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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK XAVIER GRACIA,

Defendant and Appellant.

D057123

(Super. Ct. Nos. JCF20766,  
JCF22398)

APPEAL from a judgment of the Superior Court of Imperial County, William D. Lehman, Judge. Affirmed.

Mark Xavier Gracia appeals a judgment following his jury conviction on two counts of custodial possession of a weapon (Pen. Code, § 4502, subd. (a)).<sup>1</sup> On appeal, he contends the trial court erred by: (1) consolidating for trial the cases for the two counts and denying his subsequent severance motions; (2) denying his motion to exclude all correctional officers from the jury panel; (3) denying his challenges for cause to four

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

potential jurors; (4) ordering he be physically restrained with a leg brace during trial; (5) ordering his inmate defense witnesses be physically restrained and wear prison clothing; and (6) denying his motion for new trial on the ground of prosecutorial misconduct.

#### FACTUAL AND PROCEDURAL BACKGROUND

In 2007, a grand jury indictment was filed accusing Gracia of one count of custodial possession of a weapon (§ 4502, subd. (a)) on February 11, 2006. In 2008, an information was filed charging Gracia with one count of custodial possession of a weapon (§ 4502, subd. (a)) on June 24, 2008. The trial court consolidated the two cases for trial.

*Count 1.* At trial, the prosecution presented evidence on the first count substantially as follows. On February 11, 2006, Gracia was an inmate at the Calipatria State Prison and was housed in the ASU (Administrative Segregation Unit). From his position in the control booth, Correctional Officer Fidencio Guzman saw Gracia place a razor blade in his shower shoe (i.e., a sandal or "flip-flop" type of shoe) while in the shower area. Razor blades are generally given to inmates prior to showering and then collected on leaving the shower area. Razor blades are considered dangerous contraband in the ASU. They have been used by inmates to assault guards and other inmates. Searching Gracia, Correctional Officer David Woodward found a razor blade hidden in Gracia's left shoe. Woodward testified that he considered a razor a weapon and was aware of incidents during which razor blades were used to slash people. Correctional Officer Bradford Smith testified he was aware some inmates used razors to sharpen

pencils or cut paper. However, there are pencils in the ASU for inmates to request and use if one breaks or wears out.

Gracia testified in his defense, stating that he had no ASU cellmate in February 2006. He drew and made items out of soap and paper. He needed sharp pencils to draw. Although new pencils were issued to inmates weekly, some of his requests for additional pencils or to have his pencils sharpened were denied. As a result, he used a razor to sharpen his pencils. Gracia admitted he traded his old razor for a new razor by hiding the new one in his shower shoe. However, he did not intend to use it as a weapon, but only to sharpen pencils.

*Count 2.* The prosecution presented evidence on the second count substantially as follows. On February 21, 2008, Correctional Officer David Soto gave Gracia a book titled "Intellectual Heritage," while he (Gracia) was housed in ASU cell No. 102. On June 17, Gracia suffered a seizure and was taken from his cell to a hospital and later the prison infirmary, where he remained for several months. He never returned to cell No. 102. While Gracia was in the infirmary, the door to cell No. 102 was open during the day and closed at night. ASU inmates could not enter cells to which they were not assigned.

On June 24, non-ASU correctional officers conducted a thorough search of all ASU cells for weapons and contraband. Mattresses were removed from each cell and passed through an X-ray machine to detect contraband. Personal property found in cells was also scanned by an X-ray machine for contraband. While operating the X-ray machine, Smith found numerous razor blades hidden in mattresses and books.

Correctional Officers Jesus Partida and Jose Espinoza removed the mattress from cell No. 102 and took it to the X-ray machine. Smith ran that mattress through the machine, which showed there were objects inside it. After circling those areas, Smith then gave the mattress to Correctional Officer Lou Hernandez, who searched it and found a four-inch-long metal rod inside. The rod was sharpened at one end and wrapped in white tissue paper. He also found a broken razor with its blade missing. Hernandez did not know whether the mattress had been scanned prior to its placement in cell No. 102. Hernandez also searched a book taken from cell No. 102. Inside the book near its spine, he found a razor blade.

Gracia testified in his defense. On March 18, 2008, Gracia referred to Woodward by his first name. Woodward took him from his cell to the property room and assaulted him while he was handcuffed. Gracia filed a complaint about the incident. A prison nurse found redness, scratches, and swelling on or to Gracia's upper and middle back.

A few days later, Correctional Officer Harmon was escorting Gracia back to his cell. On entering the cell, Harmon tried to pull Gracia's handcuffs before he put down his property, but Gracia walked away. Harmon told him, "Don't walk away from me." Harmon then sprayed Gracia's back with pepper spray and continued to do so when Gracia was on the ground. When Gracia asked why he sprayed him, Harmon explained that it was because he had filed a complaint against "Woody" (i.e., Woodward). Gracia then filed a complaint against Harmon.

Gracia testified that after the pepper spray incident, Woodward gave him a different mattress, one that had previously been used. Gracia denied having a metal rod in his mattress. Gracia also denied having a razor blade in his book.

Alex Morales, an inmate housed in the ASU, testified that on or about March 18, 2008, he saw Woodward take Gracia somewhere other than the shower area. A few days later, Morales saw Harmon spraying Gracia with pepper spray while Gracia was in his cell. Harmon told Gracia, "You don't walk away from me." After Gracia was taken to the hospital on June 17, his cell door was open. Morales saw Woodward go into Gracia's cell.

Richard Garcia, an inmate housed in the ASU, testified that about one week before the June 24, 2008, search, he saw Gracia in his cell bleeding from his face. Garcia told Woodward about Gracia's need for medical assistance, but Woodward told him they already knew about Gracia. About 15 minutes later, Garcia heard inmates yelling, "Man down!" Gracia was later taken away on a gurney. Garcia told Sergeant Hughes about the incident. Within a month, Woodward was no longer working in the ASU.

Robert Scofield, an inmate housed in the ASU, testified he watched officers take several mattresses on a cart to the X-ray machine. The mattresses were not marked until they were in the hallway near the X-ray machine. The officers' process seemed haphazard and one officer asked another how they were doing it.

The jury found Gracia guilty on both counts. After denying his motion for new trial, the trial court sentenced him to a total term of five years in prison. Gracia timely filed a notice of appeal.

## DISCUSSION

### I

#### *Consolidation of Cases*

Gracia contends the trial court abused its discretion by granting the People's motion to consolidate the two section 4502, subdivision (a), cases against him and denying his subsequent motions to sever the cases.

#### A

In 2007, a grand jury indictment was filed against Gracia in case No. JCF20766, charging him with custodial possession of a weapon (§ 4502, subd. (a)) on February 11, 2006. In 2008, an information was filed against Gracia in case No. JCF22398, charging him with custodial possession of a weapon (§ 4502, subd. (a)) on June 24, 2008.

The People filed a section 954 motion to consolidate the two cases (i.e., case Nos. JCF20766 & JCF22398), arguing they were connected in their commission and involved offenses of the same class. The People argued the offenses were identical and both occurred in a prison setting. Gracia opposed the motion, arguing the charged offenses were allegedly committed on different dates and at different locations. The trial court granted the motion to consolidate case Nos. JCF20766 and JCF22398. The court subsequently denied Gracia's two separate motions to sever the cases.

## B

A trial court may order consolidation for trial of two or more accusatory pleadings that charge "two or more different offenses connected together in their commission" or "two or more different offenses of the same class of crimes or offenses." (§ 954; see also *People v. Soper* (2009) 45 Cal.4th 759, 771.) Offenses are of the same class of crimes or offenses if they have common characteristics or attributes. (*People v. Moore* (1986) 185 Cal.App.3d 1005, 1012.) Offenses are connected in their commission if there is a common element of substantial importance in their commission, including the intent or motivation with which different acts are committed. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1210, 1216-1217; *People v. Mendoza* (2000) 24 Cal.4th 130, 160.) The law prefers consolidation of charges based on important policy considerations, including conservation of judicial resources and public funds. (*People v. Manriquez* (2005) 37 Cal.4th 547, 574; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1050.)

A trial court has broad discretion in deciding whether to grant or deny a consolidation motion. (*People v. Davis* (1995) 10 Cal.4th 463, 507-508.) On appeal, when "the statutory requirements for joinder [i.e., consolidation] are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant's severance motion." (*People v. Mendoza, supra*, 24 Cal.4th at p. 160.) *Mendoza* stated:

"In determining whether there was an abuse of discretion, we examine the record before the trial court at the time of its ruling. [Citation.] The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of

the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case." (*People v. Mendoza, supra*, 24 Cal.4th at p. 161.)

