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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO T. REYES,

Defendant and Appellant.

A131608

(Contra Costa County
Super. Ct. No. 05-101034-7)

Francisco T. Reyes was convicted by jury of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).) He seeks reversal of that conviction, claiming error by the trial court in: (1) stationing a courtroom deputy near him while he testified at trial, thereby prejudicing the jury against him; (2) improperly revealing instances of his prior misconduct to the jury; and (3) admitting the victim’s out-of-court testimony and statements, thus depriving him of his constitutional right to confront the witnesses against him. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND¹

The Prosecution’s Case

Around noon on August 8, 2010, Maria Ceja and her friend, Modesto Avalos, went to buy nachos from the home of Carolina Aguilar on Duboce Avenue in Richmond.

¹ In this portion of our opinion, we set out the facts of the underlying offense. In the course of our legal discussion, we discuss additional facts related to Reyes’s specific claims of error.

Ceja went to the door to place the order, while Avalos waited outside leaning against a truck. After they ordered the nachos, Reyes arrived on a bicycle.

Ceja testified she had known Reyes for four years and the two were friends. Approximately two years earlier, he had expressed a romantic interest in her, but after she declined his advances, Reyes became aggressive. He accused Ceja in front of her children of “messing with men” and charging men for sex.

On August 8, Reyes followed Ceja into Aguilar’s yard, came within inches of her, called her a whore, and demanded she give him money. Reyes and Ceja argued for about 10 minutes, then Reyes approached Avalos, telling Avalos it was his fault Ceja would not speak to him. Reyes became increasingly upset and continued to tell Avalos, “it’s your fault” or “it’s because of you.” Shortly thereafter, as Ceja turned and started to walk back to Aguilar’s house to purchase sodas, she heard Avalos cry out in pain. She turned and saw Avalos fall to the ground. Reyes was standing over Avalos holding a piece of wood.² Avalos was bleeding from a wound over his right eye, and it appeared to Ceja that he had lost consciousness.

Reyes then picked up Avalos by the collar and “head-butted” him several times. Avalos’s face was covered in blood, and he was not fighting back. Aguilar came out of her house, and she and Ceja managed to separate the two men. Aguilar told Avalos to run to her house, and he ran towards the back of the residence. After the women separated Reyes and Avalos, Reyes came after Ceja and hit her in the back with the piece of wood. He punched her in the face, giving her a bruise and injuring her left eye.

At about 12:40 p.m. on the day of the incident, Suzanne Arnhart was in her truck in front of a building she owned on Duboce Avenue when she saw Reyes hitting another man with a piece of wood. The man being hit was kneeling on the ground in the street,

² In the record and briefs, the dimensions of the piece of wood are described in different ways, most frequently as a two-by-four but also as a two-by-six. The clerk’s minutes and the trial court’s list of exhibits describe it as a “2x6 board.” The difference in description is not material to this case, and we will refer to the weapon as a two-by-four.

and Arnhart saw Reyes strike the victim at least three times with the board. The kneeling man had his arms over his head to protect himself and did not appear to be making any effort to fight back.

Arnhart called 911 and drove past the location where the assault was taking place. At trial, a tape recording of her 911 call was played for the jury. Arnhart told the 911 operator someone was “getting beat up with a 2x4” at the corner of Duboce and Filbert. She identified Reyes to the operator as “the guy that was hitting the other guy.” When the operator asked Arnhart how she knew Reyes, she replied, “Because he was almost arrested last weekend for staying in a . . . vacant unit I own.” At trial, Arnhart acknowledged telling the 911 operator she had seen Reyes kick Avalos, and although she could not remember the events exactly by the time of trial, she said she must have seen it or she would not have reported it. She was sure Reyes was the man she saw hitting Avalos with the two-by-four.

Richmond Police Officer Ian Reid arrived at the scene one or two minutes after 12:46 p.m. He saw Reyes and Ceja arguing, and the officer ordered Reyes to lie on the ground several times. Reyes did not comply and began to walk away. Reid grabbed Reyes and threw him on the ground. Reyes was then taken into custody. An officer who examined Reyes saw no visible injuries. The officer also examined Avalos and observed a laceration over Avalos’s right eye and lacerations on his bottom lip and left index finger. Avalos’s right orbital socket was swollen and there was red and black bruising in that area.

Officer Byron Macrenato, a certified Spanish interpreter, arrived at the scene and spoke to both Avalos and Aguilar in Spanish. Less than two minutes after his arrival, Macrenato located Avalos in the backyard of Aguilar’s house, and he observed that Avalos had several injuries to his face, including a laceration over his eye from which he was bleeding. The officer asked Avalos how he had sustained his injuries, and Avalos recounted how Reyes had head-butted him, knocked him to the ground, struck him several times in the back with a two-by-four, and kicked him.

Aguilar told Macrenato that while Avalos and Ceja were buying nachos at her house, she saw Reyes approach them holding a two-by-four in his right hand. Aguilar saw Avalos turn and confront Reyes, at which time Reyes head-butted Avalos several times. Avalos fell to the ground, and Reyes struck him in the back two or three times with the two-by-four.³

Avalos could not be located at the time of trial, and the trial court admitted his testimony from a September 9, 2010 preliminary hearing. At that hearing, Avalos testified Reyes had approached Ceja while he and Ceja were buying nachos. Reyes was upset and began to argue with Ceja, and shortly after Avalos told him to calm down, Reyes hit Avalos with a two-by-four, cutting his right eye. Avalos said he fell to the ground, and Reyes then grabbed him by the hair and hit him with his head and hands. Avalos testified he did not hit Reyes before he was hit by the two-by-four. He did not see Reyes hit Ceja with the piece of wood. After Aguilar and Ceja separated the two men, Avalos went into Aguilar's backyard. An ambulance arrived but Avalos did not want to go to the hospital.

The Defense Case

Reyes testified in his own defense at trial. He said he had been going to the store on August 8, 2010, but turned back, approached Ceja in Aguilar's yard, and asked her for money she owed him. He and Ceja were arguing when Aguilar came out of her house to give Ceja the nachos. While they were arguing, Avalos walked past Reyes and picked up a piece of wood from the sidewalk.

