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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL HERNANDEZ and RAMON  
VICENTE,

Defendants and Appellants.

B230965

(Los Angeles County  
Super. Ct. No. TA113196)

APPEAL from judgments of the Superior Court of the County of Los Angeles,  
Kelvin D. Filer, Judge. Affirmed.

Marilee Marshall & Associates, Inc., Marilee Marshall, under appointment by the  
Court of Appeal, for Defendant and Appellant Ramon Vicente.

Randall Conner, under appointment by the Court of Appeal, for Defendant and  
Appellant Manuel Hernandez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle,  
Supervising Deputy Attorney General, David A. Wildman, Deputy Attorney General, for  
Plaintiff and Respondent.

## **INTRODUCTION**

A jury found defendant and appellant Ramon Vicente (Vicente) guilty of assault by means likely to inflict great bodily injury and found defendant and appellant Manuel Hernandez (Hernandez) guilty of the lesser included offense of simple battery. On appeal, Vicente argues that the trial court erred by denying his motion for mistrial and, in the alternative, contends that his conviction should be reversed based on ineffective assistance of counsel. Both defendants further contend that the trial court erred when it refused their joint request that the trial court conduct an individual examination of each juror based on an allegation of misconduct and that the trial court erred by not excusing a juror.

We hold that the trial court did not abuse its discretion in denying Vicente's motion for mistrial and that Vicente's claim of ineffective assistance of counsel is not appropriate for appeal. We further hold that the trial court did not abuse its discretion by refusing to conduct individual examinations of the jurors and that defendants' contention concerning the trial court's failure to excuse Juror No. 8 has been forfeited. We therefore affirm the judgments.

## **FACTUAL BACKGROUND**

### **A. Prosecution's Case**

The victim, Mario Rodriguez, had known defendant Vicente for about two years prior to the assault. Vicente found Rodriguez living on the street and invited him to stay in a container in the yard of Vicente's parents' house. Rodriguez worked as a handyman for Vicente's family and became friends with them, including Vicente.

At some point, Vicente told Rodriguez to leave the house, and when Rodriguez tried to speak with Vicente's father about the issue, Rodriguez and Vicente began fighting. During the fight, the two men fell to the ground and Vicente cut the bridge of

his nose. One of Vicente's nephews then broke up the fight, and Vicente's mother asked Rodriguez to leave the family's home. Rodriguez received permission from his employer to sleep in an old inoperable car parked at the employer's premises.

Four or five days before the July 11, 2010, assault, Rodriguez encountered Vicente in a store. When Rodriguez left, Vicente followed him. Rodriguez walked to his place of employment, picked up a tire iron, and told Vicente, "Ok. Now come." As Vicente approached Rodriguez, he saw the tire iron, turned around, and left. Rodriguez denied ever hitting Vicente with a tire iron or stabbing him with scissors.

On a separate occasion, Rodriguez rode his bicycle to the location where he slept, and he saw Vicente talking to a neighbor. Vicente approached Rodriguez laughing and then hit Rodriguez in the eye with a pair of pliers. Neighbors, including Juana Trejo and her mother, came out to determine what had happened.

On the night of July 10, 2010, Rodriguez worked until 10:00 or 11:00 p.m. and then went to sleep in the car. He was awakened by Vicente at the window of the car who said, "Oh, you're here. Right now you're not going to get away with it." Vicente had previously advised Rodriguez that "they were going to come after [him]." As Rodriguez was exiting the car, he was hit with a broomstick which broke. Rodriguez and Vicente began to fight, but then Rodriguez felt someone (Hernandez) grab him around the neck and choke him. Vicente gouged Rodriguez's eye with his fingers and the person choking him said, "So you wanted to hit my uncle with the metal thing." As Rodriguez was being held from behind, Vicente was in front of him, hitting him. Rodriguez saw Vicente grab a crow bar. Rodriguez grabbed Vicente's hands, the two men struggled, and "then at the end [Vicente] beat [Rodriguez] and he took [the tire iron]."<sup>1</sup> As neighbors came out, the fight ended, and Vicente left. Although Hernandez choked Rodriguez, he did not hit Rodriguez with his fists, feet, or any object.

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<sup>1</sup> On cross-examination, Rodriguez was asked whether he was hit with the tire iron during the assault and Rodriguez responded, "Not that I know of."

After the assault, Rodriguez noticed that three of his bottom teeth were on the trunk of the car. His eye was purple and bloodshot, and he was bleeding from his head. Rodriguez knew Vicente was drunk at the time of the assault because of the smell and because Vicente would only “come and bother” him when Vicente was drunk.

Police and paramedics arrived at the scene. Paramedics gave Rodriguez a pain pill, but he refused to be transported to the hospital due to the cost.

Sandra Trejo<sup>2</sup> lived at 1212 East Rosecrans Avenue in Compton. She lived there with her mother, her sister Juana, her brother Juan, and two of her nieces. She knew Vicente, but was not familiar with Hernandez. She was also familiar with Rodriguez because he lived in a car near her family’s apartment.

At approximately 1:30 a.m. on July 11, 2010, she was returning to her mother’s apartment from a party. She stopped outside the apartment to talk on the telephone to a friend, and saw Rodriguez arrive on his bicycle and enter the car in which he slept. The windows of the car were covered with sheets. About 20 minutes later, Sandra saw Vicente arrive by bicycle, approach the car in which Rodriguez was sleeping, turn around, and leave. About five minutes later, Vicente returned by bicycle accompanied by Hernandez. They looked into Rodriguez’s car and left.

About 10 minutes later, Sandra went into her family’s apartment and turned on the lights in the kitchen. She heard Rodriguez screaming and looked out the window. She saw Vicente and Hernandez near the trunk of the car hitting Rodriguez. Vicente was in front of Rodriguez and Hernandez was to the side. Sandra saw Vicente hit Rodriguez with his fist “many times,” at least ten. Hernandez hit Rodriguez with a tire iron more than five times. Rodriguez was “trying to cover himself with his hand.”

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<sup>2</sup> Because three members of the Trejo family testified, they will be referred to by their first names. Also, because rebuttal witness Dolores Rodriguez has the same last name as the victim, she will be referred to by her first name. And because defense witnesses Guillermo Vicente has the same last name as defendant Vicente, that witness will be referred to by his first name.

Sandra went outside and screamed at defendants, telling them “to leave [Rodriguez] alone.” Vicente told her not to become involved. Hernandez gave the tire iron to Vicente who hit Rodriguez with it once, walked toward Sandra, and threw the tire iron over a fence. Vicente told Hernandez to leave, and he told Sandra that “he was going to beat the crap out of [Rodriguez] for what [Rodriguez] had done.”

Sandra’s mother, her sister Juana, and her brother Juan came out of their apartment. Sandra confirmed that photographs she was shown at trial depicted accurately Rodriguez’s physical condition after the assault. In addition to the injuries shown in the photographs, Rodriguez had some teeth knocked out.

