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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES MICHAEL TITLOW, et al.

Defendants and Appellants.

A138713

(Contra Costa County
Super. Ct. No. 51101070)

After a joint trial before a jury, Charles Michael Titlow (Mike) was convicted of second degree murder (Pen. Code, § 187) of Ricardo Colina, and Mike's son Charles Robert Titlow (Chuck) was convicted of voluntary manslaughter (Pen. Code, § 192, subd. (a)) of Colina and accessory after the fact (Pen. Code, § 32). The jury also found Mike personally used a firearm (Pen. Code, § 12022.53). Mike was sentenced to 40 years to life in prison. Chuck was sentenced to 6 years, 8 months in prison.

On appeal, Mike contends the trial court erred in admitting, under the hearsay exception for statements against interest (Evid. Code, § 1230), evidence of various statements Chuck made to his friends after Colina was killed. Mike also asserts the prosecutor committed a series of prejudicial errors during her closing argument, and the cumulative effect of the asserted errors requires reversal.

Chuck joins in two of Mike's contentions, and further argues the trial court committed reversible error in responding to a jury question about the order in which to decide the lesser included offenses of voluntary and involuntary manslaughter.

There was no prejudicial error, and we affirm both judgments.

FACTUAL AND PROCEDURAL BACKGROUND

At 4:22 p.m. on August 19, 2009, a shooting was reported on San Pablo Avenue in an unincorporated area of Contra Costa County known as Tara Hills. Colina was found dead face down in the middle of an intersection. He died from a single gunshot wound.

Mike and Chuck were charged with the murder of Colina (count 1) and Chuck was charged as an accessory after the fact (count 2). It was further alleged that Mike personally and intentionally discharged a handgun causing Colina's death.

Prosecution's Case

Background

Chuck graduated from high school in 2007. In the summer of 2009, he sometimes lived at his father Mike's house in Tara Hills on Sargent Avenue and sometimes lived nearby in Pinole with Mike's brother, Claude Titlow (Claude). Chuck was friends with Kellen Horn, Justin Stonebraker, Richie Milhollin, and Kareem Nazari, and they all hung out together all the time. Chuck drove a truck that was primered in a flat gray color.

The prosecution called eyewitnesses to Chuck's conduct leading up to Colina's murder, eyewitnesses who were driving on San Pablo Avenue around the time of the shooting, and Chuck's friends—including Horn, who was with Chuck when he confronted Colina on San Pablo Avenue, and others whom Chuck had called to join him in a fight with Colina. The prosecution also presented physical evidence connecting Mike to the shooting.

August 18 "Road Rage" Incident

Colina's friend Nia Gordon testified that, shortly after midnight on August 18, 2009, she was riding in a car with Colina and his cousin, Jerry Owens, in Tara Hills. Colina was driving. She noticed they were being tailgated by a gray pickup truck. The truck pulled up next to them at an intersection, and Colina yelled at the driver of the truck. The driver "looked really red in the face and looked upset" and rammed his truck into Colina's car. Colina backed up and the truck hit his car again and sped off. Colina was upset; he took off his shirt, chain, and hat, and stood in the middle of the street

cussing and yelling. The gray truck returned and drove up very fast toward Colina, who jumped out of the way to avoid being hit.

Although Gordon did not identify the driver of the gray truck, other witness testimony established Chuck was the driver, and Chuck does not dispute he was involved in a road rage incident with Colina.

August 19 Before the Shooting

Paul Petruzzelli lived near the site of the road rage incident. Owens lived across the street from him. At trial, Petruzzelli remembered that detectives had been at his house for a couple of hours the night of August 19, 2009, but he testified that he could not recall anything about that afternoon. So, a recording of his August 19, 2009, interview with sheriff's detectives was played for the jury.

Petruzzelli told the detectives that a White man, whom he thought went by "Chuck," stopped by his house around 3:30 p.m. that day. Chuck was driving a black pickup truck with a broken corner light. Chuck saw Colina and another person walking, "and he kind of like got real quiet for a minute." Then Chuck "said something to them and just [took] off down the street." It appeared to Petruzzelli "there was some type of . . . aggression" between Chuck and Colina. After Chuck drove off, Colina asked Petruzzelli what Chuck said and apparently told him about the road rage incident.

The day after the shooting, he identified Chuck's truck as the truck he had seen at his house the previous day. But, after Chuck was arrested that day, Petruzzelli was taken to view him in person, and Petruzzelli told the officers he did not know him.

Eyewitnesses on San Pablo Avenue

In the afternoon of August 19, 2009, Michael Brunelle was driving southbound toward Richmond on San Pablo Avenue near the First Baptist Church. He noticed three men near a small "gray primered" truck that was parked at O'Connor Drive facing San Pablo. The three men caught his attention because they seemed to be in a heated argument. It appeared that one of the men was Black, one was White, and one was Hispanic. After he drove past them, Brunelle observed the whole incident through his driver's side mirror. He saw the Black man running at an angle toward the median of San

Pablo followed by the White man. Brunelle slowed down and then stopped his car in the middle of the street when he saw the men running to the median.

The two men stopped, faced each other in the left turn lane, and began fighting. The Black man was facing toward Pinole (north), and Brunelle could see his back. The White man was facing toward Richmond (south), and Brunelle could see his face. They were “throwing punches to each other, more slapping almost.” The two men stepped away from each other. The White man’s hands were by his side, and Brunelle did not see anything in his hands. Then a gunshot rang out, and the White man appeared “quite surprised” and “very shocked.” The gunshot came from Brunelle’s left. He heard only one shot. The Black man dropped to the ground. The White man ran to Brunelle’s left toward O’Connor. After the shooting, Brunelle backed up to see if he could assist the victim. He did not see a red truck near the two men fighting, nor did he see a black truck near the gray truck.

Another witness, Daryl Wallace, was driving on O’Connor Drive and turned right onto San Pablo Avenue (northbound toward Pinole) near the Baptist Church. To make the turn, he had to drive around a small, flat-black pickup truck blocking his way. The occupants appeared to be two Hispanic male juveniles; the driver seemed annoyed. As he drove north on San Pablo, Wallace saw through his rearview mirror two Black men walking in his direction on the sidewalk behind him. Then he heard two gunshots, and he saw the two Black men running away from the black truck. Through his rearview and passenger mirrors, Wallace saw that the driver of the black truck had a weapon, and he was in the street firing at the two Black men. He also testified, however, that he did not see the driver get out of his truck, but when he heard the gunshots, he saw a person standing in the street and assumed he was the driver of the truck. Wallace did not see where the black truck or its occupants went, and he did not notice any other cars that appeared to be associated with the truck.

Chuck's Friends and Acquaintances

Kellen Horn

Horn grew up in Tara Hills. He was Chuck's close friend, and had known Colina since kindergarten.

One evening prior to the killing, Horn and a friend, Cordon Hamilton, were at Mike's house waiting for Chuck to get off work. When Chuck arrived home, he was angry because someone had run into his truck or cut him off and thrown "[w]ater bottles or something of that sort" at his truck. Horn and Hamilton went with Chuck in the truck to "go confront the people about it," meaning "[m]ost likely fighting." As they drove by the area of the road rage incident, Horn saw Colina on the sidewalk jumping around with his shirt off and "holding onto his pants." Horn thought Colina might have a gun although he did not see a weapon. He told Chuck, "Keep driving. He has a gun." Chuck, Horn, and Hamilton then went back to Chuck's house and played video games.

The afternoon of Colina's murder, Chuck called Horn and said he had seen the people who ran into his truck walking near Horn's house in Tara Hills. Chuck told Horn he was going to pick him up "and we were gonna go fight 'em." Chuck and Horn drove around the neighborhood and saw Colina and another Black man, who all agree was Owens, walking about a block from San Pablo Avenue. Chuck then called Milhollin and Mike. Stonebraker was also called, although Horn was unsure whether it was he or Chuck who called him. Chuck told Milhollin "he had found the kids that . . . ran into him and we were going to fight 'em."

Chuck and Horn drove to the intersection of San Pablo Avenue and Tara Hills Drive and waited. Horn saw a burgundy Dodge Ram truck traveling north on San Pablo. Chuck pulled out in front of it, and Horn saw that Mike was driving the burgundy truck. At some point, Horn also saw Stonebraker on San Pablo Avenue driving a shiny black Chevy truck. As Chuck and Horn drove north on San Pablo, Horn saw Colina and Owens on the sidewalk. Chuck "drove up on them pretty fast and then . . . pulled the emergency brake." Chuck's truck skidded to a stop at the driveway of the Baptist church within a couple feet of Colina and Owens, and they jumped out of the way.

Chuck got out and chased Colina. Colina ran into the church parking lot and then back to the street heading south on San Pablo Avenue. Mike cut Colina off with his truck, and prevented him from running further south. Colina ran to the median strip at the intersection of O'Connor Drive, and he and Chuck started fighting. Horn was north of Chuck because he had started to chase Owens, who had run north on San Pablo. Horn did not run very far because Owens was "a lot faster than [him]," so he ran back to help Chuck. Stonebraker had parked in front of Chuck's truck and also briefly chased Owens.

