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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.

POOROUSHASB PARINEH,

Defendant and Appellant.

A139246

(San Mateo County
Super. Ct. No. SC074512A)

Defendant Pooroushasb Parineh (Parineh) was convicted by a jury of shooting and killing his wife Parima Parineh (Parima) for financial gain, and sentenced to life without the possibility of parole, plus 25 years to life. The central question for the jury was whether Parineh killed Parima or she committed suicide. In either event, the motive was apparently to collect on multi-million dollar insurance policies on Parima’s life. Parima had attempted suicide less than a month before she died.

Parineh contends that the court erroneously admitted incriminating statements he made that were protected by the attorney-client privilege. He argues that the court may have erred in excluding evidence that Parima made an additional suicide attempt, an argument that requires us to review the sealed transcript of an in camera hearing that led the trial court to conclude that the evidence was privileged and irrelevant to the defense. Parineh further contends that the court erred when it instructed the jury pursuant to a modified version of CALCRIM No. 306 (“Untimely Disclosure of Evidence”), which was given based on discovery violations pertaining to defense expert witnesses. We

conclude there was no error and need not consider any question of prejudice. The judgment is affirmed.

I. BACKGROUND

At 4:16 p.m. on April 13, 2010, San Mateo County deputy sheriffs were summoned to Parineh and Parima's home in Woodside to investigate a shooting death. Parineh let them inside. Parima was lying dead on a bed with a gun under her hand. There were four bullet casings on the bedroom floor, and a woodchip at the foot of the bed that appeared to have come from the bed's headboard.

Deputy Coroner Fielding arrived at the scene around 8:00 p.m. and estimated that Parima had been dead from four to eight hours. Forensic pathologist Rogers autopsied Parima's body and found that she died from two gunshot wounds to her head, either of which could have been fatal. One shot entered through her right cheek and lodged near her left ear. The other entered close to her right upper lip and exited near her right ear. Both shots were fired from close range, but there were no press contact wounds to indicate the gun was held against Parima's head when the trigger was pulled. Rogers had autopsied hundreds of people who committed suicide by shooting themselves, and said the usual cause of death is a single shot, with a press contact wound on the side of the head or in the mouth. He had never seen a pattern of shots like those in Parima's case. Fielding had investigated a hundred scenes of suicides by shooting, and had never seen a case with missed shots or multiple wounds.

Parineh and Parima had been married for 35 years and had three adult children: Austiaj Parineh (Austiaj), Austiag Hormoz Parineh (Hormoz), and Khashayar Parineh (Khashayar). Austiaj and Khashayar were living at the Woodside home in 2010. On the day Parima was shot, Austiaj left the house between 8:00 and 9:00 a.m. and returned after 6:00 p.m. Khashayar left the house around 9:00 or 9:30 a.m. and returned after 7:00 p.m. Khashayar called home at 11:01 a.m. and had a 90-second conversation with his mother. Cell phone records showed that Parineh received calls at the home between 10:21 and 11:56 a.m. He made calls from the home beginning at 12:27 p.m., and left the home shortly after 1:00 p.m. He was driving home during calls between 3:36 and 3:46 p.m.

On March 16, 2010, just a few weeks before her death, Parima had tried to commit suicide. Austiaj testified that her mother generally got up early, but that morning Parineh closed the master bedroom door, said Parima was sleeping, and told Austiaj not to disturb her. Austiaj left the house, and when she returned around noon she heard Parima snoring, which was unusual because she generally did not take naps. When Parima was still asleep at 4:00 p.m., Austiaj told Parineh she was going to check on her mother. After putting clothes in the dryer, Austiaj went to the master bedroom and found Parineh shaking Parima. Parima was unconscious, Austiaj called 911, and Parima was transported to Stanford Hospital.

In 2006 or 2007, Rashid Siddiqui, an insurance broker, helped Parineh obtain two Allianz insurance policies on Parima's life with a combined value of \$26 million. The policies provided that benefits would be payable after two years even in the event of a suicide. Siddiqui testified that the policies were intended to cover estate taxes the children would owe in the event of their parents' deaths. Parineh testified that, as of 2007, he had amassed real estate worth \$152 million. However, the property values declined in 2008, and by 2010 Parineh had major financial problems.