Avalos walked up to Reyes, who was standing on the sidewalk holding his bicycle, and swung the piece of wood at Reyes's head. Reyes lifted up his bicycle to shield himself, and the wood crashed against the bicycle. Reyes dropped the bicycle and

³ Aguilar's trial testimony differed from the statement she gave Macrenato shortly after the incident. At trial, Aguilar testified she never saw anyone attacked on her property. She said when she returned with Ceja's change, she saw Reyes and Avalos in the street fighting. They were hitting each other, but she did not see either of them use a weapon, although she admitted it was possible she had seen Reyes with a piece of wood in his hands. Aguilar did not see Reyes hit Ceja.

grabbed the piece of wood as it flew through the air, then threw it into the street. While Reyes was struggling with the piece of wood, Avalos hit him on the top of the head with his fist. The men began fighting, eventually falling to the ground, and Reyes grabbed Avalos by the hair and hit him two or three times with his fist. Avalos tried to head-butt Reyes, but Reyes managed to avoid being hit. Aguilar and Ceja intervened to separate the two men, and Ceja kicked Reyes several times. Reyes got up from under Avalos, and the latter headed for Aguilar's backyard.

Reyes acknowledged the piece of wood was a deadly weapon, and he threw it far away so it could not be used. He admitted hitting Avalos, but explained he did not use a lot of force when he did so and was only acting in self-defense. Reyes testified he received two or three cuts or abrasions, but he did not show those injuries to the police.

The Charges, Verdict, and Sentence

For the attacks on Avalos and Ceja, the Contra Costa County District Attorney charged Reyes with two counts of assault with a deadly weapon and by force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).) Reyes was alleged to have personally used a deadly weapon—the two-by-four—in connection with both counts. (Pen. Code, § 12022, subd. (b)(1).)

On January 18, 2011, the jury convicted Reyes on count 1 for the attack on Avalos, and it found the weapons enhancement true. Reyes was acquitted of the attack on Ceja charged in count 2. The trial court sentenced Reyes to the three-year midterm and stayed the enhancement for use of a deadly weapon. Reyes filed a timely appeal.

II. DISCUSSION

Reyes raises four points of alleged error. First, he claims the trial court violated his constitutional rights by placing a courtroom deputy near him while he testified. Second, he contends that during trial the jury was improperly made aware of two instances of his prior misconduct. Third, he argues the admission of Avalos's statements to Macrenato violated his constitutional right to confrontation. Finally, he asserts that the trial court erred in admitting Avalos's preliminary hearing testimony, because the prosecution failed to demonstrate that there had been reasonable diligence in attempting

to secure Avalos’s attendance at trial. We conclude that none of these arguments has merit.

A. *The Trial Court Did Not Abuse its Discretion by Stationing a Courtroom Deputy Near Reyes While He Testified.*

Reyes contends he was deprived of his constitutional rights to due process, a fair trial, and the presumption of innocence because the trial court chose to station a courtroom deputy near the witness stand while Reyes testified. We disagree. Having reviewed the record, we conclude the trial court did not abuse its discretion in ordering this additional security measure. Moreover, even if we were to assume the trial judge abused her discretion, any error was harmless.

1. *Facts*

Prior to Reyes’s testimony and outside the presence of the jury, the trial court told counsel, “[I]t’s common practice in my court to have a deputy stand near the defendant at all times in the courtroom, whether the person is at the counsel table or on the stand. And if Mr. Reyes takes the stand, I was going to do that in this case.” Defense counsel objected that having the deputy near Reyes would cause the jury to infer that the court viewed the defendant as a physical threat and would prejudice the jury against him.

The court overruled the objection, stating, “I should have made it clear, but it’s also my practice, if we do this, to specifically admonish the jury not to hold it against him, but to inform them that it is common practice to have the deputy stand near the defendant at all times while in the courtroom or on the stand. And not to take any inference from the Court that it’s following this practice. [¶] But for the record, I am concerned—and I’m not doing this arbitrarily. For the record, I am concerned because of the allegations in this case, and the testimony that we’ve heard so far, and I view it as a security precaution that I’m taking. [¶] But I will—I also am comfortable with instructing the jury that it is common practice in this court to have the deputy near the defendant while court is in session and not to take any inference about that or hold that against the defendant.”

Before Reyes took the stand, the court gave the jury the following instruction: “[M]embers of the jury, I want to explain that it’s common practice in my courtroom the defendant is usually accompanied by a Sheriff’s deputy. [¶] And so it is my practice to have that person, the deputy, stand near the person who is the defendant, whether they’re at counsel table or here on the witness stand. [¶] And the—you might notice, well, the other witnesses didn’t have—the other witnesses weren’t the defendant. [¶] I don’t mean to infer anything about Mr. Reyes’s testimony or to distinguish him from other people who have testified in the case by having the deputy stand here. It’s just common practice in my courtroom that wherever the defendant is, the deputy is there also. [¶] So that fact should not affect your consideration of anything in terms of this next witness’s testimony.”

2. *Governing Law and Standard of Review*

In *People v. Stevens* (2009) 47 Cal.4th 625 (*Stevens*), the California Supreme Court held that a courtroom deputy’s presence at the witness stand during a defendant’s testimony is not an inherently prejudicial practice that must be justified by a showing of manifest need. (*Id.* at pp. 629, 638, 642.) The high court explained the trial court’s responsibility in such situations: “The court may not defer decisionmaking authority to law enforcement officers, but must exercise its own discretion to determine whether a given security measure is appropriate on a case-by-case basis. [Citations.] Under *Holbrook v. Flynn* (1986) 475 U.S. [560] at page 570, the trial court has the first responsibility of balancing the need for heightened security against the risk that additional precautions will prejudice the accused in the eyes of the jury. ‘It is that judicial reconciliation of the competing interests of the person standing trial and of the state providing for the security of the community that, according to [Supreme Court precedent], provides the appropriate guarantee of fundamental fairness.’ [Citation.] The trial court should state its reasons for stationing a guard at or near the witness stand and explain on the record why the need for this security measure outweighs potential prejudice to the testifying defendant. In addition, although we impose no sua sponte duty for it to do so, the court should consider, upon request, giving a cautionary instruction,

either at the time of the defendant's testimony or with closing instructions, telling the jury to disregard security measures related to the defendant's custodial status." (*Stevens, supra*, at p. 642.)