Horn observed Colina and Chuck fighting. Chuck hit Colina in the jaw, and Colina hit Chuck in the eye. Chuck was facing toward Richmond and Colina was facing toward Pinole. Horn heard a gunshot, and "[e]verybody dropped." Mike's truck was in the lane closest to the median on northbound San Pablo Avenue. After the gunshot, Chuck and Horn got up and ran to Chuck's truck. Chuck had to run in front of Mike's truck to get to his truck. Chuck seemed shocked and confused. He said to Horn, "what the fuck just happened?" Three trucks then left the scene headed north on San Pablo Avenue. Stonebraker led the way, followed by Mike and then Chuck. After they left the church driveway, Chuck called Milhollin.

Chuck and Horn drove to Mike's house, and Mike talked to them in the front yard. He told them not to worry, and gave Horn a gun wrapped in a t-shirt. Mike told Horn to take it to his house and keep it. Horn testified he did not say no to Mike "[b]ecause if I would have said anything, it would have given him doubt in me of whether or not he could trust me."

Milhollin arrived at the house, and Chuck and Horn borrowed Milhollin's truck to drive to Horn's house. Horn hid the gun in his closet. He thought the gun was a .38-caliber revolver. He had seen Mike with the revolver once before when Mike had it at Horn's house during a party. Chuck and Horn returned to Mike's house, and Mike had left. Chuck told Horn that Mike had gone to a construction site where Claude was working so he would have an alibi. Horn thought Nazari and Nick Tormey were also at Mike's house.

Chuck and Horn went to Nazari's house in Pinole. They hung out in the garage with Nazari, Milhollin, and Daniel Dye, who was a casual acquaintance. Horn testified, "[Chuck] was pretty much just saying what had happened. How, you know, we got out and we—he was fighting Ricardo [Colina], and then how his dad pulled up and how his dad shot and then how we got out of there." Horn could not remember whether Chuck "said how his dad had shot him or if he had demonstrated it." Chuck described or demonstrated the shooting on more than one occasion, and, at trial, Horn could not remember what Chuck said about the shooting in Nazari's garage and what he said at other times. Chuck said Mike's weapon was never outside the truck; the gun was inside the truck when it was fired. Horn recalled that someone in Nazari's garage said, " 'Your dad must have done it,' " and someone, referring to Mike, said, " 'He's a crazy motherfucker.' "

Horn testified that Chuck told him that Mike called and wanted the gun. So, he and Chuck left Nazari's house and went to Horn's house to get the gun and return it to Mike.¹ He and Chuck drove to Mike's girlfriend's house in Rodeo and gave the gun to him. At that time, Mike was driving a small green car.

Late that evening, Chuck sent Horn a text about "Paul," apparently referring to Petruzzelli. Horn knew that Chuck talked about the road rage incident with Paul and that Chuck told Paul, " 'They're going to find out who they're fucking with.' " In his text, Chuck expressed concern that Paul was "putting his name out there," and connecting Chuck to the shooting.

The day following the murder, detectives Mike Meth and Garrett Schiro interviewed Horn at his house. Horn told them about the events that led to the fight in front of the church, but he lied and said he did not know who fired the gun. He testified,

¹In a recorded interview with law enforcement in September 2009, however, Horn said he got the gun from his house and took it to Mike *before* he and Chuck went to Nazari's house. Horn also said he was driving his own truck when he returned the gun to Mike. This order of events is consistent with testimony that Chuck and Horn arrived at Nazari's house later that evening in a white truck and that Nazari himself did not go straight home from Mike's house.

“I was told not to say that” Mike fired the gun, and he did not identify Mike “[b]ecause I didn’t want to be that guy who told on somebody else.” He was also afraid if he said something, “somebody would come after me.” Meth and Schiro told Horn they knew he was withholding information, and Horn was arrested as an accessory to murder. Chuck was also arrested that day, but they were both released within a few days without charges filed.

Sometime after his release, Horn was at Mike’s house, and Mike and Chuck asked him if he talked to anybody. They had heard he told the whole story to a woman. Horn denied it, and they told him to keep his mouth shut.

Chuck told Horn that his uncle Claude had taken the burgundy truck to his grandmother’s house. Chuck said they would explain any gunshot residue in the truck by saying it was from 4th of July fireworks. Chuck also told Horn “they had put [Mike’s] arms in bleach” to get rid of any gunshot residue.

The prosecutor asked Horn whether, after the killing, he learned “about a plan related to what Mike Titlow was going to do at that scene.” He answered that he remembered “knowing something of that,” but he could no longer remember what was said about a plan.

Sergeant Tiffany Van Hook was the lead detective on the case, and she interviewed Horn at least five times. In addition to Horn’s testimony, the jury heard excerpts of Horn’s first and second taped interviews. In Horn’s second interview, Van Hook asked if there had been a conversation between Chuck and Mike “about a gun” after the road rage incident and before the shooting. Horn responded that, the night of the road rage incident, Chuck told Mike over the phone, “I think these people have guns.” Chuck later told Horn, “ ‘Uh, whenever shit goes down,’ just call his dad.”

Horn reported that, at the fight on San Pablo Avenue, nobody had a gun except Mike, and no one else was in Mike’s truck. Asked whether Chuck said Mike was going to “back you guys up with a gun,” Horn answered, “Yeah, he was just—he was supposed to—what (Chuck) told is he was supposed to be there. And from what [Chuck] knew before is [Mike] was going to be there with an eye on us. . . .”

At Mike's house after the shooting, Horn saw Mike hand the gun to Chuck and say, "Take care of this. Get it out of here.'" Mike directed them to hide the gun at Horn's house. Chuck and Horn borrowed Milhollin's truck because they did not want to carry the gun in Chuck's truck when they thought the police would be looking for it. Around 7:00 p.m., they returned the gun to Mike at his girlfriend's house in Rodeo. Horn was driving his truck at this time. In Rodeo, Mike no longer had the burgundy Dodge truck; he was in a green Honda. Horn said to Chuck that the best way to get rid of the gun was to throw it over a bridge. Horn told Van Hook, "[Chuck] just came back and told me it was taken care of," but he was not more specific.

Chuck demonstrated to Horn how Mike had shot Colina from his truck. From the way Chuck described the shooting, Horn thought Chuck knew what happened because Mike told him, not because Chuck saw Mike fire the gun. Chuck demonstrated that Mike held the gun across his chest and did not point the gun out the window of the truck. Chuck told Horn, "He would have fucking shot me if he wasn't—if he would have been six inches more to this side.'" Horn said Mike's truck was six to ten feet from Colina and Chuck. Horn also told Van Hook that Chuck would not tell on his dad.

Van Hook testified that Horn told her of "a plan that he learned about after the shooting with regard to Mike." In his second interview, Horn reported that Chuck said the plan had been for Chuck and Horn not to get out of the truck; the plan was Chuck was going to pull his truck up to Colina and Owens, they were going to run, and Mike was going to shoot them. Similarly, in a third interview in February 2010, Horn told Van Hook that, after the shooting, Chuck told him that the initial plan was for Chuck to drive up and Mike was to take care of everything. Horn told Van Hook that Chuck did not know the plan was they would remain in the truck before the shooting, which was why Chuck and Horn chased Colina and Owens. Horn believed the only part of the plan Chuck did not know about was that they were not supposed to get out of the truck.

Horn said, when Mike gave them the gun after the shooting, he said to Chuck, "Don't worry. This isn't my first time.'" The night Chuck and Horn were released

from jail within a week of the murder, Chuck told Horn that Mike had dunked his arms in bleach the night of the shooting.

In a telephone interview in December 2012, Horn said that before the shooting, he and Chuck were waiting for Mike at Tara Hills Drive, and Chuck pulled onto San Pablo Avenue after Mike arrived.

Justin Stonebraker

Stonebraker testified that his group of friends in 2009 included Chuck, Horn, Milhollin, Nazari, Tormey, and Chris Martin. One afternoon in August 2009, Chuck called and said to meet him at Nation's Hamburger because he found " 'the guys that flashed the gun on me. Let's get them.' " Stonebraker drove to Tara Hills Drive and San Pablo Avenue in his black Chevy pickup truck. He had heard about the car-ramming incident from Chuck, and he intended to help him. Horn called and said they were on San Pablo.

Stonebraker headed toward Pinole (north) on San Pablo Avenue and saw Chuck's truck on a side street to his right. Chuck was ready to make a right turn. Chuck pulled out onto San Pablo Avenue, sped up, and stopped near Colina and Owens. Stonebraker drove around Chuck's truck to follow Owens and stopped about a block past the Baptist Church. He got out of his truck and saw Owens trying to jump a fence. At this point, Stonebraker heard what sounded like a gunshot. He ran to his truck and drove away. As he drove north on San Pablo, he saw a burgundy truck that he had seen before at Claude's house. Stonebraker did not see who was driving the burgundy truck, and he did not see Mike that day.

Richie Milhollin

Milhollin testified that his friends in the summer of 2009 included Nazari, Chuck, Horn, Stonebraker, and Martin. He drove a black Chevy truck. At trial, Milhollin did not recall the events of the day Colina was killed.

A recording of Milhollin's August 25, 2009, interview with Meth and Van Hook was played for the jury. Milhollin said Chuck called him around 3:50 or 4:00 p.m. on August 19. Chuck said he was about to get into a fight and told Milhollin to meet him at

Nation's. Milhollin was with some friends at Nazari's house in Pinole Valley when he got the call. He told Nazari that Chuck was fighting, and they went to meet him. Milhollin and Martin took Milhollin's truck, and Nazari went in his own truck.