On July 11, 2010, Juan Trejo was in bed about to go to sleep when he heard noises like “people slamming [in]to a car . . . .” He went to the living room and his sister Sandra opened the door. Juan saw Rodriguez being hit. When he walked out of the house, he saw Vicente with a “tool” in his hand. Vicente was “walking away, [and] then he threw [the tool] to the other side of the house.” Hernandez had Rodriguez in a choke hold. Then Vicente and Hernandez walked away.

Juana Trejo lived with her mother, her sister Sandra, her brother Juan, and her two daughters at 1212 Rosecrans Avenue in Compton. On July 11, 2010, she was sleeping when she heard Sandra telling their mother “to get up.” She went to the door and saw Rodriguez “full of blood and [Vicente and Hernandez] close to him.” Juana saw Rodriguez holding his face, moving away from Vicente and Hernandez, and heard him ask the two men to leave. He appeared frightened. She did not see what had happened to Rodriguez who asked her to call 911. Neither Vicente nor Hernandez appeared to be hurt.

On August 8, 2010, Juana saw Vicente again. She was outside of her house saying goodbye to some friends when Vicente passed by on his bicycle. Vicente addressed Juana’s mother and “apologized for what had happened, and he asked [them] to please not come to court.”

On July 11, 2010, Los Angeles County Deputy Sheriff Javier Flores was working at the Compton station assigned to patrol. At approximately 1:35 a.m., he received a call

that there was a fight in progress, but no further details were provided. He responded to 1212 Rosecrans Avenue in Compton. He parked his vehicle at the approach to the driveway and observed a crowd of 8 to 10 people in front of the location. Deputy Flores interviewed Sandra Trejo. He also saw Rodriguez bleeding from the right side of his head. Blood was dripping down the side of Rodriguez's face and from his mouth. Rodriguez was also missing a bottom tooth or teeth. He appeared upset and complained of pain. Paramedics arrived at the scene and provided medical treatment for Rodriguez. Based on information provided by witnesses, Deputy Flores searched for and recovered a tire iron. He also arrested Hernandez at the scene.

## **B. Defense Case**

Gabriel Lopez knew Vicente by his nickname "Juero." He met him once about a year before trial when Vicente cleaned the front lights of Lopez's car. A few months prior to trial, Lopez was driving his car on Rosecrans Avenue at around 12:30 or 1:00 a.m. to buy medicine for his sick wife. Vicente was standing on the left side of a driveway near a barber shop. He was standing near an older gentleman with white hair whom Lopez identified from a photograph as Rodriguez. Rodriguez was holding a tire iron as if he was about to hit Vicente with it. Vicente had his left arm across his chest with his left hand in a fist in a defensive position. By the way Vicente was holding his arm, he appeared to be injured, but he told Lopez he was fine. Rodriguez did not react to Lopez's presence. Vicente walked away from Rodriguez, and Lopez went back to his car and drove to a 7-Eleven for his wife's medicine. Lopez did not see Vicente hit Rodriguez and did not see Hernandez or a young woman talking on a cell phone.

The only time Lopez saw Vicente after the incident on Rosecrans Avenue was at court the day before Lopez testified. Lopez was at court that day to file a restraining order. He ran into Vicente, whom he knew as Juero, in the court hallway. Lopez said, "Hi" to Vicente and "asked [Vicente] what was going on . . . ." Vicente replied, "It's goods [*sic*] that I ran into you. I'm here in court. I'm glad I ran into you. I need to know if you can testify for me." Lopez told Vicente he was in court for a small claims matter

and gave Vicente his name if Vicente needed him for anything. Lopez did not know why Vicente was in court. Vicente's attorney then asked Lopez for his telephone number and Lopez gave it to him. Lopez did not speak to Vicente about Lopez's testimony.

Dr. Paul Bronston was an emergency room physician who reviewed Vicente's emergency room records for May 17, 2009, and July 11, 2010. The May 17, 2009, records by ambulance personnel documented that Vicente was stabbed in the left arm with scissors. Vicente received a three-quarter inch cut and also a bloody nose. The ambulance personnel also noted an "old nose injury . . . ." Dr. Bronston opined that it was more likely than not that the cut to Vicente's left arm would have required suturing.

The emergency room records for July 11, 2010, were from Memorial Hospital of Gardena and they indicated that Vicente arrived at the hospital at 4:00 a.m. on July 11, 2010. The records further reflected that Vicente complained of an injury to his left forearm which he suffered as the result of a blow from a pipe.<sup>3</sup> The emergency room physician ordered an x-ray of Vicente's arm which showed that it was not fractured. Vicente's arm was put in a sling and he was given pain medication. Both the physician and the nurse noted that Vicente had recently taken alcohol, but neither noted that Vicente was intoxicated. The discharge physician, however, noted "alcohol intoxication."

Vicente testified on his own behalf as follows. He met Rodriguez and brought him to live at his father's house so he could work for Vicente and his father. Vicente told Rodriguez he could help Vicente "buffing cars and lights." Rodriguez slept in a shed in the backyard of Vicente's father's house.

At some point, Vicente concluded that Rodriguez was stealing jobs from him and stealing from his father. There were also other problems with Rodriguez that ultimately caused Vicente to ask him to leave. Rodriguez responded that Vicente's father wanted Rodriguez to live at the house. When Vicente again told Rodriguez to leave, the two men began to fight and "suddenly [Rodriguez] pulled a carpet blade and cut [Vicente's] nose

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<sup>3</sup> The nurse's notes reported that the blow was from a metal bar.

really bad.” Vicente’s family members arrived and separated the two men. Despite the serious nature of the cut to his nose, Vicente did not go to the hospital for treatment or call the police. Rodriguez left the Vicente family home after that incident.

The next day, Vicente saw Rodriguez leaving a restaurant and asked him, “How can you do this to me,” and cursed at him. In response, Rodriguez stabbed Vicente with scissors. Rodriguez followed Vicente and threatened to kill him. Vicente called the police and sought medical treatment.

Vicente denied that he followed, taunted, or attacked Rodriguez. He also denied that he caused Rodriguez to lose his job.

On July 10, 2010, Vicente and Hernandez were cleaning the garage, and Vicente “had a little beer.” Around 1:00 a.m. on July 11, 2010, they walked to the Carl’s Jr. on Rosecrans Avenue. As they were walking down Rosecrans, Rodriguez appeared and began swinging a crowbar at Vicente. Vicente raised his left arm in a defensive position and was struck more than once on that arm. When Vicente attempted to grab the crowbar, he suffered two broken fingers on his right hand. Hernandez grabbed Rodriguez from behind. Vicente then struck Rodriguez twice in the face. Vicente managed to grab the crowbar with both hands and take it from Rodriguez. Vicente told Hernandez to release Rodriguez, and he threw the crowbar over a fence to prevent Rodriguez from hitting him again. Rodriguez threatened to kill Vicente, and he did not appear to be injured.

When the fight ended, Vicente went to his father’s house and rode his bike to his brother-in-law’s house who gave Vicente a ride to the hospital. Because the hospital was closed, Vicente called 911 and was transferred in an ambulance to a different hospital. Vicente denied riding his bicycle up to Rodriguez’s car on two occasions prior to the incident.