Thomas Kaljian, a real estate broker and business associate of Parineh's, obtained a \$1.3 million judgment against him and filed liens against his properties. Parineh lost all of his \$3.2 million dollar investment in IDS, a company he started in 2008. In 2010, five of his properties, including the Woodside home, were in foreclosure. A receiver took over Parineh's commercial property at 5050 El Camino in Los Altos and its rents, leaving the family without a source of income.¹ In January 2010, Parineh applied for SSI benefits.

The beneficiary of the Allianz policies was a family trust. In December 2009, Parineh wrote Hormoz an email asking him to take over the life insurance trust from Parineh's brother Guiv, saying, "My will and most probably your mother's will if

¹ The receiver recalled Parineh saying at one point "that wives are like cars, that you lease them, you don't buy them, and that then you can replace them every four years."

something happens to her before me to have all the money that is in the insurance to save everything financially. . . . [Y]ou shall have the money to save the financial empire that I have built” The trust was amended in February 2010 to remove Guiv as trustee, and the three children were designated beneficiaries of the life insurance policies.

To pay the premiums on the Allianz policies, Parineh obtained a loan from HSBC Bank. The collateral for the loan was the policies’ cash surrender values—the premiums paid and returns on investments of the premiums, less any surrender penalty—plus \$2.36 million. HSBC learned of the Kaljian judgment and notified Parineh in January 2010 that his loan was in default. At that time, he owed the bank over \$5 million, and the bank had insufficient collateral for its debt because Kaljian had a superior lien on the funds Parineh had deposited. If the bank liquidated the cash surrender value of the policies to partially satisfy the debt, the policies would collapse. On February 8, HSBC informed Parineh that it was going to terminate their lending relationship, and the only question was when that would happen.

Parineh testified that HSBC told him it was going to collapse the policies immediately after their March 19 anniversary date. On March 11, Parineh asked HSBC for a three-week extension before it collapsed the policies. He told HSBC that he had “all the supporting documents to show you the proof of funds” to pay the Kaljian judgment. At trial, Parineh admitted the statement was false. Daen Wombwell, a life insurance financing agent who helped Parineh obtain the HSBC loan, testified that most people in Parineh’s situation would want to “shut down the policy . . . to free up as much of their collateral for whatever else they needed to use it for.”

Austiaj testified that Parineh told her on the way to the hospital on March 16 that he and Parima had a suicide pact, and that he was supposed to die as well. Parineh said that Parima had been “brave” or “courageous.” Khashayar testified that outside the hospital that night Parineh “kicked the air in frustration, and punched the air and [said], ‘You missed your chance at 30 million dollars.’” Hormoz testified that he talked with Parineh at the hospital on March 18 and asked what Parima had ingested. Parineh refused to answer and Hormoz persisted. To coax a response, Hormoz, a lawyer, told

Parineh that their conversation would be protected by the attorney-client privilege. Parineh then informed Hormoz that he did not know what Parima had taken, but he had obtained it from Siddiqui, and Siddiqui had obtained it from a nurse named Juanita. Parineh warned Hormoz that “if I told everyone, he would shoot me and my mother.” Hormoz said that the first thing Parima did after she regained consciousness from the March 16 suicide attempt was to ask where Parineh was. Hormoz told her he was nearby, and Parima asked, “Is he alive?” Hormoz testified Parineh told him on March 22 that Parima “could not even die with honor and she cried and complained and she even threw up half the drink that he made.”

Parineh admitted telling Khashayar that he had lost his chance at \$30 million, but said he was being sarcastic. He said he was angry at Khashayar because “they never appreciated her. They took everything for granted.” He denied making the statements reported by Austiaj and Hormoz.

Parima told medical personnel at the hospital that she attempted suicide to get insurance money for the children. She was discharged from the hospital on March 24, after her supervising psychiatrist concluded she was no longer suicidal.