It should be considered whether the joinder of a weak case with a strong case may have a "spillover" effect of the aggregate evidence in both cases that could alter the outcome of some or all of the charges. (*People v. Memro* (1995) 11 Cal.4th 786, 849-850.)

Likewise, in reviewing a trial court's order denying a severance motion, we consider whether the prejudice to the defendant of the case consolidation outweighed its benefits, including whether any "spillover" effect prejudiced the defendant. (*People v. Hill* (1995) 34 Cal.App.4th 727, 735.)

## C

Gracia asserts the trial court abused its discretion by granting the People's motion to consolidate the two cases because the two charged offenses occurred more than two years apart, did not share common actions, had different defenses, and were not connected in any substantial manner. He argues there was a prejudicial "spillover" effect of evidence from the stronger 2006 case (i.e., razor blade in shower shoe) showing he was a bad person likely to commit crimes that resulted in his conviction in the weaker 2008 case (i.e., razor blade in book and pointed rod in mattress). He argues the jury likely considered his admission he knowingly possessed the razor blade in the shoe in the 2006 case in discrediting his defense in the 2008 case that he had no knowledge of the

razor blade or pointed rod and had, instead, been "set up" by correctional officers. He also argues that, in turn, the allegations in the 2008 case were used to show he had the intent to improperly use the razor blade in the 2006 case.

We do not conclude on the record in this case that there was a prejudicial "spillover" effect from one case to the other. The class of the two charged offenses was the same (i.e., § 4502, subd. (a), custodial possession of a weapon). The two cases were connected in that Gracia was the alleged offender in both. They were further connected in that they involved the same place (i.e., the ASU housing unit at the Calipatria State Prison). Therefore, although the alleged offenses were committed at different times and involved different factual circumstances, section 954's requirements for consolidation were satisfied.

Gracia has not carried his burden to show the trial court abused its discretion by consolidating the two cases against him. As Gracia acknowledges, the People presented the testimony of its witnesses and other evidence in two phases—it first presented evidence on the 2006 incident and then it presented evidence on the 2008 incident. In so doing, it enabled the jury to consider the evidence in each case separately without any prejudicial "spillover" effect from one case to the other. (See, e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 854; *People v. Ruiz* (1988) 44 Cal.3d 589, 604-607; *People v. Breault* (1990) 223 Cal.App.3d 125, 133-134.) Although there was no cross-admissibility of evidence between the two cases, the trial court instructed the jury that

each count was separate and it must consider each count separately.<sup>2</sup> We presume the jury followed the court's instructions. (*People v. Mendoza* (2007) 42 Cal.4th 686, 699.) We conclude the jury considered the evidence presented on each count separately without any "spillover" effect from one case to the other. Furthermore, neither charged offense was unduly inflammatory to affect the jury's proper consideration of the other charged offense. Considering the law's preference for joinder of cases, the trial court properly exercised its discretion in granting the prosecution's motion to consolidate the cases. Gracia has not carried his burden to show he was prejudiced by the consolidation of the two cases. For the same reasons, we conclude the trial court properly exercised its discretion by denying Gracia's two subsequent motions to sever the cases.

## II

### *Motion to Exclude All Correctional Officers from the Jury Panel*

Gracia contends the trial court erred by denying his motion to exclude all correctional officers from the jury panel. He asserts correctional officers should be considered "peace officers" under Code of Civil Procedure section 219 (hereafter § 219) who are excluded from jury panels in criminal cases.

## A

Before trial, Gracia moved in limine to exclude all correctional officers from the jury panel, arguing they are analogous to "peace officers" excluded pursuant to section

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<sup>2</sup> The trial court instructed with CALCRIM No. 3515: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one."

219. The People opposed the motion, arguing that although certain peace officers are excluded from jury panels under section 219, correctional officers are not included in that statutorily excluded class.

The trial court denied Gracia's motion because "ordinary correctional officers, as opposed to those in the special categories as set out in [section 219] are not peace officers, [and] are not exempt from service in a criminal case." During jury selection, each party made challenges for cause and exercised peremptory challenges, and no correctional officers were on Gracia's jury.

## B

Code of Civil Procedure section 219 provides:

"(a) Except as provided in subdivision (b), the jury commissioner shall randomly select jurors for jury panels to be sent to courtrooms for voir dire.

"(b)(1) Notwithstanding subdivision (a), *no peace officer, as defined in Section 830.1, subdivision (a) of Section 830.2, and subdivision (a) of Section 830.33, of the Penal Code, shall be selected for voir dire in civil or criminal matters.*

"(2) Notwithstanding subdivision (a), *no peace officer, as defined in subdivisions (b) and (c) of Section 830.2 of the Penal Code, shall be selected for voir dire in criminal matters.*" (Italics added.)

Section 219, subdivision (b), provides that no peace officer, as defined in section 830.1, section 830.2, subdivisions (a), (b), and (c), or section 830.33, subdivision (a), may be selected for a jury panel in a criminal case. Those excluded categories of peace officers include county deputy sheriffs, city police officers, district attorney investigators, state highway patrol officers, and state university and college officers. Gracia concedes

correctional officers are *not* expressly included in any of those excluded categories. Rather, correctional officers are listed in section 830.2, subdivision (d), which is *not* one of the statutory categories expressly excluded from jury panels pursuant to section 219, subdivision (b)'s definition of "peace officers."

Section 830.2, subdivision (d), defines a peace officer as "[a]ny member of the Office of Correctional Safety of the Department of Corrections and Rehabilitation, provided that the primary duties of the peace officer shall be the investigation or apprehension of inmates, wards, parolees, parole violators, or escapees from state institutions, the transportation of those persons, the investigation of any violation of criminal law discovered while performing the usual and authorized duties of employment, and the coordination of those activities with other criminal justice agencies" or "[a]ny member of the Office of Internal Affairs of the Department of Corrections and Rehabilitation, provided that the primary duties shall be criminal investigations of Department of Corrections and Rehabilitation personnel and the coordination of those activities with other criminal justice agencies." (§ 830.2, subd. (d)(1), (2).) Although section 830.2, subdivision (d), includes certain correctional officers within section 830.2's broad definition of "peace officers," section 219, subdivision (b), does not include section 830.2, subdivision (d), within its narrower definition of those peace officers who are categorically excluded from jury panels in criminal cases.

Although, as Gracia notes, correctional officers may be deemed peace officers under section 830.2, subdivision (d), or other statutes (e.g., § 830.5), or in other contexts

(see, e.g., *California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294, 299-300, 304), we are not persuaded by his assertion that those other provisions and contexts require that correctional officers be equated with those peace officers expressly excluded from jury panels pursuant to section 219, subdivision (b), and also be excluded from jury panels. Because the trial court had no statutory authority to automatically exclude all correctional officers from the jury panel, we conclude the court did not err by denying Gracia's motion to exclude those officers from the jury panel.<sup>3</sup> Furthermore, Gracia does not persuade us he was denied due process or a trial by a fair and impartial jury by the court's denial of his motion.

### III

#### *Gracia's Challenges for Cause*

Gracia contends the trial court erred by denying his challenges for cause to four potential jurors.

#### A

During jury selection, Gracia challenged for cause four potential jurors—identified by their initials: O.R., J.Q., A.F., and D.A. O.R. was employed at the Centinela State Prison as a stationary engineer, had friends and relatives working for the Department of Corrections and Rehabilitation (DCR), including at Calipatria State Prison, and knew two of the prosecution's potential witnesses. After initially indicating he was unsure whether

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<sup>3</sup> To the extent Gracia argues correctional officers should automatically be excluded from jury panels in cases involving prison inmates or criminal cases generally, it is for the Legislature, and not the courts, to make that policy determination.

his experiences at Centinela would prevent him from giving Gracia a fair trial, O.R. stated he thought he could put aside his own experiences or biases, follow the law as instructed, and decide the case based on its unique evidence. He further stated that although he would try to do so, he could not promise anything. Gracia challenged O.R. for cause. The trial court denied his challenge, explaining: "Although [O.R.] made some comments that were inconsistent, I think what became apparent to me after talking to him during the last few minutes was that he would follow the law as the Court instructs." During the subsequent peremptory challenge phase of jury selection, O.R. confirmed that he believed he could give both the defendant and the People a fair trial.

