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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOAQUIN MURRIETA MARTINEZ,

Defendant and Appellant.

D059094

(Super. Ct. No. SCN246872)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P.

Weber, Judge. Affirmed.

A jury found Joaquin Murrieta Martinez guilty of the first degree murder of Janina Hardoy. (Pen. Code, §§ 187, subd. (a), 189; undesignated section references are to this code.) He subsequently admitted he had three prior convictions for which he had served prison terms. The trial court sentenced Martinez to prison for 25 years to life for the murder (§ 190, subd. (a)) and imposed a consecutive prison term of three years for the prior convictions (§ 667.5, subd. (b)).

Martinez appeals, contending on several grounds that the judgment must be reversed because he was unlawfully prevented from introducing exculpatory testimony and hearsay statements of a witness who asserted her privilege against self-incrimination and refused to testify at trial. We reject these contentions and affirm the judgment.

I.

FACTUAL BACKGROUND

Martinez, a homeless drug addict, accepted an invitation from Hardoy to move into a house she leased in Oceanside, where several other previously homeless drug addicts also resided. Martinez and Hardoy had a sexual relationship for a few months, but that ended when Lisa Brown moved into the house and Martinez began having sex with her. Over the next several months, various drug addicts moved in and out, the atmosphere became increasingly negative and hostile, and the premises degenerated into a flophouse for persons addicted to methamphetamine or heroin.

The financial situation of those living at Hardoy's house also gradually deteriorated. When Hardoy exhausted her inheritance and could no longer pay the rent or other bills, Martinez began robbing banks with Brown, Joseph Cooper and others living at the house to pay the household bills and to support their drug habits. Hardoy knew about these bank robberies, and she periodically argued with Martinez and threatened to report them to the police.

The last of these arguments was overheard by Yesenia Green, an acquaintance of Martinez. Martinez left the house with Green and her friend because of the argument. When Green and her friend drove Martinez back to Hardoy's house a few hours later,

Green's friend said to Martinez, "Okay. We'll be back." Martinez responded, "Okay. But by the time you guys get back, the bitch will be dead."

A few days later, Martinez and Brown met Cooper and others at a motel. Cooper told Martinez they needed to go back to Hardoy's house to retrieve some things, but Martinez told Cooper they could not go to the house because Hardoy's corpse was there. Martinez also said he needed Cooper to help him dispose of the corpse, and Cooper agreed to do so.

Martinez then drove Cooper and Brown back to Hardoy's house. Cooper testified that on the way there, Brown told him Martinez had "poisoned" Hardoy, but when Hardoy did not die right away Martinez smothered her with a pillow.¹ Brown also said Martinez killed Hardoy because she was a "rat" who had threatened "to call the cops."² According to Cooper, as Brown related these facts Martinez "didn't do anything. He kept driving. He just kind of nodd[ed] his head and was kind of pretty serious about getting what had to be done, done, which was getting rid of the body."

When Martinez, Brown and Cooper arrived at Hardoy's house, they went to a bedroom where Hardoy's corpse lay across the bed. Martinez testified he wanted to

¹ Martinez testified at trial that he "[did]n't remember ever hearing" Brown say he smothered Hardoy with a pillow; he also denied killing Hardoy, but admitted injecting her with heroin. Toxicological tests performed on Hardoy's remains revealed methamphetamine and morphine, a metabolite of heroin. The tests were negative for the anticoagulants contained in poisons commonly used for pest control.

² On cross-examination, Martinez admitted Hardoy had "threatened to call the cops on [him]" and described her as a "yapping chihuahua." He also testified that if he ever encountered a "snitch" in prison, he would stab the "snitch" in the neck.

dismember Hardoy's corpse so that it could not be identified and traced back to the bank robberies. He therefore "took out the dental records" by bashing the corpse's face with a baseball bat and using a machete "to be sure that the teeth were all knocked [out]." To eliminate fingerprints and footprints, Martinez used the machete to chop off Hardoy's hands, and Cooper used it to chop off her feet. Martinez wrapped the dismembered hands and feet in plastic bags and stuffed them into a backpack; he and Cooper wrapped the rest of Hardoy's corpse in blankets and stuffed it into a duffel bag. Martinez and Cooper discarded the duffel bag in a dumpster in Escondido. Brown discarded the backpack in a dumpster in Vista.

II.

PROCEDURAL BACKGROUND

While Cooper was testifying at trial, the prosecutor asked him what Brown had told him during the ride from the motel to Hardoy's house about how Hardoy died. Martinez's counsel objected the question called for hearsay. The trial court overruled the objection, and Cooper testified as stated in part I., *ante*.

After Cooper testified at trial, Martinez's counsel advised the court that Brown was available to testify and that he intended to call her as a witness the following day. The court stated that it did not know why Brown had not been charged in the case and that she would need an attorney to advise her about testifying because her testimony might expose her to criminal liability. The prosecutor advised the court that Brown had been charged with being an accessory after the fact (§ 32) and had served a prison sentence for conviction on that charge. The prosecutor also stated that in doing research for the case,

he had learned that someone may be charged with both being an accessory after the fact and aiding and abetting a murder. Martinez's counsel agreed to arrange for Brown to meet with an attorney and to appear in court the following day.

Brown appeared in court the next day and, on the recommendation of her attorney, asserted her Fifth Amendment privilege against self-incrimination. Based on this assertion, the trial court ruled Brown could not be called as a witness and excused her. Brown and her counsel exited the courtroom.

The trial court then allowed Martinez's counsel "to make a record regarding [Brown]." Counsel argued the People's decision to charge Brown with being an accessory after the fact and her service of the sentence for that crime estopped the People from subsequently charging Brown with Hardoy's murder. He also argued Brown was "a vital witness for the defense." Martinez's counsel stated that his "understanding from the reports and from speaking to [his] investigator" was that Brown's testimony "would have been radically different from what [Cooper] said." According to counsel, Brown would deny she told Cooper that Martinez "said he smothered the victim . . . [or] poisoned the victim or anything of the sort"; would "attack [Cooper's] statements about her being present at the time that the body was chopped up"; and would testify that Cooper "is a great big fat liar."³ Counsel concluded by asserting that Brown had given three or four

³ In his opening brief, Martinez also asserts: "Brown would also have confirmed just who was driving the car that night: Martinez, as Cooper claimed, or Brown herself, as Martinez claimed. To the degree Brown would have confirmed Martinez['s] version, his credibility would have been bolstered and Cooper's diminished." Martinez, however, does not provide any record citation in support of this assertion. Our review of the record

interviews in which "she didn't change her story" and "would have been a solid witness for the defense."