Guillermo Vicente Barbosa was Vicente’s father and Hernandez’s grandfather. Guillermo knew Rodriguez as “Chalon.” Guillermo allowed Rodriguez to stay at his house without charging him rent because Rodriguez had no place to stay. Rodriguez lived there for about six months until an incident occurred with a knife. Vicente called to

Guillermo through a window and said he had been cut with a knife. Guillermo saw Vicente covered with blood. Guillermo went to where Rodriguez slept in the backyard and saw him with a knife. Guillermo told Rodriguez to leave because he would not tolerate that type of violence at his house. Rodriguez left Guillermo's house that day and was no longer welcome there.

### **C. Rebuttal**

Dolores Rodriguez was the mother of Sandra, Juan, and Juana Trejo. She knew Rodriguez because he lived in a car in a parking lot near her residence. She also knew Vicente and was familiar with Hernandez.

On July 11, 2010, Dolores came home from a party and went inside to go to bed, but Sandra stayed outside talking on the telephone. As she was preparing for bed, Dolores heard a voice she recognized cry out for help. She went outside and saw Rodriguez being beaten by Vicente and Hernandez. She saw Vicente and Hernandez hitting Rodriguez with "a metal stick" and their hands. The two men stopped hitting Rodriguez when Dolores and her family screamed at them to stop. She then saw Hernandez give Vicente the metal stick and Vicente tossed it over a fence.

Earlier in June 2010, Dolores witnessed another incident between Rodriguez and Vicente at the same location. She saw Vicente approach Rodriguez and hit him with a pair of metal pliers. Vicente had been waiting for Rodriguez to arrive talking with some neighbors. Dolores became afraid when she saw Vicente hit Rodriguez, so she went inside. The next day she saw Rodriguez and his eyes were "very black, bruised."

In August 2010, after the July 11 incident, Dolores was outside her apartment talking to some relatives who were visiting. Vicente passed by and told her that if an investigator came by, not to say anything. Dolores responded, "That's fine."

## PROCEDURAL BACKGROUND

In an information, the Los Angeles County District Attorney charged defendants in count 1 with assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1)<sup>4</sup> and in count 2 with assault by means likely to inflict great bodily injury in violation of section 245, subdivision (a)(1). The District Attorney alleged as to counts 1 and 2 that in the commission of those offenses, defendants personally inflicted great bodily injury on the victim within the meaning of section 12022.7, causing the offenses to be serious felonies within the meaning of section 1192.7, subdivision (c)(8). The District Attorney also alleged as to counts 1 and 2 that in the commission of those offenses, Vicente personally used a deadly and dangerous weapon within the meaning of section 12202, subdivision (b)(1). The District Attorney further alleged as to counts 1 and 2 that Vicente had suffered three prior convictions of serious or violent felonies within the meaning of sections 1170.12, subdivisions (b) through (d) and 667, subdivision (b) through (i). And the District Attorney alleged as to counts 1 and 2 that defendant Vicente had suffered three prior convictions of serious or violent felonies within the meaning of section 667, subdivision (a)(1).

Defendants pleaded not guilty and denied the allegations. Following trial, the jury found defendants not guilty on count 1. The jury found Vicente guilty as charged on count 2 and found Hernandez guilty on the lesser included offense to count 2 of simply battery in violation of section 242. In addition, as to count 2, the jury found true the allegation that Vicente personally inflicted great bodily injury.

Prior to sentencing, Vicente admitted the prior felony conviction allegations. The trial court subsequently granted Vicente's *Romero*<sup>5</sup> motion and struck two of the three prior felony convictions as remote. The trial court sentenced Vicente to an aggregate sentence of 16 years comprised of the following: A high term four year sentence on

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<sup>4</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>5</sup> *People v. Superior Court (Romero)* 13 Cal.4th 497.

count 2, doubled to eight years pursuant to the prior strike conviction, plus an additional consecutive three-year sentence pursuant to the great bodily injury allegation and an additional five-year sentence based on the prior serious felony conviction pursuant to section 667, subdivision (a)(1). The trial court suspended the imposition of the sentence for Hernandez and placed him on summary probation for a period of three years.

## DISCUSSION

### A. Background

Each of defendants' contentions is based upon sidebar discussions with counsel and four jurors that took place during and immediately after Lopez's testimony. These sidebar proceedings were the result of an exchange that took place between Lopez and Vicente in a courthouse hallway the day before Lopez testified—an exchange that three jurors witnessed and about which a fourth juror had been informed.

#### 1. *Juror Nos. 2 and 6 ad Hernandez's Motion for Mistrial*

During a break in Lopez's testimony, the following proceedings took place outside the presence of the jury. "The Court: We're here with Juror Number 2. What did you want to share with us? [¶] . . . [¶] Juror: In regards to the case, while we were waiting outside late in the afternoon yesterday, I did see the witness, Mr. Lopez, with [Vicente] in the hallway, where they met each other. However, the expression that they used, they used the word 'Primo.' So for me Primo in Spanish means more like cousin. So I didn't hear the word Juero as [Lopez] referred to [Vicente]. So I just wanted to share that. [¶] The Court: Is there anything about that that makes you feel like you could not be fair to either the defendant or fair to the people, or is it just because you heard them use a phrase you just wanted to bring to our attention? [¶] Juror: Just bring it to the [court's] attention. Basically, I just wanted to share. That sounds to me more like a cousin. Just like relatives. [¶] The Court: And you are not to share that with any of the other jurors. And do you still feel like you can be fair to all the parties in the case? [¶] Juror: Yes, I

just wanted to make sure that you're aware of it, how I felt about it. [¶] The Court: But as you sit there right now it's not going to affect you? [¶] Juror: No. I mean, certainly I was just gathering all the information, listening to the statements. [¶] The Court: When you say listening to statements, you mean out in the hallway? [¶] Juror: No, here in court. [¶] The Court: What I want to make sure from you is you are committed to making your decision based only on the evidence in this trial. Can you do that? [Juror]: Certainly. [¶] The Court: All right. I don't know if counsel wanted to ask any questions of her. [¶] [Vicente's Attorney]: Have you discussed this with any other jurors? [¶] . . . [¶] Juror: Only one. [¶] [Vicente's Attorney]: Which one was that? [¶] Juror: The one with the long hair. The Pastor. [¶] The Court: That's Juror Number 6. [¶] [Vicente's Attorney]: Did you just ask should I go talk to the judge, or did you specifically express your concern. [¶] Juror: Just what should I do. [¶] The Court: So you didn't tell him what you heard or did you tell him what you overheard? [¶] Juror: That I saw both of them meeting. [¶] The Court: All right. So why don't you go ahead and go back out. [¶] [Prosecutor]: Your Honor, can I ask— [¶] The Court: Go ahead. [¶] [Prosecutor]: To you what does 'Primo' mean? [¶] Juror: Well, the word Primo is cousin. [¶] [Prosecutor]: Cousin? Okay. And did you hear any other words besides Primo? [¶] Juror: No. I mean, just conversation. It was not very loud, just, 'Hey, Primo,' so they greet each other. [¶] [Prosecutor]: Besides that you couldn't understand any other words? [¶] Juror: Nothing. [¶] [Prosecutor]: Thank you. [¶] The Court: Any questions? Why don't you go back and don't discuss this with any other jurors. [¶] . . . [¶]"