As Milhollin drove by the church on San Pablo Avenue, he thought someone had been hit by a car. He saw Colina lying on the ground. Chuck called and said, " 'Shit[']s all bad,' " and to meet at his house. Milhollin drove to Mike's. At the house, Chuck "was all like scared and juiced." He was yelling and screaming and said he needed Milhollin's truck. Chuck and Horn took the truck and returned after about five or 10 minutes. At that time, Milhollin sensed Mike was the shooter.

Later that day in Nazari's garage, Chuck told everyone, "I told you we were gonna fight them motherfuckers." He said he jumped out of his truck, and Mike almost hit Colina with his truck. Chuck said he was "swinging [at Colina] and all of a sudden he heard pop, pop, pop, and then he dropped." Milhollin told Meth, "Then [Chuck] pulls me aside and tells me, you know who did it right? I was like yeah, I can fucking put . . . two and two together, I ain't stupid. And he goes well yeah, well that gun is already in the bay now."

Van Hook interviewed Milhollin again in September 2009. He told her that Mike had been to his house while he was away. Mike told Milhollin's father that Milhollin should talk to Mike when he returned. Milhollin and Nazari went to see Mike at Claude's house. Mike told Milhollin, " 'You're going to take this to your grave. Keep your mouth shut.' " Mike also said he thought Nazari might be talking, and he told Milhollin to tell Nazari to keep his mouth shut.

Kareem Nazari

Nazari testified that he was friends with Milhollin and Martin. He knew Chuck and considered him an acquaintance through mutual friends. Like Petruzzelli and Milhollin, Nazari did not recall the events of August 19, 2009. He remembered seeing sheriff's detectives, but did not recall any of his conversations with them.

Van Hook interviewed Nazari a week after Colina was killed. He told her that Milhollin, Martin, and Tormey were at his house on the afternoon of August 19.

Milhollin told him Chuck called and said they needed to go down to the Nation's in Tara Hills because Chuck was going to get into a fight and they were going to help him. Milhollin told Nazari that Chuck said he was going to fight the guys that had previously pulled a gun on him. Milhollin and Martin got in Milhollin's truck, and Nazari and Tormey got in Nazari's truck. Nazari took San Pablo Avenue and saw a body in the road. Milhollin called and told him to go to Chuck's house. When he got to the house, Milhollin and Martin were standing on the sidewalk. Chuck and Horn arrived in Milhollin's truck a short time later. Nazari overheard Chuck saying that Mike was at the fight on San Pablo Avenue. Nazari demonstrated for Van Hook how Chuck had demonstrated the holding of a gun, but he did not know whether this meant Mike or Chuck shot the victim.

Nazari told Van Hook that Chuck and Horn were at his house later that evening. Milhollin, Tormey, Martin, Dye, and Nazari's girlfriend were there. Nazari also recalled receiving a text from Milhollin about the gun being thrown over a bridge.

On the Sunday after the shooting, Nazari and Milhollin went to Claude's house, and Milhollin spoke with Mike alone. Later, Milhollin told Nazari that Mike was worried that Nazari was snitching.

Nick Tormey

Tormey testified that he was friends with Nazari and hung out with Milhollin, Horn, and Dye. He did not know Chuck. One afternoon in August 2009, he went with Nazari in Nazari's truck. He thought they were just meeting a friend. On San Pablo Avenue, it appeared someone had been hit by a car, and Nazari drove to his friend's house. After they arrived, Chuck and other people arrived at the house; Chuck appeared frantic and paranoid. Tormey asked if they saw the man that had been hit by a car, and they said the person was not run over. Tormey saw Mike arrive at the house around the same time in a green Honda. He also seemed frantic and paranoid.

Tormey was at Nazari's house when Chuck and Horn arrived there later that evening in a white truck. Chuck stayed for about 10 minutes. He said Horn was in the car with him when the fight started, and Horn was worried about being a suspect in the

shooting. Chuck said his dad was there, and he thought his dad shot the victim. Everyone said they should throw the gun off a bridge.

Additional Evidence

A pathologist conducted a postmortem exam on Colina and recovered a bullet from his body. Colina died from a single gunshot wound of the neck and chest that caused him to bleed to death. The pathologist concluded the gun would have been more than 12 to 15 inches away when fired.

A firearms expert testified the bullet recovered from Colina's body was lead and, based on its size and markings, was discharged from either a .38 Special or .357 Magnum revolver.

The day after Colina was killed, the sheriff's department searched Mike's house. A holster for a small revolver and a box of lead .357 Magnum ammunition were recovered. No other ammunition was found. The box of ammunition held 50 rounds, and nine rounds were missing. The firearms expert testified the holster was probably an ankle or leg holster, and would hold a small .357 Magnum revolver.

When Chuck was arrested the day after the killing, his hands were swabbed for gunshot residue (GSR) analysis, and the white tank top he was wearing was also taken for GSR analysis. No particles of GSR were found on Chuck's hands, but one particle characteristic of GSR and many particles consistent with GSR were on the tank top.²

²Gunshot residue particles are a family of particles formed in the discharge of a firearm. The three elements involved are lead, barium, and antimony. A particle of the right shape and size that has all three elements is considered a "characteristic" particle. If a particle contains one or two of the elements, it is "consistent" with GSR.

The tank top analyzed for GSR was one Chuck was *wearing* when he was arrested the day after the shooting. In February 2010, Horn did give Van Hook a T-shirt he said was the one the gun was wrapped in. Van Hook testified, however, that she did not have GSR or DNA testing done on the shirt because of the amount of time that had passed and the fact Horn easily could have manufactured evidence—Horn continued to visit Mike's house after his arrest and easily could have taken a T-shirt from the house and wiped it on a hunting rifle.

Sheriff's deputies seized a red Dodge Ram 1500 truck found at the residence of Mike's mother, Mary Titlow, in Butte County in late August 2009. The truck was registered to Mary and Ernest Titlow, but receipts with Mike's name and Chuck's name were found inside the truck. Many particles consistent with GSR were found on the truck's headliner.

Phone records for Chuck's cell phone showed that, on August 19, 2009, he called Horn shortly before 4:00 p.m., he called Stonebraker at 4:08 p.m., and he called Mike and Milhollin multiple times between 4:00 p.m. and 5:00 p.m. Mike's cell phone records showed he called Chuck at 4:11 p.m. Between 5:45 p.m. and 11:00 p.m., there were eight calls between Mike and Chuck.

Defense

Mike called Javari Jackson, who was riding in his father's truck as they drove south on San Pablo Avenue around the time of the shooting. He noticed two young Black men walking, and then saw a dark gray truck pull up on the sidewalk with its tires screeching. The two Black men ran in opposite directions. One man ran south toward Richmond. The driver of the gray truck, who appeared to be White or Mexican, chased him. A light colored Honda was driving north on San Pablo. The Black man ran around the driver's side of the Honda toward the middle of the road, and the man chasing him ran on the other side of the car. The two men met in the middle of the road. The Black man turned around, "squaring up ready to fight," and the White man swung. It appeared the Black man got knocked out because he fell to the ground face first. Jackson watched the men from the time the truck screeched to a stop at the sidewalk, and he did not see a red truck pull up to the two men while they were fighting.

Mary Titlow testified that she owned a maroon Dodge Ram truck, which Mike borrowed in March or April of 2009 and returned after four or five months. Mary took her husband target shooting in the truck in November 2008. At that time, he was terminally ill and could not get out of the truck. She set up targets for him, and he sat in the passenger seat and shot his rifle out the window. He died in January 2009. Mary never saw Chuck with a gun.

Jessica Johnston testified as a character witness for Chuck. He was her boyfriend in the summer of 2009. They had an on-again, off-again relationship for about four or five years. Johnston never saw Chuck with a gun and he never spoke enthusiastically about guns. He was loyal to his friends.

Chuck also played excerpts of taped interviews of Horn, Tormey, and Nazari.

Jury Instructions and Verdict

The trial court instructed the jury on premeditated murder (CALJIC No. 8.20), lying in wait (CALJIC No. 8.25), drive-by murder (CALJIC No. 8.25.1), second degree murder (CALJIC Nos. 8.30, 8.31), voluntary manslaughter (CALJIC No. 8.40), sudden quarrel, heat of passion, and provocation (CALJIC No. 8.42), imperfect defense of others (CALJIC No. 5.17), and, as to Chuck, involuntary manslaughter (CALJIC No. 8.45). In addition, the jury was instructed on conspiracy (CALJIC No. 6.10.5) and the requirement that accomplice testimony be corroborated (CALJIC No. 3.11). The jury was specifically told that if one or more of the charged offenses were committed by anyone, Horn was an accomplice as a matter of law.

After finding him not guilty of first degree murder, the jury found Mike guilty of second degree murder and found he personally used a firearm. After finding him not guilty of either first or second degree murder, the jury found Chuck guilty of voluntary manslaughter and being an accessory after the fact.

DISCUSSION

A. Admission of Evidence of Chuck's Statements to Friends in Nazari's Garage

Mike contends the trial court erred in admitting, pursuant to Evidence Code section 1230 (section 1230), evidence of statements Chuck made to his friends that indicated Mike was the shooter. He argues the admission of these nontestimonial hearsay statements against him violated his right to due process. We reject his constitutional claim, and we conclude the trial court did not abuse its discretion in admitting this evidence under section 1230's exception to the hearsay rule.