In response to the arguments of Martinez's counsel, the trial court stated that in light of the testimony introduced at trial, Brown "could have absolutely been charged as aiding and abetting the death of [Hardoy]." The court also noted that Brown could face criminal liability if she had lied in any of her statements to the police, and that "there are also some potential federal charges." The court stated it "was not comfortable putting [Brown] on the stand without getting counsel to advise her regarding any Fifth Amendment aspects of her testimony."

The prosecutor also made some statements for the record. He reminded the court there is no limitations period for murder. He also stated: "And the People are not precluded . . . from charging the crime in which the proof is strongest first"; Brown "remains a suspect in this murder"; and "it's not over. We're just looking for one additional [piece of] corroborative evidence and charges could be filed. I just don't know. It depends on the state of the evidence."

After the jury found him guilty, Martinez renewed and expanded his arguments concerning the need for Brown's testimony in a motion for new trial. He argued the trial court "erred in the decision of [a] question of law arising during the course of the trial" when it excused Brown from testifying based on her assertion of her Fifth Amendment privilege. (§ 1181, subd. 5.) Martinez also asserted, without supporting factual or legal

revealed that in his offer of proof, Martinez's trial counsel made no mention of any expected testimony from Brown as to who was driving the car.

analysis, that the court "should have either ordered the [P]eople to grant [Brown] immunity or suggested the use of her hearsay statements in this case." The People, of course, opposed the new trial motion; and the court denied it.

III.

DISCUSSION

Martinez contends the judgment must be reversed because he was denied a fair trial by not being able to call Brown as a witness. According to Martinez, Brown could not invoke the Fifth Amendment and refuse to testify because at the time of trial she was no longer subject to prosecution for murder; the prosecutor committed misconduct by threatening to charge Brown with murder but not granting her use immunity; and the trial court should have granted Brown "judicial immunity." Martinez also contends his trial counsel provided ineffective assistance by not seeking to admit statements Brown made to a defense investigator that contradicted Cooper's testimony about who killed Hardoy. As we shall explain, none of these contentions has any merit.

A. *Brown Properly Asserted Her Privilege Against Self-incrimination Because She Could Have Been Charged with Murder Had She Testified at Martinez's Trial*

Martinez's primary contention on appeal is that the trial court should not have excused Brown as a witness on the basis of the Fifth Amendment⁴ because she was not

⁴ As relevant here, the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." (U.S. Const., 5th Amend.) This privilege against self-incrimination applies in state court proceedings. (*Malloy v. Hogan* (1964) 378 U.S. 1, 8.) To claim the privilege, a prospective witness must have reasonable cause to believe his testimony might support his conviction of crime or might supply evidence needed to prosecute him. (*Ohio v. Reiner* (2001) 532 U.S. 17, 20-21; *People v. Seijas* (2005) 36 Cal.4th 291, 304 (*Seijas*).)

subject to prosecution for murder when he summoned her to testify on his behalf.

Martinez argues that under section 654, as interpreted in *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*), the People's decision not to charge Brown with murder when they charged her with being an accessory after the fact, to which she pled guilty and served a prison sentence, estops them from charging her with murder. We disagree.

Section 654, subdivision (a) provides in part that when an "act or omission . . . is punishable in different ways by different provisions of law," an "acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." This provision "bars multiple prosecutions for the same act or omission where the defendant has already been tried and acquitted, or convicted and sentenced." (*People v. Davis* (2005) 36 Cal.4th 510, 557 (*Davis*).)

The parties agree the "leading case" on the section 654 bar against multiple prosecutions is *Kellett, supra*, 63 Cal.2d 822. (*Davis, supra*, 36 Cal.4th at p. 557.) In *Kellett*, the defendant pled guilty to a misdemeanor charge of brandishing a firearm (§ 417) and was later charged with being a felon in possession of a firearm (§ 12021). Both charges arose out of the defendant's standing on a public sidewalk while holding a pistol. The California Supreme Court held the second prosecution was barred: "When, as here, the prosecution is or should be aware of more than one offense *in which the same act or course of conduct plays a significant part*, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and

sentence." (*Kellett*, at p. 827, italics added.) The Supreme Court explained that such a bar is needed to avoid "harassment" of defendants and "waste of public funds." (*Ibid.*; see also *Davis*, at p. 557 ["This preclusion is primarily 'a procedural safeguard against harassment.'"].)

To determine whether the "same act or course of conduct plays a significant part" in more than one offense (*Kellett, supra*, 63 Cal.2d at p. 827), what matters "is the totality of the facts, examined in light of the legislative goals of sections 654 and 954" (*People v. Flint* (1975) 51 Cal.App.3d 333, 336).⁵ "More specifically, if the evidence needed to prove one offense necessarily supplies proof of the other, . . . the two offenses must be prosecuted together, in the interests of preventing needless harassment and waste of public funds." (*People v. Hurtado* (1977) 67 Cal.App.3d 633, 636 (*Hurtado*)). To raise the bar against multiple prosecutions, however, "[t]he evidentiary test of *Flint* and *Hurtado* requires more than a trivial overlap of the evidence. Simply using facts from the first prosecution in the subsequent prosecution does not trigger application of *Kellett*." (*People v. Valli* (2010) 187 Cal.App.4th 786, 799 (*Valli*)). Thus, successive prosecutions are not barred when "[d]ifferent evidentiary pictures are required . . . [or] [d]ifferent witnesses would testify to the events." (*Ibid.*)

Here, the evidentiary test articulated and applied in the cases cited above is not satisfied. To be sure, there would be some overlap in the evidence that supported

⁵ Section 954 authorizes joinder of "two or more different offenses connected together in their commission."

Brown's conviction of being an accessory after the fact and the evidence the People likely would introduce against her in a subsequent murder prosecution. Presumably, the People would use evidence of Brown's intimate relationship with Martinez and her participation in the dismemberment and disposition of Hardoy's corpse, which supported the accessory conviction, as circumstantial evidence that Brown also aided and abetted Hardoy's murder. (See *People v. Jones* (1980) 108 Cal.App.3d 9, 15 [companionship and conduct before and after crime are probative of aiding and abetting].)