"The Court: All right. Bring in Number 6. [¶] . . . [¶] Juror Number 6, . . . [d]id you have a conversation with any of the other jurors about something that they may have seen or heard, one of the parties or witness in this case? [¶] Juror: Very brief one with the lady, Juror Number 2, I think. [¶] The Court: What did she tell you exactly? [¶] Juror: She said that she overheard the last witness or saw an encounter with Mr. Vicente. [¶] The Court: Did she say what it was that she overheard? [¶] Juror: She said that he called him another name besides Juero, the one he said in court. [¶] The Court: And did

you see them talking at all? [¶] Juror: No. [¶] The Court: And was that the extent of your conversation with the other juror? [¶] Juror: Yes. [¶] The Court: Anything about that that you think you're going to hold it against either side? [¶] Juror: No. [¶] The Court: Did you discuss this with any of the other jurors? [¶] Juror: No. [¶] The Court: Do you still think you can be a fair and impartial juror on this case? [¶] Juror: Yes, sir. [¶] The Court: Counsel have any questions. [¶] [Hernandez's Attorney]: Yes. Did you see the interaction yesterday? [¶] Juror: No, sir. [¶] [Hernandez's Attorney]: Did Juror Number 2 tell you or did you get the sense that other jurors had seen anything? [¶] No. [¶] [Hernandez's Attorney]: Thank you. [¶] The Court: All right. [¶] [Vicente's Attorney]: Juror Number 6, did Juror Number 2 specifically tell you the name that she felt had been used? [¶] Juror: No. [¶] [Vicente's Attorney]: Just that it was something other than Juero? [¶] Juror: Yes. [¶] [Vicente's Attorney]: Nothing further. . . .”

“The Court's position is it's no harm no foul, and both of the jurors have indicated that's not going to affect them in any form or fashion. . . . [¶] . . . [¶] “[Vicente's Attorney]: I agree with the court that it's no harm no foul with regard to Juror Number 6, but I think it is an issue with regard to Juror No. 2. Because Juror No. 2 . . . seems to have a very set view that this word only has one meaning. To her mind it means that he's a family member. And the obvious conclusion to be drawn is that he's a family member who is making up a story and lying under a false pretense. And I don't think—I just think that's a real problem situation with Juror No. 2. [¶] [Hernandez's Attorney]: And on behalf of my client, Mr. Hernandez, I'm going to join, but also ask that she be excused or in alternative a mistrial be granted. My client, I'm concerned his fifth, sixth amendment rights are going to be violated. I'm concerned now. The jury is tampered in a way that it's going to prejudice my client. [¶] [Vicente's Attorney]: I don't think there's a need for mistrial, but I do think Juror Number 2 should be replaced.”

“The Court: All right. [Mr. Prosecutor]? [¶] . . . [¶] The Court: What about the defense request to remove Juror Number 2? [¶] [Prosecutor]: I think potentially the best way to solve this problem would be to remove both two and six and replace them with the alternates. Because I would like to question Mr. Lopez as to the conversation he had

and how he greeted the defendant. And the only way to do that without causing serious problems with the jurors would be to remove both of them. [¶] The Court: Why Juror Number 6? [¶] [Prosecutor]: Well, 6 obviously knows something about what happened. I mean, if I start questioning Mr. Lopez now on how he greeted the defendant yesterday, I think Number 6 is going to start thinking, and then Number 2 is removed, he's going to start having a lot of questions in his mind about what's going on. [¶] I don't think we need a mistrial, but removing some of the jurors may be appropriate. [¶] . . . [¶]"

“[Vicente’s Attorney]: With regard to Number 6, I think the issue with Number 2 is not that the conversation was heard, but that she has very specific interpretations of what those words mean, whereas Number 6 didn’t even hear what the words are and has no interpretation, just that he called him something other than Juero. As far as Number 6 knows, that could have been Pal, it could have been Buddy. Number 2 heard a specific word used and she put that in a specific context rightly or wrongly. And that’s the difference between two and six and why I don’t think there’s grounds to remove Number 6. [¶] . . . ¶]”

“The Court: All right. Anything else? [¶] [Hernandez’s Attorney]: No. [¶] [Vicente’s Attorney]: No. [¶] The Court: Motion for mistrial will be denied. The fact that one of the jurors overheard something and was concerned about it, after questioning her I don’t think there’s any basis to think that she’s either shared that information with any other jurors or tainted them in any form or fashion. And she didn’t indicate that it would affect her ability to be fair. [¶] I’m concerned though because the way in which she brought it to our attention and even the response to our questions, clearly she has concern as to whether the witness and Mr. Vicente are friends or if they’re closer than that because of what she overheard. So I do have some concern as to Juror Number 2. I’m not going to excuse Six. Plus, Six said he did not overhear what was [said]. He was fairly adamant on his ability to maintain his fairness. But I’m concerned about Juror Number 2.”

“[Vicente’s Attorney]: I would ask the court to remove Juror Number 2. I think she heard this comment and in response to the questions . . . she has a very particular

interpretation of this word. [¶] The Court: All right. People? [¶] [Prosecutor]: I think she should be removed as well. But I do want to be able to further question Mr. Lopez about this conversation. [¶] [Hernandez Attorney]: I join. And I'm renewing my request for mistrial. Precisely because now the questioning is going into another area that would prejudice my client. [¶] The Court: I don't know how it prejudices your client at all. All right. I'm going to remove Juror Number 2 . . . ."

## 2. *Lopez's Continued Testimony*

Following the proceedings concerning Juror Nos. 2 and 6, the prosecutor resumed cross-examination of Lopez. During that continued cross-examination, Lopez was again questioned about his encounter with Vicente in the court hallway the day before and gave, inter alia, the following answers: "[Prosecutor]: And then did you use the word 'primo' with him. Did you say, 'Hey, primo'? [Lopez]: No, not at all. [Prosecutor]: Did you say, 'Hey, Juero'? [Lopez]: Yesterday when I saw [Vicente] in the hallway. When I was about to go into small claims I stopped for a moment so I recognized him right away. And I said, 'Hey you' in English, 'hey you, you stop. You're arrested,' I said. I was just joking. So, then that's when he says, 'Oh, I'm so happy to see you.' [¶] . . . [¶] [Prosecutor]: So then did you ever address him with any name at all, Juero, Primo, whatever? [Lopez]: No, not that I recall."

