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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**A137496**

**v.**

**(Solano County  
Super. Ct. No. VCR211632)**

**KEITH UNDRAY FORD,**

**Defendant and Appellant.**

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A jury convicted Keith Undray Ford of first degree murder (Pen. Code, § 187, subd. (a))<sup>1</sup> and the court sentenced him to 25 years to life in state prison. On appeal, Ford argues: (1) the court erroneously responded to a jury question; (2) the jury convicted him on an invalid theory of guilt; (3) the prosecutor committed misconduct during closing argument; and (4) the court erred by admitting a message Ford posted on his Facebook page.

We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

Ruben Martinez was shot and killed outside his girlfriend's house in Vallejo. The People charged Ford with the first degree murder of Martinez (§ 187, subd. (a)) and alleged various firearm use sentencing enhancements (§ 12022.53, subds. (b), (c) (d)).

<sup>1</sup> Unless noted, all further statutory references are to the Penal Code.

### ***Prosecution Evidence***

In August 2010, then 20-year-old Martinez attended college and worked as a car salesman. Martinez owned a blue SUV with big rims and tinted windows. Martinez treasured the car and washed it several times a week. On an August 2010 night, Martinez planned to go to a family party with his girlfriend, Jessica Blanco. He washed the SUV before their date.

Around 10 p.m., Martinez picked Blanco up at her house in Vallejo. His car was “really clean and shiny.” Martinez decided he wanted to see a movie instead of attending the family party, so he and Blanco returned to Blanco’s house so she could “check the movie times and get a jacket.” As they approached Blanco’s street, Blanco noticed a white car. It had been driving in the same direction as Martinez’s car, but then made an abrupt U-turn directly in front of Martinez’s car and drove away in the opposite direction.

Martinez reached Blanco’s house. He stopped the SUV in front of her house but left the engine running. Martinez sat in the driver’s seat and the white light from his cell phone was visible from outside the car. Blanco got out of the car and went into her house to use the bathroom. While inside, she heard a “really loud popping noise” and “a screeching noise, tires peeling, gravel.” Blanco went outside and saw Martinez’s car had crashed into a neighbor’s house, the engine still revving and tires spinning. Martinez was slumped in the driver’s seat, dead from a gunshot wound in his head.

A neighbor, Bethel J., and her daughter, Tenley, lived across the street from Blanco. They were across the street from Blanco’s house when Bethel saw Martinez’s car parked in front of Blanco’s house and a person in the driver’s seat using a cell phone. Bethel and Tenley saw three young African American men walking toward them. Tenley’s dog charged at one of the men, who appeared to be in his early twenties. Tenley “couldn’t really” see that man’s face because it was dark, but she noticed he had short hair cut close to his scalp. The man was “skinny” and taller than she. Initially, that man was with his two companions, but he started walking faster and separated from the two other men. One of the other men had dreadlocks and was wearing a hooded sweatshirt.

A fingerprint examiner found a latent palm print on the driver's side door of Martinez's SUV, just beneath the window. The latent print matched Ford's left palm print. The fingerprint examiner was certain "both impressions were made by the same palm." A few days after Martinez died — but before the fingerprint results were in — a Vallejo detective stopped Ford driving a white Oldsmobile sedan. Ford was 23 years old and was wearing short hair in a "fade." There were six cell phones in the center console of Ford's car, which Ford said he "bought [ ] stolen off the streets." Ford told the detective he was at his mother's house in Vallejo, about three miles from Blanco's residence, on the night Martinez was shot. Ford did "not remain in custody" and the detective did not speak to Ford again until December 2010, when Ford was in jail for an unrelated firearm possession charge.<sup>2</sup>

Ford called his girlfriend while he was in jail for the unrelated offense and before he was charged with Martinez's murder. In a recorded conversation, Ford said, "luckily I aint in here for murder, that's all I keep thinking about. . . . oh well I wish it didn't have to happen. . . ." He also said, "I just [wish] I was at home. . . . I know I gotta deal with my [unintelligible] it's too late for all that . . . to be wishin I was at home. . . . See I'm disappointed in myself. But [expletive] that's what happens when you carry a gun. Ain't nothin good gonna come of it. And I know this and [expletive] still happen, cause I tell other people the only thing you gonna get out of a gun is you gonna throw down with it or you gonna shoot somebody with it. And I tell everybody that and look at my [expletive]."