"Nonetheless, the People's decision to use the [accessory] offense[] to help prove murder [would] not meet the evidentiary test as stated in *Hurtado*: 'if the evidence needed to prove one offense necessarily supplies proof of the other, . . . the two offenses must be prosecuted together . . .'" (*Valli, supra*, 187 Cal.App.4th at p. 800.) The evidence that Brown was an accessory — i.e., that after and with knowledge of Hardoy's murder, she disposed of part the corpse to help Martinez avoid prosecution for the murder (see § 32) — would not supply proof that she aided and abetted the murder itself — i.e., that before the murder, Brown knew Martinez intended to kill Hardoy and, with the intent to facilitate the murder, did something to help him kill her (see §§ 31, 187, subd. (a); *People v. Beeman* (1984) 35 Cal.3d 547, 561). Because a murder conviction would require the People to prove an intent and an act by Brown that differ from those needed to convict her of being an accessory after the fact, "the evidentiary pictures which had to be painted to prove the [accessory and murder] offenses [are] sufficiently distinct so as to permit separate prosecutions of the two offenses." (*Hurtado, supra*, 67 Cal.App.3d at pp. 636-637; see also *Valli*, at pp. 799-800 [acquittal of murder did not bar subsequent

prosecution for evading arrest even though evidence of evasion was introduced to establish consciousness of guilt in murder trial].)

Moreover, barring a subsequent prosecution of Brown for Hardoy's murder would not further "the policies underlying section 654—preventing harassment of the defendant and the waste of public resources through relitigation of issues." (*Davis, supra*, 36 Cal.4th at p. 558.) Brown's interest in being free from the harassment of a second trial is nonexistent, because her conviction of being an accessory after the fact resulted from a guilty plea, not a trial. For the same reason, the public's interest in avoiding the waste of resources through relitigation would be "minimal." (*Id.* at p. 559.) "Balanced against these minimal interests [is] the public's weighty interest in prosecuting and punishing [Brown] for the serious crime[] of [murder]." (*Ibid.*) The balance of policy considerations thus clearly tips in favor of allowing Brown to be prosecuted for murder.

We are not persuaded to reach the opposite conclusion by Martinez's argument that under *In re Grossi* (1967) 248 Cal.App.2d 315, Brown had to be charged with murder when she was charged with being an accessory after the fact because the offenses "took place close in time and pursuant to one single course of conduct." *In re Grossi* is simply not on point.

Grossi used a revolver to rob a gas station attendant and was apprehended with the revolver four hours later after he committed a traffic violation and attempted to elude police. He was charged with armed robbery and being a felon in possession of a firearm; the robbery charge was dismissed for lack of prosecution; and he pled guilty to and was sentenced for the other offense. After Grossi was recharged with and convicted of armed

robbery, he sought a writ of habeas corpus. The Court of Appeal held the second prosecution for robbery was barred because the record "fairly reek[ed] of a single course of conduct, indivisible for purposes of section 654," and nothing in the record supported the People's "hypothesis" that between the robbery and the arrest Grossi had "start[ed] a new course of conduct." (*In re Grossi, supra*, 248 Cal.App.2d at pp. 321-322.)

Unlike Grossi, Brown suffered no harassment by being convicted of an offense and later recharged with another offense that had been dismissed from the earlier case for lack of prosecution. And, unlike Grossi's possession of the revolver, which had a single purpose and was a key evidentiary element of both offenses he was charged with, there is no single act by Brown that formed a significant evidentiary part of both Hardoy's murder and being an accessory after the fact. Rather, as explained above, those offenses require different mental states and acts. In addition, Hardoy's murder and the dismemberment and disposal of her remains occurred a few days apart and were carried out with different objectives (the murder to prevent Hardoy from reporting the bank robberies to police, and the mutilation of her corpse to prevent the police from tracing the robberies to Martinez). Thus, unlike the crimes in *In re Grossi, supra*, 248 Cal.App.2d 315, the crimes at issue here did not "'arise out of the same act, incident, or course of conduct'" for purposes of the section 654 bar to multiple prosecutions. (*People v. Turner* (1985) 171 Cal.App.3d 116, 129 (*Turner*).)

Accordingly, we conclude the same act or course of conduct did not play "a significant part" in the homicide and accessory offenses. (*Kellett, supra*, 63 Cal.2d at p. 827.) This conclusion renders inapplicable the *Kellett* rule barring multiple

prosecutions. (See *Turner, supra*, 171 Cal.App.3d at p. 129 ["[T]he *Kellett* rule requiring joinder of all offenses . . . [is] applicable only where the offenses arise out of the same act, incident, or course of conduct".])

Finally, we note the parties disagree regarding the applicability of the exception to the *Kellett* rule for cases "where the prosecutor "'is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of reasonable diligence.'"" (*Davis, supra*, 36 Cal.4th at p. 558.) Martinez contends this exception does not apply because "this is not a case where the prosecution was unaware of Brown's involvement in the entire incident. The People counter that when they charged Brown with being an accessory after the fact, they "did not have sufficient evidence to charge [her] with murder yet." Our conclusion the *Kellett* rule barring multiple prosecutions does not apply makes it unnecessary for us to resolve the parties' dispute over the applicability of the exception.⁶

⁶ Were we to address the issue, we would reject Martinez's contention the trial court's statement that Brown "could have absolutely been charged as aiding and abetting the death of [Hardoy]" renders the exception inapplicable. The quoted statement was prefaced by the following qualifier: "given the testimony of several of the witnesses in this trial." Since the trial did not occur until 2010, the court did not state the People could have charged Brown with murder when they charged her in 2008 with being an accessory after the fact. Moreover, the prosecutor represented at trial that the murder case was still open and that Brown remained a suspect who could be charged with murder "if sufficient evidence comes forward." Thus, contrary to Martinez's argument, the record does not indicate the People had enough evidence in 2008 to charge Brown with Hardoy's murder.

In sum, we hold that under section 654, Brown's conviction and sentence for being an accessory after the fact do not bar a subsequent murder prosecution. Therefore, Brown had reasonable cause to believe she might incriminate herself if she testified at Martinez's trial and properly invoked her Fifth Amendment privilege not to do so. (*Ohio v. Reiner, supra*, 532 U.S at pp. 20-21; *Seijas, supra*, 36 Cal.4th at p. 304.)⁷

B. *The Prosecutor Did Not Improperly Interfere with Martinez's Right to Present a Defense by Threatening to Charge Brown with Murder and Refusing to Grant Her Immunity*

Martinez complains he was denied a fair trial because the prosecutor's threat to prosecute Brown for Hardoy's murder and refusal to grant her immunity "stifled the truth-seeking process otherwise legally and constitutionally required." He asserts "Brown was directly driven off the witness stand by virtue of the cautionary warning issued by both the court and the prosecution as to what might happen to her should she testify. And this, Martinez submits, denied him his fundamental right to present a defense." This argument has no merit.

