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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK BARRON et al.,

Defendants and Appellants.

D060119

(Super. Ct. No. BLF004258)

APPEALS from judgments of the Superior Court of Riverside County, Graham Anderson Cribbs, Judge. (Retired Judge of the Riverside Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

A jury convicted Mark Barron and Christopher Gallegos of arson of an inhabited structure, and the trial court sentenced each of them to prison for the middle term of five years. (Pen. Code, § 451, subd. (b).) On appeal, they contend reversal is required because of juror misconduct, prosecutorial misconduct, court bias, ineffective assistance of counsel, insufficiency of the evidence, improper admission of evidence, instructional

error, denial of their suppression motion, and sentencing error.¹ We conclude the contentions lack merit, and thus we affirm the judgments.

FACTS²

Gallegos owned property on Riviera Drive in Blythe, California, on which he had a mobilehome. The mobilehome was insured against loss for \$25,000, and its contents were insured for \$12,500.

In September 2005³ Gallegos told Frank Bonnet, a Blythe resident, that he wanted to replace the mobilehome with a manufactured home, and he was saving money for that purpose instead of spending it on his hobby of racecar driving. Gallegos and Bonnet discussed how expensive it was to hire someone to haul away an old mobilehome.

The evening of December 30, Gallegos drove to a camping area known as Seven Mile Dunes, roughly a 45-minute drive from Blythe, where he met up with his friend Barron and others. That day, Barron used ignitable fuel while working on his

¹ Defendants are represented by the same retained appellate attorney after waiving any conflicts of interest. Defendants have submitted nearly identical appellate briefs.

² Defendants' counsel violates a basic principle of appellate practice by ignoring facts favorable to the judgment. California Rules of Court, rule 8.204(a)(2)(C), requires the opening brief to "[p]rovide a summary of the *significant facts* limited to matters in the record." (Italics added.) "An appellant must fairly set forth all the significant facts, not just those beneficial to the appellant." (*In re S.C.* (2006) 138 Cal.App.4th 396, 402.) We recite the facts most favorable to the judgment. (*People v. Key* (1984) 153 Cal.App.3d 888, 892.)

³ Further dates are also in 2005 unless otherwise specified.

motorhome. A fellow camper, Christopher McMillen, saw Gallegos and Barron at approximately 11:00 p.m. when he went to bed.

Kenneth Day lived across the street from Gallegos. On December 31, Day and his wife returned home from an evening out between 12:30 a.m. and 12:45 a.m. They later noticed a fire at Gallegos's mobilehome. After assuring himself no one was inside the mobilehome, Day tried to suppress the fire with a garden hose. Meanwhile, Day's wife called the fire department.

An officer with the Blythe Police Department was dispatched to Gallegos's property at 1:14 a.m. When he arrived three minutes later, the east end of the mobilehome was engulfed in flames. The fire was "blowing out the windows and through the roof." The Blythe Fire Department arrived to extinguish the fire.

That morning a deputy with the Riverside County Sheriff's Department, Jon Miles, was patrolling in the Blythe area. At 1:15 a.m. he got notice of a structure fire on Riviera Drive. He could see the glow of a fire in the distance. He drove toward Riviera Drive and got onto a narrow, unpaved, and elevated road on a canal bank. Moments later, the headlights of a Ford Expedition (Expedition) appeared in front of Miles's patrol car, coming from the direction of Riviera Drive. The cars stopped when they "came bumper to bumper" about half-a-mile from Gallegos's property as the crow flies, or one mile by car.

Deputy Miles obtained Barron's name as the registered owner of the Expedition. Miles went to the Expedition because neither car could pass the other. Gallegos was driving and Barron was in the front passenger seat. Gallegos said they were coming from

a fishing spot about half-a-mile behind his property, which he wanted to show Barron, and they were headed to Seven Mile Dunes. What appeared to be a "fully-engulfed residential fire" was visible behind the Expedition, and the fire's glow was apparent even when facing away from it. Neither Gallegos nor Barron, however, mentioned the fire.