In *People v. Hernandez* (2011) 51 Cal.4th 733 (*Hernandez*), our state's high court held that a trial court abuses its discretion when it stations a deputy at the witness stand during a defendant's testimony if it is clear the trial court did so based on a standing practice rather than on a case-specific assessment of the need for such heightened security measures. (*Id.* at p. 744.) In that case, a courtroom deputy followed the defendant to the stand and stood behind him during his testimony. (*Id.* at p. 739.) The trial court had not discussed this procedure with counsel beforehand, and when defense counsel later objected to it, the trial judge explained she had observed this procedure in every trial she had ever done and further noted the "defendant was accused of aggravated assault 'with a very bad injury.'" (*Ibid.*) The judge stated that the placement of the deputy at the witness stand was "'just what happens in every case that I've ever tried.'" (*Id.* at p. 740.) The trial judge also relied on the defendant's "'18-page rap sheet'" but refused to review the defendant's record to see whether he had acted violently, stating that she had no need to do so. (*Ibid.*)

The Supreme Court concluded this constituted an abuse of discretion, because the trial court's decision "was not based on a thoughtful, case-specific consideration of the need for heightened security, or of the potential prejudice that might result." (*Hernandez, supra*, 51 Cal.4th at p. 743.) The trial court's remarks revealed that it "was following a general policy of stationing a courtroom officer at the witness stand during *any* criminal defendant's testimony, regardless of the specific facts about the defendant or the nature of the alleged crime." (*Ibid.*) The Supreme Court dismissed the trial court's "scattered references to individualized facts" as "at most, an effort to construct a post hoc justification for a security measure the court had already decided to employ pursuant to its standard policy." (*Ibid.*) The circumstances of the trial further indicated the trial judge had stationed the deputy at the witness stand as a routine practice, and not based upon case-specific considerations. "The court did not discuss the matter with counsel,

did not hear case-specific rationales for increased security, and did not state reasons on the record before imposing the security measure.” (*Id.* at p. 744.) These circumstances supported the Court’s conclusion that the court ordered the deputy’s presence at the witness stand as a matter of routine. Although *Hernandez* concluded this constituted an abuse of discretion, it nevertheless found the error harmless. (*Id.* at pp.744, 746–748.)

“Decisions to employ security measures in the courtroom are reviewed on appeal for abuse of discretion. [Citation.]” (*Hernandez, supra*, 51 Cal.4th at p. 741). This standard applies to the challenge to the trial court’s decision to station a courtroom deputy near Reyes while he was testifying. (*Stevens, supra*, 47 Cal.4th at pp. 643–644.) If we find the trial court abused its discretion in this regard, we then review the error under the familiar standard of *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*Hernandez, supra*, at p. 745.) Under the *Watson* standard, “we must reverse the conviction if it is reasonably probable the defendant would have obtained a more favorable result absent the error.” (*Ibid.*)

3. *The Trial Court Properly Exercised its Discretion.*

Reyes contends the trial judge in this case, like the trial judge in *Hernandez*, attempted to construct a post hoc justification for a heightened security measure she had already decided to employ as a matter of standard practice. He further argues there were no facts to justify the trial court’s choice and that the trial court’s reliance on the charges against him was in derogation of the presumption of innocence, because he had not yet been convicted of the charges. We cannot agree.

Reyes makes much of the trial court’s statement that stationing a deputy near a testifying defendant was its “common practice.” The People contend the word “common” does not mean that the court stationed a deputy near a testifying defendant in every criminal trial or that it did so without considering the circumstances of the particular case. It is unclear from the record whether the court’s reference to its common practice meant that it imposed this security measure in every single case in which a criminal defendant testified or whether it simply meant the practice was not unusual. (Cf. *Hernandez, supra*, 51 Cal.4th at p. 743 [trial judge stated she had seen a deputy at the

witness stand in every case she had ever done, even in cases of petty theft].) We are unwilling to conclude that this ambiguous statement, standing alone, demonstrates an abuse of discretion. (See *id.* at p. 744 [“[w]here *it is clear* that a heightened security measure was ordered based on a standing practice, the order constitutes an abuse of discretion” (italics added)].) We note that unlike the trial judge in *Hernandez*, the trial judge in this case explained her reasoning on the record. She told counsel she was not imposing the security measure arbitrarily but instead was taking a “security precaution” because of the allegations against Reyes and the testimony she had heard. The trial judge also considered the potential prejudice to Reyes and on her own motion gave a cautionary instruction to the jury that it should not infer anything about Reyes from the deputy’s presence. This was sufficient to satisfy the trial court’s obligations. (See *Stevens, supra*, 47 Cal.4th at p. 642 [trial court should state on the record its reasons for stationing deputy near the witness stand, explain why need for security measure outweighs prejudice to defendant, and consider giving cautionary instruction].)

We also reject Reyes’s argument that the trial court could not consider the charges against him in deciding what security measures were appropriate. (See *Hernandez, supra*, 51 Cal.4th at p. 743 [trial court stationed deputy at witness stand without considering “specific facts about the defendant or *the nature of the alleged crime*” (italics added)]; *Stevens, supra*, 47 Cal.4th at p. 643 [trial court properly exercised discretion based upon testimony it had heard from witnesses in the case].) Moreover, his claim that there was “no evidence of . . . refusal to submit to arrest” is simply false. Prior to the court’s ruling, it had heard the testimony of a police officer who, after arriving at the scene of the crime, had ordered Reyes to lie on the ground several times, and who reported Reyes failed to comply and instead began to walk away. The officer drew his gun, grabbed Reyes, and threw him on the ground. The allegations against Reyes and these facts support the trial court’s exercise of discretion. Furthermore, unlike *Hernandez*, in this case the stationing of the deputy near the witness stand did not take defense counsel by surprise. (*Hernandez, supra*, at pp. 743, fn. 4, 744.) The trial judge

here discussed the procedure with counsel in advance and explained on the record its rationale for imposing the security measure. (Cf. *id.* at p. 744.)

We therefore conclude the trial court properly exercised its own judgment, based on the facts of this case, in ordering a deputy to stand near Reyes while he testified. In these circumstances, its imposition of this security measure was not an abuse of its discretion. (See *Stevens, supra*, 47 Cal.4th at p. 643.)

4. *Assuming the Trial Court Abused its Discretion, Any Error Was Harmless.*

Even if we “err on the side of caution and presume that the trial court abused its discretion under *Hernandez*” (*People v. Sanchez* (2011) 200 Cal.App.4th 70, 79), we conclude it is not reasonably probable Reyes would have obtained a more favorable result absent the presumed error. We reach this conclusion for several reasons.