"The state and federal Constitutions guarantee the defendant a meaningful opportunity to present a defense. [Citations.] As [the California Supreme Court has]

⁷ In his reply brief, Martinez contends Brown did not properly invoke her Fifth Amendment privilege against self-incrimination because she made only a "blanket" assertion and did not "object[] with specificity" that the testimony sought would incriminate her. (See, e.g., *Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 308 [witness "may not invoke a blanket privilege against self-incrimination" but must show particular questions "would elicit answers that 'support a conviction' or that 'furnish a link in the chain of evidence needed to prosecute the witness'"].) We deem this contention forfeited because Martinez did not raise it in his opening brief, and the People did not have an opportunity to respond to it. (E.g., *People v. Zamudio* (2008) 43 Cal.4th 327, 353; *People v. Battle* (2011) 198 Cal.App.4th 50, 76.)

observed, 'A defendant's constitutional rights to compel the attendance of witnesses, as guaranteed by the Sixth Amendment, and to due process, as guaranteed by the Fourteenth Amendment, are violated when the prosecution interferes with the defendant's right to present witnesses.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 456 (*Lucas*)). To prevail on such an interference claim, a defendant must establish: (1) prosecutorial misconduct, i.e., conduct entirely unnecessary to the proper performance of the prosecutor's duties and of such a nature as to transform a defense witness willing to testify into one unwilling to testify; (2) a substantial causal link between the prosecutor's misconduct and the defendant's deprivation of the witness's testimony; and (3) the materiality to his defense of the testimony of which he was deprived. (*Id.* at p. 457.)

Like the defendant in *Lucas, supra*, 12 Cal.4th 415, Martinez "is unable to carry the first part of his burden, that is, to show that the prosecutor acted improperly. Contrary to [Martinez's] argument, it is clear that the court, not the prosecutor, was the moving force in raising the issue of [Brown's] possible self-incrimination." (*Id.* at pp. 457-458.) As recited above (see pt. II., *ante*), when Martinez's counsel indicated he intended to call Brown as a witness, the court expressed concern that Brown might incriminate herself by discussing her involvement in Hardoy's murder and disposal of the corpse, and appointed counsel to advise her on the matter. After the court raised this concern with counsel, the prosecutor merely offered information relevant to the court's concern when he correctly advised the court that under some circumstances a person may be charged with both murder and being an accessory to the murder (see, e.g., *People v. Wallin* (1948) 32 Cal.2d 803, 806-807; *In re Malcolm M.* (2007) 147 Cal.App.4th 157,

169), and that Brown remained a suspect who might be charged with Hardoy's murder if sufficient evidence developed. "Further, the prosecutor's comments were not threats directed to the witness." (*Lucas*, at p. 458.) Importantly, when the prosecutor initially discussed Brown's potential liability for Hardoy's murder, Brown had not yet appeared in court; and when he advised the court that Brown remained a suspect in the murder and might be charged should sufficient evidence develop, she had already left the courtroom. Hence, contrary to Martinez's assertion, the prosecutor did not engage in any improper "intimidation." "In sum, as the prosecutor's comments evidently responded to a concern of the court's, we see no indication on this record the prosecutor engaged in conduct 'wholly unnecessary to the proper performance of [his] duties and of such a character as 'to transform [the witness] from a willing witness into one who would refuse to testify.'"" (*Ibid.*)⁸

Also like the defendant in *Lucas, supra*, 12 Cal.4th 415, Martinez "argue[s] the prosecutor's refusal to grant [Brown] immunity for murder charges was also misconduct, as it was allegedly unconscionable and interfered with [Martinez's] right to present a

⁸ The absence of any such misconduct by the prosecutor distinguishes this case from those on which Martinez relies. (See, e.g., *United States v. Smith* (D.C. Cir. 1973) 478 F.2d 976, 978 [prosecutor threatened witness he would be prosecuted if he testified]; *In re Martin* (1987) 44 Cal.3d 1, 35 [prosecutor had defense witness arrested in front of other defense witnesses after he gave testimony contradictory to that of key prosecution witness]; *People v. Warren* (1984) 161 Cal.App.3d 961, 973 [prosecutor threatened witness "that if he testified he not only could but probably would be prosecuted"]; *People v. Robinson* (1983) 144 Cal.App.3d 962, 970 [prosecutor threatened witness that charges "'will be filed, should you take the stand'"].) Indeed, the *Lucas* court distinguished those cases in rejecting the same argument Martinez makes here. (*Lucas, supra*, 12 Cal.4th at p. 458.)

defense." (*Id.* at p. 459.) But, as the People point out, Martinez never requested immunity for Brown at trial. Therefore, as in *Lucas*, "[t]he issue is not preserved for review." (*Ibid.*)

In his reply brief, Martinez argues on several grounds that he did not forfeit his challenge to the prosecutor's refusal to grant Brown immunity, but none has any merit. Contrary to Martinez's unsupported assertion, the "objections" of his trial counsel that the People had no legal right to charge Brown with murder did not constitute a request that she be granted immunity. Further, Martinez's reliance on cases holding that an objection is not needed to preserve a claim of instructional error when the error affects the defendant's substantial rights (e.g., *People v. Felix* (2008) 160 Cal.App.4th 849, 857) or to preserve an issue that presents a "pure question[] of law that can be resolved without reference to the particular sentencing record developed in the trial court" (*People v. Welch* (1993) 5 Cal.4th 228, 235) is obviously misplaced. His appellate claim does not involve instructional error, sentencing error or a pure question of law. Rather, because a request to the prosecutor for immunity at trial might have been granted and, if denied, a proper record concerning the reasons for the denial could have been developed, we apply the general rule that issues not raised in the trial court are forfeited on appeal. (See, e.g., *People v. Williams* (2008) 43 Cal.4th 584, 624-625; *People v. Cudjo* (1993) 6 Cal.4th 585, 619 (*Cudjo*).)

In any event, even if we were to reach the merits of Martinez's argument that the prosecutor's "refusal" to grant Brown immunity was improper, we would reject it. Our Supreme Court repeatedly and consistently has held that a "defendant has no power to

force the prosecution to grant immunity to defense witnesses." (*Lucas, supra*, 12 Cal.4th at p. 459; accord, *People v. Williams, supra*, 43 Cal.4th at p. 622; *People v. Samuels* (2005) 36 Cal.4th 96, 127 (*Samuels*); *In re Williams* (1994) 7 Cal.4th 572, 609.) Hence, even if Martinez had preserved this argument, he has not demonstrated reversible error.