Gallegos and Barron voluntarily revealed information unrelated to the fire that caused Deputy Miles to arrest them.⁴ During the stop, Miles was notified over his lapel microphone that the fire was at Gallegos's mobilehome. The notification was audible to Gallegos, but he did not react. Another deputy arrived and he and Miles took Gallegos and Barron to the sheriff's department.

After obtaining Barron's consent, police officers searched the Expedition. It contained matchbooks, a "barbecue-type Scripto lighter," and a gas can spout.

Police detective Jeffrey Wade arrived at Gallegos's property at 2:10 a.m. on December 31, at which time the mobilehome was still smoldering. The mobilehome's security screen door had been left open. Detective Wade inspected the back of the property, which was enclosed by a chain link fence running roughly north to south, parallel to Riviera Drive. The fence's gate was open. A path used for all-terrain vehicles

⁴ Gallegos and Barron were correctional officers in the state prison system. Barron admitted he was in possession of a loaded gun in violation of a court order. Gallegos admitted he was in possession of a firearm and he was not carrying his concealed weapons permit. The information was not revealed to the jury.

ran from outside the gate in a southwesterly direction to abutting field access roads running north to south, and east to west (the T-intersection).⁵

Detective Wade found recent boot impressions on the path, going from the gate to the T-intersection and circling back to the gate.⁶ The impressions were made by one pair of boots, which had a rectangular design running across the arch. The stride distance for the boot impressions retreating from Gallegos's property was much longer than the approaching set, which indicated running.

Further, Detective Wade found recent tire impressions on the access roads at the T-intersection, traveling south and turning west. From the pattern of the boot and tire impressions, he believed the boot wearer exited and reentered the vehicle's passenger side door. The boots Barron wore that morning were taken to the scene and appeared to be a match.

Detective Wade also found intermittent impressions from the same tires going west on the access road to where it dead-ended at a canal, and then south on another access road toward the canal road on which Deputy Miles encountered Barron's Expedition. As Detective Wade drove to the point of encounter, he could see Gallegos's property in his passenger side rear view mirror.

⁵ Photographs of the property and surrounds were apparently magnified for the jury. The actual exhibits are small and somewhat difficult to decipher, which will explain any inaccuracies in our descriptions.

⁶ Where impressions were found the soil was fine and powdery. From inside the gate to the mobilehome the surface was gravel and no impressions were found.

David Cabral, a battalion chief for the California Department of Forestry and Fire Protection, was called to the scene in the early morning on December 31. He concluded the fire was caused by the igniting of a flammable liquid applied to the floor of the mobilehome in two spots, which burned down to the joists. The fire was "rapid-building" because of the accelerant, and it destroyed the mobilehome in a short time. He found no evidence the fire originated in the kitchen, the furnace area, or as a result of an electrical problem.

The sheriff's department released Gallegos, and presumably Barron, about 10:00 a.m. on December 31. Gallegos did not go to his property to observe the damage. Instead, Gallegos and Barron returned to Seven Mile Dunes. They told McMillen they had been arrested and they appeared distraught. They did not, however, mention the cause of arrest or that Gallegos's mobilehome had burned down. Gallegos never filed an insurance claim for the loss.

In the ongoing investigation, photographs of the tire and boot impressions, imprints of the tires on Barron's Expedition, and Barron's boots were sent to the California Department of Justice (DOJ). The DOJ determined the tire impressions could have been made by the Expedition's tires, and the boot impressions were definitely made by Barron's boots.

The DOJ also examined eight samples of fire debris from the mobilehome for ignitable liquid residue, and no residue was found on seven of the samples. The eighth sample, from a floor joist, was inconclusive. There was "an indication that an ignitable liquid residue may be present," but it was "possible that these results could have come

from background materials in the debris." This did not alter Chief Cabral's opinion as to the cause of the fire. He explained, "I'm basing my opinion on my training and experience and following the burn patterns and reading the fire history within the [mobilehome]." He also explained that ignitable liquid residue may have been destroyed through fire suppression efforts, including the use of foam, and sometimes residue completely burns away.