When police responded to the March 16 suicide attempt, Deputy Sheriff Hensley asked Parineh to give her any guns that were kept in the house. Parineh testified that he owned four handguns and a rifle. He gave Hensley two of the handguns. Hormoz testified that he searched the house for guns, found a rifle in his parents’ closet, and hid it in his bedroom. He found ammunition and dumped it in a pond on the property. He told Parineh he was looking for guns, and when he examined a bag he associated with Parineh’s guns, Parineh said, “You are not going to find it in there. You’ll never find it. You’ll find it over my dead body.” Parineh acknowledged that Parima was shot with one of his guns. It was kept loaded under the mattress in their bedroom. He told Parima where it was, and showed her how to shoot it.

John Bourke, a supervising criminalist in the Santa Clara County District Attorney’s crime lab, testified for the prosecution as an expert in crime scene reconstruction and bloodstain pattern analysis. In Bourke’s opinion, Parima’s gunshot

wounds were not self-inflicted. Bourke found many indications that the scene had been altered. A bloodstain on the comforter next to Parima's right elbow showed that the comforter had been placed on her and then taken off. Blood on both sides of an olive pillow showed that the pillow had been moved. Blood on Parima's right hand showed that the hand had been moved after blood was deposited on it. Movement of the body was indicated by the placement of Parima's left hand. Streaks of blood on the bed were left by a hand in places Parima could not have reached. Teeth under Parima's body showed that her body had been moved. Parima was found in an unnatural position with her legs crossed. Deputy Coroner Fielding testified that the gun would not have fallen where it was found given Parima's position when she died. Bourke opined that the position of the gun and the blood on the gun showed that the gun was placed by "[s]ome outside source."

Forensic pathologist Terri Haddix testified for the defense that the shot to Parima's cheek preceded the shot to her lip. Haddix opined that Parima could have been conscious and capable of movement for five minutes or longer after the shot to the cheek, but that the shot to the lip would have been immediately fatal. Haddix had performed 2500 to 2700 forensic autopsies, and admitted that she had never seen a shot pattern like the one here in a suicide case.

John Jacobson, a forensic scientist with the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives, testified for the defense as an expert in firearms and crime scene reconstruction. He was retained primarily to investigate evidence concerning the gun used in the shootings and the trajectories of the shots fired. Jacobson testified that the positions of the gun and Parima's hands and body were consistent with her firing the fatal shot to her lip while pulling the trigger with her thumb. Jacobson admitted that if she pulled the trigger with her thumb Parima was not holding the gun in a natural way. He also admitted that the gun should have been found in Parima's hand, not beneath it.

Defense expert Celia Hartnett, formerly the supervising criminalist for the San Mateo County Sheriff's Department, disputed Bourke's testimony that the blood evidence showed Parima's wounds were not self-inflicted. Her opinion was based in

significant part on the absence of “voids” or “shadowing” in the blood spatter at the scene—areas where no splatter would be found because another person was blocking the path of the blood. Since no shadowing was shown in photos of the scene, there was no “affirmative evidence . . . that a second person was present at the time of the gunshots.” However, Hartnett admitted that blood splatter could have appeared all around Parima if it went over another shooter in the room, or the shooter moved while firing multiple shots. Based on the blood evidence, Hartnett opined that Parima shot herself in the cheek, lost control of the gun, and then shot herself in the lip.

The day after Parima’s death, Parineh called Siddiqui to set up a meeting to talk about the death benefits on the life insurance policies. Parineh met with Siddiqui on April 14 or 15 and asked Siddiqui to send him, rather than the children, the paperwork to make a claim for the benefits.

Parineh and Myong Suk Shuch had an affair in 1991 and 1992. Shuch testified that the affair ended when Parima learned of it, but she and Parineh remained friends, maintained a business relationship, and engaged in various financial transactions. Parineh borrowed \$175,000 from Shuch in 2009. They spoke frequently on the phone between the time of Parima’s suicide attempt and her death. Shuch’s number was stored on Parineh’s phone under the name “Connor.” On April 15, two days after Parima’s death, Parineh stayed with Shuch in a hotel in Cupertino.