J.Q. had a close friend who worked under Calipatria State Prison's warden and, based on his prior discussions with his friend, J.Q. initially stated he would have "some sort of bias" against Gracia. However, he later stated that if his friend were not involved in the case against Gracia, he thought he could decide the case based on the evidence presented at trial, follow the law as instructed, and be fair to both sides without any bias. The trial court denied Gracia's challenge to J.Q. for cause, explaining: "[J.Q.] said . . . he could judge this case fairly, follow the Court's instruction[s] as long as his friend wasn't involved." During the subsequent peremptory challenge phase of jury selection, J.Q. was given a list of prospective witnesses in the case and confirmed he did not know any of them. He stated that he believed he could give both the defendant and the People a fair trial.

A.F. was employed at Calipatria State Prison as a case records technician. She stated she knew Hughes and two other potential witnesses in the case. However, she stated she could decide the case as if she had never met them before. She stated she thought she could decide the case based on the evidence presented at trial, and not on any prior knowledge of the witnesses. She further confirmed that her employment at Calipatria would not be a problem for her. Gracia challenged A.F. for cause. The trial court denied the challenge, explaining that despite her admitted familiarity with witnesses, "I thought she was pretty clear she could set that aside and be objective."

D.A.'s brother was a correctional officer in Orange County who always told stories and had been injured by an inmate. However, she stated she could put all of that out of her mind and decide the case based on the unique evidence presented at trial. She stated she could give both the defendant and the People a fair trial. Gracia challenged D.A. for cause. The trial court denied the challenge, explaining in part that "I think she could be fair and impartial."

During the peremptory challenge phase of jury selection, Gracia used four of his peremptory challenges to excuse O.R., J.Q., A.F., and D.A.

## B

Code of Civil Procedure section 225 provides for challenges by a party to individual potential jurors *for cause* on certain grounds, stating:

"A challenge is an objection made to the trial jurors that may be taken by any party to the action, and is of the following classes and types: [¶] . . . [¶] (b) A challenge to a prospective juror by either: [¶] (1) A challenge for cause, for one of the following reasons:

"(A) General disqualification—that the juror is disqualified from serving in the action on trial.

"(B) Implied bias—as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror.

"(C) Actual bias—the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party."

Code of Civil Procedure section 229 sets forth the only causes for which a potential juror may be challenged for *implied bias*, including consanguinity or affinity with (i.e., being a relative of) any party, victim, or witness; having served as a trial or grand juror or been a witness in a previous or pending trial between the same parties; an interest in the action other than as a taxpayer or member of the public; having an unqualified opinion regarding the merits of the action based on knowledge of its material facts; and the existence of a state of mind evincing enmity against, or bias toward, either party. (Code Civ. Proc., § 229, subs. (a)-(f).)

"Under California law, a juror may be excused for 'implied bias' only for one of the reasons listed in Code of Civil Procedure section 229, 'and for no other.' [Citation.] If the facts do not establish one of the grounds for implied bias listed in that statute, the juror may be excused for '[a]ctual bias' if the court finds that the juror's state of mind would prevent him or her from being impartial." (*People v. Ledesma* (2006) 39 Cal.4th 641, 670.)

The California Supreme Court stated:

"Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation.] The trial court must determine whether the prospective juror will be 'unable to faithfully and impartially apply the law in the case.' [Citation.] A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause. The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. [Citation.] '[W]here equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court. [Citations.]' "*People v. Weaver* (2001) 26 Cal.4th 876, 910.)

A trial court is in the best position to determine whether a potential juror is sincerely willing and able to listen to the evidence and the instructions, and render an impartial verdict based on that evidence and those instructions. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 488-489.) "A reviewing court must allow the trial court to make this sort of determination. The trial court is present and able to observe the juror itself. It can judge the person's sincerity and actual state of mind far more reliably than an appellate court reviewing only a cold transcript." (*Ibid.*)

## C

Based on our review of the record, we conclude the trial court did not abuse its discretion by denying Gracia's challenges for cause to O.R., J.Q., A.F., and D.A. First, there is substantial evidence to support the trial court's implied finding that none of the four potential jurors had any implied bias within the meaning of Code of Civil Procedure sections 225, subdivision (b)(1)(B), and 229. There is substantial evidence to support the court's finding that none of the four potential jurors were related to a party, victim, or

witness, had an interest in the case, had an unqualified opinion on the merits of the case based on knowledge of its material facts, or had a state of mind evincing enmity against, or bias toward, either party. To the extent Gracia argues inferences contrary to those made by the trial court, he either misconstrues and/or misapplies the substantial evidence standard of review. The fact that O.R. and A.F. were employees of DCR did not necessarily show they had an "interest" in the case within the meaning of Code of Civil Procedure section 229, subdivision (d). Furthermore, based on the parties' and the court's questioning of the potential jurors, the court reasonably concluded none of them had an unqualified opinion on the merits of case (whether or not that opinion may have been based on knowledge of its material facts).

Second, although the potential jurors may initially have made equivocal statements regarding their impartiality or bias, the trial court could reasonably believe those jurors were sincere and truthful when they subsequently stated they believed they could decide the case based on the evidence and instructions presented at trial and give Gracia a fair trial without any bias toward or against either party. The trial court was in a better position than this court to determine the actual states of mind of the potential jurors because of its ability to directly view them and hear their statements on voir dire. (*People v. Hillhouse, supra*, 27 Cal.4th at pp. 488-489.) There is substantial evidence to support the court's finding none of the potential jurors had an actual bias within the meaning of Code of Civil Procedure section 225, subdivision (b)(1)(C). The trial court

did not abuse its discretion by denying Gracia's challenges to the four potential jurors for cause. (*People v. Weaver, supra*, 26 Cal.4th at p. 910.)

Assuming arguendo the trial court erred in denying any or all of Gracia's challenges for cause to the four potential jurors, we would nevertheless conclude Gracia has not carried his burden to show he was denied his right to a fair and impartial jury. (*People v. Crittenden* (1994) 9 Cal.4th 83, 121.) Although Gracia used four of his peremptory challenges to excuse those potential jurors, he does not show his use of those challenges exhausted all of his peremptory challenges and forced an incompetent juror on him. (*People v. Yeoman* (2003) 31 Cal.4th 93, 114.) Furthermore, Gracia may have waived or forfeited this claim because he does not show he requested additional peremptory challenges or objected to, or expressed dissatisfaction with, the constitution of the final jury. (Cf. *People v. Weaver, supra*, 26 Cal.4th at p. 911.) In any event, Gracia has not carried his burden on appeal to show that any of the final jurors had an implied or actual bias against him. All of the jurors stated they could be fair and impartial and make their decisions based on the evidence and instructions presented at trial. Gracia was not prejudiced by any error by the trial court in denying his challenges for cause. (*People v. Hawkins* (1995) 10 Cal.4th 920, 939, disapproved on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

## IV

### *Physical Restraints on Gracia*

Gracia contends the trial court erred by ordering him physically restrained with a leg brace during trial.

#### A

Before trial, Gracia filed a motion to allow him to appear at trial wearing civilian clothing and without physical restraints. The Imperial County Sheriff's Department opposed the motion as to physical restraints, arguing there was a manifest need for them because of his history of nonconforming behavior (e.g., manufacturing inmate weapons, assaults on DCR staff, and in-cell violence). The Sheriff's Department requested that Gracia be restrained by either a leg brace or a "Barrett bar." The trial court ordered that Gracia be allowed to wear civilian clothing, but be restrained by a Barrett bar during trial and only a leg brace when testifying.

After a mistrial was declared, Gracia renewed his motion that he be allowed to appear at trial without physical restraints. The Sheriff's Department opposed the motion, arguing that Gracia should be restrained by a Barrett bar because he had punched another inmate in the face while being transported to court. His counsel argued Gracia was a paraplegic, suffered from seizures, and a Barrett bar would cause him pain. However, after conferring with Gracia regarding a leg brace, his counsel stated: "I think he would be okay with that [i.e., a leg brace]. He told me he'd be okay—there's nothing wrong with the leg brace, he says. I just think it's a little ridiculous, because he can't run out of

the courtroom. I guess, as far as throwing punches, I'm the closest person to him, and I'll assume the risk." The trial court rejected the Sheriff's Department's request for a Barrett bar and ordered Gracia wear only a leg brace during trial, stating:

"Well, he already has limited mobility. The leg brace would limit his mobility. Further, it would eliminate the real risk, in my mind, that, number one, people could hear the chains. Number two, because [Gracia] maybe backs up or somehow inadvertently expose[s] the piece of metal in the loop. . . . It seems to me that a leg brace is what's appropriate in this case."