C. *The Trial Court Had No Authority to Grant Brown Use Immunity*

Martinez next argues the trial court, "knowing that Brown was a percipient witness and important to Martinez'[s] defense, should have forced the People to grant Brown immunity so that she could have testified for the defense." He contends the trial court erred when, in denying his new trial motion, it stated it had no power to order the prosecutor to grant a witness immunity. Martinez asserts "there is, in fact, significant decisional authority for the proposition that a trial court can itself grant use immunity."⁹ We are not persuaded.

As an initial matter, we agree with the People that Martinez forfeited this claim of error because he did not ask the trial court to grant Brown use immunity. (*People v. Williams, supra*, 43 Cal.4th at pp. 624-625; *Lucas, supra*, 12 Cal.4th at p. 460; *Cudjo, supra*, 6 Cal.4th at p. 619.) Martinez first raised the court-granted immunity issue when he moved for a new trial after the jury found him guilty, and he did so in one sentence in a four-page motion that cited no applicable authority. Nevertheless, because Martinez asserts "his trial counsel's failure to research the question of judicial immunity and to

⁹ "Use immunity protects a witness against the actual use of [the witness's] compelled testimony, as well as the use of evidence derived therefrom." (*People v. Vines* (2011) 51 Cal.4th 830, 882, fn. 24.)

request such denied him effective assistance of counsel,"¹⁰ we shall address the issue on the merits. (See *Lucas*, at p. 457 [addressing merits of forfeited immunity issue when defendant claimed ineffective assistance of counsel].)

There is no California statute or case authorizing a trial court to grant immunity to a witness when not requested to do so by the prosecutor. Indeed, the grant of immunity to a witness "is an executive function" (*People v. Williams, supra*, 43 Cal.4th at p. 622), "since the decision to seek immunity is an integral part of the *charging* process, and it is the prosecuting attorneys who are to decide what, if any, crime is to be charged" (*In re Weber* (1974) 11 Cal.3d 703, 720). In accordance with this view, our Supreme Court has noted, "the Courts of Appeal of this state have uniformly rejected the notion that a trial court has the inherent power . . . to confer use immunity upon a witness called by the defense." (*People v. Hunter* (1989) 49 Cal.3d 957, 973 (*Hunter*).)¹¹ Because the issue of whether a court has inherent authority to grant a defense witness use immunity raises several important policy considerations, we join our colleagues in the First District and

¹⁰ The federal Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." (U.S. Const., 6th Amend.; see *Gideon v. Wainwright* (1963) 372 U.S. 335, 342-343 [holding 6th Amend. right to counsel applies in state court criminal trials].) The state Constitution similarly provides: "The defendant in a criminal cause has the right . . . to have the assistance of counsel for the defendant's defense . . ." (Cal. Const., art. I, § 15.) Under both, the right to the assistance of counsel "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

¹¹ See, e.g., *People v. Cooke* (1993) 16 Cal.App.4th 1361, 1371 (*Cooke*); *People v. Estrada* (1986) 176 Cal.App.3d 410, 418; *People v. DeFreitas* (1983) 140 Cal.App.3d 835, 839-841; *People v. Sutter* (1982) 134 Cal.App.3d 806, 816.

"decline [Martinez's] invitation to declare a doctrine of judicial use immunity for defense witnesses in criminal cases. . . . The relief which [Martinez] here requests should be granted, if at all, by our state's highest court" (*Cooke, supra*, 16 Cal.App.4th at p. 1371.)

Martinez insists our Supreme Court has already authorized "limited judicially declared use immunity." He relies on the following dictum from *Hunter, supra*, 49 Cal.3d at page 974: "Though it is possible to hypothesize cases where a judicially conferred use immunity might possibly be necessary to vindicate a criminal defendant's rights to compulsory process and a fair trial [citation], that is not a question we need here decide." As Martinez notes, the Supreme Court has repeated this dictum in subsequent decisions. (See, e.g., *Samuels, supra*, 36 Cal.4th at p. 127; *Cudjo, supra*, 6 Cal.4th at p. 619.) But, the Supreme Court has never actually held that trial courts have inherent authority to grant witnesses use immunity; instead, it has "expressed reservations concerning [such] claims" (*People v. Williams, supra*, 43 Cal.4th at p. 622) and repeatedly described them as ""doubtful"" (*Samuels*, at p. 127; *People v. Stewart* (2004) 33 Cal.4th 425, 468; *Lucas, supra*, 12 Cal.4th at p. 460). Contrary to Martinez's contention, then, there is no "solid California precedent" for a trial court's power to grant a defense witness use immunity. (See, e.g., *People v. Valencia* (2011) 201 Cal.App.4th 922, 929 [dicta do not constitute precedent].)

In any event, this case does not meet the criteria for judicially conferred immunity discussed in *Hunter, supra*, 49 Cal.3d 957. Under the first of two tests articulated in *Hunter*, a court might confer use immunity when a witness's testimony is "'clearly

exculpatory'" and "'essential'" and there are "'no strong governmental interests which countervail against a grant of immunity.'" (*Hunter*, at p. 974.) Immunity would be denied, however, "'if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or it is found to relate only to the credibility of the government's witnesses.'" (*Ibid.*) Under the second test articulated in *Hunter*, a court might confer use immunity when the prosecutor does not "administer the immunity power evenhandedly, with a view to ascertaining the truth," and instead "intentionally refuse[s] to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative exculpatory evidence." (*Id.* at pp. 974-975.) As later explained by our Supreme Court, this "second test referred to in *Hunter* . . . potentially authorizes a trial court to grant immunity to a defense witness when the prosecution has acted with the deliberate intention of distorting the factfinding process." (*Stewart, supra*, 33 Cal.4th at p. 471.)

Here, use immunity was not justified under *Hunter's* first test because Brown's expected testimony was neither clearly exculpatory nor essential. In his offer of proof, Martinez's trial counsel stated that Brown would deny she told Cooper that Martinez had killed Hardoy and would testify that Cooper "is a great big fat liar." Counsel, however, did not represent that Brown would testify that Hardoy overdosed on methamphetamine or heroin, that somebody else killed her, or that Martinez had an alibi. As represented in the offer of proof, Brown's testimony would not clearly show Martinez did not murder Hardoy; at most, it would undermine Cooper's credibility and corroborate Martinez's testimony that he did not remember hearing Brown tell Cooper that he (Martinez)

smothered Hardoy. Martinez therefore "failed to demonstrate that the proffered testimony was 'clearly exculpatory and essential' to his defense." (*Hunter, supra*, 49 Cal.3d at p. 974; see also *Samuels, supra*, 36 Cal.4th at pp. 127-128 [testimony that would have been cumulative of other witnesses' testimony was not essential under *Hunter*].)

