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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCHUNE DYUEL EPPS,

Defendant and Appellant.

D059021

(Super. Ct. No. RIF132260)

APPEAL from a judgment of the Superior Court of Riverside County, Helios J. Hernandez, Judge. Affirmed.

Defendant Franchune Dyuel Epps and her codefendants, Brooke Rottiers and Omar Hutchinson,¹ were all charged in an information with two counts of first degree murder (Pen. Code, § 187, subd. (a) (undesigned statutory references will be to the Penal Code)) for the murders of Milton Chavez and Marvin Gabriel, who were asphyxiated by Rottiers. The information also alleged the special circumstances that Epps, Rottiers, and Hutchinson (1) committed multiple murders within the meaning of

¹ Rottiers and Hutchinson are not parties to this appeal.

section 190.2, subdivision (a)(3); and (2) committed the murders during the commission of a robbery in violation of section 190.2, subdivision (a)(17).

As Epps and Hutchinson made extrajudicial statements that implicated each other in the crimes, the court ordered three separate juries pursuant to *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) and *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*) (together *Aranda-Bruton*).² During the trial and before the People rested, the court granted the prosecution's motion for an order that, if any of the defendants testified, all three juries would hear the testimony.

After the People rested, the court denied Epps's motion for acquittal under section 1118.1. Epps and Rottiers rested, and Hutchinson thereafter testified before all three juries after Epps's counsel made a request, which the court did not rule upon and Epps's counsel did not renew, for additional time to prepare his cross-examination of Hutchinson.

Epps's jury convicted her of both counts of first degree murder and found true the special circumstance allegations that she committed multiple murders within the meaning of section 190.2, subdivision (a)(3), and committed the murders during the commission of a robbery in violation of section 190.2, subdivision (a)(17). The court sentenced Epps to two consecutive terms of life without the possibility of parole.

² In a joint jury trial of multiple defendants, the *Aranda-Bruton* rule generally bars admission of a nontestifying defendant's extrajudicial statement that implicates a codefendant in the charged crimes because admission of such a statement deprives the codefendant of his or her constitutional right to confront the nontestifying defendant. (See 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, §§ 375-379, pp. 541-545.)

Epps appeals, contending (1) the court erred when it denied her motion for judgment of acquittal under section 1118.1; (2) she was denied the effective assistance of counsel when the court allowed the prosecution to reopen its case-in-chief after both sides rested in order to present incriminating evidence from Hutchinson and refused to give Epps's counsel time to prepare to meet this previously excluded evidence; and (3) the court erred by requiring her to wear leg shackles during the trial. We affirm the judgment.

FACTUAL BACKGROUND

A. The People's Case

1. Discovery of the bodies

The victims, Gabriel and Chavez, worked in construction. Gabriel weighed between 175 and 200 pounds and was five feet eight inches tall. Chavez weighed between 104 and 120 pounds and was five feet five inches tall.

In the afternoon on August 29, 2006, a car was discovered next to the road in an isolated area near Lake Matthews. When investigators from the Riverside County Sheriff's Department's Central Homicide Unit arrived at the scene, they discovered the bodies of two men, who were later identified as Gabriel and Chavez. A washcloth was found stuffed in Gabriel's mouth, duct tape covered his mouth, a belt had been wrapped around his face, and plastic bags also had been wrapped around his face and neck. A telephone cord had been wrapped around both his wrists, and a black bra had been wrapped around that telephone cord. Gabriel had been hogtied; an electrical cord was found around the wrist bindings and between the wrists and the ankles.

Electrical cords had been wrapped around Chavez's ankles, and a leather belt had been wrapped around his chin and the back of his neck. Over that, another leather belt, a pair of panties, and two pieces of telephone cord also had been wrapped around Chavez's neck.

Mark McCormick, M.D., a forensic pathologist for the Riverside County coroner's office, testified that Gabriel and Chavez both died from asphyxiation.

2. Crime scene and investigation

Investigators learned from the manager of the National Inn in Corona that he had recently evicted two people, Rottiers and Hutchinson, from room 114 after the cleaning crew informed him that blankets and sheets were missing and the power cords had been removed from two motel vacuum cleaners. The manager testified that on August 28, 2006, between 8:00 and 8:30 a.m., Rottiers borrowed the motel dolly to move some items out of room 114, and a car had been backed into the garage.

Scott Williams testified that on August 29, 2006, he was released from prison on parole and was picked up by Christy Day, the mother of his son and a recovering methamphetamine and heroin addict. Day took Williams to the National Inn where she lived. Williams indicated at trial that the National Inn was a "[k]ind of rough motel" where other parolees stayed and prostitution and drug use occurred. Williams also indicated he knew Rottiers and Hutchinson. The manager showed Williams room 114. The room had been stripped of bed linens. Two homicide detectives came to the door while Williams was in the room.

Detective Jesse Martinez, a homicide investigator at the Riverside County Sheriff's Department, testified that on August 29, 2006, he was assigned to assist Senior Investigator Robert Masson (Detective Masson) and Investigator John Powers in investigating this case. Detective Martinez testified that when he, Detective Masson, and another investigator arrived at the National Inn that day, the manager told them he was in the process of renting room 114 to Williams and Day. When the investigators entered room 114, they encountered Williams.

Day testified and identified Rottiers in the courtroom, indicating she had met Rottiers at the National Inn. Rottiers lived in room 114 in August 2006 and was in a romantic relationship with Hutchinson. Day also identified Hutchinson in the courtroom, stating she had purchased methamphetamine from him. Day denied knowing that Hutchinson was Rottiers's pimp, but, when asked about Rottiers's role as a prostitute, Day testified that Rottiers told her she would rob her customers instead of "doing the date."

Day testified that on August 27, 2006, at around 10:00 p.m., she went to Rottiers's room to look for Day's daughter. When Rottiers answered the door, Day saw two Hispanic men in the room with Rottiers. One of the men was taller than Day, who is five feet seven inches tall.

Day also testified that in the early morning hours of August 29, 2006, Rottiers came to her room, woke her up, and told her she did something she was not proud of. Rottiers said she had picked up two men in Riverside and had brought them back to her room to "do a date," and Hutchinson came into the room and caught her having sex with one of them. Rottiers told Day that Hutchinson said something like, "You say you're so

bad, let's see what you got" or "Let's see what you're going to do now." Rottiers also told Day she ended up strangling the two men with her hands, bras, and panties, and that she "kind of liked it." Rottiers told Day that she hit the men with her knuckles when they started to smell, and she showed Day her bruised and swollen knuckles. Rottiers also told Day she put the men's bodies in a car along with all the bedding from the room, drove out to Lake Matthews, and tried to light the car on fire, but a second car got stuck and "they"³ had to leave before she was able to burn the car.

According to Day, Rottiers came back to Day's room at National Inn a few days later and was talking loudly with Hutchinson on a Nextel phone. Day overheard Rottiers say something about DNA, that Hutchinson was being "weak," and that she would do the same thing to him as she did to "those two mother fuckers" she had killed. At that point, the manager came to the room and told Rottiers to leave.