DISCUSSION

I

Juror Misconduct

A

Defendants moved for a new trial based on juror misconduct, specifically the refusal to deliberate and the reliance on outside evidence. A criminal defendant "has a constitutional right to have the charges against him or her determined by a fair and impartial jury." (*People v. Duran* (1996) 50 Cal.App.4th 103, 111; U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16.) "When a party seeks a new trial based upon jury misconduct, a court must undertake a three-step inquiry. The court must first determine whether the affidavits supporting the motion are admissible under Evidence Code section 1150, subdivision (a).⁷ If the evidence is admissible, the court must then consider

⁷ Evidence Code section 1150, subdivision (a) provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror

whether the facts establish misconduct. [Citation.] Finally, assuming misconduct, the court must determine whether the misconduct was prejudicial. [Citations.] A trial court has broad discretion in ruling on each of these questions and its rulings will not be disturbed absent a clear abuse of discretion." (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 255, fn. omitted.)

B

"A refusal to deliberate is misconduct." (*People v. Lomax* (2010) 49 Cal.4th 530, 589.) " 'A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury.' " (*Ibid.*)

Defendants relied on the declaration of one trial juror (TJ3), who was remorseful over his guilty votes. The declaration states, "I was the lone holdout for not guilty until the very end," and "I will regret this decision the rest of my life."

As to the deliberation issue, the declaration states another juror "announced to all of us inside the jury room that 'No one is getting off on a technicality as far as I'm concerned.' " As the court found, however, "There is no evidence of any sort that a

either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

'technicality' was ever mentioned." Contrary to defendants' assertion, the juror's use of the term "technicality" does not suggest she was referring to the applicable law as a "technicality" that could be ignored, or indicate "an incessant refusal to deliberate based on evidence."

According to the declaration, this same juror "*would not open her mind to opposing jurors [sic] deliberations. She behaved as if . . . her sole mission was to convert other jurors regardless of the evidence in the case. Her standard of evidence was the 'totality of the evidence' rather than reasonable doubt as to each and every element of the offense. This juror, even at the time we reported to the court that we were hopelessly deadlocked, stated that she was not sure whether further deliberations would be helpful. Not that she was open for further review of the evidence, but because she believed that I would not be able to withstand an additional day of pressure because everyone was poised to go home.*" (Italics added.)⁸

The claims as to the juror's mental state are speculative and inadmissible. Generally, only proof of overt acts and statements of a juror, which are objectively ascertainable, are material; the subjective reasoning of a juror, which is not objectively ascertainable, is immaterial. (Evid. Code, § 1150, subd. (a); *People v. Cleveland* (2001))

⁸ Late afternoon of the second day of deliberations, October 13, 2010, the jury foreperson advised the court the jury was deadlocked 11-1. The court inquired whether the jurors believed additional deliberation would result in a verdict, and this juror responded, "I don't know. I don't know." Ten of the jurors responded no, and one responded, "I wish." The court directed the jurors to deliberate further, and they rendered a verdict late morning on October 14, 2010.

25 Cal.4th 466, 485; *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124 ["Evidence of jurors' internal thought processes is inadmissible to impeach a verdict."].) Moreover, a juror's statement that further deliberations may not be fruitful does not indicate a refusal to deliberate.

Additionally, the declaration does not say TJ3 heard the juror argue a standard other than proof beyond a reasonable doubt applied. The jury was instructed with CALCRIM No. 220 on reasonable doubt, and we presume the jury followed the instruction. (*People v. Morales* (2001) 25 Cal.4th 34, 47.) The jury was also instructed to consider *all* the evidence (CALCRIM No. 222). The instructions complement each other, and by considering the "totality of circumstances" the juror was merely following the law.