Furthermore, under *Hunter's* first test, even when a witness's testimony is clearly exculpatory and essential, a court may not grant use immunity if "'strong governmental interests . . . countervail against a grant of immunity.'" (*Hunter, supra*, 49 Cal.3d at p. 974.) Here, the record supports legitimate reasons for not granting Brown use immunity. Cooper and others testified she was sexually involved with Martinez, participated in the bank robberies, and helped dismember and dispose of Hardoy's corpse. The prosecutor thus reasonably could have believed Brown might commit perjury to try to exculpate Martinez if granted immunity. (See *Cooke, supra*, 16 Cal.App.4th at p. 1371.) Also, because Brown remained a suspect in Hardoy's murder, "it was contrary to the People's interest to grant immunity" (*Lucas, supra*, 12 Cal.4th at p. 461), which "substantially burdens the government with having to prove that evidence against a previously immunized witness was not obtained or derived from immunized testimony" (*Cooke*, at p. 1370). In sum, "given [Brown's] apparent complicity and culpability, the prosecution clearly had a strong governmental countervailing interest in not granting [her] either use or transactional immunity." (*Stewart, supra*, 33 Cal.4th at p. 470.)

Martinez also has not satisfied *Hunter's* second test for granting judicially conferred immunity because there is no evidence the prosecutor "acted with the

deliberate intention of distorting the factfinding process." (*Stewart, supra*, 33 Cal.4th at p. 471.) Martinez asserts in his briefing that "the only possible rationale behind not granting Brown use immunity would have been to suppress essential (to the defense) exculpatory evidence," and that "most certainly what underlay this entire scenario was the desire to keep Brown from denying having made" the statements to Cooper that Martinez killed Hardoy. He points to nothing in the record to support these assertions, however, and even concedes in his reply brief that the record does not "expressly" establish that the prosecutor "refused to grant Brown immunity in order to suppress essential evidence and thereby distort the factfinding process." We do not believe the record impliedly establishes such distortion either. There is no indication the prosecutor granted immunity to witnesses who testified favorably to the People but refused to grant it to Brown, who purportedly would have testified favorably to the defense. Nor did Martinez's trial counsel's offer of proof indicate Brown would provide critical evidence that Martinez did not murder Hardoy. In brief, "there is no evidence here that the prosecutor intentionally refused to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative exculpatory evidence." (*Hunter, supra*, 49 Cal.3d at p. 975.)

For the foregoing reasons, we hold the trial court had no power to grant Brown use immunity even if Martinez had asked it to do so, and would have had to deny any motion requesting such immunity. Because counsel "is not ineffective for failing to make frivolous or futile motions," we reject Martinez's claim of ineffective assistance of counsel. (*People v. Thompson* (2010) 49 Cal.4th 79, 122 (*Thompson*); accord, *People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1409 ["trial counsel is not required to make

frivolous or futile motions, or indulge in idle acts"]; *People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091 (*Torrez*) ["A defense counsel is not required to make futile motions or to indulge in idle acts to appear competent."]; *People v. Taylor* (1984) 162 Cal.App.3d 720, 726 ["Counsel is under no obligation to make idle or frivolous motions."].)

D. *Martinez's Trial Counsel Did Not Provide Ineffective Assistance by Not Seeking Admission of Brown's Statements to a Defense Investigator Under Evidence Code Section 1202*

Martinez complains his trial counsel provided ineffective assistance in that, after Brown was excused from testifying, he did not seek to admit statements she made to a defense investigator that contradicted Cooper's testimony about what she told him regarding Hardoy's murder. As Martinez concedes, these statements were hearsay because Brown made them to the investigator outside court and because Martinez sought to introduce them to prove that Brown did not tell Cooper that Martinez killed Hardoy. (See Evid. Code, § 1200, subd. (a).)¹² Although hearsay is generally inadmissible (*id.*, subd. (b)), Martinez contends Evidence Code section 1202 authorized admission of Brown's statements to the investigator. We disagree.

Evidence Code section 1202 provides in pertinent part: "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement *by such declarant received in evidence as hearsay evidence* is not inadmissible *for the purpose of attacking*

¹² Evidence Code section 1200, subdivision (a) defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated."

the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct." (Italics added.) Under this provision, "when *a hearsay statement* by a declarant who is not a witness is admitted into evidence by the prosecution, an inconsistent hearsay statement *by the same person* offered by the defense is admissible *to attack the declarant's credibility.*" (*People v. Corella* (2004) 122 Cal.App.4th 461, 470 (*Corella*), italics added.) Thus, among the requirements for admissibility of a declarant's inconsistent hearsay statement under Evidence Code section 1202 are: (1) prior admission of a statement *by the same declarant*, (2) admission of that statement *as hearsay evidence*, and (3) admission of the inconsistent statement *for the purpose of attacking the declarant's credibility.* These requirements were not satisfied in this case.

First, for purposes of Evidence Code section 1202, Brown was not the declarant of the out-of-court statements admitted through Cooper. In general, a "[d]eclarant' is a person who makes a statement." (Evid. Code, § 135.) To be sure, Brown originally made the statements that Martinez "poisoned" Hardoy and smothered her with a pillow; but Martinez acknowledges the statements were offered as "adoptive admissions, coming in through the statements of Brown, but deemed by operation of law to have been [his] own statements as well." Indeed, the statements were admissible based on Cooper's testimony that Martinez remained silent and nodded his head while Brown told Cooper

that Martinez killed Hardoy. (See Evid. Code, § 1221.)¹³ As our Supreme Court has explained, "once the defendant has expressly or impliedly adopted the statements of another, the statements become *his own admissions*, and are admissible on that basis as a well-recognized exception to the hearsay rule." (*People v. Silva* (1988) 45 Cal.3d 604, 624 (*Silva*); accord, *People v. Castille* (2005) 129 Cal.App.4th 863, 876 ["The analytical basis for this exception is that the adopting party makes the statement his own by admitting its truth."].) "Stated another way, when a defendant has adopted a statement as his own, 'the defendant himself is, in effect, the declarant.'" (*People v. Jennings* (2010) 50 Cal.4th 616, 662 (*Jennings*).) Because Martinez was effectively the declarant of the out-of-court statements that he "poisoned" and smothered Hardoy, any inconsistent statements by Brown to the defense investigator were not made "by the same person" and thus were not admissible under Evidence Code section 1202. (*Corella, supra*, 122 Cal.App.4th at p. 470.)