1. Procedural Background

Mike moved to exclude any statements made by Chuck that tended to incriminate him, arguing such statements were inadmissible hearsay. The trial court ruled the statements Chuck made to his friends about the fight and shooting were admissible as statements against interest under section 1230.

The court “looked very carefully at the totality of the circumstances and the motivation Chuck would have to make these statements to his friends shortly after the events.” It found Chuck’s statements were against his interest, reasoning as follows:

“This entire event, this series of events, was initiated and caused allegedly by Chuck getting into a fight with [Colina] and . . . ramming his car and allegedly trying to run him over two days before. [¶] Chuck then told everybody that he believed [Colina] had a handgun. [¶] He [made] efforts to find [Colina] . . . [and] call[ed] his friends and urged them to come help him assault [Colina].

“I think the evidence does allow a reasonable inference, even in light of [Horn’s] reinterview, that it was Chuck who advised his father that he intended to fight [Colina] and that he believed [Colina] had a gun. And it is reasonable to infer that Chuck was aware that his father had access to a firearm. [¶] According to [Horn’s] current interview, it appears that it was clear to both of them that Mike was following them at the time shortly before the fight onto San Pablo Avenue. In fact, they stopped at an intersection, waited until Mike pulled up behind them in his truck, and then drove to the scene of the fight and then knowing that his father was behind him in his truck, Chuck and [Horn] get out of their car to go assault [Colina] and chase Mr. Owens down the street.

“Under those circumstances, Chuck has every reason to believe that his personal interests are seriously impacted by the shooting of—allegedly by his father since it was he who set these actions into process and caused the actions to occur, inviting everyone to the fight, including his father, and

could reasonably infer that his father may be armed. [¶] . . . [I]t was against his penal interest in describing his father’s conduct as well as his own in setting up these circumstances and engaging in the fight. It did expose and does expose Chuck to very significant culpability.”

Further, the court found “it’s against his familial interest, that is, his interest in getting along with his family and having the relationship of father and son with his father. [¶] The statement against interest exception applies to . . . penal interest and other interests including social approbation and in my view the family tie. [¶] If Chuck were to falsely accuse his father of this, in my view, it would be strongly against Chuck’s interest as a son as well as his penal interest.”

The court also found Chuck’s statements “highly reliable” based on the circumstances in which they were made. “Chuck is speaking to his close friends, in fact his closest friends, the people he invited to back him up in this fight. . . .” “These are not people aligned with law enforcement, so he does not have a motive to falsely implicate his father and lift blame from himself.” Moreover, the court found it clear that the Titlow family was close, and “Chuck would not falsely implicate his father in the shooting.”

2. Constitutional Claim

As an initial matter, we reject Mike’s claim that the admission of Chuck’s nontestimonial hearsay statements raises a constitutional issue.

“[I]n *Ohio v. Roberts* (1980) 448 U.S. 56, 66, [*Roberts*] [the United States Supreme Court] construed the federal Constitution’s confrontation right as allowing the use at trial of any out-of-court statements that were within a ‘firmly rooted hearsay exception’ or had ‘particularized guarantees of trustworthiness.’ But some 25 years later, in *Crawford [v. Washington]* (2004) 541 U.S. 36 (*Crawford*), the high court abandoned that approach and adopted this general rule: The prosecution may not use ‘[t]estimonial statements’ of a witness who does not appear at trial, unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination.” (*People v. Dungo* (2012) 55 Cal.4th 608, 616.)

Mike concedes the admission of evidence of Chuck’s statements to his friends did not violate his Sixth Amendment right to confront witnesses because the statements were not testimonial. Despite this concession, he argues admitting this evidence violated his constitutional right to due process because Chuck’s statements were “unreliable” and lacked “sufficiently particularized guarantees of trustworthiness.” Mike relies on *Lilly v. Virginia* (1999) 527 U.S. 116, 139 (*Lilly*), in which the United States Supreme Court concluded an accomplice’s statement inculcating another was not so reliable that there was no need for cross-examination under the confrontation clause. But *Lilly* predated *Crawford*, and the *Lilly* court applied the now-rejected reliability test set forth in *Roberts*.³ (*Lilly, supra*, 527 U.S. at pp. 135–139.) “*Roberts, supra*, 448 U.S. 56, and its progeny are overruled for all purposes. . . . Thus, there is no basis for an inference that, even if a hearsay statement is nontestimonial, it must nonetheless undergo a *Roberts* analysis before it may be admitted under the Constitution.” (*People v. Cage* (2007) 40 Cal.4th 965, 981, fn. 10, italics added.) Accordingly, *Lilly* has no bearing on whether the admission of Chuck’s nontestimonial hearsay statements was constitutional. (*Ibid.*; see *United States v. Smalls* (10th Cir. 2010) 605 F.3d 765, 773 [“*Roberts* [is] no longer good law . . . , rendering *Lilly* a dead letter”].)

Mike argues *Lilly* establishes that the admission of evidence of Chuck’s hearsay statements violated his constitutional right to reliable evidence under the due process clause. But *Lilly* was decided based on the confrontation clause. Even when it was good law, it had no relevance to due process analysis. Essentially, Mike’s argument is that the *Roberts* reliability test (as applied in *Lilly*) survives *Crawford* through the due process clause. But *Crawford* overruled *Roberts* in part because “[r]eliability is an amorphous, if not entirely subjective, concept” and because the *Roberts* reliability test was “so unpredictable.” (*Crawford, supra*, 541 U.S. at p. 63.) Justice Kennedy later observed that *Crawford* rejected the *Roberts* reliability test “to delink the intricacies of hearsay law

³Under the prior rule, any hearsay statement (testimonial or not) made by an unavailable declarant was admissible only if it bore adequate “ ‘indicia of reliability.’ ” (*Roberts, supra*, 448 U.S. at p. 66.)

from a constitutional mandate” and “to allow the States, in their own courts and legislatures and without this Court’s supervision, to explore and develop sensible, specific evidentiary rules pertaining to the admissibility of certain statements.” (*Bullcoming v. New Mexico* (2011) 564 U.S. 647, 681, (dis. opn. of Kennedy, J.) Given this history, we see no basis to conclude the *Roberts* reliability test nonetheless survives as a constitutional standard governing the admissibility of nontestimonial hearsay statements with its source as the due process clause instead of the confrontation clause. (*Ibid.*; see Simons, Cal. Evidence Manual (2016 ed.), § 2:113, p. 205 [“There is no reason to believe that the *Roberts* reliability test will be resurrected through the Due Process Clause.”].)

3. Section 1230

A. Applicable Law

Section 1230 provides in relevant part: “Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability, . . . or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.”

“ ‘The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. . . . [T]he court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant’s relationship to the defendant.’ [Citation.] . . . We have recognized that, in this context, assessing trustworthiness ‘ ‘ ‘requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.’ ” ’ ” (*People v. Geier* (2007) 41 Cal.4th 555, 584 (*Geier*), overruled on other grounds as recognized by *People v. Seumanu* (2015) 61 Cal.4th 1293, 1320.)

“ ‘There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception. The trial court

must look to the totality of the circumstances in which the statement was made. . . . Clearly the least reliable circumstance is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others. . . . However, the most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures.’ ” (*People v. Tran* (2013) 215 Cal.App.4th 1207, 1217 (*Tran*).

“ ‘[S]ection 1230 only permits an exception to the hearsay rule for statements that are specifically dis-serving of the declarant’s penal interest. [Citation.] This is not to say that a statement that incriminates the declarant and also inculcates the nondeclarant cannot be specifically dis-serving of the declarant’s penal interest. Such a determination necessarily depends upon a careful analysis of what was said and the totality of the circumstances.’ ” (*Tran, supra*, 215 Cal.App.4th at p. 1217.)

“A trial court’s decision to admit or exclude evidence is a matter committed to its discretion ‘ “and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” ’ ” (*Geier, supra*, 41 Cal.4th at p. 585.) In their appellate briefing, both Mike and the Attorney General assert an independent standard of review applies to the preliminary determination of trustworthiness under Evidence Code section 1230. The California Supreme Court, however, recently made clear that review is for abuse of discretion. (*People v. Cortez* (2016) 63 Cal.4th 101, 125, fn. 5 (*Cortez*).

B. Analysis

The evidence showed that, on the night of the road rage incident, Chuck told Mike he thought the people involved had guns. Chuck then told Horn, “ ‘whenever shit goes down,’ just call his dad,” thus suggesting that Chuck at least believed Mike would know how to deal with people who had guns. It could be inferred that Chuck knew his father had access to a firearm as Mike had been seen with a revolver, a holster for a small revolver and a box of .357 Magnum ammunition were found in Mike’s house, and Chuck lived with Mike. On the day Colina was shot and killed, Chuck drove around looking for Colina. He called his friends and Mike to back him up. He waited for Mike to arrive

before confronting Colina and Owens, although he did not similarly wait for Milhollin. He chased Colina on foot. Mike pulled his truck in front of Colina to prevent his escape. When Colina faced Chuck and started to fight, he was shot. Immediately after the shooting, Mike seemed frantic and paranoid.