TJ3's declaration also states another juror "announced early on the last morning that he would no longer deliberate because he was through. He declared himself out of the deliberations." The declaration does not indicate this juror refused to deliberate before making the statement. The jury deadlocked 11 to 1 the previous day, with TJ3 being the lone holdout for guilty verdicts. The jury foreman's note to the court on the second day states, "We spent the day at *attempting to convince each other* to no avail." (Italics added.) Defendants cite no authority for the proposition that a juror must *continue* to deliberate indefinitely after he or she is convinced further deliberation would be fruitless.

Additionally, the court found TJ3's declaration shows deliberations *did* take place. It states that initially six jurors were undecided and six jurors were prepared to vote

guilty, yet after the equivalent of two days of deliberations the jury reached a unanimous verdict. Presumably, the jurors who believed in defendants' guilt persuaded the others. It appears that defendants' actual complaint is that deliberations did not go their way.

The declaration's statement that the six jurors who initially voted guilty "closed their mind before looking at ALL the evidence" is speculative and inadmissible under Evidence Code section 1150, subdivision (a). The same applies to the statement that the "personal lives and commitments" of some jurors "were more important than the lives and liberty of [defendants]." We find no abuse of discretion.

C

The jury's receipt of outside evidence may also constitute misconduct. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) Again, defendants relied on TJ3's declaration, which states: "After one of the breaks and after the 10 to 2 votes, [the jury foreman] for some reason announced that although he should not say what he was about to say, he . . . had heard (in the hallway) defendant [Barron] say that he was a runner. Another juror urged [the foreman] to go ahead and share what he had heard outside the court room. This information was then deliberated upon among the jurors to show that Barron was physically capable of lighting the fire and dashing 1,500+ feet in the allotted time frame without breaking a sweat."

The court admonished defendants to avoid jurors in the hallway and hallway conversations. Barron's trial counsel, Shaffer Cornell, admitted in a declaration that he and Barron did not follow the admonishment. The declaration states Cornell "did discuss with . . . Barron about jogging in order to relieve the stress he was suffering from the trial"

and that they 'both talked about running' where the foreman could hear their conversation." A claim of juror misconduct is invalid when the defendant, or his counsel, "instigated the incident; a party cannot profit by his or her own wrongdoing." (*In re Hamilton* (1999) 20 Cal.4th 273, 305; *People v. Hendricks* (1988) 44 Cal.3d 635, 643.)⁹

II

Prosecutorial Misconduct

Defendants next contend the misconduct of the prosecutor, Steve Morgan, requires reversal of the judgments. Defendants cite Morgan's argument during closing that the defense fire expert, Nina Scotti—who testified she would classify the cause of the fire as unknown because she could not rule out an electrical fire—"is nevertheless in the business of providing a case for the defense." Morgan added, "[H]er bias . . . indicates to you that she knows that her job was to sit down and try to come up with every conceivable way of challenging Chief Cabral's investigation."

Further, defendants assert that during closing argument Morgan used "[d]eceptive tactics used to define legal terms," specifically the proof beyond a reasonable doubt standard. Defendants cite this portion of his argument: "Now, when every one of you came in here, . . . you knew absolutely nothing about this case. If at the end of the case

⁹ We also note that the outside information merely corroborated Gallegos's testimony that Barron was capable of running. Gallegos said that on the afternoon of December 30, he and Barron were behind the mobilehome in the area of the T-intersection engaging in "horseplay." Barron would run after Gallegos, who was driving his Suzuki Samurai, in an attempt to get into the vehicle, and when Gallegos drove off without him, he would slow down and walk. In closing, Barron argued the testimony explained why his recent boot impressions were found there.

you look at the evidence and you say, 'I know what happened,' then that was enough evidence because all you know is what's in the evidence. So I've actually heard a juror say, 'Oh, we knew he was guilty, but we didn't think there was enough evidence.' But if you know the defendant is guilty, then that is enough evidence because you only reach that point by looking at the evidence. That's all you know about the case." Defendants assert Morgan "reworded the jury instructions so that the jury would believe that any evidence would be sufficient to uphold a guilty verdict."