Richard Stornetta testified that he and Williams were released from prison at the same time, and Day picked them up and took them to the National Inn. Stornetta went with Williams to look at room 114, which Stornetta described as torn up and "stripped." A woman nicknamed "Crazy," whom Williams identified at trial as Rottiers, came to Day's room. Stornetta heard Rottiers talking on the phone with someone, yelling at that person and calling that person a "weak piece of shit" who could not even help her "pick up one of 'em." Rottiers talked about her DNA being all over the room and said something about a dolly cart. At that point Williams asked Rottiers to leave.

³ The evidence shows Epps accompanied Rottiers.

Yvette Meek, a recovering drug addict, testified she knew Rottiers and Hutchinson in 2006. Meek stated that Rottiers told her she would pick up guys pretending to be a prostitute, and then she would rob them without going through with the sexual act.

3. Forensic evidence

Megan Mannion-Gray, a criminalist at the California Department of Justice's Jan Bانشinski Laboratory and Bureau of Forensic Services, testified about DNA testing on evidence taken from the victims. Epps, who is an African-American, was excluded as a DNA donor on 15 items compared by the lab. Regarding a swab taken from one item of evidence as to which Epps could not be excluded as a DNA donor, there was a 33 percent chance that a randomly selected African-American could have been the donor.

Regarding another swab as to which Epps could not be excluded as a DNA donor, there was more than a 50 percent chance that a randomly selected African-American could have been the donor. Rottiers could not be excluded as a contributor of DNA discovered on an electrical cord, but Epps could be excluded. Rottiers could not be excluded as a contributor of DNA found in fingernail clippings taken from Gabriel, but Epps could be excluded. Rottiers also could not be excluded as a contributor of DNA discovered on a belt, but Epps could be excluded.

4. Phone records

A radio frequency engineer working for Ericsson under contract for Sprint Nextel, provided expert testimony regarding phone records obtained from Sprint in this case. He indicated that the timing, duration, and locations of cell phone calls can be determined from phone records and cell tower locations.

Authenticated Sprint Nextel cell phone records for Epps, Rottiers, and Hutchinson were presented to the jury. The phone records showed direct connect communications made on August 27, 2006, from Epps's phone to one belonging to Rottiers that carried the billing of "Krazie Hutchinson." A total of four such phone connections were recorded between 9:46 p.m. and 10:18 p.m. on August 27. A fifth connection between those two phones was recorded early the next morning, August 28, at 2:22 a.m.

The phone records also showed a direct connect communication made from Rottiers' phone to Epps's phone at 10:15 p.m. on August 27, 2006. Later that night, at 11:23 p.m., a direct connect communication was made between Epps's phone and Hutchinson's phone. The next day, August 28 at 12:15 p.m., a connection was also made from Epps's phone to Hutchinson's phone.

5. Epps's May 15, 2007 statements to Detectives Masson and Martinez

On May 15, 2007, Epps gave a statement to Detectives Masson and Martinez, a transcript of which was admitted into evidence. Epps indicated she knew Rottiers through a mutual boyfriend, Brandon Evans, who had been Epps's boyfriend two or three years earlier. Epps knew that Rottiers's nickname was "Crazy" and Rottiers's current boyfriend, Hutchinson, was Rottiers's pimp. She claimed she went to the National Inn in Corona at around 2:00 a.m. to buy drugs from Hutchinson, and she was high on drugs at the time. She stated that when she arrived at the motel room, she saw Rottiers, Hutchinson, and Rottiers's twin daughters. She described the room as "junky," with phone cords ripped from the wall, vacuum cleaners with cords ripped out, and a phone on the bed with no cord.

Epps stated that Rottiers and Hutchinson were arguing when she entered the room. Rottiers told Hutchinson he was stupid and careless, and Hutchinson called Rottiers a "stupid bitch." Epps told the detectives Hutchinson said, "Oh, shit, the blanket," and Rottiers threw a blanket on the floor as if she were hiding something. Epps said she did not know what was under the blanket, but it was something "kind of lumpy," and an investigator later told her the "lumps" were bodies.

Epps asked, "Am I being recorded?" When Detective Masson assured her that she was not being recorded, but that Detective Martinez was taking notes for a report, Epps provided additional details about the homicides. She stated that she saw Rottiers and Hutchinson wrapping up the bodies in blankets, and she helped them move one the bodies to the trunk of the car Rottiers was driving. Epps said that to get the body into the trunk, she lifted one side of the blanket and Rottiers lifted the other. Rottiers and Hutchinson moved the second body to the trunk of the car after Rottiers asked the motel manager for a dolly. Hutchinson left after the second body was put in the car. Epps stated she helped Rottiers vacate the motel room and move to the Flaming Arrow motel.

Epps told the detectives she left Rottiers at the Flaming Arrow, but later saw her driving around town as Epps was driving down the street with the bodies in the trunk. Rottiers told her she needed to drop the car off, and Epps led her to the Lake Matthews area where she showed Rottiers an open space where she could leave the car. Rottiers pulled off the road, left the engine running as if the car had been abandoned, and then hopped out of the car and let it roll. Epps said she got out of her car and cursed at Rottiers for leaving the engine running, and then they got into Epps's car. Epps started

driving Rottiers back to her motel room. However, following Rottiers's directions, Epps drove the car into sand and she had to call for a tow truck to pull it out. Epps left Rottiers by the side of the road and drove home.

When pressed, Epps told the detectives that Rottiers killed the two men by smothering them by stepping on their faces with her bare feet after they were tied up. Epps stated she was sitting in the room when it happened, and Rottiers killed the larger man first. She claimed she did not know how the other man died; she looked over and he was not moving or breathing. Epps then said Rottiers smothered the smaller man first. She claimed she went there because Rottiers "chirped" her that Hutchinson had "chronic" (drugs) for her.

Contrary to her earlier version of the facts, Epps then told the detectives that the two men were still dressed when she arrived at the motel room, and both undressed when Rottiers told them to do so. The men thought they were about to have sex. Rottiers began hitting them with Hutchinson's belt. Rottiers punched the smaller man and knocked him out. The larger man was covering his private parts with his hands when Hutchinson hit him and knocked him to the floor. Rottiers then tied up both men using cords from the phone and vacuum cleaners. Rottiers then killed both men, the smaller man first, with Rottiers's daughters still in the room. Epps again stated that Rottiers killed the larger man by stepping on his face and smothering him, but also stated she did not know how the smaller man died.

Epps told the detectives she pulled her car into the motel just as Rottiers and the two men were getting out of their car. Rottiers and the two men entered the motel room

about 30 seconds before Epps entered the room. Hutchinson was already in the room with Rottiers's daughters.

Epps stated she "might have handed [Rottiers] the phone cord." She said she knew the cord was not hooked up to the wall phone because the cord was by her leg and she grabbed it. Epps said she "probably tried to give [the cord] to her and it didn't go, so she snatched [it]." Epps admitted she pulled the cord from the wall. She then said Rottiers "ripped it out of the wall." She said she watched Rottiers rip the cord out of the vacuum cleaner. Epps denied handing Rottiers any duct tape.

6. Epps's June 14, 2007 statements to the district attorney

On June 14, 2007, Epps was interviewed by District Attorney Senior Investigator Tom Dove and Deputy District Attorney John Molloy. A transcript of the interview was admitted into evidence.