First, the trial court followed the procedure recommended in *Stevens, supra*, 47 Cal.4th 625, by giving a cautionary instruction at the time of Reyes’s testimony telling the jury it should not infer anything from the deputy’s presence. (*Id.* at p. 642; see also *Hernandez, supra*, 51 Cal.4th at p. 744, fn. 5 [trial court should give cautionary instruction when defendant requests it or should explain on the record why it has been refused].) We presume the jury followed this instruction.⁴ (*Stevens, supra*, at p. 641.)

Second, Reyes himself notes a number of similarities between the facts of his case and those of *Hernandez*, where the Supreme Court found harmless the trial court’s error in stationing a security officer at the witness stand. (*Hernandez, supra*, 51 Cal.4th at pp. 746–748.) As in *Hernandez*, Reyes was accompanied by a single deputy, and the record does not reflect anything unusual about the deputy’s behavior during defendant’s

⁴ Reyes makes the general observation that “[p]rotective instructions have frequently been found to be insufficient to cure potential prejudice.” Not only does he fail to explain why the instruction in this case would have been insufficient, he does not even expressly claim that it was. Moreover, the cases he cites in support of this proposition involve factual circumstances very different from those before us. (Cf. *People v. Felix* (1993) 14 Cal.App.4th 997, 1009 [reviewing court held “limiting instruction was likely to be of little value” where prior robbery conviction was admitted against defendant to show identity, but instruction did not explain how evidence showed identity and “a proper use of this evidence to show identity tends to elude reason”].)

testimony. (*Id.* at p. 746.) Indeed, Reyes “does not claim the deputy’s demeanor here was in any way inappropriate.” (*Stevens, supra*, 47 Cal.4th at p. 639, fn. 6.) Reyes concedes, and the record reflects, that he was dressed in street clothes during the trial. (*Hernandez, supra*, at p. 746 [defendant wore street clothes to trial and, other than “deputy’s presence, the jury had little indication that defendant was in protective custody”].)

Third, the jury’s acquittal of Reyes on count 2 strongly suggests the deputy’s presence did not prejudice the jurors against defendant. (See *Hernandez, supra*, 51 Cal.4th at p. 748, fn. 8.) In this case, as in *Hernandez*, “jurors did not blindly vote to convict because they perceived defendant to be dangerous.” (*Ibid.*) In short, the verdicts permit us to infer that the jury’s decision was not the result of prejudice against Reyes, but rather the result of a fair assessment of the evidence. (*Ibid.*)

Fourth, Reyes argues “that the case against him was close and boiled down to a credibility contest between him, Ceja and Avalos” We disagree that the case was close, and it was not merely a credibility contest between Reyes, on the one hand, and Ceja and Avalos, on the other. There were four witnesses to Reyes’s beating of Avalos. They included Arnhart—whose testimony Reyes does not address—but who knew Reyes from the neighborhood and was “sure” she saw him hitting Avalos with a two-by-four. Reyes himself admitted hitting Avalos, although he claimed he had done so in self-defense. This evidence strongly supports the jury’s verdict. (See *Hernandez, supra*, 51 Cal.4th at p. 747 [defendant admitted to assaulting and injuring victim and only issues for jury concerned defendant’s claim of self-defense].) In addition, that the case may have turned on the jury’s evaluation of the witnesses’ credibility does not make it unique. (*Id.* at p. 746.) “In nearly every case when an accused testifies in his own defense, the jury will have to weigh the credibility of the defendant and the alleged victim.” (*Stevens, supra*, 47 Cal.4th at p. 641.)

Finally, Reyes’s reliance on Justice Moreno’s separate opinion in *Hernandez* is misplaced. (*Hernandez, supra*, 51 Cal.4th at pp. 748–750 (conc. & dis. opn. of Moreno, J.)) Like Justice Moreno, Reyes claims “the *only* reasonable interpretation a jury could

draw from the use of this protocol is that the trial court thinks defendant is ‘particularly dangerous or culpable’ ‘suggest[ing] particular official concern or alarm.’ [Citation.]” (*Id.* at pp. 749–750.) To the contrary, our Supreme Court has held that “there is a wide range of inferences [a jury] may draw from an officer’s presence near a testifying defendant.” (*Stevens, supra*, 47 Cal.4th at p. 638.) Moreover, Justice Moreno’s opinion was not joined by a majority of his colleagues, and thus it is not binding on us. (See *People v. Ceballos* (1974) 12 Cal.3d 470, 483 [opinion of single justice in which no other justice joins “has no controlling weight”].) “‘[A] majority opinion of the Supreme Court states the law and . . . a dissenting opinion has no function except to express the private view of the dissenter.’ [Citation.]” (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1337.)

We therefore hold that even if the trial court abused its discretion in placing a deputy near Reyes during his testimony, “it is not reasonably probable defendant would have obtained a more favorable result without the deputy stationed at the witness stand, and the error in this case was harmless. (*Watson, supra*, 46 Cal.2d at p. 837.)” (*Hernandez, supra*, 51 Cal.4th at p. 748.)

B. *The References to Reyes’s Prior Misconduct Do Not Require Reversal.*

Reyes argues his conviction must be reversed because, in his view, two instances of his prior misconduct were improperly brought to the jury’s attention. The first instance concerns an answer Ceja gave in response to cross-examination by Reyes’s trial counsel. Because his counsel did not object to Ceja’s answer or request a curative instruction, Reyes contends he received ineffective assistance of counsel.⁵ The second instance concerns a portion of the tape recording of Arnhart’s 911 call that was played for the jury. We will address these issues in turn.

⁵ In his brief on appeal, Reyes recognizes that his trial counsel’s failure to object forfeited this claim on the merits. (See, e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 912 [failure to object to testimony regarding defendant’s commission of serious criminal offense forfeits claim on appeal].)