Mike challenges the admission of evidence of what Chuck said to his friends in Nazari's garage, statements he characterizes as bragging by Chuck at a party that Mike was the shooter. According to Horn, at Nazari's house after the shooting, "[Chuck] was pretty much just saying what had happened. How, you know, we got out and we—he was fighting [Colina], and then how his dad pulled up and how his dad shot and then how we got out of there." Milhollin said Chuck told everyone, "I told you we were gonna fight them motherfuckers." Chuck said he jumped out of the truck and Mike almost hit Colina with his truck. Chuck said he was "swinging [at Colina] and all of a sudden he heard pop, pop, pop, and then he dropped." Then Chuck pulled Milhollin aside and said, "you know who did it right?" and "the gun is already in the bay now." Tormey testified that Chuck said his dad was at the fight and he thought his dad shot the victim.

The trial court could reasonably determine that Chuck's statements in Nazari's garage were specifically diserving of his penal interest because, in context, they showed (1) Chuck initiated the fight with Colina, (2) he invited Mike to the fight, (3) he either knew or reasonably expected Mike would bring a gun to the fight, (4) Mike did bring a gun to the fight, and (5) Mike shot Colina. As the court explained: "Chuck has every reason to believe that his personal interests are seriously impacted by the shooting . . . by his father since it was he who set these actions into process and caused the actions to occur. . . [¶] . . . [I]t was against his penal interest in describing his father's conduct as well as his own in setting up these circumstances and engaging in the fight. It did and does expose Chuck to very significant culpability." Indeed, as the Attorney General points out, the jury found Chuck guilty of voluntary manslaughter of Colina undoubtedly based in part on his statements at Nazari's house.

The trial court also could reasonably find Chuck's statements trustworthy based on the circumstances in which they were made. " '[T]he most reliable circumstance is one

in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures.’ ” (*Tran, supra*, 215 Cal.App.4th at p. 1217.) Here, the court relied on the fact Chuck was speaking with his close friends, whom he had asked to back him up in the fight with Colina. The court also properly took into account Chuck’s relationship to Mike in finding that Chuck would not falsely implicate his father in the shooting. (*Geier, supra*, 41 Cal.4th at p. 584.) Under the totality of the circumstances, the trial court did not abuse its discretion in determining that Chuck’s statements were against his penal interest.

Mike argues Chuck’s statements to his friends were not specifically diserving to his interests, citing *People v. Leach* (1975) 15 Cal.3d 419, 441. Our Supreme Court recently addressed section 1230’s “specifically diserving” requirement in *Cortez, supra*, 63 Cal.4th 101. The court emphasized that context is crucial to the determination: “On the specific facts of this case, we also disagree that [the declarant’s] identification by name of who accompanied him was not specifically diserving of his interest. Our analysis begins with *Williamson v. United States* (1994) 512 U.S. 594, 600–601, (*Williamson*), where the high court held that the federal hearsay exception for statements against penal interest does not authorize admission of collateral, non-self-inculpatory statements, even if they are made within a broader narrative that contains self-inculpatory statements. In disagreeing that this holding would eviscerate the federal exception, the court explained: “[W]hether a statement is self-inculpatory or not can only be determined by viewing it in context. Even statements that are on their face neutral may actually be against the declarant’s interest. “I hid the gun in Joe’s apartment” may not be a confession of a crime; but *if it is likely to help the police find the murder weapon*, then it is certainly self-inculpatory. “Sam and I went to Joe’s house” might be against the declarant’s interest if a reasonable person in the declarant’s shoes would realize that *being linked* to Joe and Sam would implicate the declarant in Joe and Sam’s conspiracy. And other statements that give the police significant details about the crime may also, depending on the situation, be against the declarant’s interest. The question . . . is always whether the statement was sufficiently against the declarant’s penal interest “that a

reasonable person in the declarant's position would not have made the statement unless believing it to be true," and this question can only be answered in light of all the surrounding circumstances.' ” (*Cortez, supra*, 63 Cal.4th at pp. 126–127.)

In *Cortez*, after the defendant Cortez was arrested in connection with a shooting, the declarant Bernal told his nephew he shot rival gang members and Cortez was driving. (*Id.* at p. 108.) The court found no error in the admission of the Bernal's hearsay statement for use against Cortez. The court concluded that identifying Cortez was specifically disserving to Bernal's interests in part because he “knew that ‘being linked to’ [Cortez] ‘would implicate’ him in a drive-by shooting for which [Cortez] had been arrested.” (*Id.* at p. 127.)

Here, Mike argues Chuck's statements to his friends were not specifically disserving to his interest because, although he implicated himself in the shooting, Chuck identified Mike as the shooter. Mike asserts Chuck thereby minimized his own involvement and shifted the blame to Mike. In light of the surrounding circumstances, however, we conclude the trial court acted within its discretion in reaching a contrary conclusion. Chuck was not responding to police interrogation, so it would be reasonable to determine he had no motive to falsely minimize his own role in the shooting and, clearly, no opportunity to curry favor with law enforcement. (Cf. *Williamson v. United States, supra*, 512 U.S. at p. 603 [“confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor”].) Furthermore, Horn knew Chuck did not have a gun and did not shoot Colina, while Milhollin and Tormey thought Colina had been hit by a car. Given that Chuck's friends at Nazari's garage did not suspect he had shot Colina, the trial court could reasonably find that Chuck's statements were specifically disserving to his penal interest because they linked him to Colina's shooting.

Again, “[t]he focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration.” (*Geier, supra*, 41 Cal.4th at p. 584.) A statement against a declarant's penal interest is not necessarily rendered untrustworthy simply because it also describes another person as more culpable than the declarant. For

example, in *People v. Greenberger* (1997) 58 Cal.App.4th 298, which involved a kidnapping and murder for hire, the Court of Appeal held a declarant's statement that he was hired to drive and the defendant shot the victim 13 times was admissible against the alleged shooter. (*Id.* at pp. 315, 336–337.) In *People v. Gordon* (1990) 50 Cal.3d 1223, 1248–1252, overruled on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 835, the California Supreme Court held a declarant's statements were properly admitted in the trial of a defendant for murder and robbery where the statements showed the declarant was merely an accessory after the fact. Similarly, in *Tran, supra*, 215 Cal.App.4th at pp. 1218–1219, a declarant's statements that his brother shot the victim and that declarant helped burn the evidence were admissible in the brother's murder trial because the declarant's statements implicated himself in arson and being an accessory after the fact.

We recognize that, in the recent case *People v. Smith* (2016) 248 Cal.App.4th 794 (*Smith*), the majority concluded a declarant's hearsay statements that she and her boyfriend burglarized a home and killed an elderly woman were *not* admissible against her boyfriend. (*Id.* at p. 801.) The declarant told an acquaintance that her boyfriend hit the victim to stop her screaming. (*Id.* at p. 804.) The *Smith* majority reasoned, “By placing responsibility for the violence directed at the victim squarely on [the boyfriend's] shoulders, [the declarant's] statements cannot reasonably be viewed as anything other than an attempt to shift blame to [the boyfriend] and to cast herself in a more favorable or sympathetic light.” (*Id.* at p. 826.)

Justice Benke dissented. She explained: “Our state's jurisprudence . . . [regarding] Evidence Code section 1230, does not, as suggested by the majority opinion, inevitably prevent admission of such statements when the declarant's statements paint the declarant in a more favorable light than the criminal defendant who is the subject of the declarant's statement. Under the majority's narrow and novel interpretation of the penal interest exception, such a statement would be admissible only in those rare instances where the declarant has assumed the bulk of responsibility for a crime. This limitation on the use of such statements is unprecedented and inconsistent with the prevailing principle

that admission of hearsay statements which inculcate both the declarant and a criminal defendant is left to the sound discretion of the trial court.” (*Smith, supra*, 248 Cal.App.4th at pp. 832–833, Benke, J. dissenting.) She further observed, “Only when there is both blame shifting by the declarant *and other circumstances suggest some improper motive for the blame shifting* have courts found admission of a hearsay statement error.” (*Id.* at p. 837, italics added.) We find Justice Benke’s reasoning persuasive. Here, as we have discussed, the trial court did not abuse its discretion in determining Chuck’s statements were admissible because the statements were against his penal interest and the circumstances did not suggest improper motive for shifting blame to Mike.

Mike’s remaining arguments are unavailing. He claims that, before the conversation at Nazari’s house, Milhollin said to Chuck, “Dude, you guys are fucked. If [Colina’s] really dead.” He argues this demonstrates Chuck had a motive to minimize his involvement in Colina’s death when he was talking to his friends at Nazari’s. But Milhollin’s interview shows a different sequence. Milhollin said, “[Chuck] and [Horn] come, kick it for a minute and they . . . tell everybody the whole fucking story and they fucking leave.” He continued, “[T]hen they—I called him . . . He said that fool [Colina] died. . . . You should watch the news. . . . And I go telling him, I said, ‘Dude, you guys are fucked.’ ” Milhollin said “you guys are fucked” *after* Chuck told him about the shooting.

Mike also asserts there was no evidence Chuck had an actual and appreciable understanding of the penal consequences of his statements. As Mike recognizes, however, the test under section 1230 “is an objective one—would the statement subject its declarant to criminal liability such that a *reasonable* person would not have made the statement without believing it true.” (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1678, italics added.) We have concluded it was not an abuse of discretion for the court to

determine that Chuck’s statements were against his penal interests under a reasonable-person standard.⁴

Mike next claims the trial court erred in finding Chuck was talking to his “closest friends” because Nazari’s girlfriend, Dye, and Tormey were also present. However, the fact remains that Nazari’s house was a noncoercive setting among friends, not an interrogation. The presence of friends outside Chuck’s closest circle does not undermine the court’s reasoning that his audience was “not people aligned with law enforcement, so he [did] not have a motive to falsely implicate his father and lift blame from himself.”