The court also ordered Gracia be allowed to appear at trial in a wheelchair. Gracia presumably appeared at trial wearing civilian clothing and a leg brace restraint under his pants.<sup>4</sup>

## B

Section 688 provides: "No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge." In *People v. Duran* (1976) 16 Cal.3d 282, the court stated "a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (*Id.* at pp. 290-291, fn. omitted.) The court explained: "We believe that possible prejudice in the minds of the jurors, the affront to human dignity, the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints, as well as the effect

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<sup>4</sup> Without citation to the record, Gracia asserts he "was shackled during trial, using a 'Barrett' bar." We have found no support in the record for that assertion and presume the trial court's order he be restrained by only a leg brace was carried out during trial.

such restraints have upon a defendant's decision to take the stand, all support our continued adherence to the [*People v. Harrington* (1871) 42 Cal. 165, 168] rule." (*Id.* at p. 290.) *Duran* further concluded: "[I]n any case where physical restraints are used those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances." (*Id.* at p. 291, fn. omitted.) *Duran* explained how a trial court should exercise its discretion in determining whether to order a defendant be physically restrained during trial, stating:

"In the interest of minimizing the likelihood of courtroom violence or other disruption the trial court is vested, upon a proper showing, with discretion to order the physical restraint most suitable for a particular defendant in view of the attendant circumstances. The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion. In those instances when visible restraints must be imposed the court shall instruct the jury *sua sponte* that such restraints should have no bearing on the determination of the defendant's guilt. However, when the restraints are concealed from the jury's view, this instruction should not be given unless requested by defendant since it might invite initial attention to the restraints and thus create prejudice which would otherwise be avoided." (*People v. Duran, supra*, 16 Cal.3d at pp. 291-292, fn. omitted.)

The court noted that because "shackles or manacles are not easily hidden from the jury's view" (*id.* at p. 291, fn. 9), a trial court should order "less drastic and less visible restraints" when, in its discretion, it concludes it is safe to do so. (*Ibid.*) In the circumstances in *Duran*, because there was no showing on the record of the need or

reasons for shackling the defendant, *Duran* concluded the trial court abused its discretion by ordering that the defendant be shackled during trial. (*Id.* at p. 293.)

In *People v. Cox* (1991) 53 Cal.3d 618 (disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22), the court stated that "[w]hile no formal hearing as such is necessary to fulfill the mandate of *Duran*, the court is obligated to base its determination on facts, not rumor and innuendo even if supplied by the defendant's own attorney." (*Id.* at pp. 651-652.)

In *People v. Hawkins, supra*, 10 Cal.4th 920, the court concluded that "defendant's three reported fistfights in prison, together with his extensive criminal history, are sufficient to support the trial court's order to shackle defendant, inasmuch as they demonstrate instances of 'violence or nonconforming conduct' while in custody." (*Id.* at p. 944.) *Hawkins* concluded the trial court did not abuse its discretion by ordering the shackling of the defendant. (*Ibid.*) The California Supreme Court subsequently stated that *Duran's* requirement of a showing of a manifest need for physical restraints "is satisfied by evidence that the defendant has threatened jail deputies, possessed weapons in custody, threatened or assaulted other inmates, and/or engaged in violent outbursts in court." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1031.)

In *People v. Hill* (1998) 17 Cal.4th 800, the court stated: "[*Duran's*] emphasis that a showing exist on the record of 'manifest need' for shackles presupposes that it is the trial court, not law enforcement personnel, that must make the decision an accused be physically restrained in the courtroom. A trial court abuses its discretion if it abdicates

this decision-making authority to security personnel or law enforcement." (*Id.* at p. 841, fn. omitted.) Furthermore, *Hill* stated the record must show the trial court independently determined, based on an on-the-record showing of a defendant's nonconforming conduct, that "there existed a manifest need to place defendant in restraints." (*Id.* at p. 842.)

In *People v. Mar* (2002) 28 Cal.4th 1201, the court confirmed its rule that a trial court "should impose the least restrictive [physical restraint] measure that will satisfy the court's legitimate security concerns." (*Id.* at p. 1206.) Furthermore, the court stated its holding in *Duran* was not limited to visible physical restraints. (*Mar*, at p. 1219.) *Mar* explained that although *Duran* "emphasized the adverse effect that visible restraints might have upon a jury, it also relied upon the circumstance—highlighted by this court's early decision in *Harrington*, *supra*, 42 Cal. 165—that the imposition of such a restraint upon a defendant during a criminal trial 'inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense . . . .' [Citations.] Even when the jury is not aware that the defendant has been compelled to wear a stun belt, the presence of the stun belt may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury—especially while on the witness stand." (*Mar*, at p. 1219.) In the circumstances of *Mar*, the court concluded that because the security officers did not present an on-the-record showing of the defendant's purported nonconforming conduct and the trial court did not make a finding of manifest need to impose a stun belt restraint,

the trial court abused its discretion by denying the defendant's objection to restraint by a stun belt. (*Id.* at pp. 1222-1223.) Noting Court of Appeal decisions have suggested that erroneous orders for physical restraints on defendants not visible to a jury are subject to the standard of prejudicial error of *People v. Watson* (1956) 46 Cal.2d 818, 836, *Mar* applied that standard of prejudice and concluded the trial court's abuse of discretion was prejudicial error under the *Watson* standard. (*Mar*, at p. 1225 & fn. 7.)

In contrast, when a trial court erroneously orders that a defendant be *visibly* restrained (e.g., by visible shackles) during trial, the defendant's federal constitutional right to due process is violated unless the People prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Deck v. Missouri* (2005) 544 U.S. 622, 635; *People v. McDaniel* (2008) 159 Cal.App.4th 736, 742.) The *Chapman* standard of prejudice applies to any error in requiring a defendant to appear at trial in visible physical restraints. (*Deck*, at p. 635; *Chapman v. California* (1967) 386 U.S. 18, 24.)

## C

The People assert Gracia forfeited any claim on appeal that the trial court erred by ordering he be restrained by a leg brace during trial because he agreed to the use of a leg brace. In opposing the People's argument that Gracia should be restrained by a Barrett bar rather than a leg brace, Gracia expressly agreed to the use of a leg brace. As noted above, after conferring with Gracia regarding a leg brace, his counsel stated: "I think he would be okay with that [i.e., a leg brace]. He told me he'd be okay—there's nothing wrong with the leg brace, he says." Based on that statement, we conclude Gracia

forfeited or waived any claim on appeal by not objecting below, and instead agreeing, to the use of a leg brace restraint. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583.) Contrary to Gracia's assertion, we do not believe an objection to a leg brace restraint would have been futile. Therefore, Gracia cannot raise this contention on appeal. (*Ibid.*)

In any event, assuming *arguendo* Gracia did not forfeit or waive that contention, we nevertheless conclude the trial court did not abuse its discretion by finding a manifest need for restraining Gracia with a leg brace during trial. In opposing Gracia's motion to appear unrestrained at trial and requesting use of a Barrett bar, counsel for the Sheriff's Department made an offer of proof to the trial court regarding a May 27, 2009, incident that showed a manifest need for greater restraint of Gracia than a leg brace. Sheriff's Department counsel stated:

"The offer of proof is that while [Gracia] was being transported to [court on May 27, 2009, he] had two legs and one wrist restrained, but had another wrist free so that he would be . . . better able to walk with his walker. As he was walking through the jail, he was walking past five or six inmates that were in administrative segregation that were also being transported to the jail at the same time. And as he walked past one, an inmate named Benjamin Oliveria . . . , [Gracia] took his hands off of his walker, took a step towards Mr. Oliveria, the inmate, and punched him in the face with a closed fist."

She further stated: "I believe from the report that [Gracia] actually took one hand off the walker, took a step. He may have had that second hand still on the walker before he approached the other inmate." She also made an offer of proof as to why Gracia appears in court in a wheelchair rather than using a walker, stating: "[T]he offer of proof is that the only reason [Gracia] is in the wheelchair in court is to facilitate his movements.

When he is in the Imperial County Jail, he does not have access to a wheelchair. He uses only a walker when he's in our custody. And, further, he walks with the walker at least 300 yards every time he's transported to the court." The trial court rejected the Sheriff's Department's request that Gracia be restrained with a Barrett bar, explaining: "[Gracia] already has limited mobility. The leg brace would limit his mobility. Further, it would eliminate the real risk, in my mind, that, number one, people could hear the chains [of the Barrett bar]. Number two, because [Gracia] maybe backs up or somehow inadvertently expose[s] the piece of metal in the loop [of the Barrett bar]. And the fact that he's chained to the floor [with the Barrett bar] that would eliminate that possibility as well. It seems to me that a leg brace is what's appropriate in this case."