Several months after Martinez's murder, Ford posted the following message on his Facebook page: "I heard through the grapevine you was looking for the guy. Let me know something. And since you think I popped you, check this out. First off, I don't [expletive] with the Vistas. Second off, I am too good of a shooter to hit a nigga that many times and not knock they ass down. Last, when you getting shot, I was on Fifth

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<sup>2</sup> In December 2010, Ford told the detective he was at "home or . . . at his mother's home watching his son" on the night Martinez was shot. He denied knowing Martinez or recognizing a picture of him, and denied knowing anything about the incident.

buying some syrup off Jigs. Plus, I don't even [expletive] with niggas, so ain't nobody talked to me since I got out of jail last. Real killers move in silence. And would I brag on a job I didn't even complete? Niggas knocking [expletive] down. I don't need credit for an attempt, so take that how you want to.”<sup>3</sup>

The police arrested Ford for Martinez's murder. When told his palm print was on the door of Martinez's car, Ford responded, “[T]hat don't mean nothing. That just means I came in contact with the vehicle at one time or another.” Ford did not explain how he “came in contact” with Martinez's car “at one time or another.”

### ***Jury Instructions, Verdict, and Sentencing***

The People prosecuted Ford for murder under two theories: felony murder and malice aforethought. The prosecution argued Ford attempted to rob Martinez of his cell phone and, in the commission of the robbery, shot Martinez. The court instructed the jury on first degree felony murder and second degree murder with malice aforethought. The court did not instruct the jury on an aiding and abetting theory.

During deliberations, the jury sent a note to the court asking, “If someone believes that the defendant was present at the time of the shooting and was an active participant in the attempted robbery, but was not the actual shooter, does that imply guilt of either the first or second degree murder charge?” With defense counsel's approval, the court responded, “You have received all of the evidence and all of the law pertaining to this case.” The jury convicted Ford of the first degree murder of Martinez (§ 187, subd. (a)) but could not reach a verdict on the firearm use sentencing enhancements and the prosecution dismissed them.<sup>4</sup> The court sentenced Ford to 25 years to life in state prison.

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<sup>3</sup> The prosecution played a recording of the jailhouse phone call for the jury. A prosecution witness read Ford's Facebook message to the jury two times because the witness missed a line while reading the message the first time.

<sup>4</sup> When questioned by the court during deliberations, the foreman reported the jury voted 12-0 on personal and intentional discharge of a firearm during a felony (§ 12022.53, subd. (c)), 12-0 on personal and intentional discharge during a felony causing death (§ 12022.53, subd. (d)), but was deadlocked 7-5 on personal use of a firearm during a felony (§ 12022.53, subd. (b)). After a lunch recess, jurors confirmed the 7-5 deadlock and the court declared a mistrial on all of the firearm allegations. Ford moved for a new

## DISCUSSION

### I.

#### *Ford's Claim Regarding the Court's Response to the Jury's Question Fails*

Ford claims the court's "incomplete and misleading response" to the jury's question requires reversal. The People contend Ford waived this claim. They also contend the court's response complied with section 1138,<sup>5</sup> and any assumed error is harmless.

#### A. Background

During deliberations the jury asked the court: "If someone believes that the defendant was present at the time of the shooting and was an active participant in the attempted robbery, but was not the actual shooter, does that imply guilt of either the first or second degree murder charge?" The court's initial thought was "the answer would simply be 'No.' Even if somebody was a co-participant who did the killing . . . there are other elements to the intent to aid and abet." Defense counsel agreed, saying "since we didn't argue" aiding and abetting "and we didn't present it in instruction or through testimony . . . it is too late." Defense counsel urged the court to refer the jury to the instructions.

The prosecutor asked the court to read CALCRIM No. 3530<sup>6</sup> and advise the jury "the Court is not going to provide the law on that issue because the evidence does not

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trial, claiming the jury "was allowed to continue deliberations despite an incorrect directive" from the court on aiding and abetting, and that the jury's verdict "was not consistent with the law." The court denied the motion.