Finally, Mike argues Chuck’s statements were not against his social interest because, in Tara Hills, involvement in a shooting would increase one’s reputation. At best, this argument might support a determination that Chuck’s statements were not against his interest, but it does not show the trial court abused its discretion when it concluded they were. (*People v. Valdez* (2012) 55 Cal.4th 82, 145.) The trial court did not abuse its discretion in allowing evidence of Chuck’s hearsay statements made in Nazari’s garage.

B. Admission of Evidence of a “Plan” to Shoot Colina

Mike next challenges the admission of evidence that, after the shooting, Chuck told Horn about a “plan” to shoot Colina. Chuck joins in this argument.

1. Procedural Background

Mike moved to exclude evidence that Chuck told Horn “that Chuck learned after the murder that the plan was that Chuck and [Horn] were not supposed to get out of the truck, that . . . Mike was going to ‘take care of it’ before the fight started.” The prosecutor indicated that evidence of a plan would be admitted through Horn’s testimony.

⁴Mike argues section 1230’s objective test violates the due process clause by permitting admission of unreliable evidence, but we have rejected Mike’s constitutional claim as explained above. Furthermore, the reasonable-person standard does not mean evidence of an unreliable hearsay statement may be admitted under section 1230. As our high court has repeatedly stated, the focus of section 1230 is the “ ‘the basic trustworthiness’ ” of the hearsay statement. (*People v. Masters* (2016) 62 Cal.4th 1019, 1055; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1108, *Geier, supra*, 41 Cal.4th at p. 584.)

However, in his interview with Van Hook closest to trial, Horn said he did not remember hearing about a “plan” after the shooting. As a result, the trial court ruled that evidence of a plan “is out according to the current interview” of Horn, and the prosecutor agreed.

At trial during Horn’s testimony, the prosecutor asked, “[A]t some point in time after the killing of Ricardo Colina did you learn about a plan related to what Mike Titlow was going to do at that scene?” Horn answered, “I can’t remember fully if there was a plan or if I had heard anything about there being a plan.” The prosecutor asked whether he had discussed a plan with Van Hook. Chuck’s attorney objected, arguing there was no evidence of the existence of a plan. The trial court agreed that there was no admissible testimony that a plan existed, but allowed the prosecutor to ask whether Horn discussed a plan with Van Hook. Horn testified that he did discuss a plan with Van Hook in 2009 and 2010, and his memory of the plan was better then.

The trial court then allowed Van Hook to testify on Horn’s prior statements about a plan as a past recollection recorded.

2. Analysis

Mike argues the trial court erred in admitting evidence of Horn’s prior statements about a plan because both Horn’s prior statements to Van Hook and Chuck’s statements to Horn were hearsay not subject to an exception. Mike’s arguments lack merit.

First, Mike asserts Horn’s prior statements were not admissible as prior inconsistent or consistent statements. This is a straw man, however, because evidence of Horn’s prior statements was not admitted on the basis of either of these exceptions to the hearsay rule. Rather, the evidence was admitted under Evidence Code section 1237, the hearsay exception for a past recollection recorded.⁵ During a discussion outside the

⁵Evidence Code section 1237, subdivision (a) provides: “Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: [¶] (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; [¶] (2) Was made (i) by the witness himself or under his

presence of the jury, the prosecutor explained that the purpose of her questioning of Horn was to lay “the foundation for past recollection recorded that he remembered the details and the conversations when he spoke with Sergeant Van Hook and that he told her the truth.” The parties later argued about whether foundation had properly been laid on the specific subject matter of a plan to shoot Colina. The trial court allowed Van Hook to testify about Horn’s prior statements, implicitly ruling the requirements of Evidence Code section 1237 were satisfied. Mike makes no challenge to the admissibility of the evidence as a past recollection recorded. (See, e.g., *People v. Cowan* (2010) 50 Cal.4th 401, 464–465 [where witness had no independent recollection of an incident at trial, witness’s recorded statement with police made over three months after the incident was admissible under Evidence Code section 1237].)

Second, Mike claims Chuck’s statements to Horn about a plan were not admissible as statements against interest under section 1230. Chuck told Horn the plan was for Chuck to pull his truck up to Colina and Owens, and as they ran, Mike would shoot them. Horn also said that “Chuck had told him after the shooting that the initial plan was Chuck and [Horn] were just going to drive up and that Mike was going to take care of everything.” Horn believed the only part of the plan that Chuck did not know about was that he was supposed to remain in his truck. The trial court could reasonably find these statements were against Chuck’s penal interest because, in context,⁶ they suggested Chuck and Mike had planned that Mike would shoot Colina; Chuck just did not realize that Mike intended to shoot Colina without Chuck getting out of his truck.

direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an accurate record of the statement.”

⁶The context includes evidence that Chuck knew Mike had access to a gun, Chuck believed Mike was the person to call “whenever shit goes down,” Chuck knew Mike would be at the fight “with an eye on” him, and Chuck waited for Mike but not his friends before confronting Colina on San Pablo Avenue.

Mike argues Chuck's statements were untrustworthy because "[m]ost likely" he was trying "to gain sympathy" and "ensure [Horn's] silence," but this argument does not demonstrate the trial court abused its discretion in viewing the statements differently. Assessing whether a hearsay statement is trustworthy " " " requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.' " " " (Geier, *supra*, 41 Cal.4th at p. 584.) The court could reasonably determine Chuck's statements were trustworthy. Again, Chuck was not talking to law enforcement. He was talking to his close friend and accomplice. We cannot say the trial court's understanding of human nature applied to the facts of this case was an abuse of discretion.

C. Admission of Horn's Testimony About Mike Dunking His Arms in Bleach

Mike also argues the trial court erred in admitting Horn's testimony that Mike washed his hands in bleach to eliminate any gunshot residue.

1. Procedural Background

Addressing Mike's motion in limine to exclude evidence of Chuck's hearsay statement about Mike washing his arms in bleach, the trial court found the statement admissible against Chuck. The court stated, "Whether it's admissible against Mike or not, it depends on . . . whether it's based on percipient observation or hearsay or some other form." Thus, the court implicitly determined the statement was against Chuck's interest, and ruled its admissibility hinged on whether it could be established that Chuck had sufficient personal knowledge.

At trial, Horn was asked whether Chuck said anything to him about Mike having "done anything to himself to get rid of any gunshot residue." Horn answered, "I don't remember exactly when he told me, but he had told me that they had put his arms in bleach." Neither Mike nor Chuck objected.

2. Analysis

Mike argues Horn's testimony should not have been admitted because the prosecutor never laid the foundation for Chuck's personal knowledge that Mike washed

his arms with bleach. We disagree. “When a witness’s personal knowledge is in question, the trial court must make a preliminary determination of whether ‘there is evidence sufficient to sustain a finding’ that the witness has the requisite knowledge. (Evid. Code, § 403, subd. (a)(2).) ‘Direct proof of perception, or proof that forecloses all speculation is not required.’ [Citation.] The trial court may exclude testimony for lack of personal knowledge ‘*only if no jury could reasonably find that [the witness] has such knowledge.*’ [Citation.] Thus, ‘[a] witness challenged for lack of personal knowledge *must*. . . be allowed to testify *if there is evidence from which a rational trier of fact could find that the witness accurately perceived and recollected the testimonial events.* Once that threshold is passed, it is for the jury to decide whether the witness’s perceptions and recollections are credible. [Citation.]’ [Citation.] An appellate court reviews a trial court’s determination of this issue ‘under an abuse of discretion standard.’ ” (*Cortez, supra*, 63 Cal.4th 101 at p. 124.)

Here, Horn testified that Chuck told him, “they had put his arms in bleach.” The trial court necessarily found this evidence sufficient to allow the jury to consider the question of Chuck’s personal knowledge. (See *Cortez, supra*, 63 Cal.4th at p. 125 [where evidence permitted inference of personal knowledge, “the question of [the declarant’s] knowledge about [matters in hearsay statement] was for the jury”].) We see no abuse of discretion. A reasonable inference could be made that Chuck had personal knowledge of the matter because Horn’s testimony suggested that Chuck was among the group (“they”) that put Mike’s arms in bleach. The statement was against Chuck’s penal interest because he was, in effect, admitting that he was an accessory to the shooting committed by Mike. (See *Tran, supra*, 215 Cal.App.4th at p. 1219 [declarant’s statement that his brother shot someone and declarant helped him burn his car was against declarant’s interest because it rendered him potentially liable as an accessory to murder].)

Mike’s argument to the contrary is unavailing. He claims Horn “spent the night after the shooting with Chuck,” so Chuck could not have been physically present when Mike washed his arms. But the evidence does not support Mike’s claim. Horn said that on the evening of the shooting, he dropped Chuck off to see his girlfriend, and then he

went out. Chuck sent Horn a text about Paul on the evening of the shooting, further evidence that Chuck and Horn were not together all night. Thus, Chuck could have been with Mike on the night of the shooting and helped him wash his arms in bleach.