Second, the out-of-court statements Brown made to Cooper were not admitted as hearsay evidence. "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing *and that is offered to prove the truth of*

¹³ "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) "If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt." (*People v. Preston* (1973) 9 Cal.3d 308, 313-314 (*Preston*).)

the matter stated." (Evid. Code, § 1200, subd. (a), italics added.) The accusations Brown made against Martinez, however, were not admitted for their truth. "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, *the statement is admissible for the limited purpose of showing the party's reaction to it.* [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.'" (*People v. Riel* (2000) 22 Cal.4th 1153, 1189, italics added.) In other words, Brown's "statements incriminating [Martinez] were not admitted for purposes of establishing the truth of the matter asserted, but were admitted to supply meaning to [Martinez's] conduct or silence in the face of [Brown's] accusatory statements." (*People v. Combs* (2004) 34 Cal.4th 821, 842; accord, *Preston, supra*, 9 Cal.3d at p. 315 ["The evidence was admitted not to prove the truth of the statements but to show defendant's response to them."].) Accordingly, because the statements Brown made to Cooper accusing Martinez of murdering Hardoy were not "received in evidence *as hearsay evidence*" (Evid. Code, § 1202, italics added), any inconsistent statements Brown made to the defense investigator were not admissible under Evidence Code section 1202. (See *People v. Curl* (2009) 46 Cal.4th 339, 362 (*Curl*) [Evid. Code, § 1202 inapplicable when admitted statement was not hearsay].)

Third, the inconsistent statements Brown made to the defense investigator were not needed to attack Brown's credibility. "The purpose of allowing extrajudicial inconsistent statements is to be fair to the party against whom the hearsay was received inasmuch as he was denied the opportunity of cross-examination; thus, such party should

at least be allowed to impeach the declarant by admitting the declarant's own statements which are inconsistent with the declaration received in evidence." (*Am-Cal Investment Co. v. Sharlyn Estates, Inc.* (1967) 255 Cal.App.2d 526, 542.) As explained above, however, Martinez became the declarant of the incriminating statements Brown made to Cooper in the car on the way to dismember Hardoy's corpse when, by remaining silent and nodding his head, he adopted those statements as his own. Because Martinez took the stand at trial (and testified he did not remember hearing Brown tell Cooper that he [Martinez] killed Hardoy), the jury could assess the declarant's credibility. In any event, once incriminating statements are "deemed the defendant's own admissions, we are no longer concerned with the veracity or credibility of the original declarant." (*Silva, supra*, 45 Cal.3d at p. 624; accord, *Jennings, supra*, 50 Cal.4th at p. 662.) Hence, because Brown's credibility was not at issue, Martinez had no need to use Evidence Code section 1202 to admit her inconsistent statements for purposes of impeachment.

Martinez argues the conclusion Brown's credibility no longer mattered once he adopted her accusatory statements "misses the point." He claims "Brown's credibility was not in question[, n]or did the defense seek to impeach her credibility. What was at stake, rather, was whether she made the statements (that were purported to have been adopted by [Martinez]) in the first place; [he] could only have adopted Brown's admissions [*sic*] if she made [them]." Thus, Martinez contends, the jury needed to hear the defense investigator's testimony to determine whether Martinez actually adopted Brown's statements. This argument fails on its own terms.

If Martinez did not seek to impeach Brown's credibility, then there was no basis for invoking Evidence Code section 1202, because that statute makes inconsistent statements by a hearsay declarant "admissible *solely* to attack the credibility of the [declarant]." (*People v. Baldwin* (2010) 189 Cal.App.4th 991, 1005 (*Baldwin*)). Further, if all that mattered was whether Brown in fact made the statements to which Cooper testified, then the truth of those statements was irrelevant, Cooper's testimony was not hearsay (Evid. Code, § 1200, subd. (a) [hearsay "is offered to prove the truth of the matter stated"]), and again there was no basis for invoking Evidence Code section 1202 (*Curl, supra*, 46 Cal.4th at p. 362 [Evid. Code, § 1202 inapplicable when admitted statement was not hearsay]). Finally, both Cooper and Martinez testified about what they heard Brown say during the car ride and what Martinez's reaction was, and Cooper was vigorously cross-examined on these topics. Based on this testimony, the jury had sufficient information from percipient witnesses to decide whether Brown made the accusations against Martinez and whether he adopted them. To make those decisions, the jury did not also need to consider hearsay from the defense investigator about what Brown told him. (Cf. *Preston, supra*, 9 Cal.3d at pp. 315-316 [no impairment of right to confront and cross-examine witnesses when witnesses who heard accusations adopted by defendant were cross-examined before jury even though person who made accusations was entitled to assert 5th Amend. privilege and did not testify].)

Finally, we reject Martinez's argument that *Corella, supra*, 122 Cal.App.4th 461, and *Baldwin, supra*, 189 Cal.App.4th 991, are "on all fours with" this case and support admissibility of Brown's statements to the defense investigator under Evidence Code

section 1202. In *Corella*, the prosecution introduced the defendant's wife's statement to the police that the defendant struck her, and the defendant sought to introduce her contrary testimony at a preliminary hearing. The Court of Appeal held the testimony was admissible under Evidence Code section 1202. (*Corella*, at pp. 469-472.) In *Baldwin*, the prosecution introduced a jail cell recording containing statements by the defendant admitting he was the shooter, and the defendant sought to introduce other evidence containing inconsistent statements. The Court of Appeal held the defendant's proffered evidence was admissible under Evidence Code section 1202. (*Baldwin*, at pp. 1002-1005.) Neither *Corella* nor *Baldwin* considered the particular issues raised by adoptive admissions involved in this case. Moreover, unlike this case, in *Corella* and *Baldwin* the prosecution admitted statements *as hearsay*, and the defendants then sought to admit other, inconsistent hearsay statements *by the same persons for the purpose of attacking their credibility*. Thus, *Corella* and *Baldwin* do not support application of Evidence Code section 1202 here.

In sum, we hold Brown's statements to the defense investigator contradicting those Cooper said she made concerning Hardoy's murder were not admissible under Evidence Code section 1202. Martinez's trial counsel therefore was not ineffective in failing to seek their admission on that basis. (See, e.g., *Thompson, supra*, 49 Cal.4th at p. 122 ["Counsel is not ineffective for failing to make frivolous or futile motions."]; *Torrez, supra*, 31 Cal.App.4th at p. 1091 ["A defense counsel is not required to make futile motions or to indulge in idle acts to appear competent"].)