<sup>5</sup> Section 1138 provides in relevant part, "After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, . . . the information required must be given. . . ."

<sup>6</sup> CALCRIM No. 3530, "Judge's Comment on the Evidence," provides, "Do not take anything I said or did during the trial as an indication of what I think about the evidence, the witnesses, or what your verdict should be. [¶] Now, I will comment on the evidence only to help you decide the issues in this case. [¶] However, it is not my role to tell you what your verdict should be. You are the sole judges of the evidence and believability of witnesses. It is up to you and you alone to decide the issues in this case.

support that factual scenario.” Defense counsel objected, arguing it would be inappropriate for the court to comment on the evidence. As defense counsel explained, “The statement that [the prosecutor] would like the Court to read to the jury that the evidence does not support that factual scenario, that might be the prosecutor’s position, but I think if the Court gives that statement, the Court is basically indicating the Court’s position. [¶] It could be taken by the jury as a Court position and the Court would be risking directing a verdict or [ ] usurp[ing] the jury’s ultimate fact-finding power, even simply by suggesting what the evidence actually is without them determining what the actual evidence is.”

Defense counsel continued, “The evidence does support the possibility that somebody else is the shooter because there was somebody else who does not meet the general generic description of Mr. Ford, and that’s the person who was seen by Bethel J[.] in the black hoodie with the dreadlocks on that side of the street walking towards the SUV. [¶] So there is evidence to support that, and I think the Court . . . can only tell the jury to refer back to the testimony that they heard and to refer to the jury instructions as given.” The court agreed that telling the jury the evidence did not support that factual scenario “may be taking away a factual decision by the jury.”

The prosecutor then proposed a “similar” but more “neutral” response, to which defense counsel objected. The court agreed with defense counsel and stated, “I think what I am inclined to do is simply something to the effect of ‘You’ve received all of the evidence and all of the law pertaining to this case.’ I think that’s, in essence, what you’re asking.” Defense counsel responded, “Right.” Then the court said, “So the response would be, ‘You have received all of the evidence and all of the law pertaining to this case,’” and defense counsel stated she had no objection. When the court read the proposed response — “‘You have received all of the evidence and all of the law pertaining to the this case’” — defense counsel said, “I think what the Court read is sufficient.” The court then responded to the jury’s question and defense counsel

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You may disregard any or all of my comments about the evidence or give them whatever weight you believe is appropriate.”

reiterated her agreement with the court's response, noting it was proper because it referred the jury "to the law and they have the law and they can state it for themselves."

B. Ford Forfeited His Section 1138 Claim and Cannot Demonstrate Prejudice

"When a jury asks a question after retiring for deliberation, '[s]ection 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law.' [Citation.] But '[t]his does not mean the court must always elaborate on the standard instructions.'" (*People v. Eid* (2010) 187 Cal.App.4th 859, 881-882.) While the court "has an obligation to rectify any confusion expressed by the jury regarding instructions, [it] has discretion to determine what additional explanations are sufficient to satisfy the jury's request for information." (*People v. Smithey* (1999) 20 Cal.4th 936, 1009.)

Numerous courts have held a defendant waives or forfeits an objection to the trial "court's response to a jury inquiry through counsel's consent, or invitation or tacit approval of, that response." (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1048, citing cases; *People v. Hughes* (2002) 27 Cal.4th 287, 402 [claim "'waived by defense counsel's agreement with the trial court'"]; *People v. Thoi* (1989) 213 Cal.App.3d 689 (*Thoi*)). For example, in *Thoi*, the defendant argued "the trial court erred by failing to answer certain jury questions which arose during jury deliberations." (*Thoi*, at p. 697, fn. omitted.) The appellate court rejected this claim — noting defense counsel "actively and vigorously lobbied against further instruction" — and concluded "[c]ounsel's conduct either waived or invited any error by the court." (*Id.* at p. 698.)