Additionally, defendants accuse Morgan of witness tampering. During his questioning of McMillen about defendants' return to Seven Mile Dunes after the fire, Morgan requested and received a short break to speak to McMillen privately. Morgan then resumed his questioning.

Defendants, however, forfeited their claims of prosecutorial misconduct by not objecting to Morgan's conduct or requesting an admonition in the trial court. (*People v. Fuiava* (2012) 53 Cal.4th 622, 726-727; *People v. Price* (1991) 1 Cal.4th 324, 447.) Even if defendants had preserved their claims, however, we would find them without merit.

"The prosecution is given wide latitude during closing argument to vigorously argue its case and to comment fairly on the evidence, including by drawing reasonable inferences from it." (*People v. Lee* (2011) 51 Cal.4th 620, 647.) "Although prosecutorial arguments may not denigrate opposing *counsel's* integrity, 'harsh and colorful attacks on the credibility of opposing *witnesses* are permissible. [Citations.]" [Citation.] Moreover, a prosecutor 'is free to remind the jurors that a paid witness may accordingly be biased

and is also allowed to argue, from the evidence, that a witness's testimony is unbelievable, unsound, or even a patent "lie." ' ' ' (*People v. Parson* (2008) 44 Cal.4th 332, 360.) Morgan's comments concerning Scotti, a paid witness, were not improper. Further, as to the supposed witness tampering, defendants' attorneys were free to question McMillen about any coaching, but they opted not to do so.

As to the reasonable doubt standard, we find no misconduct when we consider Morgan's comments as a whole and in context. (See *People v. Gonzalez* (2011) 52 Cal.4th 254, 320.) *Before* making the comments defendants complain about, Morgan advised the jury "that you decide the case only on the evidence," and, "In this case, as in every criminal case, it must be proved according to the law beyond a reasonable doubt. That standard is, as they always say and always remind you, the highest standard that we have." He added, "What is the standard? The standard is defined in the instruction. You've just heard it, but I'll repeat it again. When you look at the evidence, when you look at the totality of the evidence, all of the evidence, you have an abiding conviction of the truth of the charge."

III

Ineffective Assistance of Counsel

Defendants also contend they received ineffective assistance of their private counsel. Gallegos complains that his attorney elicited his direct testimony that his mobilehome and its contents were insured and he wanted to purchase a new manufactured home. Barron complains that his attorney did not object to the questioning.

Defendants assert the errors were prejudicial because the evidence was used to establish motive.

" "A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) 'Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.' ([Citation], italics in original.) In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' " " (*In re Richardson* (2011) 196 Cal.App.4th 647, 657.) "Although the fact that counsel is privately retained is an important consideration in measuring the effectiveness of counsel's representation," the standard of "effectiveness of counsel applies to both appointed and retained counsel." (*People v. Diggs* (1986) 177 Cal.App.3d 958, 968; *People v. Frierson* (1979) 25 Cal.3d 142, 161-162.)

" 'We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions.' " (*People v. Prieto* (2003) 30 Cal.4th 226, 261.) " 'When . . . the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons. . . . Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, not on appeal.' " (*People v. Lucero* (2000) 23 Cal.4th 692, 728-729.) "However, an ineffective assistance

claim may be reviewed on direct appeal where 'there simply could be no satisfactory explanation' for trial counsel's action or inaction." (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98, fn. 1.)

Here, the record does not reveal defense counsels' reasoning, and a satisfactory reason appears for their tactics during their case-in-chief. Gallegos's direct testimony about insurance was not the initial mention of the issue. Rather, before trial commenced the court authorized the prosecution's introduction of insurance evidence. Gallegos argued the evidence was irrelevant because the theory that he burned his mobilehome to collect insurance was mere speculation since he never made a claim. The court disagreed, explaining the circumstantial evidence went to motive and would assist the jury in determining guilt or innocence. Under Evidence Code section 210, " 'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." On appeal, defendants do not challenge the admission of insurance evidence on relevancy grounds.