E. *Martinez's Trial Counsel Did Not Provide Ineffective Assistance by Not Seeking Admission of Brown's Statements to a Defense Investigator Under "Constitutional Principles of Due Process"*

Martinez finally claims his trial counsel was ineffective for not asking the trial court to admit Brown's hearsay statements to the defense investigator on due process principles in a timely manner. According to Martinez, "[w]ith Brown's pro-prosecution hearsay statements directly before the jury, [he] was denied due process of law by the court's refusal to admit evidence of Brown contradicting those statements" As we shall explain, this "attempt to inflate garden-variety evidentiary questions into constitutional ones is unpersuasive." (*People v. Boyette* (2002) 29 Cal.4th 381, 427.)

It is well-settled that the due process clause (U.S. Const., 14th Amend., § 1) and other provisions of the federal Constitution "guarantee[] criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; accord, *Lucas, supra*, 12 Cal.4th at p. 456.) It is equally well-settled that "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." (*United States v. Scheffer* (1998) 523 U.S. 303, 308 (*Scheffer*)). Thus, "the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302 (*Chambers*)). "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." (*Taylor v. Illinois* (1988) 484 U.S. 400, 410.)

One such standard rule of evidence is the hearsay rule, which generally excludes hearsay "because the out-of-court declarant is not under oath and cannot be cross-examined to test perception, memory, clarity of expression, and veracity, and because the jury (or other trier of fact) is unable to observe the declarant's demeanor." (*Cudjo, supra*, 6 Cal.4th at p. 608.) The many exceptions to the hearsay rule "reflect situations in which circumstances affording some assurance of trustworthiness compensate for the absence of the oath, cross-examination, and jury observation." (*Ibid.*) Because, as noted, a defendant must comply with standard evidentiary rules "designed to assure both fairness and reliability in the ascertainment of guilt and innocence" (*Chambers, supra*, 410 U.S. at p. 302), he "'does not have a constitutional right to the admission of *unreliable* hearsay statements'" (*People v. Ayala* (2000) 23 Cal.4th 225, 269, italics added (*Ayala*)).

The statements Brown made to the defense investigator are similar to those held properly excluded in *Ayala, supra*, 23 Cal.4th 225. The defendant in *Ayala* sought to introduce hearsay statements of individuals interviewed by his investigators but who died before they could testify at trial. The California Supreme Court held that because the statements were unreliable, the trial court did not violate the defendant's constitutional rights by excluding them: "the statements were given to a person seeking exculpatory evidence, they were not spontaneous, and there was no opportunity for cross-examination." (*Ayala*, at p. 270.) The same is true here: an investigator hired by Martinez was seeking evidence to exculpate him; Brown's statements were not spontaneous, but were given in response to questions posed by the investigator; and Brown could not be cross-examined, because she asserted her Fifth Amendment privilege

against self-incrimination. Brown's intimate relationship with Martinez further contributed to the unreliability of her statements to the investigator. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 408 [sexual relationship between defendant and witness may show bias].) Under these circumstances, any interest Martinez had in introducing Brown's hearsay statements to his investigator must yield to California's "interest 'in ensuring that reliable evidence is presented to the trier of fact in a criminal trial.'" (*Ayala*, at p. 270.)

Martinez insists, however, that *Washington v. Texas* (1967) 388 U.S. 14 (*Washington*) and *Chambers, supra*, 410 U.S. 284, require admission of Brown's hearsay statements to the defense investigator. We disagree.

In *Washington, supra*, 388 U.S. 14, Texas statutes barred a person who had been charged as a participant in a crime from testifying in defense of another alleged participant unless the witness had been acquitted. The United States Supreme Court held the statutes unconstitutional because they "arbitrarily denied [the defendant] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." (*Id.* at p. 23.) In *Chambers, supra*, 410 U.S. 284, a state evidentiary rule did not permit a murder defendant to introduce evidence that a third party had made self-incriminating statements to three other persons. The United States Supreme Court held that because the testimony of those persons "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest," and because their "testimony also was critical

to [the] defense," the state could not apply its hearsay rule "mechanistically to defeat the ends of justice." (*Id.* at p. 302.) Thus, in both *Washington* and *Chambers*, state rules precluded the admission of evidence of a type generally admitted and central to the truth-finding process of a trial (i.e., testimony from a percipient witness and reliable hearsay statements) and thereby "significantly undermined fundamental elements of the defendant's defense." (*Scheffer, supra*, 523 U.S. at p. 315; see also *In re Aontae D.* (1994) 25 Cal.App.4th 167, 174-175.)

That is not the situation here. Unlike the statutes held unconstitutional in *Washington, supra*, 388 U.S. 14, which prevented the defendant from calling a percipient witness to the murder with which the defendant was charged, the hearsay rule at issue here had no such deleterious effect on Martinez's defense. The defense investigator had no personal knowledge of Hardoy's murder; according to the offer of proof made by Martinez's trial counsel, the investigator simply would have testified that Brown told him she did not tell Cooper that Martinez killed Hardoy. Such testimony would have been hearsay (see Evid. Code, § 1200, subd. (a)), as Martinez concedes; but unlike the hearsay at issue in *Chambers*, it did not bear "persuasive assurances of trustworthiness" or fall within a recognized exception to the hearsay rule, nor was it "critical to [Martinez's] defense" (*Chambers, supra*, 410 U.S. at p. 302). Rather, as explained above, Brown's hearsay statements to the defense investigator were unreliable; and they would only have contradicted Cooper's testimony, which Martinez himself did when he testified at trial. For these reasons, neither *Washington* nor *Chambers* requires admission of the statements Brown made to the defense investigator. (See *Scheffer, supra*, 523 U.S. at p. 316

["*Chambers* therefore does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence."]; *People v. Kraft* (2000) 23 Cal.4th 978, 1035 [application of ordinary rules of evidence generally does not infringe criminal defendant's constitutional rights].)

We conclude Martinez's constitutional right to present a defense did not include the right to introduce the statements Brown made to the defense investigator contradicting Cooper's testimony. Accordingly, Martinez's trial counsel was not ineffective for failing to seek to introduce them on that basis. (See, e.g., *Thompson, supra*, 49 Cal.4th at p. 122 ["Counsel is not ineffective for failing to make frivolous or futile motions."]; *Torrez, supra*, 31 Cal.App.4th at p. 1091 ["A defense counsel is not required to make futile motions or to indulge in idle acts to appear competent."].)

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.