The same is true here. As in *Thoi*, defense counsel repeatedly opposed the prosecution's suggested responses and urged the court to refer the jury to the instructions. The court proposed a response and defense counsel agreed with it, stating it was "sufficient." After the court responded to the jury's question, defense counsel opined the response was proper because it referred the jury "to the law and they have the law and they can state it for themselves." Under the circumstances, Ford has forfeited his claim regarding the court's response to the jury's question. (*People v. Rodrigues* (1994) 8

Cal.4th 1060, 1193 [claim waived where “defendant both suggested and consented to the responses given by the court”].)

Even if Ford had preserved this argument for appeal, we would reject it because Ford cannot demonstrate prejudice from any assumed error. (*People v. Roberts* (1992) 2 Cal.4th 271, 326 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) harmless error standard]). Ford claims the jury would have acquitted him of murder “absent the incomplete response to the jury’s question” because at least one juror believed he “was not the shooter but was an aider and abettor.” According to Ford, “one or more jurors did not believe that [he] personally fired the gun and thus convicted him of murder on an aiding and abetting theory.”

We are not persuaded. The prosecution charged Ford with murder “during the course of Mr. Ford trying to take [Martinez’s] phone” under two theories, first degree felony murder and second degree malice aforethought. The prosecution did not pursue an aiding and abetting theory. That the jury found Ford had not personally used a firearm when committing the murder does not mean it concluded Ford was not a perpetrator who shot Martinez, or that the jury could have only convicted him as an aider and abettor. The jury could have believed Ford had a firearm which accidentally discharged during the attempted robbery, killing Martinez; this would have been consistent with CALCRIM No. 540, which provides a “person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.”

At trial, the prosecution offered substantial evidence demonstrating Ford was guilty of murder: (1) Ford’s palm print was found on Martinez’s newly-washed car and Ford did not explain how his hand came into contact with Martinez’s car; (2) shortly before the shooting, witnesses saw a man matching Ford’s general appearance and a car similar to the one Ford drove; (3) Ford told his girlfriend he was happy he had not been charged with murder, he wished “it didn’t have to happen,” and was disappointed with himself because “the only thing you gonna get out of a gun is you gonna throw down with it or you gonna shoot somebody with it[;]” (4) Ford bragged on his Facebook page about being a good shooter (“knockin’ [expletive] down”) and not getting caught (“aint

nobody talked to me since I got outa jail . . . Real killas move n silence”); and (5) Ford was found with multiple cell phones in his car a few days after Martinez’s murder, suggesting a motive to rob and/or kill Martinez. Based on this evidence, it is not reasonably probable the jury would have acquitted Ford of murder had the court — as Ford has suggested — answered the jury’s question with a simple “no.” (*People v. Robinson* (2005) 37 Cal.4th 592, 634-635 [assumed error under section 1138 was harmless].)

## II.

### *The Jury Did Not Convict Ford on a Legally Incorrect Theory*

Ford contends the jury’s guilty verdict on the murder charge “and its inability to reach a verdict on the personal use of a firearm enhancement” demonstrate the jury relied upon a “legally incorrect aiding and abetting theory” of guilt. We disagree. We have already explained the jury’s failure to return a verdict on the firearm use allegations does not demonstrate the jury concluded Ford was not the perpetrator, nor that the jury could only have convicted Ford as an aider and abettor. It is well settled the “disposition of one count [has] no bearing upon the verdict with respect to other counts, regardless of what the evidence may have been. Each count must stand upon its own merit.” (*People v. Ranney* (1932) 123 Cal.App. 403, 407; *People v. Amick* (1942) 20 Cal.2d 247, 252; see also § 954 [“An acquittal of one or more counts shall not be deemed an acquittal of any other count”].) This principle applies when there is a conflict between a verdict on an offense and an enhancement. (See *People v. Lopez* (1982) 131 Cal.App.3d 565, 570-571 [rejecting claim that jury must have found the defendant was an aider and abettor where jury convicted him of assault with a deadly weapon but found not true the allegation he personally used a weapon].) Here, the jury’s failure to return a verdict on the firearm use allegations does not demonstrate the jury convicted Ford on an invalid theory of guilt.<sup>7</sup>

