid. Code, § 1200, subd. (a) [“ ‘[h]earsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated”].) No declaration from Juror No. 12 was presented.¹⁹ Thus, the trial court properly recognized that it need not go beyond the first step because “[n]ormally, hearsay is not sufficient to trigger the court’s duty to make further inquiries into a claim of juror misconduct.” (*People v. Hayes* (1999) 21 Cal.4th 1211, 1256; see also *People v. Carter* (2003) 30 Cal.4th 1166, 1217; *Cox, supra*, 53 Cal.3d at p. 697; *Williams, supra*,

¹⁹ Juror No. 12’s out of court statement to the defense investigator was not admissible under Evidence Code section 1251. Evidence Code section 1251 provides: “Subject to Section 1252, evidence of a statement of the declarant’s state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if: [¶] (a) *The declarant is unavailable as a witness*; and [¶] (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.” (Italics added.) In this case, Ortega has made no showing that Juror No. 12 was unavailable. (See Evid. Code, § 240.)

45 Cal.3d at p. 1318; Evid. Code, § 1200, subd. (b) [“[e]xcept as provided by law, hearsay evidence is inadmissible”].) And, “ordinarily a trial court does not abuse its discretion in declining to conduct an evidentiary hearing on the issue of juror misconduct when the evidence proffered in support constitutes hearsay. [Citations.]” (*People v. Dykes, supra*, 46 Cal.4th at p. 810.) On this record, the trial court did not abuse its discretion in denying Ortega’s motion for new trial.

III. DISPOSITION

The judgment is affirmed.

Bruiniers, J.

We concur:

Simons, Acting P. J.

Needham, J.