Epps stated she met Hutchinson a month or two before August 2006. She bought drugs from him. Epps had known Rottiers since about 2003. She met Rottiers through Epps's former boyfriend, Evans.

According to Epps, she went to the National Inn on the day of the incident to buy drugs from Hutchinson. When she arrived, six people were in the room: Rottiers, Rottiers's two daughters, who were asleep on the bed, Hutchinson, and "two Mexican guys," who were lying naked on the floor. Epps stated that Rottiers and Hutchinson were arguing about something, and she (Epps) was "so high" on drugs at the time she could not remember what they were arguing about and she could not remember whether the two men were tied up. She recalled that Rottiers, who was barefooted, walked over to the

smaller man, who was praying, and stepped on his nose and mouth. Hutchinson was standing over the man, who started kicking, and told him not to move. The man's face turned purple and he urinated on himself. The larger man, who was crying, stood up.

Epps stated that one of Rottiers's girls woke up and Hutchinson was going to take her out, but Rottiers told him not to leave and, pointing to the larger man, said, "This one has to go, too." Rottiers started punching and spitting on the larger man, who fell to his knees and begged her to stop, saying "please, please." Rottiers hit him again and then Hutchinson punched him. When Hutchinson hit him, the man fell and hit his head on the edge of the door. Rottiers then stepped on his nose and mouth with both feet and leaned against the wall to keep her balance. The man was kicking and Rottiers stood on his face for 10 to 15 minutes. Epps claimed she sat on the bed during the entire incident. According to Epps, when Rottiers finished she asked Epps to help her move her things to another motel. Epps helped put her things into the victims' car and took them to the other motel while Hutchinson took the girls to a fast-food restaurant.

Epps admitted she helped Rottiers put the smaller man into the car. They carried him on a blanket. Epps said she grabbed one end of the blanket, Rottiers grabbed the other end, and they walked up to the car and put him in the trunk. When Rottiers and Hutchinson were unable to lift the heavier man's body, which was wrapped in a blanket, Rottiers asked the manager for a dolly and brought it back to the room. Epps said she was holding the girls as Rottiers and Hutchinson put the "big guy" on the dolly, pulled him out to the car, and put him in the trunk on top of the "little guy." Epps also admitted she drove her borrowed car and led Rottiers to a place near Lake Matthews in the

mountains to dispose of the victims' car and the bodies. On the way back, Epps's car got stuck in sand and she called for a tow truck. To help pay for the tow service, Rottiers got into "some other dude's" car and was paid \$150 to do a "quickie." Rottiers used Epps's cell phone to call for a cab and left on her own, but Epps said she did not know how she returned to Corona.

When questioned about DNA evidence, Epps admitted she might have touched a vacuum cleaner or a vacuum cleaner cord or a telephone cord. She stated it was possible the two men were tied up when she arrived at the motel.

Epps denied that she participated in killing the victims. She denied seeing duct tape on the face of one of the men. Epps claimed she did not see Rottiers kill the man who was lying unconscious on the floor when Epps arrived; she only watched Rottiers kill the "big guy." However, she then stated she saw Rottiers stand on both men. Epps denied the men were hogtied.

Epps claimed a phone cord was on her foot, she grabbed it, and then she dropped it without giving it to Rottiers. She claimed that when she grabbed for the phone cord, Rottiers told Epps to give her the vacuum cleaner cord, Epps said, "I ain't giving you shit," and Rottiers then ripped the cord out of a vacuum cleaner.

Epps admitted she watched as Rottiers tied up one of the men with a cord she ripped out of a vacuum cleaner.

The People rested on June 9, 2010, in the presence of all three juries.

B. The Defense Cases

1. Epps's and Rottiers's defense

On June 9, 2010, after the People rested, Rottiers and Epps presented no witnesses and rested in the presence of all three juries based upon "the sufficiency of the prosecution case."

2. Hutchinson's defense

The next day, June 10, Hutchinson's counsel informed the court and counsel for the other parties that Hutchinson had decided to testify on his own behalf.

In the presence of all three juries, Markson first presented the testimony of Virgal Cooper, who stated that he used methamphetamine in the summer of 2006, he lived at the National Inn motel in Corona at that time, and Hutchinson was his methamphetamine supplier. Cooper indicated that in late August 2006, he used his cell phone to call Hutchinson to buy some methamphetamine. Although Cooper initially stated he called Hutchinson after midnight, he then acknowledged his cell phone records showed he made the call at 10:26 p.m. Cooper met with Hutchinson at the bottom of the stairs outside Cooper's motel room about 20 or 30 minutes later and bought some methamphetamine from Hutchinson. As they were sitting on the stairs, Cooper saw a small car pull into the motel parking lot. According to Cooper, four people were in the car: Rottiers, two "Hispanic guys," and an African-American woman. When asked by Hutchinson's counsel whether he saw any of those four people in the courtroom, Cooper testified he saw one: Rottiers.

On cross-examination by Epps's counsel, Cooper stated he did not know Epps, but he had met her twice through "other people." When counsel said, "You told Officer Gibson, 'I never met Franchune Epps at all and cannot recall ever having met her,'" Cooper responded he had "[n]ever met her formally." Counsel then asked Cooper, "You don't recognize her in the courtroom today?" Cooper replied, "No, I don't." He then testified he met Epps at a motel "[d]own the street—I forget the name of it—by the pool hall." When asked, Cooper could not remember the name of the pool hall, but indicated it was next door to a CVS pharmacy.

a. Hutchinson's testimony before all three juries

Also on June 10, 2010, following Cooper's testimony, Hutchinson testified on his own behalf in the presence of all three juries. He indicated that he and Rottiers started living together in June or July of 2006. He noticed that she put the name "Krazie Hutchinson" on one of the phone bills that was in her name. On August 11, 2006, he moved his belongings into room 114 at the National Inn, but did not always stay there.

Hutchinson stated that on Sunday morning, August 27, he woke up at the Motel 6 and went over to the National Inn to check on Rottiers's twin daughters. When he arrived, he found Rottiers vacuuming the room. He and Rottiers got into an intense argument. Rottiers tried to bully him, and he told her he was no longer going to pay for the room and she needed to find somewhere to go. After 20 minutes, he left. He testified he had no plans to get back with Rottiers that evening or to watch her daughters or to commit a robbery that night.

Hutchinson stated he next saw Rottiers at around 2:30 the next morning (August 28). He was sitting on a chair behind a wall in the carport and putting some "dope" in a sack for Cooper, who had called him at 10:30 p.m., when two cars came in and parked in the carport. Rottiers was driving one of the cars and Chavez and Gabriel were with her. Hutchinson identified Epps in the courtroom as the driver of the other car. He testified that Epps was carrying a stick in her hand that looked like half of a mop handle.

Hutchinson indicated that he confronted Rottiers about the two men as they were walking towards room 114, and she told him she was about to rob the men and asked whether he wanted to help. Hutchinson said he told Rottiers he had \$900 in his pocket and did not need to rob anyone. Rottiers went to the room and he went back to talk to Cooper. Shortly thereafter, out of curiosity, Hutchinson went to the room. He stated he knocked on the door, and, when Rottiers opened it, he saw the two men were dressed and money and wallets were on the bed. He saw Epps sitting in a chair by the kitchen playing with a cell phone. Rottiers, who had been speaking to the two men in Spanish, told Hutchinson that one of them said he was going to do something to her girls. Hutchinson testified he immediately jumped on the "big guy" (Gabriel) and they both fell on the bed.