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<sup>7</sup> In his reply brief, Ford relies on an incomplete quotation from *People v. Godinez* (1992) 2 Cal.App.4th 492 (*Godinez*) to support his claim that “[w]here there is an acquittal or a deadlock on a personal use of a firearm allegation, ‘the inference is compelling that appellant was convicted upon a finding of aider and abettor status.’” (*Id.* at p. 505.) *Godinez* is distinguishable and Ford has taken the quotation out of context. In

Ford urges us to apply the *Green/Guiton* test (*People v. Green* (1980) 27 Cal.3d 1, 69 (*Green*), overruled on different grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239; *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*)), both of which hold “[w]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.” (*Guiton*, at p. 1122.) *Green* and *Guiton* do not apply here because the prosecutor did not suggest, nor did the trial court instruct on, a legally erroneous theory of the case.

### III.

#### *Even Assuming the Prosecutor Committed Misconduct, Ford Cannot Establish Prejudice*

Ford argues the prosecutor committed misconduct during closing argument by telling the jury the “presumption of innocence is over” and Ford is “not presumed innocent anymore.” At the end of closing argument, the prosecutor stated: “I’ve provided you with all the information that you need to feel the abiding conviction in the truth of these charges. I have provided the information for you to make that decision.

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*Godinez*, the prosecution relied on an aider and abettor theory in a prosecution arising from a fatal stabbing during a gang fight. (*Id.* at p. 499.) The trial court gave the jury an erroneous instruction on aiding and abetting liability for an unplanned offense. (*Id.* at p. 502.) The jury convicted the defendant of voluntary manslaughter on an aiding and abetting theory but found untrue the allegation he personally used a knife. (*Id.* at p. 495.) The appellate court determined the erroneous jury instruction was not harmless because it was “reasonably possible a jury might have concluded the victim’s death was not a reasonable and natural consequence of the attack Godinez aided and abetted.” (*Id.* at pp. 503-504.) In explaining why the error was not harmless, the court noted, “It is significant, moreover, that the jury *acquitted* Godinez of personally using a knife, and during its deliberations asked the court to reread instructions and answer questions concerning the extent of aider and abettor liability. The inference is compelling that appellant was convicted upon a finding of aider and abettor status.” (*Id.* at pp. 504-505.) Here and in contrast to *Godinez*, the prosecution did not rely on an aider and abettor theory and the court did not instruct the jury on that theory. Ford’s reliance on *Smith v. Lopez* (9th Cir. 2013) 731 F.3d 859 (petn. for review pending, petn. filed Feb. 5, 2014) (*Smith*) in a supplemental letter brief does not alter our conclusion.”

You should be comfortable with that decision. I want you to be comfortable with that decision and, again, as I indicated before, to follow through with your promise to not hesitate to convict once the case has been proven to you beyond a reasonable doubt. [¶] This idea of this *presumption of innocence* is over. Mr. Ford had a fair trial. We were here for three weeks where . . . he gets to cross-examine witnesses; also an opportunity to present information through his lawyer. He had a fair trial. This system is not perfect, but he had a fair opportunity and a fair trial. *He's not presumed innocent anymore. . . .* [¶] And so we're past that point. We're at the point now where you go back, look at the information that you have before you, consider all that information. And again, I want you to feel comfortable with your decision and you should feel comfortable with your decision." (Italics added.)

Defense counsel objected that the prosecutor misstated the law. Outside the presence of the jury, defense counsel asked the court to give "a limiting instruction . . . letting the jury know that they have to deliberate first before the presumption falls." The prosecutor claimed his comment was an "entirely appropriate argument. All the evidence is in." The court agreed, overruled defense counsel's objection, and declined to give a limiting instruction.

The prosecutor resumed his closing argument, "And so we're past that point. We're at the point now where you go back, look at the information that you have before you, consider all that information. And again, I want you to feel comfortable with your decision and you should feel comfortable with your decision. [¶] Again, palm print, left palm print in the exact location where a right-handed shooter would be; victim having a cell phone within a minute or so of his death; the defendant having those multiple cell phones in his car five days after; the Facebook posts; the two jail calls; and no motive for anyone else to kill [Martinez]. And the evidence is no alibi information from the defendant. And the evidence before you, when you take all of that information together, is that the defendant is guilty of murder."