On cross-examination of Jason Green, a sheriff's deputy who investigated the case, Gallegos's attorney stated, "I think under direct examination you indicated that Mr. Gallegos had an insurance policy with coverage up to \$100,000." Deputy Green clarified the \$100,000 was for liability coverage, and there was \$25,000 in coverage for the mobilehome and \$12,500 for personal property.

During direct questioning of Gallegos, his attorney likely emphasized the relatively small amount of insurance on the mobilehome to show he *lacked* a financial motive for arson, and Barron's attorney raised no objection for the same reason. Gallegos

also testified he had the insurance for several years and never increased the amount of coverage, he paid \$65,000 in cash for the mobilehome, he had saved \$5,000 to \$6,000 toward the purchase of a manufactured home, he had adequate credit to finance the purchase, and he earned approximately \$10,000 per month, including overtime, as a correctional officer, and he would not do anything to jeopardize his career. Defendants have not met their burden of showing ineffective assistance of counsel.

IV

Evidentiary Ruling

Defendants do assert the court's allowance of insurance evidence violated Evidence Code section 1155. The statute provides: "Evidence that a person was, at the time a harm *was suffered by another*, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing." (Italics added.)

Defendants concede they did not object to admission of the evidence on the ground of Evidence Code section 1155. "A defendant who fails to make a timely objection or motion to strike evidence may not later claim that the admission of the evidence was error [citations] or that the prosecutor committed misconduct by adducing it [citation]. Further, '[w]hen an objection is made to proposed evidence, the specific ground of the objection must be stated. The appellate court's review of the trial court's admission of evidence is then limited to the stated ground for the objection.'" (*People v. Abel* (2012) 53 Cal.4th 891, 924.) In any event, on its face Evidence Code section 1155

applies only to liability insurance. (*Garfield v. Russell* (1967) 251 Cal.App.2d 275, 279, fn. 3.)

V

Judicial Bias

Defendants also contend the trial judge demonstrated bias toward the prosecution by allowing it a week to present its case, and allowing the defense only two days. Further, in response to a jury request during deliberations, the court read into the record "17 points" Morgan made in closing argument to summarize the circumstantial evidence of defendants' guilt, and allowed the jury to have a hard copy of the 17 points.

"A trial court commits misconduct if it 'persists in making discourteous and disparaging remarks to a defendant's counsel . . . and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense.' " (*People v. Fudge* (1994) 7 Cal.4th 1075, 1107.) Defendants, however, raised no objection based on judicial bias in the trial court. Thus, they forfeited their claim. (*Id.*, at p. 1108; *People v. Bell* (2007) 40 Cal.4th 582, 603, fn. 7.)

In any event, the length of the prosecution's case in comparison to that of the defense does not suggest bias. The prosecution, after all, had the burden of proof. It presented 10 witnesses when the defense presented two witnesses. Defendants do not cite the record to show that either defense attorney sought permission to present additional witnesses or lengthier closing arguments.

On Morgan's "17 points," defendants assert that "[i]n the interest of fairness, the judge should have at least provided a hard copy of the defense's argument as well." They do not cite the record, however, to show they ever asked the judge to provide any closing argument materials to the jury. Additionally, in providing the jury with Morgan's "17 points," the court admonished the jury for "the seventh, eighth, or ninth time" that his closing argument was not evidence, and it was up to the jury to "decide what you understand the evidence to be." The court emphasized, "You're not to assume that anything that I read to you has in fact been established." Even if there was arguable error, it was not prejudicial.

" '[I]f a reasonable man would entertain doubts concerning the judge's impartiality, disqualification is mandated.' " (*People v. Enriquez* (2008) 160 Cal.App.4th 230, 244.) We have reviewed the entire record and detect no bias. To the contrary, the judge was evenhanded.

VI

Substantial Evidence

Defendants challenge the sufficiency of the evidence to support the guilty verdicts. They virtually disregard, however, the evidence supporting the convictions. "When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record *in the light most favorable to the judgment* to determine whether it contains evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a

judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' " (*People v. Elliott* (2012) 53 Cal.4th 535, 585, italics added.)