Hutchinson testified his statement to Detective Masson that he hit the man after the man lunged at Rottiers was a "pure ass lie." Hutchinson also testified that his statement to Detective Masson that Epps had a gun was false, and he made that false statement because Rottiers asked him to do so.

According to Hutchinson, he sat down on the bed and read a magazine after he hit Gabriel. He said that Rottiers and Epps left the room to check the car, and he stayed in

the room. The door was open and the men did not leave. Rottiers and Epps quickly returned. Hutchinson testified that Rottiers looked at him and Epps with a "mean" look, and then hit the "big dude," Gabriel, on the back of his head with the telephone that was in the room. According to Hutchinson, Epps then hit the other man (Chavez) with the stick she was carrying, and Hutchinson left the room after telling Rottiers and Epps they were crazy.

Hutchinson testified he returned to room 114 later that morning at around 4:00 a.m. He indicated he did not expect Gabriel and Chavez to be there because "pretty much the robbery's done." He saw that Chavez was naked and hogtied with his hands behind his back and his wrists tied to his ankles. He had a belt around his neck. Hutchinson acknowledged that, at Rottiers's request, he told Detective Masson that Rottiers had told him that "[Epps] made me do it," but he testified that statement was not true. Hutchinson stated that Rottiers "had asked me to blame [Epps] for that."

According to Hutchinson, Chavez started choking when Rottiers tried to loosen the belt around his neck. Hutchinson said he saw Gabriel lying naked and unresponsive on the floor, moaning and groaning. Rottiers started asking for cords to tie up the men, and Hutchinson suggested she use a vacuum cleaner cord. Hutchinson tugged weakly on the cord, and Rottiers snatched it and ripped it out of the vacuum cleaner. He stated that Epps threw a phone cord near Rottiers, and he was in the room for only about 10 to 15 minutes and then left.

Hutchinson said he returned to the National Inn and walked back to room 114 a third time at around 6:00 a.m. after Rottiers called him. As he was walking back to the

room, he saw the manager standing by the office. As he approached the room, he saw Rottiers coming out of the room and rolling one of the bodies out on a dolly. When Rottiers rolled the dolly up to the trunk of the car, she asked Hutchinson, who was standing next to the trunk, to help her hoist the body into the trunk. Chavez's body was already in the trunk, and Epps was also standing by the car. He did not hear Chavez making any noises and he did not see any movement in the blanket covering his body.

Hutchinson claimed he did not help Rottiers put Gabriel's body in the trunk, but admitted that when Rottiers asked him where she should dump the bodies, he told her to dump them in a field in the Lake Matthews area. He stated that he and Rottiers later went to Orange County and Rottiers complained he did not help her dispose of the bodies.

On June 15, after he completed his testimony, Hutchinson rested.

2. Epps's and Rottiers's defense cases

Also on June 15, after Hutchinson completed his testimony and rested, Rottiers and Epps rested without presenting any witnesses.

DISCUSSION

I

DENIAL OF EPPS'S MOTION FOR ACQUITTAL (§ 1118.1)

Epps first contends the court erred when it denied her motion for judgment of acquittal under section 1118.1. We reject this contention.

A. Background

On June 9, 2010, after the prosecution concluded its case-in-chief and rested, Epps brought a motion under section 1118.1 for dismissal of both first degree murder charges.

In opposition to the motion, the prosecutor relied principally on Epps's statements to Detective Masson, which, he argued, showed she participated in planning the murders and assisted Rottiers when she killed the two victims.

1. *Ruling*

The court denied Epps's acquittal motion. Noting it was "more than coincidental" that Epps showed up at the motel "at the time the [victims were] getting robbed and murdered," and also noting that Epps stayed in the motel room "the whole entire time," the court stated it "could see how [Epps's] jury could draw the conclusion she was a helper, part of the muscle." The court also found that the fact that Epps helped Rottiers dispose of the bodies could lead the jury to believe Epps "was an aider and abett[o]r and a helper in these murders."

B. *Applicable Legal Principles*

1. *Standard of review*

In *People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213, the California Supreme Court explained that "[i]n ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction."

When assessing a challenge to the sufficiency of the evidence supporting a conviction, we apply the substantial evidence standard of review, under which we view the evidence "in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a

reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

On appeal, we independently review the trial court's ruling under section 1118.1 that the evidence is sufficient to support a conviction. (*People v. Cole, supra*, 33 Cal.4th at p. 1213.)

2. *Aiding and abetting*

A person incurs criminal liability as an aider and abettor when he or she (1) by act or advice, aids, promotes, encourages or instigates the commission of the crime; (2) with knowledge of the perpetrator's unlawful purpose; and (3) with the intent or purpose either to commit, or to facilitate or encourage commission of, the crime. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164, citing *People v. Beeman* (1984) 35 Cal.3d 547, 561.)

"Whether [a] defendant aided and abetted [a] crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment." (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) While a defendant's mere presence at the scene of an offense is not sufficient in itself to sustain a

conviction of aiding and abetting its commission, it is a circumstance that will tend to support a finding that the accused was an aider and abettor. (*Ibid.*; *People v. Miranda* (2011) 192 Cal.App.4th 398, 407.) "[C]ompanionship, and conduct before and after the offense," are also relevant factors the trier of fact may consider in determining whether the accused aided and abetted the commission of a crime. (*People v. Miranda*, p. 407; *People v. Campbell*, p. 409.)

C. Analysis

Epps acknowledges "there was evidence that two homicides occurred during a robbery and that [she] was present when it happened," She asserts that "no substantial evidence established any active participation by [her]" in the commission of those crimes. She also asserts that "none of [her] actions provided sufficient evidence that [she] shared Rottiers's intent to rob or kill the two men or otherwise act as an aider and abettor in the crimes." Thus, she maintains, the court erred in denying her motion for acquittal under section 1118.1. These assertions are unavailing.

After reviewing the record, we conclude the prosecution presented substantial evidence apart from Hutchinson's testimony (discussed further, *post*) from which a rational jury could conclude beyond a reasonable doubt that Epps aided and abetted the commission of those crimes, and, thus, the court properly denied her motion for acquittal. It is undisputed Rottiers murdered Chavez and Gabriel in room 114 of the National Inn in the early morning hours of August 28, 2006. The prosecution's phone records evidence showed that four direct connect communications were made the night before the murders, between 9:46 p.m. and 10:18 p.m. on August 27, from Epps's phone to Rottiers's phone.

A fifth connection between those two phones was recorded early the next morning, August 28, at 2:22 a.m. The phone records also showed a direct connect communication made from Rottiers's phone to Epps's phone at 10:15 p.m. on August 27.