Austiaj testified that she told Parineh on April 17 that the police did not believe Parima’s death was a suicide. Parineh replied that “he was in the bathroom and he heard two shots, and he came out and my mom was suffering, and she said, ‘Please help me,’ and . . . he said that he helped her.” The next day, Parineh told Austiaj that there were four shots and “there was no way to save her.” A couple of days later, Parineh told Austiaj that he was wearing gloves when he shot Parima.

Austiaj testified that Parineh contacted the children every two or three days between April 13 and May 7 about getting money from the life insurance to save the family properties. On May 7, Parineh left instructions in Austiaj’s car about the Allianz policies. On May 29, Parineh addressed an email through a business colleague to Austiaj

stating: “If there are any insurance moneys disbursed to Austiaj, Hormoz, and Khashayar, they at least should pay the judgment of nearly two million dollars, and they also must negotiate and clear [the home in Woodside]” Parineh asked for \$7.5 million to cover those liabilities. At another point in the message, Parineh told Austiaj: “But remember you are a jerk, and Hormoz is an asshole and a control freak and Khasha goes with the wind.”

Parineh testified that he did not attend Parima’s memorial service in late April because of the children’s hostility toward him. He was arrested on June 17. The children each received about \$8 million from the life insurance policies.

II. DISCUSSION

A. Admission of Allegedly Privileged Evidence

Parineh contends that the court erroneously overruled his objection to the introduction of statements he made to Hormoz on March 18 and 22 about Parima’s suicide attempt, after Hormoz told Parineh the statements would be privileged because he was an attorney. Parineh told Hormoz on March 18 that he had procured the drink Parima ingested in her March 16 suicide attempt, and he told Hormoz on March 22 that Parima had vomited half of the drink and could not “die with honor.”

(1) Record

At the hearing on Parineh’s motion to exclude these statements based on the attorney-client privilege, he testified that Hormoz had interned at a district attorney’s office, but in March of 2010 he was practicing law at a civil firm in Los Angeles. Hormoz had given him legal advice on property matters before their March 18 conversation. In that conversation, Hormoz asked him about the circumstances of Parima’s suicide attempt, and got angry when Parineh said he did not know. Hormoz asked, “Why are you holding information in?” Parineh said he was not, and Hormoz said, “Yes, you are.” Hormoz then said, “[A]nything that you say is between—you know, it’s privileged. It’s between me and you, even though we are father and son, but I’m a lawyer.” Parineh asked Hormoz why his statements would be privileged, and Hormoz replied, “Because I can act as your lawyer too and protect you.” Parineh was

asked, “After what Hormoz said to you, did you believe that your son was acting in a capacity as a lawyer when you continued to speak with him?” He answered, “Of course.”

During arguments on the motion, the prosecutor indicated that, “in an abundance of caution” about whether the privilege applied, Hormoz had not yet revealed what Parineh told him on March 18 about the suicide, but he had disclosed their subsequent communications.

The court explained at length its reasons for admitting Parineh’s statements. The court found that Hormoz and Parineh did not have an attorney-client relationship with respect to Parima’s suicide, and that their communications on the subject were not privileged. Hormoz was not a criminal defense attorney, and Parineh did not seek his legal advice in connection with the suicide. Hormoz was incorrect when he advised Parineh that anything he said would be privileged simply because Hormoz was a lawyer, and Parineh’s stated belief in that advice was not controlling. The March 18 conversation was primarily a personal, not legal, discussion.

(2) *Analysis*

“Under [Evidence Code] section 954, a client holds a privilege to prevent the disclosure of confidential communications between client and lawyer.” (*People v. Gionis* (1995) 9 Cal.4th 1196, 1207 (*Gionis*)). “ [T]he party claiming the privilege carries the burden of showing that the evidence which it seeks to suppress is within the terms of the statute.’ ” (*Id.* at p. 1208.) A “client” is “a person who . . . consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity” (Evid. Code, § 951.) “ ‘Intent and conduct are critical to the formation of an attorney-client relationship. [Citation.]’ [Citation.] An attorney-client relationship can only be created by contract, express or implied. [Citation.]” (*Chih Teh Shen v. Miller* (2012) 212 Cal.App.4th 48, 57 (*Chih*)).