1. *Defense Counsel Did Not Render Ineffective Assistance by Failing to Object to Ceja's Statement.*

a. *Facts*

During Ceja's cross-examination, defense counsel asked Ceja whether she knew that a certain house was the one Reyes slept or spent time in. Ceja responded, "Unfortunately I couldn't be sure that he would have been there because he had just gotten out of jail until I saw him coming out." Defense counsel did not object to the statement, ask that it be stricken, or request a curative instruction. Instead, she followed up by asking Ceja, "I want to be clear in asking you this question, Ms. Ceja. On August 8th, did you know that the house that you saw Mr. Reyes come out of, that that was a house that he stays in?" Ceja responded that Reyes "went there to sleep, but I didn't know that he was staying there."

b. *Governing Law and Standard of Review*

Reyes has the burden to demonstrate, by a preponderance of the evidence, that he is entitled to relief on the grounds of ineffective assistance of counsel. (E.g., *People v. Ledesma* (1987) 43 Cal.3d 171, 217–218.) To do so, he must show that: (1) his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) he was prejudiced by the deficient performance. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) It is difficult to carry this burden on direct appeal from a conviction (*id.* at p. 437), because the trial record often does not indicate why trial counsel acted or failed to act in the manner she did. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–268.) We may not reverse a conviction on the grounds of ineffective assistance of counsel unless the record affirmatively discloses that counsel had no rational tactical purpose for the act or omission in question. (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) Where the record sheds no light on the issue, we must affirm unless there could be no conceivable reason for counsel's act or omission. (*Ibid.*) Furthermore, our review of trial counsel's performance is deferential (*People v. Ledesma, supra*, at p. 216), and there is a strong presumption that counsel's actions fell within the wide range of reasonable professional assistance. (*People v. Lucas, supra*, at p. 437.)

Finally, “we need not dwell on the question whether defendant can establish deficient performance by his trial counsel” if he cannot establish prejudice, “that is, a reasonable probability of a more favorable outcome in the absence of the assertedly deficient performance.” (*People v. Stewart* (2004) 33 Cal.4th 425, 495.)

c. *Reyes Has Not Demonstrated His Trial Counsel’s Performance Was Deficient.*

Reyes suggests his trial counsel should have objected to Ceja’s comment about his release from jail and sought either to have the reference stricken or to have the jury admonished to disregard it. He claims his trial counsel’s performance was deficient because there can be no reasonable tactical explanation for her silence in the face of Ceja’s comment. But Reyes points to nothing in the record “showing that counsel had no satisfactory rationale for what was . . . not done.” (*People v. Pope* (1979) 23 Cal.3d 412, 426, fn. 16.) As the record sheds no light on the issue, we must affirm unless there can be no conceivable reason for his counsel’s action. (*People v. Jones, supra*, 29 Cal.4th at p. 1254.) Here, we can certainly conceive of reasons why counsel might have decided not to object to Ceja’s comment.

“The decision of when to object is inherently tactical, and the failure to object will seldom establish incompetence. [Citation.]” (*People v. Scott* (1997) 15 Cal.4th 1188, 1223.) In this case, “[c]ounsel may well have tactically assumed that an objection . . . would simply draw closer attention to the [witness’s] isolated comments.” (*People v. Ghent* (1987) 43 Cal.3d 739, 773.) The same may be said of counsel’s failure to request a curative instruction. She “may well not have desired the court to emphasize the evidence [Citation.]” (*People v. Freeman* (1994) 8 Cal.4th 450, 495.) It is certainly possible that counsel made a tactical decision not to draw further attention to Ceja’s brief comment.⁶ On this record, we cannot say there was no conceivable reason for counsel’s action. (*People v. Jones, supra*, 29 Cal.4th at p. 1254.)

⁶ Reyes argues we may infer that there was no reasonable tactical explanation for his trial counsel’s silence because counsel did object to other offending references, such as Arnhart’s comments in the 911 call, and to the stationing of the deputy at the witness stand during his testimony. To the contrary, that counsel objected to other matters she

d. *Reyes Has Not Shown He Was Prejudiced.*

Even if we were to assume trial counsel's performance was deficient, Reyes's claim would fail because he has not demonstrated prejudice. Ceja's comment was brief, and in any event, the jury later learned Reyes had a criminal history when he was impeached with two prior convictions. In addition, as explained in our statement of facts and in part II.A., *ante*, the evidence against Reyes was strong. Moreover, the jury's acquittal on count 2 shows its decision was not the product of a prejudice against him because of his criminal record.

2. *The Trial Court Did Not Abuse its Discretion by Admitting a Portion of Arnhart's 911 Call.*

a. *Facts*

At trial, the prosecutor sought to introduce a tape recording of a portion of Arnhart's 911 call in which Arnhart identified Reyes as the assailant. In the recording, when the 911 operator asked Arnhart how she knew Reyes, Arnhart replied, "Because he was almost arrested last weekend for staying in a . . . vacant unit that I own." The prosecutor argued the recording showed Arnhart's ability to identify Reyes as the person holding the two-by-four. Defense counsel objected, arguing that because Arnhart worked in the neighborhood, she knew Reyes for reasons unrelated to the arrest and could identify him that way. Counsel contended the statement about Reyes almost being arrested was more prejudicial than probative.

The trial court found "under [Evidence Code section] 352 that the probative value is not substantially outweighed by the danger of undue prejudice . . ." It explained, "Identification of who actually was holding the two-by-four has become an issue. And the conduct is not—is not the type that would raise undue prejudice with the jury. It's not

felt might prejudice her client tends to negate Reyes's claim that she "failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Pope, supra*, 23 Cal.3d at p. 425.) The objections Reyes cites show his trial counsel was conscious of her duty to protect her client from potential prejudice. Indeed, in his brief to this court, Reyes himself agrees that his trial counsel "was aware of her duty to protect [him] from the admission of evidence that was more prejudicial than probative."

necessarily a crime of moral turpitude. And there is not an arrest [or] . . . conviction. [¶] So that it's—you know, becomes a detail that seems key in terms of how she is able to make the identification in the context of the 911 tape.”

b. *Governing Law and Standard of Review*

Evidence Code section 1101, subdivision (b) permits admission of “evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as . . . identity . . .) other than his disposition to commit such an act.” The admissibility of evidence of an uncharged offense “depends upon three principal factors: (1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence. [Citations.]” (*People v. Thompson* (1980) 27 Cal.3d 303, 315, disapproved on another point as stated in *People v. Scott* (2011) 52 Cal.4th 452, 470–471.) As we explain below, each of these factors supports the trial court’s decision.