According to Ford, the prosecutor's comments about the presumption of innocence misstated the law and deprived him of a fair trial. Several cases have rejected

this argument, including *People v. Goldberg* (1984) 161 Cal.App.3d 170 (*Goldberg*) and *People v. Booker* (2011) 51 Cal.4th 141, 185 (*Booker*). In *Goldberg*, the prosecutor stated during closing argument: ““And before this trial started, you were told there is a presumption of innocence, and that is true, but once the evidence is complete, once you’ve heard this case, once the case has been proven to you—and that’s the stage we’re at now—the case has been proved to you beyond any reasonable doubt. I mean, it’s overwhelming. *There is no more presumption of innocence.* Defendant Goldberg has been proven guilty by the evidence . . .”” (*Goldberg, supra*, 161 Cal.App.3d at p. 189.) The *Goldberg* court held the comment was not misconduct and determined the prosecutor was merely restating, “albeit in a rhetorical manner,” the otherwise noncontroversial point that a defendant is presumed innocent ““until the contrary is proved . . .”” (*Ibid.*)

In *Booker*, the prosecutor told the jury: “I had the burden of proof when this trial started to prove the defendant guilty beyond a reasonable doubt, and that is still my burden. It’s all on the prosecution. I’m the prosecutor. That’s my job. [¶] ‘The defendant was presumed innocent until the contrary was shown. That presumption should have left many days ago. He doesn’t stay presumed innocent.’” (*Booker, supra*, 51 Cal.4th at p. 183.) The California Supreme Court rejected a contention of prosecutorial misconduct, concluding: “Although we do not condone statements that appear to shift the burden of proof onto a defendant (as a defendant is entitled to the presumption of innocence until the contrary is found by the jury), the prosecutor here simply argued the jury should return a verdict in his favor based on the state of the evidence presented.” (*Id.* at p. 185; see also *People v. Panah* (2005) 35 Cal.4th 395, 463 (*Panah*) [prosecutor’s closing argument statement that the evidence had ““stripped away” defendant’s presumption of innocence” was not misconduct because it was made “in connection with [the prosecutor’s] general point” that the strength of the evidence had overcome the presumption of innocence].)

After briefing was completed in this case, the Sixth District Court of Appeal reached a different conclusion in *People v. Dowdell* (2014) 227 Cal.App.4th 1388 (petns. for review pending, petns. filed Aug. 19 & 26, 2014) (*Dowdell*). There, the People

charged one of the defendants, Terrance Ray Lincoln, with various offenses arising out of a “robbery/carjacking/kidnapping.” (*Id.* at p. 1393.) Before closing arguments, the trial court instructed dual juries “A defendant in a criminal case is presumed to be innocent. This presumption requires the people prove a defendant guilty beyond a reasonable doubt. Subsequently, in closing argument before the Lincoln jury, the prosecutor twice argued that the presumption of innocence was ‘over.’ First, he argued that ‘The evidence is overwhelming. My goal was to give [Lincoln] a fair trial, he just got one. You have the evidence. *The presumption of innocence is over.* I have the evidence. It wasn’t a fair fight, it wasn’t supposed to be. Go and deliberate, be thorough and come back guilty on all counts.’ Similarly, he later argued that ‘It’s fairly obvious that Mr. Lincoln committed all of the crimes we are accusing him of. *The presumption of innocence is over.* He has gotten his fair trial. Be thorough, deliberate, and come back with guilty verdicts on all counts.’” (*Id.* at p. 1407.) Defense counsel did not object to the prosecutor’s comments and Lincoln raised an ineffective assistance of counsel claim on appeal. (*Id.* at p. 1405.)