“Generally, the formation of an attorney-client relationship is a question of fact.” (*Chih, supra*, 212 Cal.App.4th at p. 57.) Although there are court of appeal cases characterizing the issue as one of law (e.g., *Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 (*Responsible Citizens*)), they cannot be squared with the

supreme court decision in *Gionis* (see also *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 281 [emphasizing “the factual nature underlying the formation of the professional relation”]). “On appeal, the scope of judicial review is limited. ‘When the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is substantial evidence to support it [citations].’ ” (*Gionis, supra*, 9 Cal.4th at p. 1208.)

In this case, as in *Gionis*, “the question is whether, as a matter of law, the record establishes that the incriminating statements attributed to [Parineh] by [Hormoz] constituted information transmitted between client and attorney in the course of an attorney-client relationship.” (*Gionis, supra*, 9 Cal.4th at p. 1208.) The answer is “no.” The weight of the evidence supported the trial court’s finding that the March 18 conversation at which the attorney-client relationship was allegedly established was a personal and family communication, not a legal and professional one. Parineh’s admission that he procured the drink meant to kill Parima implicated him in a crime (Pen. Code, § 401 [assisting in a suicide]), and we will assume that, as he said, Hormoz told him he could “protect” him as an attorney. However, no reasonable inference can be drawn that Parineh made this admission to retain Hormoz, with no criminal defense experience, as his attorney in the matter (Evid. Code, § 351 [defining “client”]), or that his statements were intended to create a contract for such representation (*Chih, supra*, 212 Cal.App.4th at p. 57).

As the trial court stated, its ruling was supported by the decision in *United States v. Salyer* (E.D.Cal. 2012) 853 F.Supp.2d 1014 (*Salyer*). The defendant in *Salyer* moved on attorney-client privilege grounds to suppress telephone conversations he had with his girlfriend that were recorded while he was in jail. Although his girlfriend was an attorney and they often discussed his legal situation, most of the calls were not privileged because their predominant purpose was not “ ‘to render or solicit legal advice.’ ” (*Id.* at p. 1018.) They were instead “social conversation[s] between two persons with a long term close

personal relationship.” (*Id.* at pp. 1021–1022.) “ ‘The fact that a person is a lawyer does not make all communications with that person privileged’ ” (*id.* at p. 1021), and the conversations were “replete with examples of [the girlfriend’s] utter lack of experience or knowledge of criminal procedure in general and Mr. Salyer’s case in particular ” (*id.* at p. 1023).

Central to the issue here, the court observed “ ‘[t]here is general agreement that the protection of the privilege applies only if the *primary or predominate purpose* of the attorney-client consultation is to seek legal advice or assistance.’ ” (*Salyer, supra*, 853 F.Supp.2d at p. 1018 [original italics]; accord, *Holm v. Superior Court* (1954) 42 Cal.2d 500, 507, disapproved on another ground in *Suezaki v. Superior Court of Santa Clara County* (1962) 58 Cal.2d 166, 176.) The trial court could reasonably find that Parineh’s admissions were not made to obtain Hormoz’s legal advice or assistance. He was only acceding to an angry son’s demands for information about his mother’s suicide attempt. “We cannot endorse the . . . view that the attorney-client privilege applies whenever issues touching upon legal matters are discussed with an attorney. That has never been the law. Significantly, a communication is not privileged, even though it may involve a legal matter, if it has no relation to any professional relationship of the attorney with the client.” (*Gionis, supra*, 9 Cal.4th at p. 1210.) The court thus had substantial evidence from which to find that no attorney-client relationship was formed during the March 18 conversation. Since Parineh’s claim of privilege is based entirely on that conversation, his statements on that date and on March 22 were properly admitted.

Parineh argues that *Salyer* is distinguishable because the defendant there “sought to abuse the privilege by using it to suppress myriad personal conversations with his lover. While these conversations—as one would expect—touched on Salyer’s legal predicament, they were clearly personal and non-legal. The situation here is different. . . . Hormoz in effect advised Parineh that he was representing him in connection with the circumstances surrounding Parima’s suicide attempt.” But even if Hormoz could be taken to have offered to act as Parineh’s counsel in the matter, there was no discussion of legal issues that would suggest Parineh was accepting the offer and

thereby contracting for Hormoz's representation. He merely made an incriminating admission because he thought it could not be disclosed.