Pursuant to these phone conversation, Epps agreed to drive to the motel and meet Rottiers there in the early morning hours of August 28 at the same time that Rottiers arrived there in a separate car with the victims in order to provide what the court referred to as "part of the muscle" that Rottiers needed to rob and murder the victims. Specifically, the prosecution presented evidence that during her interview Epps told Detectives Masson and Martinez that she drove to the National Inn at around 2:00 a.m., she pulled her car into the motel just as Rottiers and the two men were getting out of their car, and Rottiers and the two men entered the motel room about 30 seconds before Epps entered the room. A rational jury could reasonably infer that, as the court found, it was "more than coincidental" that Epps showed up at the time the victims were about to be robbed and murdered, and that she stayed in the motel room "the whole entire time" Rottiers was perpetrating the crimes. Epps admitted to the detectives she was in the room when Rottiers smothered the men by stepping on their faces after they were tied up. Epps also admitted to the detectives that she "might have handed [Rottiers] the phone cord" she used to tie up one of the victims. Referring to the phone cord, Epps stated, "I probably tried to give it to her."

The prosecution also presented evidence that during Epps's recorded June 2007 interview, she told a deputy district attorney and an investigator that after Rottiers smothered the smaller man with her bare feet, Rottiers pointed to the larger man (Gabriel)

and said, "This one has to go, too," and then smothered him with both of her bare feet. During the interview, Epps admitted she helped Rottiers put Chavez's body in the trunk of the victims' car, she watched as Rottiers used a dolly to take Gabriel's body to the car and then put the body in the trunk; and, driving separately, she led Rottiers to a place near Lake Matthews to dispose of the victims' car and the bodies.

From the foregoing substantial evidence and reasonable inferences that can be drawn therefrom, a rational jury could find beyond a reasonable doubt that Epps aided and abetted the commission of the crimes with knowledge of Rottiers's unlawful purpose and with the intent to facilitate or encourage Rottiers's perpetration of the crimes. (See *People v. Cooper, supra*, 53 Cal.3d at p. 1164.) Accordingly, we conclude the court properly denied Epps's section 1118.1 motion for acquittal.

II

ADMISSION OF HUTCHINSON'S TESTIMONY, DENIAL OF EPPS'S REQUEST FOR A CONTINUANCE, AND EPPS'S CLAIMS OF CONSTITUTIONAL ERROR

Epps next contends she was "denied the effective assistance of counsel when the trial court allowed the prosecution to reopen its case in chief after both sides rested in order to present incriminating evidence from co-defendant Hutchinson and refused to give [Epps's] counsel time to prepare to meet this previously excluded evidence." This series of contentions is unavailing.

A. Background

On April 14, 2010, during pretrial proceedings, the court granted an unopposed defense motion for three separate juries pursuant to *Aranda-Bruton* (discussed, *post*; see

also fn. 2, *ante*) because the defendants had made recorded out-of-court statements incriminating one another. The prosecution presented its first witness on May 6, in the presence of Epps's jury, Rottiers' jury, and Hutchinson's jury.

1. *June 1, 2010: Recordings of Hutchinson's out-of court statements played for his jury only*

On June 1, in the presence of Hutchinson's jury only, the prosecutor called to the stand Detective Masson, who testified that he interviewed Hutchinson several times on September 5, 6, and 7, 2006. Detective Masson testified the interviews were recorded and transcribed. After Detective Masson authenticated the recordings and the transcripts, the seven recordings were played for Hutchinson's jury only.

2. *The prosecution's June 4 motion to have all juries hear the testimony of any testifying defendant was opposed by defendants*

On Friday, June 4, outside the presence of the juries and before the prosecution rested on June 9, the prosecutor brought a motion requesting that if any of the defendants testified before his or her jury, all three juries should hear that testimony. The prosecution's theory was that, if a defendant elected to testify, *Aranda-Bruton* principles would no longer apply and the nontestifying defendants' Sixth Amendment right to confrontation would not be violated because the testifying defendant would be subject to cross-examination.

In response, the court noted that *Aranda-Bruton* would not apply, and there would have been only one jury in this case, if, at the beginning of the trial, each of the three defendants had indicated an intention to testify. The court stated, "It's the statement, the

recorded statement coming in without [the] ability to cross-examine the person who made the statement which creates the *Aranda-Bruton* issue."

Hutchinson's counsel asked for time to prepare a response to the prosecution's motion, and the court gave defense counsel the weekend to prepare their arguments on this issue.

3. *June 7 tentative ruling denying the prosecution's motion*

On Monday, June 7, the court again heard arguments on this issue outside the presence of the juries. Both Epps and Rottiers opposed the prosecution's motion, indicating they intended to rest after the prosecution rested and arguing this would preclude the presentation of any additional evidence to their respective juries.

Addressing the prosecutor, the court stated, "There is no authority for what you want to do. [¶] . . . What you're trying to do is piggyback on the defense case." Citing *Aranda-Bruton*, the court also stated, "[W]e have three separate jury trials. It's not one jury trial. [¶] Each [defendant] gets to make [his or her] decision independently. And if [Rottiers's] jury wants to rest, that's the end of it. . . . [T]here's nothing for you to reopen with. . . . So after you've rested, . . . if they want to rest, they can rest. . . . [T]he case is closed, period. Closing arguments. Jury goes off to deliberate."

Hutchinson's counsel argued that if Hutchinson elected to testify after Epps and Rottiers rested, Hutchinson would testify only in front of his jury.

At the conclusion of the arguments, the court denied the prosecution's motion, stating:

"[T]he [prosecutor] is not seeking to present evidence on his own. He's just hoping to use somebody else's evidence. . . . There is no authority supporting the [prosecutor], plus I don't think it's fair. It's a due process fundamental fairness issue. You can't bootstrap your way into using evidence that you can't present against the other defendant. So the [prosecutor's] motion is denied."

4. *June 9: Ruling granting the prosecution's motion before the People rested; denial of Hutchinson's severance motion*

a. *Ruling granting the prosecution's motion*

On June 9, before the prosecution rested later that day, the court revisited the issue outside the presence of the juries and, after reviewing the *Aranda-Bruton* principles, reversed its decision and ruled that if one defendant testified, all three juries would hear the testimony. The court explained its reasoning for granting the prosecution's motion:

"[T]he reason we have three juries is because there's out-of-court statements being introduced against various defendants which carry within them implications of wrongdoing by other codefendants. And since it's an out-of-court statement brought in through a tape the person making the statement is not subject to cross-examination. That's the whole reason for having multiple juries. [¶] If there was no such statement or if the defendants . . . said in advance they were going to testify we'd have only one jury. There would be no reason to have multiple juries. [¶] . . . [I]f . . . one or more of the defendants wants to testify, all the juries hear it because but for *Aranda-Bruton* there would only be one jury and they'd be hearing that same thing."

Epps's counsel objected, stating there was no case law on point. Counsel also objected under Evidence Code section 352, arguing that Hutchinson had "given numerous interviews," the defense would have the right to impeach him if he testified, and such impeachment would consume about a day and a half of court time.