## 3. *Juror No. 8 and Defendants' Motions for Mistrial*

Following the completion of Lopez's testimony, the following proceedings took place outside the presence of the jury concerning Juror No. 8. "The Court: Side Bar with Juror Number 8? [¶] Juror: Yesterday I saw him go to the witness and call him Primo like he knew him for a long time, but I thought he was like family that's why I didn't say anything. Then when the prosecutor asked the witness if you called him by Primo and he said no, I heard him call him Primo by that name. I discussed it with Juror Number 12 and he heard it also. That's why I wanted to bring it to your attention. Because I don't know if you bring it up into deliberations. [¶] The Court: No, because that's not

evidence. I already instructed you, anything you heard or observed that was done while the court was not in session, that's not evidence and you're not to discuss it. Now, as you sit there right now, does that affect you in any form or fashion or do you think you can still be fair to all parties involved? [¶] Juror: Yes, I can still be fair. I just wanted to bring it up. [¶] The Court: Do the attorneys have any questions. [¶] [Prosecutor]: What was the other juror? Number 10 you said? [¶] Juror: Number 12. [¶] [Prosecutor]: Okay. [¶] Juror: I didn't think it was nothing until you mentioned it. [¶] [Prosecutor]: But then he mentioned it on the stand? [¶] Juror: Yes, but that's what I heard him call him. [¶] [Vicente's Attorney]: But you're confident that you heard what you heard even though Mr. Lopez says he did not say that? [¶] Juror: Correct. [¶] [Vicente's Attorney]: And you don't think this in some way, since you're going to be asked to judge everyone's credibility, you're not going to say, I think the guy lied because I heard him say something different in that hallway? [¶] Juror: Well, I got to go by evidence that was presented. But I'm just saying from what I heard I just wanted to bring it up to you guys. They must have told someone else the same thing. [¶] [Prosecutor]: Someone else told who? [¶] [Vicente's Attorney]: Us. [¶] [Prosecutor]: Oh. [¶] The Court: Do you have any questions? [¶] [Prosecutor]: So you and Juror Number 12 saw this; right? [¶] Juror: Heard it. [¶] [Prosecutor]: And which other jurors? [¶] Juror: Nothing that I know of. He called him Primo, I thought he was a family member. [¶] [Hernandez's Attorney]: So you don't believe this witness now; right? [¶] Juror: It's not that I don't believe him. It's just should I take that into account? [¶] The Court: And I'm telling you no. [¶] Juror: Just go by the evidence presented. [¶] The Court: And I appreciate the fact you brought it to our attention. [¶] . . . [¶]"

"The Court: We're still outside the presence of the jury. Well, this is exactly what happens. [¶] [Vicente's Attorney]: And now I think we do have a problem. Because despite what he said, I think it's unavoidable they're going to consider it. And if on cross the question I'm going to ask, you know, are you related or do you have any other relationship to the witness, by specifically using the word Primo on cross-examination,

that is actually what's blown this can of worms. [¶] [Prosecutor]: No, it was the other jurors that overheard your defendant, so let's not shift blame to the court or myself. There was apparently at least four people heard your client talking to a witness in the case. [¶] The Court: Absolutely. [¶] [Vicente's Attorney]: Who at the time was not a witness to the case. That's the issue. [¶] The Court: But the problem is, I've told the parties not to be even talking about the case. And he should have known better. He created this issue. Although, frankly this is much ado about nothing. Whether he said Primo or not. That's not a big deal.

“[Vicente's Attorney]: But when they now have to go back to when he specifically asked the question, ‘Did you call him Primo—’ [¶] The Court: He said, ‘I don't remember calling him that.’ [¶] [Vicente's Attorney]: No, he said no. He said no. The court needs it read back. [¶] [Prosecutor]: He said both. At one point he said no. [¶] [Vicente's Attorney]: So now even though he says it's not going to affect me when this witness says he said he didn't say it and I know I heard him say it, they're going to immediately dismiss this testimony. [¶] The Court: I don't think so. [¶] [Vicente's Attorney]: I don't see any way that they don't. [¶] The Court: Well, what are you asking? [¶] [Vicente's Attorney]: At this point I am now joining [Hernandez's attorney]. I did not think this was an issue before. But based on what happened now, I think there's grounds for a mistrial as well. [¶] [Hernandez's Attorney]: And I would renew that motion. These two jurors now have to be excused. As to my client's rights under state and federal constitutional law, I'm asking for a mistrial for Mr. Hernandez. [¶] [Prosecutor]: Before we jump to any conclusion on a Friday at 4:30 when all of our brains are a little weaker, we can take the weekend. I can do some research and the court can look into it or counsel can look into it. And we can convene on Monday and discuss it again. But I don't think the court should dismiss it at this point without some thought behind it. [¶] [Vicente's Attorney]: Well, at a minimum we have to talk to 12 too. [¶] . . . [¶] The Court: Motion for mistrial is denied. See everybody on Monday. [¶] [Vicente's Attorney]: I think that the court's ruling is premature without talking to

Number 12. [¶] The Court: You made the request right now. I will deny it right now. We'll talk to Number 12 on Monday.”

#### 4. *Juror No. 12 and Renewed Motions for Mistrial*

When the court reconvened the following Monday for the next day of trial, the following proceedings took place concerning Juror No. 12 and the defendants' renewed motions for mistrial. “The Court: We're on the record on the trial matter. Outside the presence of the jury. . . . When we left off [Friday], Juror Number 8 stated his position in terms of what he had overheard in the hallway, and he also said Juror Number 12 heard it also. So what I'm proposing at this point is that we just bring in Juror Number 12. I'm going to ask him questions only. I'm not going to allow counsel to question him, but if there are any other questions you want me to ask him.”

“[Vicente's Attorney]: Well, I'd like to be heard first. I think in light of the fact that we—the issue started with Juror Number 2 who has subsequently been removed. [¶] The Court: Right. I understand that. [¶] [Vicente's Attorney]: And she talked that she discussed this with Juror Number 6. And then about 45 minutes later then we find out Juror Number 8 heard something. And now Juror Number 12 hearing something. [¶] The Court: Well, I want to make sure he's not getting that confused with Juror Number 6. [¶] [Vicente's Attorney]: Right. But it seems clear Juror Number 8, at a minimum, had heard something also and yet hadn't brought it to the court's attention. I think the safer course of action is to bring all of them in one at a time individually.”

“The Court: Well, I thought about doing that . . . . But frankly, I agree with what you said earlier. We're making a mountain out of a molehill. This is nothing that I feel—although I understand defense counsel's position. I don't think whether someone used the word *Primo* in greeting someone is going to affect this jury one way or the other. It's a slang term just as you indicated. . . . Here's what concerns me, though, is that Mr. Vicente was out there among the jurors. That concerns me. I understand your position in terms of you said the witness came up to him. But I think all of this could have been avoided had there not been any sort of conversation whatsoever, however innocent, out in

the hallway. Also, frankly, Juror Number 8 didn't really need to bring it to our attention. Because I instructed them once and I intend on instructing all of them again, that you must disregard anything you see or hear when the court is not in session, even if it is done or said by one of the parties or witnesses. I already instructed them on that and I'm going to instruct them again. I thought about the individual thing, but I'm also concerned about creating something that's not there. So my intentions were to call in Juror No. 12, make sure there's no contamination there and then rereading that instruction."