Given the showing on the record of Gracia's history of manufacturing inmate weapons, assaulting DCR staff, in-cell violence, and recent assault on another inmate during transportation to court, we conclude the trial court did not abuse its discretion by implicitly finding there was a manifest need to restrict Gracia with a leg brace during trial. (Cf. *People v. Hawkins, supra*, 10 Cal.4th at p. 944 [three prison fistfights and extensive criminal history justified shackling of defendant]; *People v. Lomax* (2010) 49 Cal.4th 530, 562 [defendant's assault of deputy sheriff in holding cell justified use of stun belt]; *People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1031.) In this case, there was evidence in the record showing Gracia had manufactured prison weapons and assaulted other inmates and DCR staff in prison. Furthermore, there was evidence he assaulted another inmate while being transported to court. The California Supreme Court has

stated that evidence a defendant has possessed weapons in custody or assaulted other inmates may satisfy *Duran's* requirement of a showing of a manifest need for physical restraints of a defendant. (*People v. Lewis and Oliver*, at p. 1031.) Given evidence that Gracia had done both, as well as assaulted DCR staff in prison and another inmate while being transported to court, the trial court acted within its discretion by ordering that Gracia be restrained with a leg brace during trial. Contrary to Gracia's apparent assertion, the fact that he had not tried to escape or acted violently while in the courtroom did not preclude the trial court from properly finding there was a manifest need for a restraint.

#### D

Assuming arguendo the trial court erred by ordering Gracia to be restrained by a leg brace during trial, we nevertheless would conclude he has not carried his burden on appeal to show it is reasonably probable he would have obtained a more favorable verdict absent that error. Because the leg brace presumably was not visible to the jury, the *Watson* standard of prejudice applies to the error.<sup>5</sup> (*People v. Mar*, *supra*, 28 Cal.4th at

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<sup>5</sup> Contrary to Gracia's assertion, there is no evidence in the record showing any of the jurors saw Gracia's leg brace during trial. Gracia first cites to his counsel's statement that after the first mistrial a potential juror indicated that she had been able to see and hear Gracia's shackles underneath the desk. However, that incident did not involve either a juror at Gracia's trial or the leg brace used to restraint him during trial. Rather, it occurred during jury selection before the mistrial when Gracia presumably was restrained with a Barrett bar with chains that created the noise heard by the potential juror. Second, Gracia argues his jurors must have inferred he was restrained because they were not present when he moved from his counsel's table to the witness stand and back and/or because he was not required to stand when taking his oath. However, absent any evidence on the record indicating otherwise, we cannot conclude the jurors were aware of Gracia's leg brace simply because they were not present during those events or transition movements. Finally, Gracia asserts one juror must have seen Gracia removed from the

p. 1225 & fn. 7; *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1830; *People v. Watson*, *supra*, 46 Cal.2d at p. 836; cf. *Deck v. Missouri*, *supra*, 544 U.S. at p. 635; *People v. McDaniel*, *supra*, 159 Cal.App.4th 736 at p. 742.) The fact there was conflicting evidence and/or conflicting inferences from the evidence on counts 1 and 2 does not show this was such a "close" case that the court's requirement that Gracia be restrained by a hidden leg brace probably affected the jury's verdict. Gracia does not persuade us his testimony and/or trial demeanor was so affected by the leg brace that it is reasonably probable he would have obtained a more favorable verdict absent the leg brace restraint. The trial court did not prejudicially err by ordering that Gracia be restrained with a leg brace during trial.

## V

### *Inmate Defense Witnesses*

Gracia contends the trial court erred by ordering that his inmate defense witnesses be physically restrained and wear prison clothing while in the courtroom.

## A

Before trial, Gracia filed a motion to allow his inmate witnesses, Alex Morales and Richard Garcia, to testify at trial without physical restraints and wearing civilian

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witness stand and therefore seen his leg brace. The record shows that during a break in Gracia's testimony the trial court kept one juror in the courtroom to discuss her request to be excused for a personal reason. The reporter's transcript does not show whether Gracia left the witness stand during the court's short inquiry of the juror regarding her request. Absent any evidence in the record showing the juror saw Gracia leave the witness stand or, more importantly, saw his leg brace under his pant leg, we conclude it cannot be reasonably inferred that juror saw his leg brace. Therefore, we presume the leg brace was not visible to, and was not seen by, any of the jurors.

clothing. During trial, Gracia refiled that motion. The People opposed Gracia's motion, arguing there was a manifest need to shackle Morales and Garcia during trial. In particular, the People noted Morales was serving a prison term of 26 years to life for the first degree murder of a rival gang member and had nonconforming conduct while in prison (i.e., stabbed a correctional officer in the neck with a razor, attempted to send other inmates an inmate-manufactured weapon, resisted being handcuffed, and attempted to force his way out of his cell). The People noted that Garcia was serving a prison term of life without the possibility of parole for first degree murder and had convictions for assaults and batteries and had nonconforming conduct while in prison (i.e., assaulted other inmates, possessed an inmate-manufactured weapon, and escaped while being transported for a court appearance). The People also opposed Gracia's request that Morales and Garcia be allowed to wear civilian clothing during their testimony because Gracia would suffer no prejudice if they wore prison clothing.

The trial court denied Gracia's motion and instead ordered that Morales and Garcia be shackled during their trial appearances, noting their nonconforming conduct showed there would be a danger were they to appear unshackled. The court also denied Gracia's motion that Morales and Garcia be allowed to wear civilian clothing during their trial appearances, stating there was "no hiding the fact" that they were prison inmates and there could be no prejudice to Gracia were they to wear prison clothing. At trial, Morales and Garcia were seated at the witness stand and sworn outside the jury's presence.

During trial, pursuant to a joint stipulation, a third inmate witness, Robert Scofield, was allowed to testify for the defense wearing civilian clothing while being restrained by a Barrett bar attached to his leg but hidden from jury view behind the witness box. Scofield was seated and sworn outside the jury's presence.

The trial court instructed the jury with a modified version of CALCRIM No. 204, stating:

"The fact that physical restraints have been placed on witnesses is not evidence. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations."

## B

The *Duran* rules for physical restraints, as discussed above, apply to defense witnesses as well as to defendants. (*People v. Cenicerros* (1994) 26 Cal.App.4th 266, 277.) *Duran* stated: "The rules articulated hereinafter are applicable to the shackling of defendants and defense witnesses, since the considerations supporting use of physical restraints are similar in each instance. [Citation.] . . . [H]owever, the prejudicial effect of shackling defense witnesses is less consequential since 'the shackled witness . . . [does] not directly affect the presumption of innocence.' " (*People v. Duran, supra*, 16 Cal.3d at p. 288, fn. 4.) Accordingly, inmate defense witnesses "cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (*Id.* at pp. 290-291, fn. omitted.)

The prejudice of any error by a trial court in ordering physical restraint of a defense witness, whether visible or not, is determined by applying the *Watson* standard of prejudicial error (i.e., whether it is reasonably probable the defendant would have obtained a more favorable result absent the error). (*People v. Cenicerros, supra*, 26 Cal.App.4th at pp. 278-280.) "[S]hackling a witness does not directly affect the presumption of a defendant's innocence and weighs little in the assessment of his or her credibility." (*Id.* at p. 279.)

Based on our review of the record in this case, we conclude the trial court did not abuse its discretion by finding there was a manifest need to physically restrain Morales and Garcia with shackles during their trial appearances. Both Morales and Garcia had extensive criminal histories and were serving life terms for first degree murder. Furthermore, their nonconforming conduct while in prison supported the trial court's determination that shackling was necessary because of the danger they posed. Morales stabbed a correctional officer in the neck with a razor, attempted to send inmate-manufactured weapons to other inmates, resisted being handcuffed, and attempted to force his way out of his cell. Garcia slashed and punched other inmates, possessed an inmate-manufactured weapon, and had previously escaped while being transported to court. *Duran's* requirement of a showing of a manifest need for physical restraints "is satisfied by evidence that the [defense witness] has threatened jail deputies, possessed weapons in custody, threatened or assaulted other inmates, and/or engaged in violent outbursts in court." (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1031.) Based on

the criminal histories and violent and other nonconforming conduct of Morales and Garcia while in custody, we conclude the trial court did not abuse its discretion by concluding there was a manifest need to restrain them with shackles during their appearances at Gracia's trial. Furthermore, Gracia does not persuade us the trial court abused its discretion by not ordering a lesser form of restraint (e.g., Barrett bar or leg brace) for them. Although "shackles or manacles are not easily hidden from the jury's view," the trial court could reasonably conclude that shackling was the "[least] drastic and [least] visible restraints" necessary to protect others from the dangers Morales and Garcia posed. (*People v. Duran, supra*, 16 Cal.3d at p. 291, fn. 9.)