The court affirmed its ruling, explaining that "the underlying rationale of *Aranda-Bruton* is that the need for separate juries is because the person whose statement is

relevant isn't going to take the stand and can't be cross-examined, and that's totally undermined when the person does take the stand and can be cross-examined." The court concluded that "[i]f any of the codefendants testif[ies,] all the juries hear it."

b. Denial of Hutchinson's severance motion

Hutchinson's counsel then moved to sever Hutchinson's trial from those of Epps and Rottiers, arguing Hutchinson had a right to testify only before his own jury and "give any version of events that he wants that he thinks is exonerating, and only to them because they are the only people that are deciding his guilt." Counsel informed the court that Hutchinson wanted to testify, but he would not do so if he was required to testify before all three juries.

The court denied Hutchinson's severance motion, stating there was a "strong preference for joint trials," and whether one jury or all three juries heard Hutchinson's testimony would have "no effect" on Hutchinson because only his jury was "going to be voting on his guilt."

c. The People rest

Later that same day, June 9, the prosecutor presented his last witness in the presence of all three juries, and then rested, stating he had "[n]o additional witnesses" and adding he had "evidence items to discuss . . . with the Court." After the jurors left the courtroom, the court discussed the exhibits with counsel and the prosecutor and then stated, "[W]e've gone over the exhibits, and that doesn't seem to be a problem."

Still outside the presence of the jurors, the court next heard and denied the defendants' section 1118.1 motions for acquittal. The court then stated, "The DA has rested."

Epps's and Rottiers's attorneys advised the court outside the presence of the jurors that they did not want to present any evidence. Hutchinson's counsel indicated he intended to call three witnesses the following day, June 10. Apparently referring to the court's denial of Hutchinson's severance motion, his counsel also informed the court and the other counsel that Hutchinson would not testify on his own behalf "unless the Court changes its ruling."

After further discussions, all three juries returned to the courtroom. Addressing the prosecutor, the court asked, "[A]nything else from the People?" The prosecutor replied, "Subject to the admission of evidence that I am now moving at this time to introduce into evidence, Your Honor, the People would rest." The court observed that "the items of evidence are all submitted except for those one or two but, in general, everybody is in agreement on those."

d. Epps and Rottiers rest based upon "the sufficiency of the prosecution's case"

Immediately thereafter, both Rottiers and Epps rested based upon "the sufficiency of the prosecution's case." Hutchinson's counsel stated, "I will be presenting some witnesses tomorrow as we discussed."

5. June 10: Hutchinson's counsel informs the court and the other counsel Hutchinson will testify, Epps's request for a continuance, Hutchinson's testimony begins

The next day, June 10, Hutchinson's counsel informed the court and counsel for the other parties that Hutchinson had decided to testify in his own defense. Epps's counsel requested a continuance in order to prepare for his cross-examination of Hutchinson. The prosecutor opposed Epps's request for a continuance, arguing that all counsel were on notice that prior to closing arguments any of the defendants could decide to testify in his or her own defense, and each counsel was "well-armed for cross-examination." The prosecutor suggested that Epps's counsel could "go last in order, if that will help the situation a little." The court did not expressly deny Epps's request for a continuance, and Epps's counsel did not renew the request before the court ordered a recess after asking, "Anything else?"

Epps's counsel did not renew his request for a continuance after Cooper completed his testimony and before Hutchinson took the stand.

6. June 14-15: Hutchinson completes his testimony and rests; Epps, Rottiers, and the People again rest

Hutchinson's testimony before all three juries continued on June 14 and ended on June 15. Hutchinson had been cross-examined repeatedly by Epps's counsel, Rottiers's counsel and the prosecutor.

During a sidebar discussion after Hutchinson completed his testimony, Epps's counsel stated he might call a witness who interviewed Cooper. Shortly thereafter the court excused the jurors for the lunch break.

B. *Applicable Legal Principles*

1. *Aranda-Bruton and the Sixth Amendment right of confrontation*

"The confrontation clause of the Sixth Amendment to the federal Constitution, made applicable to the states through the Fourteenth Amendment, provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' The right of confrontation includes the right of cross-examination." (*People v. Fletcher* (1996) 13 Cal.4th 451, 455 (*Fletcher*).

A recurring problem in the application of the Sixth Amendment right of confrontation concerns an out-of-court statement by one defendant that incriminates both that defendant and a jointly charged codefendant. (*Fletcher, supra*, 13 Cal.4th at p. 455.) "Generally, the [out-of-court statement] will be admissible in evidence against the defendant who made it (the declarant)." (*Ibid.*, citing Evid. Code, § 1220 [hearsay exception for party admissions].) However, if the declarant does not submit to cross-examination by the codefendant (the nondeclarant), "admission of the [out-of-court statement] against the nondeclarant is generally barred both by the hearsay rule (Evid. Code, § 1200) and by the confrontation clause (U.S. Const., 6th Amend)." (*Fletcher, supra*, 13 Cal.4th at p. 455.)

In *Bruton, supra*, 391 U.S. at pages 126 and 135-137, "[t]he United States Supreme Court has held that, because jurors cannot be expected to ignore one defendant's confession that is 'powerfully incriminating' as to a [codefendant] when determining the latter's guilt, admission of such a confession at a joint trial generally violates the confrontation rights of the nondeclarant." (*Fletcher, supra*, 13 Cal.4th at p. 455.) In

Aranda, supra, 63 Cal.2d at pages 528-530, the California Supreme Court reached a similar conclusion on nonconstitutional grounds. (*Fletcher*, at p. 455.)

Thus, *Aranda-Bruton* bars admission, at a joint trial, of a nontestifying defendant's out-of-court statement that incriminates a codefendant, even if the court instructs the jury to consider the statement in determining the guilt only of the declarant, because admission of the statement violates the codefendant's Sixth Amendment right of confrontation. (*Bruton, supra*, 391 U.S. at pp. 126, 135-137; *Aranda, supra*, 63 Cal.2d at pp. 529-530; *Fletcher, supra*, 13 Cal.4th at p. 455; see 5 Witkin & Epstein, Cal. Criminal Law, *supra*, §§ 375-379, pp. 541-545.)

Aranda-Bruton error is not reversible per se, but is scrutinized under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*People v. Burney* (2009) 47 Cal.4th 203, 232.) Under the *Chapman* harmless error standard, "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; see *Chapman, supra*, 386 U.S. at p. 24.) In determining whether evidence improperly admitted in violation of *Aranda-Bruton* so prejudiced a defendant that reversal of the judgment of conviction is required, the error will be deemed harmless "if the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence." (*People v. Burney, supra*, 47 Cal.4th at p. 232.)

2. *Constitutional right to effective assistance of counsel*

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) The ultimate purpose of the right to the assistance of counsel is "to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its result." (*Ibid.*) This right entitles a criminal defendant "not to some bare assistance but rather to *effective* assistance"; that is, "reasonably competent assistance of an attorney acting as his [or her] diligent and conscientious advocate." (*Ibid.*)

In *Arizona v. Fulminante* (1991) 499 U.S. 279, 306, the United States Supreme Court recognized that in *Chapman, supra*, 386 U.S. 18, it adopted the general rule that a constitutional error does not automatically require reversal of a conviction. The *Fulminante* court also recognized that in determining the effect of "most constitutional errors," appellate courts may properly apply a *Chapman* harmless error analysis. (*Fulminante*, at p. 306.) In contrast, "structural" errors involve "basic protections, [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." (*Id.* at p. 310.) A structural error requires reversal without regard to the strength of the evidence or other circumstances. (*Ibid.*) One example of a structural error in the criminal context is the total deprivation of the right to counsel at trial. (*Id.* at pp. 309-310.)