Parineh's possible belief that his statements would remain confidential militated in favor of application of the privilege. "[O]ne of the most important facts involved in finding an attorney-client relationship is 'the expectation of the client based on how the situation appears to a reasonable person in the client's position.'" (*Responsible Citizens, supra*, 16 Cal.App.4th at p. 1733.) However, this consideration did not compel recognition of a professional relationship because, as we have explained, the court had substantial evidence from which to make a contrary finding. (*Gionis, supra*, 9 Cal.4th at p. 1208 [when conflicting inferences can be reasonably drawn from the facts, the choice between them is for the trial court].)

Parineh relies on the decision in *Hoitt v. Superior Court* (1993) 16 Cal.App.4th 712, but that case is distinguishable. There, the plaintiff's brother was a lawyer who visited her in the hospital the day she was injured in a slip and fall accident. When he returned to the hospital two days later with a video camera and recorded her answers to questions about the incident "it would have been obvious to her that this was not 'brother-sister talk' but rather 'client-lawyer communication.'" Her responsive answers evidenced approval and confirmation of the lawyer-client relationship and its confidentiality." (*Id.* at p. 718.) But here, the trial court could reasonably find that Hormoz's fact-finding was primarily "father-son talk," rather than lawyer-client communication.

Accordingly, we must affirm the decision to admit Parineh's statements.

B. Evidence of a Prior Suicide Attempt

Clinical psychologist Susan Buchholz treated Parima in five therapy sessions in 2004, a session in 2009, and on April 6, 2010. The court ruled that the defense could examine Buchholz about her communications with Parima, finding that Parineh's right to present a defense outweighed the psychotherapist-patient privilege for those communications. Buchholz testified briefly at trial. Buchholz said that she agreed to treat Parima after her release from the hospital following the March suicide attempt. In

her notes for the April 6 session, Buchholz wrote that Parima suffered major depression, but that diagnosis was based entirely on her hospitalization. On April 6, Parima was “very calm, very peaceful,” and did not appear depressed or at all suicidal.

The court precluded any reference to hospital notes of a voicemail Buchholz left for the hospital staff after Parima was admitted. The notes read: “ ‘Message received from Dr. Susan Buckholz (therapist) who states that pt has had a previous suicide attempt and is depressed and anxious along with histrionic traits’ ”; and “ ‘Dr. Buckholz revealing new information that this is not pt’s first suicide attempt and that she has a history of depression, anxiety, and histrionic traits in addition to chaotic home life.’ ”

Buchholz declined to reveal the source and content of her information about a prior suicide attempt by Parima, and the court held an in camera hearing to determine whether the defense was entitled to that information. (*People v. Webb* (1993) 6 Cal.4th 494, 518 (*Webb*) [“w]hen the state seeks to protect . . . privileged items from disclosure, the court must examine them in camera to determine whether they are ‘material’ to guilt or innocence”].) After that hearing, the court informed the parties that the information was protected by the psychotherapist-patient privilege, and that evidence concerning Buchholz’s message to the hospital was “absolutely irrelevant.” The court determined that nothing disclosed at the hearing was “so fundamentally probative to the defense position in this case or the due process rights of the defendant that inquiry should be allowed.”

Parineh asks us to review the sealed in camera transcript to confirm the propriety of the court’s ruling. He submits that he may have had a due process right to refer at trial to Buchholz’s knowledge of the prior suicide attempt, as well as a due process right “to the information as *discovery*, because it would allow him to determine whether *in fact* Parima had attempted suicide before the March 16 attempt.”

In *Webb*, the court stated that its “own careful review of the [privileged] records supports all prior judicial characterizations of their contents.” (*Webb, supra*, 6 Cal.4th at p. 518.) Similarly, in *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1692 disapproved on another ground in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123), the court of

appeal reviewed privileged records and “concur[red] with the trial court’s ultimate conclusion. They contain no information whose release was potentially essential to vindicate defendant’s right to a fair trial” So too here. Our review of the sealed transcript has confirmed the correctness of the court’s ruling. There was no evidence of any significant probative value to show that Parima attempted suicide before the March 16 incident.