The evidence amply supports the arson convictions. The jury could reasonably find Gallegos enlisted Barron to help him burn down the mobilehome so Gallegos could collect insurance proceeds to pay for having it hauled from his property and to contribute toward the purchase of a manufactured home. Defendants left the Seven Mile Dunes campground in Barron's Expedition sometime after 11:00 p.m. on December 30, and had adequate time to drive to Gallegos's property and set the fire before it was detected shortly after 1:00 a.m. on December 31. Barron's boots left fresh impressions at the scene, going to and from the passenger side door of a vehicle and the back gate to the property, with the retreating prints indicating running, and fresh tire impressions were consistent with the tires on the Expedition.

Shortly after the fire was detected, Deputy Miles encountered defendants in the Expedition coming from the direction of Riviera Drive, only half-a-mile from the fire, and Barron was in the passenger seat, consistent with the boot and tire impressions. Defendants evidenced a consciousness of guilt by not mentioning the fire, and Gallegos did not even react when he heard over Deputy Miles's lapel microphone that the fire was at his mobilehome.

Defendants claim insufficiency of the evidence because "[t]here were no footprints that matched Barron's on the scene." Defendants are mistaken. They cite testimony that no shoe impressions were found in the *gravel* between the gate on the back of Gallegos's

property and the mobilehome. They also cite testimony that police investigators *at the scene* determined the boot impressions were *similar* to Barron's boots. They ignore the testimony of the DOJ investigator that "[t]here were unique characteristics that I would expect only to be from [Barron's] boot." She elaborated, "I saw many, many nicks, cuts, gouges, scrapes, and marks that were present in these impressions . . . that were present in the exact same shape, position, and location on a shoe. There would not have been any other shoe that had that number and that particular appearance of these gouges, and cuts, and scrapes."

Moreover, defendants' position is rather absurd since Gallegos admitted Barron's boot impressions were at the scene. In an attempt to explain why they were there, Gallegos testified he and Barron were engaged in "horseplay" in the area between the back gate of his property and the T-intersection on the afternoon of December 30. Gallegos's testimony, however, was ineffectual since it did not explain why the boot impressions were going to and from a vehicle with tires similar to those on Barron's Expedition. Further, the "horseplay" Gallegos described would not leave the pattern of boot impressions found at the scene.

Additionally, defendants point out that Gallegos testified he and Barron left Seven Mile Dunes to get some ice, and several bags of ice were found in the Expedition when police inspected it. Defendants claim this shows they "were at the gas station buying ice, as they told the officers, when the fire occurred." The ice issue, however, is not dispositive as a matter of law. Rather, it was the jury's province to determine the probable timeline and whether the ice provided the defendants with an airtight alibi. The

jury obviously found defendants had sufficient time to purchase the ice before setting fire to Gallegos's mobilehome.

We decline to address other items of evidence defendants cite as favorable to them, because it does not affect the outcome on our substantial evidence analysis. Defendants ask us to reassess the credibility of witnesses and reweigh the evidence, which we may not do.

VII

Lesser Included Offenses

Additionally, defendants contend the court violated its sua sponte duty to instruct the jury on the lesser included offense of attempted arson (Pen. Code, § 455). This contention is absurd since the arson of Gallegos's mobilehome was completed rather than attempted. Further, contrary to defendants' position, the court had no sua sponte duty to instruct the jury on the lesser included offense of unlawfully causing a fire. "A person is guilty of unlawfully causing a fire when he recklessly sets fire to or burns or causes to be burned, any structure . . . or property." (Pen. Code, § 452). The evidence was of defendants' intentional, not reckless, conduct. They denied any involvement in the fire. "When there is no evidence the offense committed was less than that charged, the trial court is not required to instruct on the lesser included offense." (*People v. Booker* (2011) 51 Cal.4th 141, 181.)