D. Alleged Prosecutorial Error

Mike contends the prosecutor committed misconduct in her closing argument by referring to the victim’s family in violation of a trial court ruling, arguing facts not in evidence, and misstating the law. We conclude there was no prejudicial error.⁷

“The applicable federal and state standards regarding prosecutorial misconduct are well established. “ ‘A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” ’ ” [Citations.]’ ” (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

“A prosecutor is given wide latitude during closing argument. The argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom.” (*People v. Harrison* (2005) 35 Cal.4th 208, 244.) “Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, ‘it is improper for the prosecutor to misstate the law. . . .’ ” (*People v. Centeno* (2014) 60 Cal.4th 659, 666 (*Centeno*).

“When attacking the prosecutor’s remarks to the jury, the defendant must show that, ‘[i]n the context of the whole argument and the instructions’ [citation], there was ‘a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not

⁷It is not necessary to show bad faith on the part of the prosecutor to establish error. For this reason, “ ‘[t]he term prosecutorial “misconduct” is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.’ ” (*Centeno, supra*, 60 Cal.4th at pp. 666–667.)

lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.’ ” (*Centeno, supra*, 60 Cal.4th at p. 667.) Further, “ [a] defendant’s conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.’ ” (*People v. Tully* (2012) 54 Cal.4th 952, 1010.)

1. Reference to Colina’s Family

Before trial, Chuck moved to preclude the prosecutor from referring to the victim’s family and friends, “including those sitting in the gallery.” Mike joined in the motion, and it was granted.

In her initial summation, the prosecutor did not mention Colina’s family. But both defense attorneys then referred to Colina’s family in their arguments.⁸ In rebuttal, the prosecutor responded to the defense attorneys’ reference to Colina’s family: “You know, both defense attorneys stated their arguments saying that the murder of Ricardo Colina was senseless, beyond senseless. And then they both turned, and frankly I do not understand this, and looked at the Colina family, at Ricardo’s mom, his dad, his aunts, his uncle, and had the nerve to talk about their pain, Ricardo’s attacked in the courtroom, accused of having a gun. Really? [¶] They have to sit and watch these defense attorneys attack their child that they poured their heart and soul into raising.”

Chuck’s attorney objected that the argument appealed “to passions and prejudices, and sympathies of the jurors.” The trial court responded, “I have instructed the jury that sympathy and passion are not to be considered as factors in this case.” The prosecutor continued, “I would like you to think about what you do know about Ricardo Colina, the

⁸Mike’s attorney began her closing argument, “I cannot even begin to image the pain, the frustration, the emotional rollercoaster that Mr. and Mrs. Colina are going through at the loss of their son, Ricardo Colina.” Chuck’s attorney began her closing argument by thanking the jurors for their service, and then stated, “This case recounts a terrible tragedy, a very young man shot for really no good reason. It’s very—your automatic response would be to want to bring comfort to the family, to the parents, to gratify the parents, to gratify the detective who worked so hard on this case. . .”

words that he said as he was dying, the sweet, kind, warm-hearted young man, ‘Please help me.’” No objection was made.

Mike argues the prosecutor’s argument violated the trial court’s order not to mention the victim’s family and denigrated the defense attorneys. Chuck joins in this argument. The Attorney General points out, however, that it was the defense attorneys, not the prosecutor, who informed the jury that the Colina family was in the courtroom. “‘[W]e view the prosecutor’s comments in relation to the remarks of defense counsel, and inquire whether the former constitutes a fair response to the latter.’” (*People v. Pearson* (2013) 56 Cal.4th 393, 431–432.) Given that the prosecutor’s argument was a response to comments made by both defense attorneys, we cannot say her reference to Colina’s family was deceptive or reprehensible. The prosecutor’s comment that the defense attorneys “had the nerve to talk about [the Colina’s] pain” was extremely brief and not reprehensible or unduly inflammatory. It would not have prejudiced the defendants especially in light of the trial court’s immediate reminder that “sympathy and passion are not to be considered as factors in this case.”

2. Arguing that Stonebraker Implied Mike Was Shooter

During her closing argument, the prosecutor suggested Mike and Chuck conspired to intimidate witnesses. In this context, she stated, “Think about the fear that’s bubbling underneath all the surfaces with all of these witnesses,” referring to Petruzzelli, Nazari, and Milhollin.⁹ Then she talked about Stonebraker: “Justin Stonebraker, who goes to—he started to tell the truth, and when he’s confronted with, ‘Who was out there with you guys?’ he won’t even say Mike Titlow’s name. [¶] He goes through this elaborate detail with Detective Meth, ‘What’s your name?’ [¶] ‘Mike.[’]”

Mike’s attorney objected that the argument assumed facts not in evidence. The trial court stated, “I don’t recall that portion of the recordings being made, do you?” The

⁹For example, the prosecutor pointed out Petruzzelli was cooperative with detectives the night of the shooting. Then Chuck texted Horn indicating he was worried that Petruzzelli was talking, and the next day, Petruzzelli did not identify Chuck as the person he had talked to the previous afternoon. The prosecutor referred to the video of Milhollin’s interview, and described him crying and saying he was scared.

prosecutor responded, “Oh, we didn’t play his interview, but he testified to his interview.” Mike’s attorney again objected, stating she did not believe “there was any testimony or recordings played regarding this portion of [the prosecutor’s] closing.” The trial court responded, “Okay. It’s the jury’s recollection of what the testimony was, and whether any argument by counsel is supported by the evidence you heard. So that will be the jury’s call.”

The prosecutor then told the jury that Stonebraker wrote the name Mike Titlow and then tore the note into tiny pieces. Again, the defense attorneys objected that there was no evidence of this, and the trial court responded, “Again, that’s going to be for the jury to decide.”

Mike claims the prosecutor engaged in misconduct by misstating the evidence, and the trial court compounded the error by suggesting there was evidence the jury did not see that supported the prosecutor’s statement. It appears, however, that the prosecutor was simply mistaken about which witness had gone into “elaborate detail” to avoid saying Mike’s name. Milhollin’s taped interview showed that, when Meth asked him who could have done it, he responded “I forgot your name,” and Meth said, “Mike.” Milhollin also referred to writing it down on a piece of paper. Under these circumstances, the prosecutor’s mistaken reference to Stonebraker rather than Milhollin did not constitute deceptive or reprehensible methods, and, further, her misstatement was harmless. As the Attorney General argues, the challenged comments did not cause unfairness because evidence showed that a witness behaved in the manner described by the prosecutor.

3. Reference to Fighting “Two Black Guys”

In rebuttal, the prosecutor argued, “Chuck Titlow told Kareem Nazari, ‘The two black guys that I saw walk in Tara Hills that pulled a gun on me, I found them.’ [¶] If you have any question about that, please have Kareem Nazari’s interview—” Chuck’s attorney objected that “Chuck never called Kareem.” The trial court stated, “Again, I’m going to—I’m going to have to defer to the jury to make the findings in this case.”

The prosecutor corrected herself: “Kareem Nazari talked to Chuck Titlow on Tuesday before Ricardo’s murder on Wednesday. [¶] Kareem Nazari talked to him, and Chuck told him that two black guys had pulled a gun on him.” There was no objection.

Mike asserts the prosecutor misstated the facts and introduced “a racial overtone into the case that was not present in the evidence.” Following Chuck’s objection, however, the prosecutor correctly described what Chuck told Nazari the day before the shooting,¹⁰ and her argument was fair comment on the evidence. There was no error.

4. Discussing Voluntary Manslaughter

In discussing voluntary manslaughter based on unreasonable defense of another, the prosecutor stated: “It has to be imminent danger that has to be dealt with at that moment. And it has to be deadly force. It can’t be assault with fists to justify the use of a gun. [¶] So there’s just absolutely no evidence in this case to support that conclusion. The only thing that’s even around Ricardo Colina after he’s killed is his red cell phone.” No objection was made.

Mike argues the prosecutor misstated the law, but this argument has been forfeited by his attorney’s failure to raise a timely objection and request an admonition. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1219.) We reject Mike’s claim that objection would have been futile. Had an objection been made, the trial court could have admonished the jury to follow the jury instructions on voluntary manslaughter.

We also reject Mike’s claim that his attorney rendered ineffective assistance by failing to object. “[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.” (*People v. Maury* (2003) 30 Cal.4th 342, 419.) Mike now argues the prosecutor misstated the law because “a blow with the fist may be sufficient to justify the use of deadly force.” At trial, however, Mike’s

¹⁰In an excerpt of Nazari’s August 26, 2009, interview, he said that Milhollin told him, “We got to go, Charles is about to fight at Nation’s.” Meth asked what his understanding was of who Chuck was going to fight. Nazari answered, “All I know it was two black kids that live in Tara Hills.” Meth asked, “When did you hear that?” Nazari answered, “Tuesday night he told me about it.” He confirmed it was Chuck who told him about the road rage incident.

attorney may have decided that objection was unnecessary because Mike's theory of unreasonable defense of others was not based on a belief that Chuck was in imminent peril from Colina *using his fists*. Rather, the defense theory may have been that Mike shot Colina because he had an honest but unreasonable belief that Colina *was armed*.

Further, any error was harmless. The jury was properly instructed on unreasonable defense of another. The court also instructed, "If anything concerning the law said by the attorneys in their arguments or any other time during the trial conflicts with my instructions on the law, you must follow my instructions." "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.'" (*People v. Osband* (1996) 13 Cal.4th 622, 717.)