"[Vicente's Attorney]: Here's where my area of concern is. We all agree the individual word itself—we all agree it's slang. We all agree the word itself isn't that big a deal. But now, I think it's gone past that in the sense that when the people on cross-examination after the issue with Juror Number 2 and Juror No. 6, right after the recess on Friday, then on cross-examination when [the prosecutor] specifically asked Mr. Lopez, 'did you call him Primo in the hallway the other day.' And he says no, now, the issue is not what does the word mean. I think now the issue is for those jurors that heard it, they say, look, I know what I heard. I heard whatever it was. [¶] The Court: I agree with you. [¶] . . . [¶] [Vicente's Attorney]: Whatever the word may be, I know what I heard, and I heard this witness deny it in court. Therefore I personally have caught this witness in a lie, and therefore he's not believable. And I don't think they can get past that."

"The Court: I understand that. You pointed that out last week. But the other point along those lines is first the question was posed to him twice, and I had the court reporter find it in the transcript and I double checked. The first time he said no, not at all. Then he was asked again and he said no, not that I recall. Plus, Juror Number 8 didn't say that he heard the witness call him Primo. Juror Number 8 specifically said, 'I heard the defendant say Primo.' That's what Juror Number 8 said in side bar. He said, 'I heard the defendant say Primo.' So clearly, the word was said. Who said it, who knows, who cares. Although I understand what you're saying. But I don't think—I think we can create a situation where that's going to be an issue where really that is not an issue. And I'm even considering whether counsel should even argue that. And I hate putting restrictions on counsel's argument. But I just don't think that out of fairness to all parties

that we should be arguing it. If one of them called the other Primo, who cares? It's not that big a deal. I understand you're talking about the jurors. And I think Juror Number 8, like you said, he heard the defendant said, I'm assuming the defendant is going to testify. I don't know what he's going to say in regards to that. But of course if he acknowledges it, then, boom, that's where the word came from. But I do want to question Juror Number 8. *I thought about the individual thing, but I'm more concerned with asking them as a group will they be able to follow the instructions that I'm going to reread to them. And if any of them say, based upon something heard out of the courtroom, that they have some problems. Then we'll hear from them.* Otherwise then we're inviting them to say something was wrong when there was not, because Juror Number 2 should not even have brought it up, because it happened outside the courtroom and not in the witness stand. But I understand your position, [Vicente's attorney]." (Italics added.)

"And [Hernandez's attorney], it doesn't really even affect you. [¶] [Hernandez's Attorney]: I think it does. The reason I asked for a mistrial before the Primo question was asked on cross, is my client is now in a position where this whole trial has been tainted because now we've been asking questions specifically tailored to juror concerns about out of court conduct, and we were doing this on the record in front of the jury in the actual trial, not as a separate proceeding. [¶] The Court: No, that hasn't happened. When has that happened? [¶] [Hernandez's Attorney]: Well, the question: Did you use the word 'Primo,' it wouldn't have come up, other than the fact a juror brought it up out in the hallway. [¶] The Court: Because the jurors heard it and that's why Juror Number 8 brought it up. But there's been all kinds of questions, did you talk to anyone about your testimony, did you talk to the attorneys? So just to make sure the record is clear, we haven't been discussing this in front of the jury. [¶] [Hernandez's Attorney]: No, but the Primo question that was asked to the witness. That's what I'm talking about. Now they're being asked specifically on the stand. This gentleman was asked, 'did you say Primo?' That's totally now brought in juror concerns into this courtroom that had nothing to do with the actual incident in question. So that's the focus and the need, on behalf of my client, for mistrial. [¶] . . . [¶]"

“The Court: All right. So let’s bring in Juror Number 12. [¶] [Vicente’s Attorney]: *Your Honor, I understand the court, but for the record, I would like it known that our request is that each of the jurors be interviewed individually.* [¶] [Hernandez’s Attorney]: *And I join that request.* [¶] The Court: *And I appreciate your concern. I’m going to attempt to get to the same end by asking them as a group. Because I don’t want to single any of them out.* So let’s see if Juror Number 12 is here. I’m going to remind them of their obligation and make sure that everybody still feels okay. [¶] [Hernandez’s Attorney]: Can the court phrase it in a way to ask if it was done in the past, so that they won’t focus in on the word ‘Primo,’ just generally. [¶] The Court: I will do that. [¶] [Hernandez’s Attorney]: Thank you. (Italics added.)

“The Court: We have been joined by Juror Number. 12. . . . So let me just ask you: last week, either on Thursday or Friday, one of those days, did you overhear anything that was said by any parties or witnesses as it relates to this case? Did you personally overhear anything said? [¶] Juror: Can you be more specific? [¶] The Court: Well, did you hear any witnesses say anything, any parties say anything outside the courtroom that causes you any concern? [¶] Juror: I heard—I think pretty much what Juror—I don’t know what seat he is on, seat eight, comment that was made outside by the witness that came in the other day. I heard a comment that he said to one of those guys. [¶] The Court: What was the comment? [¶] It was regarding when they approached each other. *When they referred to each other, he referred to him as Primo.* [¶] The Court: *Now, who referred to whom? Or could you tell?* [¶] Juror: *Yes, the gentleman here, Vicente.* [¶] The Court: *The defendant referred to the witness as Primo?* [¶] Juror: *Yes, sir.* [¶] The Court: Was that the only time you heard it used. [¶] Juror: Yes, sir. [¶] The Court: Now, one of the things I instructed you on during the course of the trial was that you must disregard anything that you see or hear when court is not in session, even if it is said or done by one of the parties or witness. So you understand that isn’t evidence, do you understand? [¶] Juror: Yes. [¶] The Court: And are you going to be able to basically forget or not consider the fact that you heard this word used? [¶] Juror: Sure. No problem. [¶] The Court: And that was the only time

you heard it? [¶] Juror: Absolutely. [¶] The Court: And you feel like you can be fair to both the prosecution and the defense case [¶] Juror: Sure. It was just that day he mentioned it to me, and I think it was kind of in the back of my—I want to say it was probably in the back of our minds like should we use it or not. So it’s nice to know it was clarified. [¶] The Court: That you’re not supposed to use it. [¶] Juror: Right. [¶] The Court: Okay. I appreciate that. And again, you feel like you can continue to serve with us on this matter? [¶] Juror: Sure. [¶] The Court: You don’t have to discuss, in fact, you are not to discuss this with the other jurors what we talked about right now, okay? [¶] Juror: No problem. [¶] The Court: All right. You can go back out.” (Italics added.)

“The Court: The court’s impression of this juror, as well as Juror Number 8, both of them are conscientious individuals. I feel very confident that they are not going to consider anything that was said outside this courtroom. Both of them basically said the same thing, that they heard it and their main concern is should they consider it. And since I instructed them they are not to consider it, I don’t think we have any problem with either one of them. Also, what’s interesting is he was fairly certain he only heard the word used once, and it was said not by the witness but by Mr. Vicente. Which is the same thing Juror Number 8 said at side bar. So anything else from either counsel, and I know and appreciate your position, but I do want to make sure that the record is clear as well. So, [Vicente’s Attorney], anything else in regards to this issue? My intentions are to keep them here but I’m going to reinstruct. I’m going to inquire of all of them as a group to make sure they’re all on the same page as it relates to what evidence is and what evidence is not.”