VIII

Suppression Motion

Defendants also contend the court erred by denying their motion to suppress evidence, based on the ground Deputy Miles had no cause to approach Barron's Expedition or make his initial contact with defendants. Defendants concede the detainment was legal once Deputy Miles began speaking with them and they volunteered information about possessing guns. In the People's view, Deputy Miles's initial contact with defendants was a consensual encounter rather than a detainment.

A consensual encounter occurs when, for instance, an officer approaches a person in public and asks how he or she is doing, or questions a person at a crime scene in a nonaccusatory and routine manner to determine whether he or she may have information about the crime. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1081.) "Unlike a consensual encounter, a detention is a seizure within the meaning of the Fourth Amendment of the United States Constitution; a seizure occurs when an officer restrains a person's liberty by force or show of authority." (*Ibid.*)

To justify a detention, "the circumstances known or apparent to the officer must include specific and articulable facts which, . . . would cause a reasonable officer to suspect that (1) some activity relating to crime has take place or is occurring or about to occur, and (2) the person the officer intends to stop or detain is involved in that activity. [Citations.] This reasonable suspicion requirement is measured by an objective standard, not by the particular officer's subjective state of mind at the time of the stop or detention." (*People v. Conway* (1994) 25 Cal.App.4th 385, 388.)

The court determined Deputy Miles detained defendants, because his patrol car was blocking the Expedition. The court noted he had the opportunity to turn off of the canal road on a "cross-over" before reaching the Expedition, to avoid blocking it, but he decided to proceed on the canal road. He conceded that defendants were not free to leave because he intended "to further investigate who they were and what they were up to."

The court also determined, however, that the objective reasonable suspicion test was met. Deputy Miles testified he decided to investigate because he was suspicious given the Expedition's proximity to a large fire, which appeared to him to be a structure fire; the Expedition's presence on an unimproved canal road; and the early morning hour. While he had received no information the fire was caused by arson, he believed that was a possibility.

Defendants assert their detainment was based merely on a "hunch." "[A]n investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith." (*In re Tony C.* (1978) 21 Cal.3d 888, 893.) At the preliminary hearing, Deputy Miles was asked, "So when you approached [defendants], I think at that point you had some kind of hunch that something was up?" He responded, "Yes." At the suppression hearing, however, he testified he "thought . . . it certainly is *suspicious* that there is a car suddenly coming at me at one in the morning and there is a fire in the background." (Italics added.) Under all the circumstances, we cannot fault the court's ruling. As is customary throughout defendants' briefing, they ignore the evidence unfavorable to them.

IX

Sentencing

Arson of an inhabited dwelling carries possible sentences of three, five, or eight years. (Pen. Code, § 451, subd. (b).) "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." (Pen. Code, § 1170, subd. (b).) An abuse of discretion is " 'established by "a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' " (*People v. Fuiava, supra*, 53 Cal.4th at p. 663.)

Defendants assert the court's imposition of the middle term of five years constitutes abuse of discretion because the court ignored the mitigating circumstance that they have no prior convictions, and the probation reports' recommendation of five year suspended sentences with formal probation for five years. The record, however, belies the assertion. The probation reports note defendants' lack of criminal histories, and the court stated it had read the reports thoroughly and "I'm knowledgeable of what the factors in aggravation and mitigation are."

We find no abuse of discretion. In choosing the middle term, the court explained the "sophistication that was exhibited by them in terms of carrying out the scheme to destroy the property in question was very significant." In considering the length of sentence and whether to grant or deny probation, the court may consider whether the manner in which the crime was carried out demonstrated planning, criminal sophistication, or professionalism. (Cal. Rules of Court, rules 4.414(a)(8), 4.421(a)(8).)

The court also explained that as correctional officers in the state prison system defendants were "in effect, officers of the law," "[t]here is a standard by which society expects them to abide," and they "breached their trust to the People of the State of California."

Defendants ignore the aggravating factors.

DISPOSITION

The judgments are affirmed.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

AARON, J.