C. Analysis

Epps claims that "[b]y effectively rejoining the trials" by allowing Hutchinson to testify in front of her jury after she rested on June 9, and by "refusing counsel adequate time to prepare," the court violated her Sixth Amendment right to effective assistance of counsel as well as her Fifth and Fourteenth Amendment rights to a fair trial. She asserts the court's "summary denial" of her request for a continuance to prepare for cross-examination of Hutchinson after Hutchinson's counsel announced on June 10 that Hutchinson would testify, "was an absolute deprivation of [her] Sixth Amendment right to the effective assistance of counsel," and, thus, the court's constitutional error is reversible per se.

Assuming, without deciding, that the court committed constitutional error by permitting Hutchinson to testify in front of Epps's jury after Epps rested and after the court denied her counsel's request for additional time to prepare for his cross-examination of Hutchinson, we conclude the error was not structural and it was harmless beyond a reasonable doubt. To the extent Epps suggests the court committed *Aranda-Bruton* error, such error is not reversible per se, but is scrutinized under the *Chapman* harmless-beyond-a-reasonable-doubt standard. (*People v. Burney, supra*, 47 Cal.4th at p. 232.) The record shows Epps's trial counsel was a diligent advocate who cross-examined Hutchinson twice on June 15, 2010, the last day of Hutchinson's testimony. Hutchinson began his testimony on Thursday, June 10. The next day, Friday, June 11, the court and defense counsel discussed jury instructions and scheduling, and the court adjourned the trial proceedings until Monday, June 14. Epps's counsel, Clark, cross-examined

Hutchinson on Tuesday, June 15, five days after the court denied Epps's request for a continuance. The record does not support Epps's claim that the court's refusal to grant her counsel additional time to prepare his cross-examination resulted in what Epps claims was an "absolute deprivation of [her] Sixth Amendment right to the effective assistance of counsel." In his cross-examination of Hutchinson, Epps's counsel demonstrated the thoroughness of his preparation and knowledge of the case.

We also conclude any constitutional errors in this matter were harmless beyond a reasonable doubt under the applicable *Chapman* standard. In affirming the court's denial of Epps's section 1118.1 motion for acquittal, we have already concluded that the prosecution presented overwhelming evidence apart from Hutchinson's testimony from which any rational jury could find beyond a reasonable doubt that Epps aided and abetted the commission of the crimes.

III

SHACKLING CLAIM

Last, Epps contends the court erred by requiring her to wear leg shackles during the trial. This contention is unavailing.

A. Background

The prosecution presented its first witness on May 6, 2010, in the presence of all three juries. On May 26, during the prosecution's case-in-chief, Lieutenant Perri Feinstein of the Riverside County Sheriff's Department advised the court outside the presence of the juries and the defendants, that the sheriff's department wanted all three defendants to wear leg restraints or electronic arm bands during the course of the trial

because it was "inherently dangerous" to have multiple unrestrained defendants in a double-murder case with only two officers in the courtroom. Lieutenant Feinstein asserted that "[t]he possibility of escape, or attempt of escape, or assault to the staff of the courtroom is heightened without any types of restraints on these defendants."

The court asked Lieutenant Feinstein, "Do you have any information? Has anything come up?" Lieutenant Feinstein replied she had no information that anything had come up. Epps's counsel, joined by Rottiers's counsel, but not by Hutchinson's counsel who was not scheduled to be present that day, observed that all three defendants had been model defendants in the courtroom, there had been no security issues during the trial proceedings, and it would be prejudicial to the defendants if the juries saw some type of leg restraints. Lieutenant Feinstein informed the court that the restraints would be "underneath the clothing, underneath their pants," and neither a leg brace nor an electronic arm band, which is like a "stun belt" or Taser, would be visible.

Noting it had ordered that at least two deputies be present in the courtroom during the trial proceedings, the court indicated it would make no order regarding restraints at that time, observing that only two of the three defendants were present in the courtroom, two deputies and an armed policeman were present, and the court needed input from Hutchinson's counsel, who was not present. The court continued the matter to the following day.

The next day, May 27, the court again considered the issue of restraints outside the presence of the juries and (over objections by all three defense counsel) the defendants. Lieutenant Feinstein informed the court that two of the defendants, Hutchinson and "one

of the females," were classified as "ad seg" inmates, which means the sheriff's department does not move the defendant without the presence of two deputies. Regarding Hutchinson, Lieutenant Feinstein informed the court that in April 2010 Hutchinson was found in possession of a five-inch piece of plastic that "was starting to be formed in the form of a shank" and was "found in his legal paperwork that he was trying to bring to court."

Regarding Rottiers, Lieutenant Feinstein informed the court that Rottiers had been disciplined for "bullying other inmates," being "disrespectful towards staff," and "intimidat[ing] other inmates on a regular basis." In addition, while in custody Rottiers had been rehoused twice for aggressiveness towards staff and inmates, she had thrown her property box down onto the floor from the top tier of the detention facility, she had thrown water on other inmates, she had stolen shoes from other inmates and threatened to harm them if they told anyone about it, and she had become intoxicated with methamphetamine she had managed to smuggle into her cell.

Regarding Epps, Lieutenant Feinstein informed the court that in April Epps became involved in an argument and threw water on another inmate from the top tier of the detention facility. Epps had attempted to pass a letter to an inmate who was being released so it could be mailed without proper screening, she had been found making "pruno" (jailhouse wine), a nail file had been found in her possession, she had been involved in a fight in which she was identified as the primary aggressor, and a medication had been found secreted in her rectum.

The court scheduled another hearing on the matter for the following day, and ordered that the defendants' inmate classification records be given to the prosecutor and defense counsel. Noting that shackles do not show if worn under pants, the court asked whether Epps and Rottiers were wearing pants. Epps's counsel stated that she was wearing a skirt. Lieutenant Feinstein told the court there were two kinds of restraints: a leg restraint or brace, and an electronic arm band that delivers a shock like a Taser and can be worn around an arm or a leg, even under a skirt. Indicating that ordering the defendants to wear an electronic arm band was a terrible idea, the court indicated that a leg brace would be okay if it did not show and directed counsel to "think of something between now and tomorrow."

1. *May 28 leg brace order*

The next day, Friday, May 28, the court held another hearing outside the presence of the jurors on Lieutenant Feinstein's. The prosecutor informed the court he had received the defendants' inmate classification records. At the court's request, Lieutenant Feinstein repeated the information she had learned from those records and had previously provided to the court, and she answered questions asked by defense counsel and the prosecutor. The prosecutor then argued the use of leg restraints was a "very minimally intrusive procedure" and that it was in the best interest of everyone, including the attorneys, the public, and even the defendants, that the defendants wear leg restraints in the courtroom because the defendants' accusing each other of committing the charged crimes was creating tension.