C. Instructional Issue

(1) *Record*

Prosecution expert Bourke’s opinion that Parima’s wounds were not self-inflicted was based largely on evidence that the scene had been altered, including the woodchip from the headboard found at the foot of the bed. Bourke thought the woodchip had been moved because if it had been broken by a bullet it should have fallen behind the headboard. Defense expert Jacobson conceded that Bourke’s opinion was plausible, but testified that there was another reasonable explanation for the location of the woodchip.

Jacobson opined that a bullet went through Parima’s head, ricocheted off the headboard, and came to rest under a pillow, and that this bullet could have propelled the woodchip against the wall, causing the woodchip to bounce back to the foot of the bed. Jacobson went to the scene, put the bed back to its location at the time of the shooting, and determined the distance between the headboard and the wall. The distance was sufficient to enable the chip to ricochet off the wall with enough velocity to arc back over to the foot of the bed. Jacobson admitted that his report for the case did not mention his theory about the woodchip. He explained that he was asked to investigate the woodchip only two days before he testified.

As we have said, defense expert Hartnett’s testimony focused a good deal on the absence of blood spatter “shadowing” at the scene. She said that “one of the first things that I did in this particular case was I started going methodically around the scene and the photographs of the scene looking for areas of a void. Because if I find that, instantly I know then that a second person is present here at the time of the blood splatter.”

However, her theory about the absence of shadowing was not mentioned in her reports.

Harnett admitted this theory was central to her opinions, it was important information for the prosecution, and she knew the prosecution would read her reports. She was asked “If you know it’s going to be produced in discovery, then why weren’t you including all of the important opinions that you are going to testify about?” She answered, “I don’t know.”

Hartnett’s opinion that Parima shot herself in the cheek, lost control of the gun, and then shot herself in the lip was based in part on what she opined was a bloody imprint of a gun on the sheet to Parima’s side. She admitted that the gun’s presence in a place other than where it was found was important to her opinion, and that this perceived fact was not included in her reports.

After Jacobson and Harnett testified, the prosecutor told the court he had been “blindsided” by their statements about the woodchip at the foot of the bed, the shadowing theory, and the imprint of the gun on the sheet. The court found, and Parineh does not dispute, that the failures to alert the prosecution to the opinions on these subjects were discovery violations.

The jury was instructed with a version of CALCRIM No. 306 as follows: “Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] *The defense* failed to disclose evidence of defense experts’ opinions and theories related to the following: (1) the location of the woodchip at the foot of the bed; (2) the voiding theory as it relates to blood stain pattern evidence; and (3) the opinion that a gun imprint can be seen on the bed sheet. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure. [¶] However, the fact that *the defense* failed to disclose evidence is not evidence that the defendant committed a crime.” (Italics added.) The standard instruction uses the words “[a]n attorney for the defense” instead of the words “[t]he defense” italicized in the instruction as given. (CALCRIM No. 306.) Parineh objected to the court giving this instruction, and

proposed use of “the defense” instead of “attorney for the defense” in the event the objection was overruled.

The prosecutor argued to the jury that Hartnett’s failure to disclose her “void theory” before testifying showed that she did not “want somebody to have time to pick it apart,” and did not “have a lot of confidence in it.” Defense counsel responded, “[T]here is a jury instruction, which is 306 which you are going to see, which tells you by not putting it in her report, you can consider that, consider whether it has a meaning, whether you think it’s significant. I submit to you it doesn’t make any difference about physical evidence. Either there is spatter going around the room or there is not. Whether it’s in the report, as long as you can show the actual spatter, it’s irrelevant.”

(2) *Analysis*

Penal Code section 1054.5 permits the court to “ ‘advise the jury of any failure or refusal to disclose and of any untimely disclosure” of discoverable information. CALJIC formulated a jury instruction on Penal Code section 1054.5 that read as follows:

“The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of truth, save the court time and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party’s evidence. [¶] Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, *the Defendant* failed to timely disclose the following evidence: . . . [¶] Although *the Defendant’s* failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during trial. [¶] The weight and significance of any delayed disclosure are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial or subject matters established by other credible evidence.’ ” (*People v. Bell* (2004) 118 Cal.App.4th 249, 254 (*Bell*) [italics added].)