“[Vicente’s Attorney]: I would again, renew the motion for mistrial. I obviously heard the answers from Juror Number 8 and Juror Number 12. I am not confident that some of those other jurors have not had a similar experience that we just don’t know about. And the answers from the two jurors notwithstanding, I think the way I look at it is we’ve got, at a minimum, a third of our panel is talking about, amongst themselves, about conduct that took place outside the courtroom. I know that the court will reinstruct.

I'm not confident that that reinstruction will entirely sink in. And that's not a fault of the court's. I think that that's just human nature that when people see anything they remember it and you sort of can't unring the bell, basically. And based on that there would still be a motion on behalf of Mr. Vicente for mistrial."

"[Hernandez's Attorney]: I join in that request. And under 5th, 6th, and 14th amendment, with respect to my client who didn't do anything, is really just now in a position where I would ask the court to grant mistrial as to him. There's no implication. I just think things have now gotten to the point where specific questioning on cross, the court allowed that, the jury is compromised, I would ask that at least a mistrial be granted to him. [¶] The Court: Now, let me ask you something. That the court allowed, was there any legal basis the court had from preventing the District Attorney from cross-examining on that issue? [¶] [Hernandez's Attorney]: Well, I think I objected when we were at side bar. I didn't think that was a good route to go down to ask the question Primo, since it was something that took place out in the hallway. That's my recollection. That's why I asked for a mistrial before and didn't want that question asked. [¶] [Vicente's Attorney]: And on that issue, I believe my position was that [the prosecutor] was certainly entitled to cross-examine on whether there was, in fact, any relationship between Mr. Vicente and Mr. Hernandez and Mr. Lopez, that that was certainly acceptable. But that the specific question using that specific language about Primo should not be used, and that did not accomplish anything. There was certainly nothing wrong with asking, are you related, do you have a relationship other than what Mr. Lopez testified to, was that Mr. Vicente worked on his car. But to use the specific phrase that the juror told us about here in the hallway, I think is what caused the additional problem that we're now dealing with this morning."

"The Court: All right. [Prosecutor]? [¶] [Prosecutor]: Just I think the jurors are going to have to follow the court's orders, and I was confident with Jurors 6, 8, and 12 that they'll follow the court's order. Juror Number 6 doesn't even speak Spanish, so I don't think he knows much about it at all. And both Juror 8 and 12 actually heard the defendant use the word Primo, which wasn't one of my questions. So if he said 'No, I

didn't use the word Primo,' that actually wouldn't impeach him at all. So I don't think the impeachment comes up on any of those jurors. I never asked the witness, Mr. Lopez, if Mr. Vicente used the word "Primo." I just asked, did you use the word 'Primo' and he said no. And that could be totally accurate. [¶] The Court: Well, that is accurate apparently. [¶] [Prosecutor]: So I don't think there's any problem here, and I concur with the court that it's more of a mountain made out of a molehill. [¶] The Court: The only other thing I would add is that Juror Number 8 is the individual who works at a law firm. And he and 12, just in looking at their body language and their rationale, the reasons for even mentioning it shows they were conscientious, that they wanted to know what was the law. So once I did tell them that they are not to consider it, they both were adamant that they could be fair to all parties in the case. So I'll deny the motion for mistrial with that understanding. I am going to inquire though of them, as a group, to make sure that everybody else is okay. If somebody says—the hand goes up, we'll deal with it at that time."

##### 5. *Re-instruction of Jury*

After the trial court denied the motion for mistrial, it re-instructed the jurors, inter alia, that they "must disregard anything [they] see or hear when court is not in session, even if it is done or said by one of the parties or witnesses." The trial court also asked the jurors if any of them had witnessed or heard anything outside the courtroom that would prevent them from being fair and impartial. Because none of the jurors responded in the affirmative, the trial court proceeded with trial.

## B. Motions for Mistrial

““A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. . . .” [Citation.] A motion for a mistrial should be granted when ““a [defendant’s] chances of receiving a fair trial have been irreparably damaged.””” (*People v. Collins* (2010) 49 Cal.4th 175, 198 [110 Cal.Rptr.3d 384, 232 P.3d 32], citation omitted.)” (*People v. Dement* (2011) 53 Cal.4th 1, 39-40.)

“““[W]hether a defendant has been injured by jury misconduct in receiving evidence outside of court necessarily depends upon whether the jury’s impartiality has been adversely affected, whether the prosecutor’s burden of proof has been lightened and whether any asserted defense has been contradicted. If the answer to any of these questions is in the affirmative, the defendant has been prejudiced and the conviction must be reversed. On the other hand, since jury misconduct is not per se reversible, if a review of the entire record demonstrates that the appellant has suffered no prejudice from the misconduct a reversal is not compelled.” [Citation.]” [Citations.]” (*People v. Stanley* (2006) 39 Cal.4th 913, 950.)

A motion for mistrial, like a request to investigate or remove a juror, is directed to the sound discretion of the trial court. (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986, citing *People v. Pinholster* (1992) 1 Cal.4th 865, 928 [applying abuse of discretion standard to claimed failure to conduct hearing adequate to determine whether juror should be discharged for misconduct]; *People v. Ray* (1996) 13 Cal.4th 313, 343 [decision whether to investigate juror bias is within sound discretion of trial court]; *People v. Beeler* (1995) 9 Cal.4th 953, 989 [it is within court’s discretion to determine what procedure to employ or inquiry to conduct to determine whether juror should be discharged].)

Vicente contends that the trial court erred when it denied his motion for mistrial. According to Vicente, “[t]here can be no doubt that the jurors who heard the exchange

between [Vicente] and Lopez in the hallway believed there was a prior relationship between them.” From Vicente’s perspective, the case turned on credibility, and the overheard hallway exchange between Vicente and Lopez undermined the credibility of both of them in the eyes of the affected jurors.

Vicente’s argument is not supported by the record. First, the only juror who suggested that the hallway exchange might have affected her view of the case was Juror No. 2, and the trial court excused her. Juror No. 6 did not hear the exchange, and, although Juror No. 2 made him aware of the exchange generally, Juror No. 6 was not told what was said during the exchange. Thus, it was reasonable for the trial court to conclude that Juror No. 6’s generalized and secondhand knowledge of the exchange did not affect his impartiality.

As for Juror Nos. 8 and 12, both observed the exchange and heard Vicente call Lopez “primo.”<sup>6</sup> After questioning by the trial court, however, both jurors assured the court that they could be fair and impartial and would follow the court’s instruction to decide the case on the evidence presented in court and not on anything that occurred outside court. The trial court found both of them to be credible in this regard and the record does not suggest otherwise. Therefore, it was reasonable for the trial court to deny Vicente’s mistrial motion based on the information those two jurors provided the trial court about the hallway exchange and their respective reactions to it.