Hutchinson's counsel objected to his client's being restrained, arguing Hutchinson had done nothing to demonstrate he presented a danger to the court. However, Hutchinson's counsel argued that "enough's been established" to justify restraining Epps and Rottiers. Epps's counsel argued that Epps should not be restrained because she had been "exemplary in the courtroom" and her being found in possession of a fingernail file did not did not warrant her being restrained. Epps's counsel also argued that leg braces would cause Epps some problems because she is bow-legged and her knees pop when she walks. Rottiers' counsel stated he was objecting "under the Eighth and Fourteenth Amendment[s]."

Indicating the information presented by Lieutenant Feinstein should have been presented to the court earlier, the court ordered that the defendants wear leg braces and directed Epps's and Rottiers's attorneys to get pants for them to wear because the leg braces would be visible if they wore dresses. The court also ordered that a third deputy be present in the courtroom during the rest of the trial proceedings.

2. June 1 order for removal of Epps's leg brace and subsequent proceedings

The trial proceedings resumed four days later on Tuesday, June 1. Before the jurors entered the courtroom, the court observed that Epps was wearing chains and asked for an explanation. When Epps's counsel replied that he did not know, Hutchinson's counsel stated, "She's also wearing a skirt, so they needed to restrain her, but they can't put the leg [brace] on her." When the court asked why Epps was not wearing pants in accordance with the court's order, her counsel explained the Epps's mother was supposed to get the pants but had not been able to do so. When Epps stood up at the court's

request, the court noted she was wearing a leg brace and observed that it was "really obvious."

Noting that a third deputy was present as ordered, the court ordered that Epps be taken out of the courtroom, that the leg brace be removed for the rest of the day, and that she be brought back to the courtroom without chains. The court then ordered a recess until Epps returned, and directed Epps's counsel to "make a call and report back."

Following the recess, Epps's counsel reported that he tried to locate some pants for Epps and had called Epps's mother, who said she would go shopping for some pants. Epps's counsel also reported he called someone else who indicated he was going to try to locate some pants for Epps. The three juries entered the courtroom and the prosecution continued its presentation of evidence.

At the end of the morning session the court excused the jurors, directing Hutchinson's jury to return after the lunch break, and directing Epps's and Rottiers' juries to return Thursday morning, June 3. Outside the presence of the jurors, Epps waived her right to be present during both the afternoon proceedings later that day (June 1) and the proceedings the next day, Wednesday, June 2. The court directed Epps to return at 9:00 a.m. on Thursday, June 3 "with the pants suit on and the leg brace underneath."

The court's minutes for Thursday, June 3, show that Epps was present in the courtroom. The record is silent as to whether she was wearing the leg brace.

At the conclusion of the proceedings on June 3, the court—outside the presence of the jurors and without mentioning the leg brace issue—excused Epps until Monday morning, June 7. Hutchinson's counsel, addressing the court and referring to Rottiers and

Hutchinson, stated, "[T]hey're not going to be dressed out tomorrow. That means they don't have to have a leg restraint; correct?" The court replied, "Right. They can have waist chains on them. We don't need the leg restraints tomorrow."

B. *Applicable Legal Principles*

In *Deck v. Missouri* (2005) 544 U.S. 622, 629 (*Deck*), the United States Supreme Court held that the right to due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution "prohibit[s] the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." The high court explained that "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury The constitutional requirement, however, is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling." (*Id.* at p. 633.) The *Deck* court recognized the need to restrain dangerous defendants to prevent courtroom attacks and the need to give trial courts latitude in making individualized security determinations. (*Id.* at p. 632.) It also advised that such determinations "must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial." (*Id.* at p. 633.) The Supreme Court concluded that "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict

obtained." (*Deck, supra*, 544 U.S. at p. 635, quoting *Chapman, supra*, 386 U.S. at p. 24.)

The California Supreme Court has followed similar principles by holding that "a defendant may be physically restrained at trial only if there is a 'manifest need for such restraints.'" (*People v. Seaton* (2001) 26 Cal.4th 598, 651, quoting *People v. Duran* (1976) 16 Cal.3d 282, 291; see also § 688 ["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."].) The high court has also explained: "Such a "[m]anifest need" arises only upon a showing of unruliness, an announced intention to escape, or "[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained" [Citation.] "Moreover, "[t]he showing of nonconforming behavior . . . must appear as a matter of record 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." (*People v. Hill* (1998) 17 Cal.4th 800, 841; see also *People v. Vance* (2006) 141 Cal.App.4th 1104, 1112.)

The decision whether to shackle a defendant may not be delegated to security or law enforcement personnel; the trial court must make its own determination regarding restraints. (*People v. Hill, supra*, 17 Cal.4th at p. 841; *People v. Vance, supra*, 141 Cal.App.4th at p. 1112.)

The California Supreme Court has stated it has "consistently held that courtroom shackling, even if error, was harmless if there is no evidence that the jury saw the

restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense." (*People v. Anderson* (2001) 25 Cal.4th 543, 596.) "Even a jury's brief observations of physical restraints generally have been found nonprejudicial." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1213.)

C. Analysis

We first conclude the court did not abuse its discretion or violate Epps's federal constitutional rights by ordering that she wear a leg brace beneath pants in the courtroom, because the information provided by Lieutenant Feinstein regarding the nonconforming conduct of Epps and her two codefendants while in custody established a manifest need for such restraint in the interest of maintaining security during the jury trial in this murder case. The information provided by Lieutenant Feinstein showed that in April 2010, shortly before the prosecution called its first witness in this case on May 6, Hutchinson was found in possession of a five-inch piece of plastic that was starting to be formed into a shank and was found in a box he was trying to bring to court. Rottiers had been disciplined for bullying and intimidating other inmates, and had been rehoused twice as a result of her aggressiveness towards staff and other inmates. A nail file had been found in Epps's possession, and she had threatened other inmates and been involved in a fight in which she was found to be the primary aggressor.

These circumstances regarding the aggressive nonconforming behavior of the defendants while in custody, combined with the fact that numerous witnesses were appearing before three juries in this case, created a need for heightened security in this case and fully justified the court's order requiring all three defendants to wear leg

restraints in the courtroom. The court appropriately insisted that Epps and Rottiers wear pants over the leg braces so that they would not be visible to the jurors.

Even if we were to conclude the court abused its discretion by ordering Epps to wear a leg brace, no prejudice is shown. As noted, courtroom shackling, even if error, is harmless if there is no evidence that the jurors saw the restraints or that the restraints impaired or prejudiced the defendant's rights to testify or participate in her defense. (*People v. Anderson, supra*, 25 Cal.4th at p. 596 [no basis exists to find prejudice if there is no evidence or claim that the jurors ever saw the leg brace, or that the restraint influenced the defendant to not testify or participate in her defense].)

Here, Epps was wearing a skirt and a visible leg brace when she entered the courtroom on June 1 outside the presence of the jurors. The court ordered the leg brace removed outside the courtroom and then recessed the proceedings until she returned without a leg brace or chains. None of the jurors saw the leg brace or the chains. Epps concedes the record "does not disclose whether any members of the jury observed [her] wearing shackles or walking with obvious restraints." She presents no persuasive evidence or argument that the leg restraints prejudicially influenced her to not testify or otherwise participate in her defense. We conclude Epps has not shown, and cannot demonstrate, prejudice.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.