The *Dowdell* court concluded Lincoln’s attorney should have objected because the prosecutor misstated the law. As the court explained: “the presumption of innocence continues into deliberations, and the presumption was in no sense ‘over’ when the prosecutor declared it to be so. [Citation.] Second, the prosecutor *twice* made this misstatement of the law. Arguably, the first version of the statement—prefaced by a reference to the ‘overwhelming’ state of the evidence—was comparable to the prosecutors’ statements in *Goldberg* and *Panah*. But then the prosecutor repeated the misstatement, together with the assertions that it was ‘fairly obvious’ Lincoln was guilty, and most critically, ‘*He has gotten his fair trial.*’ This last statement implied that the ‘fair trial’ was over, and with it, the jury’s legal obligation to respect the presumption of innocence. Defense counsel should have objected.” (*Id.* at p. 1408.)<sup>8</sup> *Dowdell* also concluded, however, defense counsel’s failure to object was not ineffective assistance because Lincoln did not show “a reasonable probability of a more favorable outcome had

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<sup>8</sup> The *Dowdell* court distinguished *Goldberg* and *Panah*, but not *Booker*. (*Dowdell, supra*, 227 Cal.App.4th at pp. 1407-1408.)

his trial counsel objected to the remarks. As set forth above . . . the prosecutor presented abundant evidence of Lincoln’s guilt on all counts.” (*Ibid.*)

As in *Goldberg*, the prosecutor here argued the evidence of Ford’s guilt overcame the presumption of innocence and satisfied the prosecution’s burden of proof. (*Goldberg, supra*, 161 Cal.App.3d at p. 189.) And like the prosecutor in *Booker*, the prosecutor here “simply argued the jury should return a verdict in his favor based on the state of the evidence presented.” (*Booker, supra*, 51 Cal.4th at p. 185.) Ford does not discuss *Goldberg* and does not persuade us *Booker* is distinguishable or wrongly decided. We need not resolve any conflict between the *Goldberg, Booker*, and *Panah* cases on the one hand, and *Dowdell* on the other because we conclude any assumed error is harmless under either the state (*Watson, supra*, 46 Cal.2d 818) or federal constitutional standard (see *Chapman v. California* (1967) 386 U.S. 18, 24). The court instructed the jury Ford was presumed innocent until the contrary was proven beyond a reasonable doubt (CALCRIM No. 220) and to disregard any conflicting statements made by the attorneys concerning the law (CALCRIM No. 200). Additionally, the prosecutor repeatedly reminded the jury of his burden to establish guilt beyond a reasonable doubt. The jury was properly informed about the prosecution’s burden. Finally, and as discussed above, the evidence of Ford’s guilt was strong. (*Booker, supra*, 51 Cal.4th at p. 186.)

#### IV.

##### *The Court Did Not Abuse Its Discretion by Admitting the Facebook Message and Any Error in Admitting the Message Was Harmless*

Ford claims the court abused its discretion by admitting a message he posted on his Facebook page several months after the homicide. He claims the message was irrelevant, more prejudicial than probative, and that its admission violated his constitutional right to a fair trial.

##### A. Background

The prosecution moved in limine to admit the Facebook message and the court admitted it over Ford’s objection, concluding it was “relevant and probative.” The court explained the message “talks about the person being a good shooter, too good of a

shooter to hit someone and not knock them down, moving in silence. And apparently, the way that this killing occurred, these could be descriptions of how the killing occurred . . . so there seems to be some relevance there. [¶] Perhaps most or what is probative, though, is [Ford] says, ‘Why would I brag on a job I didn’t even complete?’ . . . It says, ‘I don’t need credit for an attempt, so take how you want to.’ [¶] I think there is some probative value to that, that there may be another killing out there; there may be the killing of a victim that could be referred to ‘Why would I take credit for an attempt’ when there’s an actual killing.”

The court analyzed the Facebook message under Evidence Code section 352 and concluded, “I don’t see it being—any probative value being substantially outweighed. Again, I think it’s very probative if the jury accepts the prosecution’s version of what it means. I don’t think there’s going to be an undue consumption of time or misleading of jury issues or confusion issues. [¶] First of all, while it references some other, perhaps, attempted shooting or attempted killing, the defendant’s denying it throughout the statement, so any incident—any other incidents not being brought up in front of the jury, such as an [Evidence Code section] 1101(b)-type situation. [¶] So it appears to me to be relevant. I would allow it subject to the proper foundation. And I have used my discretion under [Evidence Code section] 352. I don’t see the prejudice outweighing the probative value.”