Assuming arguendo the trial court abused its discretion by ordering Morales and Garcia to be restrained by shackles during their trial appearances, we nevertheless would conclude it is not reasonably probable Gracia would have obtained a more favorable result at trial absent those errors. (*People v. Cenicerros, supra*, 26 Cal.App.4th at pp. 278-280.) The shackling of Morales and Garcia, even if visible to the jury, did not directly affect the presumption of Gracia's innocence and weighed little in the assessment of their credibility or Gracia's. (*Id.* at p. 279.) The jury knew Morales and Garcia, along with Gracia, were currently inmates in prison. Therefore, their credibility was already subject to doubt because of their inmate status, regardless of their shackling in court. Also, there could have been little, if any, prejudice to Gracia because although Morales and Garcia were restrained at trial in shackles, they were seated at the witness stand and sworn outside the jury's presence. Accordingly, any display of or noise from the shackling was

minimized, if not eliminated. Finally, the trial court admonished the jury to disregard the physical restraints placed on Morales and Garcia. The court instructed the jury with a modified version of CALCRIM No. 204, stating:

"The fact that physical restraints have been placed on witnesses is not evidence. Do not speculate about the reason. *You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations.*" (Italics added.)

We presume the jurors followed that instruction in the absence of any evidence to the contrary. (*People v. Mendoza, supra*, 42 Cal.4th at p. 699.) We conclude any error by the trial court in ordering that Morales and Garcia be restrained by shackles during their trial appearances was harmless error because it is not reasonably probable Gracia would have obtained a more favorable result absent that error. (*People v. Cenicerros, supra*, 26 Cal.App.4th at pp. 278-280; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

## C

Gracia also asserts the trial court abused its discretion by denying his request that Morales and Garcia be allowed to appear at trial in civilian clothing. Although neither party has cited, and we are unaware of, any published opinion deciding the merits of this issue, *People v. Froehlig* (1991) 1 Cal.App.4th 260 set forth persuasive dicta suggesting that inmate defense witnesses generally should be allowed to appear in civilian clothing.

*Froehlig* noted that a *defendant* has the federal constitutional right to appear in civilian clothing, explaining: "The appearance of the defendant in prison clothes impairs the fundamental presumption of innocence, impinges upon the tenets of equal protection

by operating against those who cannot secure release by posting bail before trial, and compromises the credibility of a defendant who also takes the stand as a witness."

(*People v. Froehlig, supra*, 1 Cal.App.4th at pp. 263-264.)

In comparison, "[t]he appearance of a defense *witness* attired in prison clothes does not, of course, adversely affect the presumption of innocence or carry with it the inference that the defendant is a person disposed to commit crimes. [Citations.] . . . The credibility of a defense witness observed by the jury in prison attire may be suspect, but the prejudicial impact upon the defense is considered 'less consequential.' " (*People v. Froehlig, supra*, 1 Cal.App.4th at p. 264.)

In the circumstances of *Froehlig*, the court stated: "Had a timely request been made by appellant, we might be compelled to find error in the trial court's refusal to permit the witness to appear in civilian clothes. [Citations.] Appellant's tardiness in seeking to change the attire of his witness is a countervailing consideration which, we conclude, must be balanced against his right upon timely request to presentation of a defense witness free from the stigma of prison clothes." (*People v. Froehlig, supra*, 1 Cal.App.4th at p. 264, fn. omitted.) Because the defendant in that case had not made a timely request and a change of the witness's clothing would have required a continuance of the trial, *Froehlig* concluded the trial court did not err by denying the defendant's request that the witness appear in civilian clothing. (*Id.* at pp. 264-265.)

In this case, Gracia made a timely request that Morales and Garcia appear at trial in civilian clothing. On July 17, 2009, Gracia filed a pretrial motion to allow Morales

and Garcia to testify at trial wearing civilian clothing. On July 31, after the jury was selected, the evidentiary portion of the trial began. On August 5, after the prosecution rested its case, Gracia refiled his motion to allow Morales and Garcia to appear in civilian clothing. The trial court denied Gracia's motion, stating:

"I think this case is distinguishable from [*Froehlig*]. The witness in [*Froehlig*] was a witness because of his conduct outside the walls of the jail. [*Froehlig*] was a case where the witness, I think, was being called to testify about how the defendant received this vehicle under circumstances that would indicate that the defendant didn't know that the vehicle was stolen. And it turned out the witness ended up, I think, in CRC. So he was in CRC at the time of trial.

"The Court said had there been a timely request [that the witness be] allowed to dress out, the Court may have been required to honor that request. But in this case, the context of the case, *these witnesses have relevant testimony because they are locked up. There's no hiding that fact.*

*"I don't know how it would prejudice the defendant by not allowing them to wear civilian clothes. It will be pretty clear from the context of their testimony they were inmates then and they are inmates now. So that request is denied . . ."* (Italics added.)

Morales and Garcia presumably appeared at trial wearing prison attire.

In general, we cannot comprehend any legitimate reason to require inmate defense witnesses to appear at trial in prison attire other than the convenience of prison or jail staff. In contrast, the wearing of prison attire, considered alone, can have an adverse effect on the jury's weighing of a witness's credibility. Balancing the potential adverse effect on a witness's credibility against the convenience of prison or jail staff, we conclude a trial court, absent extenuating circumstances, generally should grant a defendant's timely motion for inmate defense witnesses to appear at trial in civilian

clothing. The trial court in this case cited no possible extenuating circumstances for requiring Morales and Garcia to appear in prison attire. Rather, the court denied Gracia's motion based on the reasons that Morales and Garcia had relevant testimony because they were inmates and there could be no prejudice because, in any event, the jury would learn they were inmates. The court's cited reasons do not provide legitimate, much less compelling, reasons to deny Gracia's motion. The trial court erred by denying Gracia's motion to allow Morales and Garcia to appear at trial in civilian clothing.

Nevertheless, we conclude the trial court's error was not prejudicial. Unlike *Froehlig*, which apparently applied the *Chapman* standard of prejudice (*People v. Froehlig, supra*, 1 Cal.App.4th at p. 266), we believe the appropriate standard is the *Watson* standard of prejudice. Comparatively, the wearing of prison attire by inmate defense witnesses generally does not directly affect a defendant any more than the placement of visible physical restraints (e.g., shackling) on those witnesses at trial. As discussed above, in cases of erroneous physical restraint of defense witnesses, we apply the *Watson* standard of prejudicial error (i.e., whether it is reasonably probable the defendant would have obtained a more favorable result absent the error). (*People v. Ceniceros, supra*, 26 Cal.App.4th at pp. 278-280.) "[S]hackling a witness does not directly affect the presumption of a defendant's innocence and weighs little in the assessment of his or her credibility." (*Id.* at p. 279.) We apply similar reasoning to conclude the *Watson* standard of prejudice applies to the erroneous requirement that inmate defense witnesses wear prison attire. Inmate clothing of defense witnesses does

not directly affect the presumption of the defendant's innocence and weighs little in the jury's assessment of their credibility or the defendant's. (*Ibid.*)

The jury knew Morales and Garcia (along with Gracia) were currently inmates in prison. Therefore, their credibility was already subject to doubt because of their inmate status, regardless of their wearing prison attire in court. This was not such a "close" case that any slight incremental adverse effect of prison attire on the jury's weighing of the credibility of Morales and Garcia would have had any actual effect on the jury's determination of the merits of the charges against Gracia. Because it is not reasonably probable Gracia would have obtained a more favorable result had the trial court not erred by denying his motion to allow Morales and Garcia to appear in civilian clothing, we conclude the court's error was harmless. (*People v. Cenicerros, supra*, 26 Cal.App.4th at pp. 278-280; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

#### D

Gracia also asserts the trial court erred by denying his motion to allow Scofield, an inmate defense witness, to appear at trial without physical restraints. During trial, Gracia filed a motion to allow Scofield to appear at trial without physical restraints and wearing civilian clothing. That motion became moot when Gracia and the prosecutor entered into a stipulation agreeing that Scofield could appear in civilian clothing. They further stipulated that Scofield would "not be restrained by chains, but will instead wear a 'Barrett bar,' a 30-40 pound metal plate that will be attached to Scofield's leg and hidden behind the witnesses' podium. The Barrett bar will remain out of sight of the jury and

Scofield will be able to move about at the podium, and will have his hands free." During trial, Scofield was seated in the jury box and sworn outside the jury's presence. He then testified as summarized above.