We review the trial court’s decision to admit this evidence under the abuse of discretion standard. (E.g., *People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.) We will not disturb the lower court’s exercise of discretion under Evidence Code section 352 unless that discretion was exercised in an arbitrary, capricious, patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Jones* (1998) 17 Cal.4th 279, 304.) We find no abuse of discretion in this instance.

c. *The Tape Recording Was Properly Admitted Under Evidence Code Section 1101, subdivision (b).*

Turning first to the issue of materiality, there can be no question that the fact the prosecution sought to prove with the tape—the identity of the person holding the two-by-four—was material. (See *People v. Thompson, supra*, 27 Cal.3d at p. 315 & fn. 13 [to satisfy materiality requirement, fact to be proved may be an ultimate fact in the proceeding; the identity of the perpetrator is an ultimate fact in a criminal case].) Indeed, Reyes concedes in his brief that Arnhart’s ability to identify him as the one holding the two-by-four was a “key detail.” Second, Reyes does not dispute that Arnhart’s statement

that he had almost been arrested for staying in a vacant unit she owns tended to prove she could identify him accurately. He argues only that she could have identified him in a less prejudicial manner. Third, there is no rule or policy requiring the exclusion of this evidence. Evidence Code section 1101 does not bar admission of evidence of prior bad acts when relevant to prove identity. (Evid. Code, § 1101, subd. (b); *People v. Gordon* (1990) 50 Cal.3d 1223, 1240, disapproved on another point as stated in *People v. Hamilton* (2009) 45 Cal.4th 863, 926.) Nor does Evidence Code section 352 require its exclusion because, as the trial court found, it was not substantially more prejudicial than probative. (*People v. Gordon, supra*, at p. 1240.) Arnhart’s statement about Reyes almost being arrested was a small part of a longer recording, and it was certainly far less inflammatory than the testimony about the charged offenses, a factor which decreased the potential for prejudice. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) Additionally, as the trial court explained, the alleged wrong was not a crime of moral turpitude, and it did not lead to Reyes’s arrest. In these circumstances, we cannot say the trial court abused its discretion in failing to exclude this portion of the recording.

C. *Avalos’s Preliminary Hearing Testimony Was Properly Admitted.*

Reyes contends the trial court erroneously admitted Avalos’s preliminary hearing testimony under Evidence Code section 1291.⁷ The trial court admitted the prior testimony because it found Avalos was unavailable and the prosecution had exercised reasonable diligence in attempting to secure his attendance at trial. (See Evid. Code, § 240, subd. (a)(5).) Reyes argues the admission of this testimony violated his Sixth Amendment right to confrontation. We disagree.

⁷ Evidence Code “[s]ection 1291, subdivision (a)(2), provides that ‘former testimony’ such as preliminary hearing testimony, is not made inadmissible by the hearsay rule if ‘the declarant is unavailable as a witness,’ and ‘[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.’ ” (*People v. Herrera* (2010) 49 Cal.4th 613, 621, fn. omitted (*Herrera*).)

1. *Facts*

Avalos testified at the preliminary hearing on September 9, 2010. At the Evidence Code section 402 hearing on January 7, 2011, Inspector Renier Hernandez of the Contra Costa District Attorney's office testified he had been attempting to locate Avalos since mid-December 2010. Hernandez was on military leave from December 19 to December 30, 2010, and was unable to search for Avalos during that time.

The inspector detailed the efforts he had made to locate Avalos. He went to the last known addresses for Avalos listed in the prosecutor's files, and he testified that the district attorney's office updates its files with new addresses as they become known. He attempted to call the phone numbers provided in the records and spoke with the investigator who had been assigned to serve Avalos at the preliminary hearing.

Ceja cooperated with Hernandez's investigation, and he spoke to her on numerous occasions concerning Avalos's whereabouts.⁸ She was unaware that Avalos had any family in the area, and she told Hernandez that Avalos was undocumented and living in the United States illegally. Ceja was sure Avalos was living with a girlfriend at a place in Richmond, but she was unable to provide a specific address. After Hernandez returned from military duty, Ceja's husband went to the apartment complex and gave Hernandez the address. Hernandez himself went to the complex and spoke to the property manager; the latter recognized Avalos but said he had been evicted in November 2010.

Hernandez also made use of various database systems in his efforts to locate Avalos, but they revealed neither a criminal history nor a Social Security number. He consulted the ARIES regional database, which covers Alameda and Contra Costa Counties and lists all types of law enforcement contacts. He learned that Avalos went by the name "Modesto Virgin," but with a different date of birth. Using that name, Hernandez discovered Avalos had been involved in an incident with the Sheriff's office in July 2010, and he located the Sheriff's report for that incident. From that report,

⁸ The inspector also spoke to Aguilar, but she was unable to provide any information.

Hernandez learned Avalos was connected to Reyes, since both were listed as suspects in that incident. The inspector consulted the “TLO” law enforcement database, “which has information on individual residents and possible relatives and . . . locations throughout the country,” but he found no information. He also reviewed the California Law Enforcement Telecommunications System (CLETS) database,⁹ but he found no criminal history for Avalos. At Hernandez’s request, Immigration and Customs Enforcement performed a systems inquiry for the names Modesto Avalos and Modesto Virgin, but the agency had no record of anyone being arrested or deported under those names.

Hernandez also checked a number of local custodial facilities to see if Avalos was in custody, but obtained no results. He contacted three local hospitals to determine if Avalos was a patient. The morning of the hearing, the inspector contacted a homeless shelter in Richmond and was told Avalos was there. Hernandez drove to the shelter, but the person identified was not Avalos.

2. *Governing Law and Standard of Review*

While both the federal and California Constitutions guarantee a criminal defendant the right to confront the prosecution’s witnesses (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15), this right is not absolute. (*Herrera, supra*, 49 Cal.4th at p. 621.) An exception exists “ ‘where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] which was subject to cross-examination’ [Citation.]’ [Citation.]” (*Ibid.*) In California, this exception is codified in Evidence Code section 1291, subdivision (a)(2). When the requirements of this section are met, “the admission of former testimony in evidence does not violate a defendant’s constitutional right of confrontation. [Citation.]” (*Herrera, supra*, at p. 621.)

⁹ CLETS is “a statewide telecommunications system of communication for the use of law enforcement agencies.” (Gov. Code, § 15152.) By statutory mandate, it contains data on the identity of those arrested or charged with criminal offenses, the nature of their infractions, the disposition of charges, and court and corrections information. (Pen. Code, §§ 13125, 13150; see *People v. Martinez* (2000) 22 Cal.4th 106, 124–134.)