A prosecution witness read the Facebook message to the jury twice because the witness missed a line while reading the message the first time. During closing argument, the prosecutor argued the Facebook message was an admission Ford shot Martinez.

**B. The Admission of the Facebook Message Was Not an Abuse of Discretion**

Only relevant evidence is admissible. (Evid. Code, § 350.) “‘Relevant evidence’ means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) A trial court may “exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice. . . .” (Evid. Code, § 352.) “We review a trial court’s rulings on the admission . . . of evidence

for abuse of discretion.” (*People v. Chism* (2014) 58 Cal.4th 1266, 1291.) ““A trial court will not be found to have abused its discretion unless it “exercised its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice.” [Citations.]” (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1180 (*Hajek*.)

Ford contends the Facebook message was irrelevant because “it was not an admission of, and had nothing to do with, the homicide for which [he] was standing trial.” We disagree with Ford’s self-serving interpretation of the Facebook message. A plausible reading of the message is Ford murdered Martinez, a disputed fact at trial. In the message, Ford implicitly admitted committing a recent murder when he claimed he did not have to take credit for an attempted murder. He stated, why “would I brag on a job I didn’t even complete. . . . I don’t need credit for an attempt. . . .” By claiming he was “too good of a shooter to hit a nigga that many times and not knock they ass down[,]” Ford implied that when he shot someone, he did not miss. Finally, Ford bragged that, unlike the accusation made by the recipient of the Facebook message, “Real killers move in silence[,]” suggesting he quickly shot Martinez in the head without being noticed and immediately disappeared. We conclude the court did not abuse its discretion by determining the Facebook message was relevant. (*Hajek, supra*, 58 Cal.4th at p. 1205 [determination of jailhouse recording’s relevance was not an abuse of discretion].)<sup>9</sup>

We also conclude Ford has failed to demonstrate the risk of undue prejudice substantially outweighed the Facebook message’s probative value, requiring exclusion under Evidence Code section 352. “Evidence is substantially more prejudicial than probative [citation] if . . . it poses an intolerable ‘risk to the fairness of the proceedings or the reliability of the outcome. [Citation.]” (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) ““Prejudice” as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial,

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<sup>9</sup> Ford claims the message was inadmissible under Evidence Code section 1101 because he admitted the uncharged offense of “purchase and possession of a controlled substance” when he referred to “buying some syrup.” We disagree. On this record, there is no reason to believe the jury would have understood “buying some syrup” as constituting a narcotics offense.

as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. . . . “The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. . . .”” ( *People v. Doolin* (2009) 45 Cal.4th 390, 438-439, citations omitted.) Here, the Facebook message may have undermined Ford's case, but it was not more prejudicial than probative. It was relevant to the issues in the case and did not tend to evoke an emotional bias against Ford. We conclude the court did not abuse its discretion by admitting the Facebook message.

Even if we assume the court erred by admitting the message, any error was harmless given the strong evidence of Ford's guilt. ( *People v. Cummings* (1993) 4 Cal.4th 1233, 1295.) As previously discussed: (1) Ford's palm print was found on Martinez's newly-washed car and Ford did not explain how his hand came into contact with Martinez's car; (2) shortly before the shooting, witnesses saw a man matching Ford's general appearance and a car similar to the one Ford drove; (3) Ford told his girlfriend he was happy he had not been charged with murder, he “wish[ed] it didn't have to happen[,]” and conceded “the only thing you gonna get out of a gun is you gonna throw down with it or you gonna shoot somebody with it[;]” and (4) Ford was found with multiple cell phones in his car a few days after Martinez's murder, suggesting a motive to commit the crime. It is not reasonably probable the jury would have returned a more favorable verdict had the court excluded the Facebook message. ( *Watson, supra*, 46 Cal.2d at p. 836.)

Finally, we reject Ford's final claim that the cumulative impact of the alleged errors deprived him of a fair trial. We have either rejected Ford's claims of error and/or found that any errors, assumed or not, were not prejudicial. “Viewed as a whole, such errors do not warrant reversal of the judgment.” ( *People v. Stitely* (2005) 35 Cal.4th 514, 560.)

DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.