The People correctly assert that Gracia forfeited or waived any error by the trial court by requiring (or allowing) Scofield to appear at trial while being restrained by a Barrett bar. Gracia expressly stipulated to that restraint of Scofield and therefore cannot raise this contention on appeal.

In any event, any error by the trial court was clearly harmless under the *Watson* standard of prejudice. (*People v. Cenicerros, supra*, 26 Cal.App.4th at pp. 278-280.) The restraint of Scofield with a Barrett bar, even if visible to the jury, did not directly affect the presumption of Gracia's innocence and weighed little in the assessment of Scofield's or Gracia's credibility. (*Id.* at p. 279.) The jury knew Scofield (and Gracia) were currently inmates in prison. Therefore, Scofield's credibility was already subject to doubt because of his inmate status, regardless of his restraint with a Barrett bar. Also, there could have been little, if any, prejudice to Gracia because although Scofield was restrained at trial with a Barrett bar, he was seated at the witness stand and sworn outside the jury's presence. Any display of or noise from the restraint was minimized, if not eliminated. Finally, the trial court admonished the jury to disregard the physical restraints placed on defense witnesses, such as Scofield. The court instructed the jury with a modified version of CALCRIM No. 204, as quoted above. We presume the jurors followed that instruction in the absence of any evidence to the contrary. (*People v.*

*Mendoza, supra*, 42 Cal.4th at p. 699.) We conclude any error by the trial court by ordering or allowing Scofield to be restrained by a Barrett bar during his trial appearance was harmless error because it is not reasonably probable Gracia would have obtained a more favorable result absent that error.<sup>6</sup> (*People v. Cenicerros, supra*, 26 Cal.App.4th at pp. 278-280; *People v. Watson, supra*, 46 Cal.2d at p. 836.)<sup>7</sup>

## VI

### *Motion for New Trial Based on Prosecutorial Misconduct*

Gracia contends the trial court erred by denying his motion for new trial based on prosecutorial misconduct.

#### A

After trial, Gracia filed a motion for new trial based on two alleged instances of prosecutorial misconduct. The People opposed the motion for new trial, arguing that Gracia had not preserved his claims of prosecutorial misconduct because he did not

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<sup>6</sup> Although Gracia alternatively argues he was denied effective assistance of counsel when his counsel stipulated to Scofield's restraint with a Barrett bar and/or failed to object to such restraint, we conclude Gracia has not satisfied his burden to show prejudice (i.e., that it is reasonably probable he would have obtained a more favorable result had his counsel refused to so stipulate and instead objected to such restraint). (*Strickland v. Washington* (1984) 466 U.S. 668, 692-693.) We are not persuaded by his claim of ineffective assistance of counsel.

<sup>7</sup> We further reject Gracia's assertion that the cumulative effect of the trial court's purported errors regarding his and his defense witnesses' physical restraints and Morales and Garcia's prison attire requires reversal of his convictions. Based on our review of the entire record, we conclude it is not reasonably probable Gracia would have obtained a more favorable result absent those purported errors. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

timely object *and* request a curative admonition. Gracia responded by arguing that an admonition would not have cured the harm caused by the prosecutor's misconduct. After hearing arguments of counsel, the trial court denied Gracia's motion for new trial.

## B

"A criminal defendant may move for a new trial on specified grounds. (§ 1181.)" (*People v. Ault* (2004) 33 Cal.4th 1250, 1260.) Section 1181 provides that a trial court may grant a new trial only on certain specified grounds, including "when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury." (§ 1181(5).) "A motion for new trial may be granted only upon a ground raised in the motion." (*People v. Masotti* (2008) 163 Cal.App.4th 504, 508.) A trial court has broad discretion in ruling on a motion for new trial and its ruling will be disturbed only for clear abuse of that discretion. (*Ault*, at p. 1260.) On appeal from an order denying a motion for new trial, a defendant forfeits any appellate contention of error based on a specific claim the defendant did not raise below in his or her motion for new trial. (*People v. Verdugo* (2010) 50 Cal.4th 263, 309; *Masotti*, at p. 508; *People v. Pratt* (1947) 77 Cal.App.2d 571, 578.)

"The standards under which we evaluate prosecutorial misconduct may be summarized as follows. A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it

involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, . . . when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

"To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*People v. Price* (1991) 1 Cal.4th 324, 447.) Therefore, to avoid forfeiture or waiver of prosecutorial misconduct, a defendant generally "must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury." (*People v. Brown* (2003) 31 Cal.4th 518, 553.) However, "[a] defendant will be excused from the requirement of making a timely objection and/or a request for admonition if either would have been futile. [Citation.] In addition, the failure to request that the jury be admonished does not forfeit the issue for appeal if an admonition would not have cured the harm caused by the misconduct or the trial court immediately overrules an objection to alleged misconduct such that the defendant has no opportunity to make such a request." (*People v. Cole* (2004) 33 Cal.4th 1158, 1201.)

" [A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] . . . ' [Citation.]

'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets warranted by the evidence." ' " (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) Furthermore, "[t]he prosecutor is permitted to urge, in colorful terms, that defense witnesses are not entitled to credence . . . [and] to argue on the basis of inference from the evidence that a defense is fabricated . . . ." (*People v. Pinholster* (1991) 1 Cal.4th 865, 948, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

## C

Gracia first complains the prosecutor prompted, or "coached," a witness, Sergeant Bradford Smith, to change his testimony during the grand jury proceeding that resulted in his (Gracia's) indictment apparently by, in effect, suggesting to Smith that his initial grand jury testimony regarding the original report of his investigation of the 2008 incident was inconsistent with his supplemental report, but the prosecutor did so without showing that supplemental report to Smith to refresh his memory.<sup>8</sup> Smith then apparently corrected his grand jury testimony accordingly. At trial, Gracia's counsel questioned Smith regarding that change in his grand jury testimony.

To the extent Gracia contends the trial court erred by denying his motion for new trial based on that purported prosecutorial misconduct, he forfeited or waived that contention by not specifically raising it below in his motion for new trial. (*People v.*

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<sup>8</sup> Smith apparently changed his grand jury testimony regarding whether in 2008 a razor was found in a mattress or a book.

*Verdugo, supra*, 50 Cal.4th at p. 309; *People v. Masotti, supra*, 163 Cal.App.4th at p. 508; *People v. Pratt, supra*, 77 Cal.App.2d at p. 578.) We do not address the merits of that contention.

## D

Gracia next complains the prosecutor violated a court order that he advise all prosecution witnesses to refer to the Administrative Segregation Unit at the Calipatria State Prison only as either "ASU" or "AdSeg." At trial, Gracia objected when in response to the prosecutor's question asking Woodward (the prosecution's first witness) where he worked, Woodward answered that he worked in the "Administrative Segregation Unit."

Assuming *arguendo* the trial court had previously ordered the prosecutor to instruct all prosecution witnesses to refer to the Administrative Segregation Unit as only "ASU" or "AdSeg," we conclude Gracia "doubly" forfeited or waived this contention by: (1) not requesting a curative admonition after objecting to Woodward's answer; *and* (2) not raising that specific claim of prosecutorial misconduct in his motion for new trial.<sup>9</sup> (*People v. Price, supra*, 1 Cal.4th at p. 447; *People v. Brown, supra*, 31 Cal.4th at p. 553; *People v. Verdugo, supra*, 50 Cal.4th at p. 309; *People v. Masotti, supra*, 163 Cal.App.4th at p. 508; *People v. Pratt, supra*, 77 Cal.App.2d at p. 578.) We do not address the merits of that contention.

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<sup>9</sup> Gracia does not persuade us a request for an admonition would have been futile or ineffective in curing any prejudice caused by Woodward's answer. (*People v. Cole, supra*, 33 Cal.4th at p. 1201.)

## E

Gracia next complains the prosecutor engaged in juvenile theatrics during his cross-examination of Gracia by asking the trial court whether it objected to his handing the sharpened rod found in the mattress (i.e., Exhibit 8) to Gracia. The prosecutor stated: "I'm showing the witness [Gracia] what has been marked as People's Exhibit 8. [¶] Your Honor, does the Court have any objection to me handing this object to the witness?" The court replied, "Well—." The prosecutor then interjected: "Maybe I could just show it to him." Gracia's counsel did not immediately object to the prosecutor's question. Rather, during a subsequent chambers conference outside the jury's presence, Gracia's counsel stated: "I just wanted to object and bring it to your attention that it was misconduct when [the prosecutor] asked the Court if he could hand the sharp instrument to Mr. Gracia." The trial court responded:

"I was troubled by that, I got to tell you. I didn't answer the question. He says is it all right if I just show it to him. So I don't think there was any prejudice that would justify an admonition, certainly not a mistrial. . . . I'm assuming it was inadvertent. I really don't think—I was troubled by it, but I'm not going to assign misconduct to that. In fact, I'll say that you got right up to his face with it, the same object. So I'm not going to assign misconduct."