In this case, because the prosecution was the proponent of the evidence, it bore the burden of showing Avalos's unavailability. (*People v. Valencia* (2008) 43 Cal.4th 268, 292.) To do so, it was required to show that (1) Avalos was absent from the hearing and (2) it had "exercised reasonable diligence" but had been unable to procure Avalos's attendance by court process. (Evid. Code, § 240, subd. (a)(5).) "The term '[r]easonable diligence, often called "due diligence" in case law, "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.'" [Citation.] Considerations relevant to the due diligence inquiry 'include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.' [Citations.] In this regard, 'California law and federal constitutional requirements are the same' [Citation.]" (*Herrera, supra*, 49 Cal.4th at p. 622.) Courts have found reasonable diligence "when the prosecution's efforts are timely, reasonably extensive, and carried out over a reasonable period." (*People v. Bunyard* (2009) 45 Cal.4th 836, 856.) In contrast, courts have found diligence inadequate when "the efforts of the prosecutor or defense counsel have been perfunctory or obviously negligent." (*Id.* at p. 855.)

Reyes does not challenge any of the trial court's factual findings on this issue and contends only that the facts adduced at the due diligence hearing failed to establish that the prosecution exercised reasonable diligence to secure Avalos's attendance at trial. This contention is subject to our independent review. (*Herrera, supra*, 49 Cal.4th at p. 623.)

3. *The Prosecution Demonstrated Reasonable Diligence in Attempting to Locate Avalos.*

Reyes contends Inspector Hernandez's efforts to locate Avalos were not timely begun, because they commenced only two weeks before the start of trial. The California Supreme Court's recent opinion in *People v. Fuiava* (2012) 53 Cal.4th 622, disposes of this contention. In that case, a sheriff's detective "began looking for [a witness] approximately two weeks before the date set for the start of the trial," and the high court

concluded this was a reasonable time period within which to begin the search.¹⁰ (*Id.* at pp. 675–677.) Indeed, courts have upheld reasonable diligence findings when efforts to serve a witness were begun less than two weeks before trial. (*People v. Saucedo* (1995) 33 Cal.App.4th 1230, 1236 [one week], disapproved on another point in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; *People v. Smith* (1971) 22 Cal.App.3d 25, 31–32 [one week]; *People v. Rodriguez* (1971) 18 Cal.App.3d 793, 796–797 [one week].) Furthermore, we take into account the fact that the prosecution had no reason to believe Avalos would be difficult to locate, since he had cooperated and appeared at the preliminary hearing, which was held approximately three months before Hernandez began looking for him.¹¹ (Cf. *People v. Friend* (2009) 47 Cal.4th 1, 68–69 [prosecutor had no reason to know witness might disappear even though witness had failed to appear at a prior discovery hearing].) And although Hernandez’s search began approximately two weeks before the scheduled start of trial, his search commenced some three weeks before the prosecution actually sought to introduce Avalos’s testimony. (See *People v. Hovey* (1988) 44 Cal.3d 543, 562 [noting that search for witness began “[m]ore than one month before [his] trial testimony was needed”].)

Reyes characterizes Hernandez’s efforts to locate Avalos as “casual and indifferent” and claims they “were not calculated to achieve the desired result.” He claims that because Ceja told Hernandez that Avalos might be in custody, the inspector

¹⁰ Reyes also complains that no one took over the search for Avalos while Hernandez was absent on military duty. There is no indication in the record that efforts to locate Avalos would have been successful had the prosecution searched for him continuously between mid-December and the beginning of trial. Nor was the length of Hernandez’s search per se inadequate. (See *People v. Wilson* (2005) 36 Cal.4th 309, 341–342 [finding reasonable diligence where efforts to locate witness were made “over two days”].)

¹¹ Reyes does not argue that the prosecution knew or should have known Avalos would be difficult to locate, and prosecutors ordinarily are not required to check periodically on the location of every material witness in a criminal case. (See *Herrera, supra*, 49 Cal.4th at p. 630.) In fact, at the hearing on the prosecution’s motion to admit Avalos’s preliminary hearing testimony, Reyes’ trial counsel conceded that Avalos “[w]as cooperative.”

should have searched for Avalos at custodial institutions in all Bay Area counties and should have expanded his search to include the state prison system. First, Reyes's argument is based on the premise that Avalos was in custody, a premise not borne out by Hernandez's testimony. The inspector stated, "[Ceja] related to me . . . that during her inquiries she was getting information that [Avalos] was in custody, and *which I verified, and in fact it was not true.*" (Italics added.) Second, Reyes does not explain why, assuming Avalos was in state custody, the database searches Hernandez performed would have failed to locate him. Such information would ordinarily be contained in the CLETS database, which Hernandez checked. Finally, we do not think Hernandez's efforts were casual and indifferent merely because he did not check every last custodial institution in the region. (See *People v. Wise* (1994) 25 Cal.App.4th 339, 344 [efforts to locate witness were reasonably diligent where service was attempted at three local addresses and inspector "contacted the post office, the local jail, hospital and coroner"].)

Reyes points to Hernandez's failure to check the address listed for Avalos in the July 2010 Sheriff's report. There is nothing in the record indicating that Avalos might have been at that address at the time of trial, and from the facts before us, it appears unlikely. The July 2010 incident for which the report was prepared preceded Avalos's testimony at the preliminary hearing in September 2010, and Hernandez spoke to the inspector who served Avalos for that hearing. Moreover, Ceja told Hernandez that when she had last seen Avalos in approximately November 2010, he was living at an apartment complex on Center Street in Richmond. Hernandez visited the apartment complex and spoke to the property manager, who recognized Avalos but informed the inspector that Avalos had been evicted in November 2010. In light of the established fact that Avalos was living in another location in November 2010, we fail to see what would have been gained by checking the address in the July 2010 police report. By November 2010, the earlier address was clearly out of date.

As the United States Supreme Court recently noted, "it is always possible to think of additional steps the prosecution might have taken to secure the witness' presence [citation], but the Sixth Amendment does not require the prosecution to exhaust every

avenue of inquiry, no matter how unpromising.” (*Hardy v. Cross* (2011) 132 S.Ct. 490, 495.) It is enough that the prosecution used reasonable efforts to locate Avalos. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1298.) Our independent review of the record satisfies us that the prosecution exercised reasonable diligence to procure Avalos’s attendance at trial. Thus, the trial court did not err in admitting his preliminary hearing testimony.