5. Arguing Mike Hired a Lawyer for Chuck and Horn

The prosecutor argued, "[Mike has] hired a lawyer to represent both [Horn] and Chuck Titlow in custody. [¶] And while it may not be immediately obvious to lay people, he's hired a lawyer to represent his son and Kellen Horn. Interesting. [¶] He doesn't hire him to represent himself. He hires them to represent Chuck and [Horn] so that he'll have access to the investigation as it unfolds so he'll know whether or not Chuck and [Horn] are talking."

Again, Mike has forfeited any challenge to the prosecutor's statement because his attorney failed to object and request an admonition. (*People v. Rangel, supra*, 62 Cal.4th at p. 1219.) Even if we assume the argument is not forfeited, we discern no prejudice. The trial court instructed the jury to "determine what facts have been proved from the evidence received in the trial and not from any other source." (CALJIC No. 1.00) The jury was also told, "Statements made by the attorneys during trial are not evidence." (CALJIC No. 1.02) We presume the jury followed these instructions. (*People v. Edwards* (2013) 57 Cal.4th 658, 764.)

E. Cumulative Error

Mike contends the cumulative effect of the asserted errors at his trial require reversal. We have found no error in the trial court's evidentiary rulings, and where we assumed error in the prosecutor's closing argument, we found no prejudice. We also conclude there was no prejudice from the cumulative effect of any assumed error.

F. Response to Jury Question

Chuck claims the trial court's response to a jury question precluded the jury from considering involuntary manslaughter in its deliberations. We conclude this claimed error was harmless.

1. Procedural Background

The trial court gave jury instruction CALJIC No. 17.10, "Conviction of Lesser Included or Lesser Related Offense—Implied Acquittal—First," as follows:

"If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime.

"The crime of Second Degree Murder is lesser to that of First Degree Murder charged in Count 1. [¶] The crime of Voluntary Manslaughter is lesser to that of First and Second Degree Murder. [¶] The crime of Involuntary Manslaughter is lesser to that of First and Second Degree Murder.

"Thus, you are to determine whether a defendant is guilty or not guilty of the crimes charged in Counts 1 and 2 or of any lesser crimes. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdicts. However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the greater crime."

The jury reached an agreement that Chuck was not guilty of first and second degree murder on the sixth day of deliberations, as indicated by the date on the signed verdict forms. The morning of the next day of deliberations, the jury submitted a

handwritten request that read: “Re 17.10 [¶] Does 17.10 require us to be unanimous on voluntary manslaughter to get to involuntary manslaughter? If we have not unanimously agreed on not guilty to voluntary manslaughter, do we have to accept [can we consider] involuntary manslaughter?”¹¹

The trial court, prosecutor, and defense attorneys all agreed on the response the court gave the jury: “You must be unanimous on the voluntary manslaughter charge before proceeding to the involuntary manslaughter charge.”

2. *Kurtzman* and the Acquittal-First Rule

In *People v. Kurtzman* (1988) 46 Cal.3d 322 (*Kurtzman*), our Supreme Court held a trial court may instruct the jury not to return a verdict on a lesser offense unless it has agreed beyond a reasonable doubt that defendant is not guilty of the greater crime charged, but it should not prohibit the jury from *considering or discussing* the lesser offenses before returning a verdict on the greater offense. (*Id.* at p. 329.) This holding established “the ‘acquittal-first’ rule as a mandatory rule of procedure.” (*People v. Fields* (1996) 13 Cal.4th 289, 304.) “*Kurtzman* concluded that the practice of requiring unanimous acquittal on the greater offense before returning a verdict on the lesser included offense represented an appropriate balancing of interests, protecting a defendant’s interest in not improperly restricting the jury’s deliberations, and recognizing the state’s interest in having the jury grapple with the question of a defendant’s guilt of the highest crime charged.” (*Ibid.*)

In *Kurtzman*, the jury informed the court it was deadlocked on murder in the second degree but could agree on manslaughter. The jury posed questions regarding the relationship between second degree murder and voluntary manslaughter, and, at one point, the judge told the foreperson, “ ‘You understand that I wanted you to deliberate on that issue [second degree murder] *and that issue alone?*’ ” (*Kurtzman, supra*, 46 Cal.3d at p. 328, italics added.) The jury subsequently asked, “ ‘Can we find the defendant guilty of manslaughter without unanimously finding him not guilty of murder in the

¹¹In his reply, Chuck states the jury signed the verdict form four days before submitting its question, but that was a Friday and the next day of trial was Tuesday.

second degree?’ ” The judge responded, “ ‘No, you must unanimously agree on the second degree murder offense before *considering* voluntary manslaughter.’ ” (*Ibid.*)

The Supreme Court held the trial court erred in instructing the jury not to “deliberate on” or “consider” voluntary manslaughter until it reached a unanimous decision on second degree murder. (*Kurtzman, supra*, 46 Cal.3d at p. 335.) The court concluded, however, there was no prejudice because the jurors were originally properly instructed under CALJIC No. 17.10, and they deliberated on voluntary manslaughter as well as murder for two days prior to the first erroneous instruction from the judge. Further, the jurors likely did not understand the trial court’s response as limiting their consideration of the lesser offense. “The [trial] court’s final erroneous instruction was, after all, in response to the jury’s question as to whether it might ‘find the defendant guilty’ of manslaughter without ‘finding him not guilty’ of murder in the second degree. The [trial] court’s answer then, may have been understood to control the return of verdicts, not limit what evidence could be considered.” (*Ibid.*) In finding lack of prejudice, the court also observed, “there was no coercion of a single juror a small minority of jurors.” (*Id.* at p. 336.)

3. Analysis

As a preliminary matter, the Attorney General asserts Chuck forfeited his challenge to the trial court’s response to the jury’s question because his attorney agreed to the response given. (See *People v. Harris* (2008) 43 Cal.4th 1269, 1317 [defendant “has waived this argument by specifically agreeing below to the court’s handling of the jury’s question].) Chuck argues no objection was necessary because his substantial rights were affected by the trial court’s response to the jury. (Pen. Code, § 1259 [“The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.”].)

A claimed instructional error affects the substantial rights of a defendant when it “result[s] in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error.” (*People v. Andersen*

(1994) 26 Cal.App.4th 1241, 1249.) Thus, “[a]scertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was.” (*Ibid.*) Accordingly, we will consider whether the claimed error resulted in prejudice. Following the prejudice analysis of *Kurtzman*, we conclude the claimed error was harmless.

First, CALJIC No. 17.10 properly instructed the jurors that they had “discretion to choose the order in which [to] evaluate each crime and consider the evidence pertaining to it.” The jurors were even encouraged to “reach a tentative conclusion on all charges *and lesser crimes* before reaching any final verdicts.” (Italics added.) As a result, the jurors were not precluded from considering (and likely reached a tentative conclusion on) involuntary manslaughter during the six days of deliberations that preceded the claimed erroneous response to their question. (See *Kurtzman, supra*, 46 Cal.3d at p. 335 [no prejudice where jury considered lesser offense for two days].)

Second, it is not reasonably likely the jurors understood the trial court’s response as limiting their ability to *consider* involuntary manslaughter. CALJIC No. 17.10 explained the acquittal-first rule and specified that second degree murder was lesser to first degree murder, and that manslaughter (voluntary and involuntary) was lesser to murder (first and second degree). However, the jurors were not instructed on how the acquittal-first rule applied to voluntary and involuntary manslaughter. In other words, CALJIC No. 17.10 did not tell the jurors whether the trial court could accept a guilty verdict on involuntary manslaughter if they had not first reached a verdict on voluntary manslaughter.

The jurors’ question was: “Does 17.10 require us to be unanimous on voluntary manslaughter to get to involuntary manslaughter? If we have not unanimously agreed on not guilty to voluntary manslaughter, do we have to accept [can we consider] involuntary manslaughter?” The words “unanimously” and “accept” track the acquittal-first rule of CALJIC No. 17.10, which provides, “However, the court cannot *accept* a guilty verdict on a lesser crime unless you have *unanimously* found the defendant not guilty of the

greater crime.” (Italics added.) Read in context, the jurors’ question demonstrates they correctly identified the only combination of verdicts left unexplained by the acquittal-first rule articulated in CALJIC No. 17.10, namely, whether the trial court could accept a guilty verdict on involuntary manslaughter if they had not unanimously found Chuck not guilty of voluntary manslaughter.¹² Under these circumstances, the trial court’s response to the jury to “be unanimous on the voluntary manslaughter charge before proceeding to the involuntary manslaughter charge” would “have been understood to control the return of verdicts, not limit what evidence could be considered.” (*Kurtzman, supra*, 46 Cal.3d at p. 335.)

Finally, Chuck has offered no evidence suggesting coercion of any jurors in this case. (See *Kurtzman, supra*, 46 Cal.3d at p. 336.) For these reasons, the court’s response to the juror’s question would be harmless under any standard, and there is no reasonable prospect it affected the verdict.

DISPOSITION

The judgments are affirmed.

¹² Chuck only claims the trial court’s response to the jury question improperly precluded the jury from *considering* the lesser offense of involuntary manslaughter during its deliberations. He does not argue the acquittal-first rule does not apply as between voluntary and involuntary manslaughter. Accordingly, we assume it was proper for the trial court to instruct that it could not accept a guilty verdict on involuntary manslaughter unless the jury unanimously found Chuck not guilty of voluntary manslaughter.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.

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