In denying Gracia's motion for new trial based, in part, on that purported prosecutorial misconduct, the trial court stated:

"[W]ith respect to asking [Gracia] to handle the exhibit, I recall that. And what I recall is [the prosecutor] asked the court's permission to hand [Gracia] the exhibit, which was the alleged weapon. And the court didn't say anything except 'Well,' and there was a pause. And then [the prosecutor] said, 'I'll just show it to [him] and went on. And the court has no recollection of warning [the prosecutor] not to

do that. And I haven't received any reference to the record which would support that warning being given. I haven't reviewed any reporter's transcript which indicates that the court gave that warning, and I don't recall giving that warning.

"In any event, [the] court does not believe that the jury would have interpreted this brief exchange as indicating that the court believed that [Gracia] was too dangerous to handle the alleged weapon. It was a brief exchange. The court simply said, 'Well,' and then [the prosecutor] moved on. And[,] again, I don't believe that the jury would have interpreted that to mean that [Gracia] was a dangerous character who wouldn't be allowed to handle such a thing. And it was a fairly brief exchange. . . ."

Gracia asserts the prosecutor's question placed the trial court in the position of having to object to his handing the sharpened rod to Gracia, thereby indicating to the jurors that the court believed Gracia was too dangerous to hold it.<sup>10</sup> Gracia asserts the prosecutor's "antics" displayed the trial court's discomfort with Gracia being handed the sharpened rod, thereby giving the jury the impression he (Gracia) was "a dangerous inmate who would use weapons in the prison." In so doing, he argues the prosecutor committed prejudicial misconduct.

We conclude the trial court did not abuse its discretion by concluding the prosecutor's conduct, although "troubling," was not prosecutorial misconduct and

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<sup>10</sup> As Gracia notes, the prosecutor filed a pretrial motion for an order that "*defense counsel* not provide to defendant any objects which could be used for stabbing, slashing, or otherwise causing bodily injury during the course of the trial." Without citation to the record, Gracia represents the trial court granted that motion "for the most part." Assuming *arguendo* the court ordered defense counsel not to provide Gracia with any such dangerous objects, that order did not apply to the prosecutor. Therefore, the prosecutor did not violate any existing court order when he asked the court whether it objected to his handing the sharpened rod to Gracia.

denying Gracia's motion for new trial based thereon. As the trial court noted, the question the prosecutor asked the court did not violate any existing court order that would have prohibited the prosecutor from handing a dangerous object (e.g., a sharpened rod) to Gracia. Furthermore, after the court briefly hesitated without answering the question, the prosecutor abandoned his question and moved on, stating he would just show Gracia the object. We conclude that one fleeting instance of purported improper conduct by the prosecutor during Gracia's lengthy trial did *not* "involve[] the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales, supra*, 25 Cal.4th at p. 44.) Furthermore, that purported improper conduct did not infect Gracia's trial with such unfairness as to make his conviction a denial of due process. (*Ibid.*) Accordingly, the prosecutor's conduct in asking the trial court whether he could hand the sharpened object to Gracia did not constitute prosecutorial misconduct under either the federal or state constitutional standards. (*Ibid.*) Therefore, the trial court did not abuse its discretion by denying Gracia's new trial motion to the extent it was based on that conduct. (§ 1181(5); *People v. Ault, supra*, 33 Cal.4th at p. 1260.)

## F

Gracia finally complains the prosecutor committed prejudicial misconduct when, during his rebuttal closing argument, he played a portion of the song, "Bad, Bad Leroy Brown," and erroneously sang some of its lyrics (i.e., "He's got a razor blade in his shoe"). Gracia's counsel objected to the prosecutor's playing of the song. When the trial court asked the prosecutor to explain it, the prosecutor replied: " 'He's got a razor blade in

his shoe.' [¶] Demonstrative evidence, Your Honor. [¶] The defense has articulated and offered a theory that a razor blade in your shoe isn't a weapon. But ever since the sixties [sic] we've been singing about it. Clearly it is."

After completion of closing arguments and outside the jury's presence, the trial court discussed the prosecutor's conduct for the record, stating:

"Just so the record is clear, let me describe what happened at the beginning of [the prosecutor's] rebuttal argument, because I think I said something like 'What are you doing?' And what he was doing, for the record, he was playing Jim Croce's Bad Leroy Brown very loud through his laptop computer. And I certainly didn't have any warning that that was going to happen. And I think perhaps [the prosecutor] . . . viewed that as the same kind of thing that you felt that the Court should have admonished [Gracia's counsel] for during her closing.

"And so I'm not going to ascribe any bad motive to you. I think that's probably what was going through your mind. But I thought what she did was appropriate, and I thought what you did was not appropriate. And I would ask you in the future to not play loud music in this courtroom without first getting the permission of the Court."

In denying Gracia's subsequent motion for new trial based, in part, on the purported prosecutorial misconduct, the trial court stated:

"[A]lthough the court disapproved that the playing of the song because there was no advance warning, the court does not believe that the playing of the song was prosecutorial misconduct. The song was used to illustrate the People's argument that [Gracia] possessed a weapon in his shoe, not a pencil sharpener. And the court does not believe that the jury would have interpreted this song as any indication that [Gracia] had a propensity to possess weapons or commit acts of violence. So the motion based on the song is denied."

As the People assert, Gracia forfeited or waived this contention by not objecting to the prosecutor's conduct on the specific ground of prosecutorial misconduct and not requesting a curative admonition. (*People v. Price, supra*, 1 Cal.4th at p. 447; *People v. Brown, supra*, 31 Cal.4th at p. 553.) Contrary to Gracia's summary assertion, he was not excused from those requirements on the ground that a request for an admonition would have been futile or that an admonition could not have cured the prejudice caused by the prosecutor's conduct. (*People v. Cole, supra*, 33 Cal.4th at p. 1201.) There is nothing in the record to indicate the trial court would have denied a request for a curative admonition. Furthermore, based on a review of the record, we conclude an appropriate admonition to the jury could have cured any prejudice caused by the prosecutor's conduct. We presume the jury would have followed any such admonition. (*People v. Morales, supra*, 25 Cal.4th at pp. 46-47.) Because Gracia forfeited or waived this contention, we need not address the merits of whether the trial court abused its discretion by denying his new trial motion to the extent it was based on that conduct.

In any event, assuming *arguendo* that Gracia did not forfeit or waive that contention, we nevertheless would conclude the prosecutor's conduct during his rebuttal closing argument did not constitute prosecutorial misconduct under either the federal or state standard. (*People v. Morales, supra*, 25 Cal.4th at p. 44.) " [A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] . . . ' [Citation.] 'A prosecutor may "vigorously argue

his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets warranted by the evidence." ' ' " (*People v. Wharton, supra*, 53 Cal.3d at p. 567.) Furthermore, in closing argument a prosecutor " 'may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' " (*Id.* at p. 567.)

We conclude the trial court correctly construed the prosecutor's conduct as an attempt to illustrate that Gracia possessed a weapon in his shoe, rather than to argue that Gracia was a bad or dangerous person. (*People v. Wharton, supra*, 53 Cal.3d at p. 567.) Furthermore, the court correctly deemed such conduct to be inappropriate, particularly because the prosecutor did not request or receive the court's permission prior to playing that song, but that it did not rise to the level of prosecutorial misconduct. Although the prosecutor's playing of the song, "Bad, Bad Leroy Brown," and apparently singing, "He's got a razor blade in his shoe," was clearly inappropriate and displayed poor judgment on the prosecutor's behalf, we cannot conclude it constituted prosecutorial misconduct under either the federal or state standard. The prosecutor's conduct did *not* "involve[] the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales, supra*, 25 Cal.4th at p. 44.) Furthermore, that purported improper conduct did not infect Gracia's trial with such unfairness as to make his conviction a denial of due process. (*Ibid.*) Therefore, the trial court did not abuse its discretion by denying Gracia's new trial motion to the extent it was based on that conduct. (§ 1181(5); *People v. Ault, supra*, 33 Cal.4th at p. 1260.) In any event, the

conduct likely was harmless because the trial court instructed the jury that arguments of counsel are not evidence and that it should decide the case based on the evidence.

DISPOSITION

The judgment is affirmed.

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McDONALD, J.

WE CONCUR:

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BENKE, Acting P. J.

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O'ROURKE, J.