D. *Any Error in Admitting Avalos’s Statement to Macrenato Was Harmless Beyond a Reasonable Doubt.*

Reyes contends the admission of Avalos’s spontaneous statements to Macrenato violated his Sixth Amendment right to confrontation.¹² He argues Avalos’s statement was testimonial in nature under *Davis v. Washington* (2006) 547 U.S. 813 and asserts the trial court committed reversible error in finding otherwise. We need not reach Reyes’s Sixth Amendment claim, because even if we assume the challenged statement was testimonial and its admission erroneous, any error was harmless beyond a reasonable doubt. (*People v. Jennings* (2010) 50 Cal.4th 616, 652; *People v. Cage* (2007) 40 Cal.4th 965, 991–992, citing *Chapman v. California* (1967) 386 U.S. 18.)

1. *Facts*

Macrenato testified at the Evidence Code section 402 hearing that he arrived at the scene and spoke to Reyes, Aguilar, and Ceja. The officer spoke with Avalos no more than two minutes after his arrival at the scene. At that time, Macrenato was not sure who was the suspect and who was the victim. Avalos was bleeding from a wound to his head, and Macrenato asked Avalos how he had sustained his injuries. The officer testified that his purpose in questioning Avalos was first and foremost to determine his medical condition. An ambulance arrived shortly after Macrenato did, and paramedics were treating Avalos while he told the officer what had happened. Macrenato explained that “[o]nce the injuries are taken care of, then I’ll conduct my primary investigation” After hearing argument from counsel, the trial court ruled Avalos’s statement to

¹² Reyes concedes on appeal that the statement constitutes an excited utterance under Evidence Code section 1240.

Macrenato was a spontaneous utterance and was not testimonial under the Sixth Amendment.

After the trial court's ruling, Macrenato testified that when he found Avalos in the rear yard of Aguilar's residence, Avalos appeared to have sustained several injuries to his face and was bleeding from a laceration over his eye. When the officer asked Avalos how he had sustained the injuries to his face, Avalos said Reyes head-butted him several times and struck him in the back with a two-by-four. Avalos told Macrenato that while he was purchasing nachos, Reyes approached him from behind while yelling obscenities at Ceja. Avalos confronted Reyes, at which point Reyes head-butted Avalos several times, causing Avalos to fall into the street. Reyes then struck Avalos several times with the two-by-four and kicked him several times in the ribs. The attack ended when Ceja and Aguilar intervened.

2. *Harmless Error Analysis*

Among the factors we consider in our harmless error analysis are “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.” (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) As we will explain, in the overall scheme of the case, Avalos’s statement to Macrenato was not extremely important, was largely cumulative, and was corroborated by other evidence. Furthermore, the defense cross-examined other witnesses to the incident and cross-examined Avalos at the preliminary hearing. Finally, as previously stated, the prosecution’s case against Reyes was strong. (*Ibid.*)

As we explained in part II.C., *ante*, Avalos’s preliminary hearing testimony was properly admitted, and at that hearing Avalos testified Reyes had struck him with a two-by-four, head-butted him, and hit him with his hands. Ceja’s trial testimony was consistent with Avalos’s statements at the preliminary hearing. She testified she heard Avalos cry out in pain, and then turned to see Reyes standing over him with a two-by-

four in his hands. She said Avalos was bleeding from a wound over his right eye and it appeared he had lost consciousness. Ceja saw Reyes head-butt Avalos about five times. Arnhart also testified she was sure she saw Reyes hit Avalos with a piece of wood. Although at trial Aguilar testified she did not see Reyes use the piece of wood as a weapon, the jury heard the prior inconsistent statements she had made to Macrenato shortly after the incident, when she reported having seen Reyes head-butt Avalos several times and strike him two or three times with the two-by-four. Thus, Avalos's statement to Macrenato was substantially consistent with the testimony of other witnesses, "and nothing in the additional details [it] contained was crucial to the charges." (*People v. Cage, supra*, 40 Cal.4th at p. 993.)

Reyes contends Avalos's statement to Macrenato was a key piece of evidence because at the preliminary hearing Avalos did not claim Reyes had kicked him, and although he told Macrenato Reyes had hit him several times with the two-by-four, in fact Reyes did so only once. We fail to see the significance of these details, as there was ample evidence that Reyes kicked Avalos and struck him more than once with the piece of wood. Arnhart told the 911 operator she saw Reyes kicking Avalos, and she gave the same testimony in court. Arnhart also testified she saw Reyes hit Avalos at least three times with the two-by-four, and her testimony on this point was consistent with Aguilar's statement to Macrenato. Because the jury heard essentially the same information through other witnesses, the admission of Avalos's statement to Macrenato could not have prejudiced Reyes. (See *People v. Brenn* (2007) 152 Cal.App.4th 166, 179 [admission of witness's statements to 911 operator about appellant's motive harmless where "that motive was revealed at trial by means other than [the witness's] statements"].)

Reyes also had an adequate opportunity for cross-examination. He does not claim he was deprived of the opportunity to cross-examine the witnesses who appeared at trial, and this factor supports our conclusion that any error in admitting Avalos's statement to Macrenato was harmless. (See *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1228 [admission of police dispatch tape harmless where defendant had opportunity at trial to cross-examine eyewitnesses to events related on dispatch tape].) Reyes's counsel also

cross-examined Avalos himself at the preliminary hearing. In fact, at that hearing, she questioned him specifically about his statements to Macrenato and probed the inconsistencies between his statements to the officer and the testimony he had given in response to the prosecutor's questions at the hearing.

Finally, as set forth in our statement of facts and in part II.A., *ante*, the prosecution's case against Reyes was strong. Numerous witnesses testified to his attack on Avalos. Reyes did not deny hitting Avalos, but claimed only that he had acted in self-defense. In light of the other evidence presented at trial, we disagree with Reyes's claim that the case was a close one. Thus, the overall strength of the prosecution's case further supports our conclusion that any error in the admission of Avalos's statement to Macrenato was harmless beyond a reasonable doubt.

III. DISPOSITION

The judgment is affirmed.

Bruiniers, J.

We concur:

Jones, P. J.

Simons, J.

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