In addition, the trial court individually instructed Juror Nos. 6, 8, and 12 that they were to disregard the exchange and decide the case based only on the evidence provided in court. Thereafter, the trial court re-instructed the entire jury on those same issues at the end of Lopez’s testimony and again prior to deliberations. Given these repeated

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<sup>6</sup> Juror No. 8 initially informed the trial court that he heard *Vicente* address Lopez as “primo.” Vicente contends that after further questioning, Juror No. 8 stated that he heard *Lopez* call Vicente “primo.” The record, however, is unclear on the issue and, based on its examination of all the affected jurors, the trial court concluded that it was *Vicente* who used the term during the exchange. Although Vicente testified after the sidebar discussions described above, he was not asked about the issue of who, if anyone, used the term “primo” during his hallway exchange with Lopez.

admonitions, it was not unreasonable or arbitrary for the trial court to conclude that the affected jurors would follow its instructions and disregard the hallway exchange during their deliberations. Moreover, on appeal, we assume the jury followed the trial court's instructions, (*People v. Curl* (2009) 46 Cal.4th 339, 356, fn. 13; *People v. Harris* (1994) 9 Cal.4th 407, 426), and there is nothing in the record to support a contrary conclusion.

### **C. Ineffective Assistance of Counsel**

Vicente contends that because his trial counsel failed to examine him concerning the issue of whether either he or Lopez used the term “primo” during the hallway exchange, he received ineffective assistance of counsel. But Vicente fails to explain where in the record we can find information that would enable us to determine why his trial counsel failed to examine him on the “primo” issue. “We have repeatedly stressed ‘that “[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” the claim on appeal must be rejected.’ (*People v. Wilson* (1992) 3 Cal.4th 926, 936 [13 Cal.Rptr.2d 259, 838 P.2d 1212] quoting *People v. Pope* (1979) 23 Cal.3d 412, 426 [152 Cal.Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1].) A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. (*People v. Wilson, supra*, at p. 936; *People v. Pope, supra*, at p. 426.)” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

The record does not disclose why Vicente's counsel did not question him concerning the “primo” issue. But there may have been a rational basis for not doing so, such as, for example, not wanting to emphasize or highlight the issue for the jury. Also, there is no indication how Vicente would have testified on this subject. Perhaps Vicente's trial counsel determined that Vicente's testimony would not be helpful to his case. Because we cannot conclude that “there simply could be no satisfactory explanation” for the failure of Vicente's trial counsel to question him about the “primo” exchange, we must reject on appeal the claim of ineffective assistance of counsel.

#### **D. Individual Examination of Jurors**

Hernandez contends<sup>7</sup> that the trial court erred when it refused defendants' joint request for an individual examination of each juror. Citing to *People v. McNeal* (1979) 90 Cal.App.3d 830 and *People v. Burgener* (1986) 41 Cal.3d 505, Hernandez argues that individual examinations were necessary because the trial court determined that the hallway exchange adversely affected Juror No. 2's ability to be fair and impartial, but nevertheless failed to inquire whether the exchange had a similar impact on the unexamined jurors. Hernandez also argues that the trial court should have examined each juror on the issue of whether it was Lopez or Vicente who used the term "primo" before the court concluded that it was Vicente who used the term.

"[W]hen there is a claim of juror misconduct, the court must conduct 'an inquiry sufficient to determine the facts . . . whenever the court is put on notice that good cause to discharge a juror may exist.' (*People v. Burgener* (1986) 41 Cal.3d 505, 519 [224 Cal.Rptr. 112, 714 P.2d 1251].) But failure to conduct a sufficient inquiry is ordinarily viewed as an abuse of discretion, rather than as constitutional error. [Citations.]" (*People v. Pinholster, supra*, 1 Cal.4th at p. 928) "The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry." (*People v. Beeler* (1995) 9 Cal.4th 953, 989.)

In response to defendants' joint request that the trial court conduct an individual examination of each juror concerning the hallway exchange, the trial court acknowledged that it had considered proceeding in that manner. But the trial court ultimately rejected that procedure based on the legitimate concern that such individual questioning could unnecessarily open the door to unrelated issues. The trial court instead chose to inquire of the jury as a group, and specifically explained that if one or more jurors responded to the group inquiry with an affirmative response, the court would then conduct an individual examination of that juror. Under the circumstances, it was reasonable for the

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<sup>7</sup> As noted, Vicente joined in Hernandez's arguments on appeal.

trial court to proceed as it did in this case. At the time defendants made their request for individual juror examinations, there was no indication that any juror, other than the four already examined, had observed or been informed about the hallway exchange between Vicente and Lopez. Presumably, if any other jurors were aware of the exchange, he or she would have responded in the affirmative to the trial court's group inquiry, at which time the juror in question would have been individually examined as requested by defendants. Thus, the trial court's chosen procedure was reasonably designed to address defendants' concerns while at the same time avoiding unnecessary and time consuming individual examinations which could have led to unrelated issues.

Each of Hernandez's arguments concerning the need for an individual examination of the jurors is based on the assumption that one or more of the unexamined jurors heard the hallway exchange. But that assumption is speculative and contradicted by the record. Specifically, when the trial court asked the jury as a group whether any member had seen or heard anything while court was not in session that might affect their deliberations, none of the jurors responded in the affirmative. It was therefore reasonable for the trial court to conclude that it had already examined each of the jurors who had been affected by the hallway exchange and that no further individual examinations were necessary.

#### **E. Failure to Excuse Juror No. 8**

Hernandez argues that the trial court erred when it refused to excuse Juror No. 8. As noted, Vicente joins in Hernandez's arguments on appeal, including presumably the contention about Juror No. 8. But it does not appear from the record that either defendant expressly moved the trial court to excuse Juror No. 8, as an alternative to granting a mistrial. Instead, both parties requested that the trial court grant their respective motions for mistrial based on the responses of Juror Nos. 8 and 12 during the sidebar discussions, without arguing, in the alternative, that the issue could be remedied by the less drastic measure of excusing Juror No. 8.

Moreover, even assuming *arguendo*, that the statement by Hernandez's trial counsel that "[t]hese two jurors [Nos. 8 and 12] now have to be excused" can be

reasonably construed as an express request to remove Juror No. 8, as an alternative to granting a mistrial, neither defendant procured a ruling on that request. (See *People v. Ramirez* (2006) 39 Cal.4th 398, 472-473 [to preserve issue for review a defendant must not only request the court to act, but must press for a ruling; failure to do so forfeits claim].) And, neither defendant made a renewed request to excuse Juror No. 8, as an alternative to granting a mistrial, when the trial court further considered the matter on the next day of trial. By failing to request as an alternative to mistrial that Juror No. 8 be excused, or otherwise obtain a ruling on that issue from the trial court, the defendants have forfeited on appeal the issue concerning the removal of Juror No. 8. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265; see also *People v. Lewis* (2009) 46 Cal.4th 1255, 1308; *People v. Stanley, supra*, 39 Cal.4th at p. 950.)

#### **DISPOSITION**

The judgments of conviction are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.