In the *Bell* case, this court identified three flaws in the CALJIC instruction: “[1] [I]t told [the jurors] to evaluate the weight and significance of a discovery violation without any guidance on how to do so; and [2] it falsely informed them that [the defendant] was responsible for the violation. [3] It did not warn them that the violation, standing alone, was insufficient to support a guilty verdict.” (*Bell, supra*, 118 Cal.App.4th at p. 257.) Subsequent cases echoed these criticisms. (E.g., *People v. Lawson* (2005) 131 Cal.App.4th 1242, 1247–1249 (*Lawson*)). Parineh acknowledges that CALCRIM No. 306 resolved the third of these flaws by making clear that a discovery violation is not evidence of a defendant’s guilt.

But he contends the version of the CALCRIM instruction given here suffered from the first of the three problems identified in *Bell* because it was improperly modified to attribute the discovery violations to the “defense,” and thus to Parineh by partial implication, rather than “defense counsel.” (See *Lawson, supra*, 131 Cal.App.4th at pp. 1245, 1248 [criticizing a CALJIC instruction that “the defense” was responsible for a discovery violation].) Parineh cannot complain of this modification because his counsel requested it. (*People v. Enraca* (2012) 53 Cal.4th 735, 761 [doctrine of invited error]; *People v. Bailey* (2012) 54 Cal.4th 740, 753 [same].)

Parineh argues that the second of the three flaws we identified in *Bell* persists under CALCRIM No. 306 because it tells the jury to consider “the effect, if any, of th[e] late disclosure” on the weight of the evidence without indicating what factors the jury should consider in making that determination. However, no further elaboration was required.

Language like that Parineh criticizes as too vague was approved in *People v. Riggs* (2008) 44 Cal.4th 248 (*Riggs*). The defendant in *Riggs* came forward with alibi witnesses late in the trial. The court upheld an instruction that stated: “California Penal Code Section 1054.7 requires that each side in a criminal action provide names and addresses of witnesses that it expects to call at trial at least 30 days prior to the trial unless good cause is shown for this not to be done. [¶] There has been evidence presented to you from which you may find that there was a failure by the defense to provide timely notice

to the prosecution of the names and addresses of [the alibi] witnesses [¶] *You may consider such failure, if any, in determining the weight to be given to the testimony of such witnesses. The weight to be given such failure is entirely a matter for the jury’s determination.*” (*Id.* at p. 305, italics added.) The *Riggs* court wrote: “The fact that defendant failed to comply with his obligations under the discovery statutes by presenting . . . surprise alibi witnesses near the end of the trial was relevant evidence the jury could consider in assessing the credibility of their testimony. The trial court was authorized by statute to ‘advise’ the jury of this fact ([Pen. Code,] § 1054.5, subd. (b)), and its instruction to that effect properly explained that it was for the jury to determine what, if any, weight and significance the discovery violation carried in resolving the credibility of the alibi testimony. . . . *The instruction was . . . a proper statement of the applicable law, from which the parties could argue inferences that might (or might not) be drawn from the evidence presented at trial.*” (*Id.* at pp. 310–311, italics added.)

The instruction here likewise provided the jury with an adequate basis to evaluate the arguments about inferences to be drawn from discovery violations in this case. The prosecution properly argued that failure to disclose Harnett’s shadowing theory reflected her lack of confidence in it. “Were a jury to find a defendant had failed to disclose evidence to the prosecution in an attempt to hide the evidence until the last minute, the jury could reasonably infer from the fact that the defendant thereby violated his or her duty under the discovery statutes that even the defense did not have much confidence in the ability of its own evidence to withstand full adversarial testing.” (*Riggs, supra*, 44 Cal.4th at p. 308.) On the other hand, the defense could plausibly counter that the physical evidence ultimately spoke for itself.

There was no instructional error.

III. DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.