

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY M. CARRERA et al.,

Defendant and Appellant.

E053997

(Super.Ct.No. RIF150270)

OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez and Gary B. Tranbarger, Judges.¹ Affirmed as to Defendant Carrera; affirmed with directions as to Defendant Padilla.

Marilee Marshall for Defendant and Appellant Tony M. Carrera.

Laura Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant Rocky Padilla.

¹ Judge Hernandez heard the separate trial of Defendant Carrera, and Judge Tranbarger heard the separate the trial of Rocky Padilla.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and William M. Wood and Heather F. Crawford, Deputy Attorneys General, for Plaintiff and Respondent.

DEFENDANT TONY M. CARRERA

I. INTRODUCTION

Defendant Tony M. Carrera appeals from his conviction of first degree robbery murder (Pen. Code,² §§ 187, subd. (a), 190.2, subd. (a)(17)(A); count 1) and robbery (§ 211; count 2). Carrera contends: (1) the trial court erred in admitting text messages into evidence; (2) the trial court erred in admitting an investigator’s lay opinion that the voice in a “death threat” message sounded like that of Carrera; (3) a *Brady*³ violation occurred, and the trial court erred in failing to grant a mistrial after the prosecutor failed to disclose that Carrera told an investigator he believed he was being followed; (4) the trial court erred in allowing crime scene and autopsy photographs in evidence and in denying Carrera’s motion for mistrial after three jurors became sick after viewing the photographs; (5) the trial court abused its discretion by ordering a deputy to stand near an exit during Carrera’s testimony; (6) the trial court erred in denying a motion for new trial on the ground of spectator misconduct; (7) the prosecutor committed misconduct by shifting the burden of proof to the defense in argument; (8) the trial court erred in failing to instruct the jury on theft as a lesser included offense of robbery; (9) the trial court erred

² All further statutory references are to the Penal Code unless otherwise indicated.

³ *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

in denying defense counsel's request for Carrera's presence during the readback of testimony; and (10) the cumulative error doctrine requires reversal. We find no prejudicial error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

A. Prosecution Evidence

On May 10, 2009, Jeane Graves reported that her 19-year-old son, Daniel Coronado, was missing. She had last seen him at about 8:00 p.m. two days earlier. On May 12, Coronado's white Honda Civic was found engulfed in flames in Santa Ana. The fire had been purposely set by someone who poured accelerant in the passenger compartment.

Meanwhile, Sheriff's Investigator Jason Trudeau obtained Coronado's cell phone records, which showed multiple calls and text messages from a phone number belonging to Carrera. The investigator then obtained Carrera's phone records. On May 8, Carrera had sent text messages to a cell phone used by Rocky Padilla,⁴ who lived in Santa Ana. The first message stated, "If you can. Cn u rocky to gimme a call. I got a new job for him."⁵ Then Carrera texted Padilla that he would come over and "[s]coop you up."

⁴ Carrera and Padilla were jointly charged with Coronado's murder and robbery. The trial court ordered separate trials, and Padilla was tried first. Padilla's jury found him guilty of the same crimes as Carrera, and Padilla was also sentenced to life without parole.

⁵ The text messages are set forth herein with the spelling and word usage that appear in the record.

Cell phone tower records showed that Carrera's phone traveled from Riverside to Santa Ana in the afternoon of May 8.

Starting at about 5:30 p.m. on May 8, Carrera and Coronado exchanged messages about attending a party in Canyon Lake. Carrera then texted, "U got .5 [meaning marijuana]?" Coronado replied, "Dog I don't have shit." Carrera texted, "Can u break 2 blls," (meaning \$100 bills), and Coronado replied that he could not. Carrera texted back, "Wata bout 1. My parnts gave me bills." Coronado replied that he could break one, and further messages established that he had \$186.

At 7:15 p.m. on May 8, Carrera texted Coronado, "Meet me at [C]ajalco," and Coronado agreed to meet at 8:00 p.m. At 7:49 p.m., Carrera texted Coronado, "We buy Macaroni Grill," and then "Hurry up" At 7:57 p.m., Coronado texted "I'm Here," and Carrera texted back, "We buy chik.fila."

About half an hour later, Carrera started sending text messages to Coronado's phone asking him where he was, stating he could not wait much longer, and finally stating he was going to leave. There were no replies.

Investigator Trudeau viewed a surveillance video from the Crossings shopping center at Highway 15 and Cajalco Road in Corona. At 7:46 p.m. a silver Toyota Corolla pulled into a parking stall near the Chick-fil-A restaurant. At 8:02 p.m., Coronado's white Civic was parked in a stall about three spaces away from the Corolla. At 8:10 p.m., the Corolla drove away, while the Civic remained. At 9:21, the Corolla returned and parked head on with the Civic. Two minutes later, both cars pulled out of the parking lot.

Sheriff's Investigators interviewed Carrera several times. In the first interview, Carrera said he had gone to the Chick-fil-A to meet Coronado, but Coronado never showed up. In a later interview, Carrera said he had not been to Santa Ana for two weeks, and he did not know what had happened to Coronado. The morning after that interview, Carrera left a voicemail message telling the investigator a note had been left on his windshield saying, "You're next." Carrera brought the note to the station.

Carrera left another voicemail message for Investigator Trudeau, and Carrera played a message that had been left on his phone suggesting Carrera knew too much, "just like [his] . . . boy Daniel," and he was "gonna slip just like [Daniel] slipped." The investigator thought the voice sounded like Carrera's; the call had been made to Carrera's cell phone from a pay phone near Carrera's house. At the time, Carrera's cell phone was "pinging" off a cell phone tower 0.2 miles from that pay phone.

Carrera came to the station for another interview on May 16. Carrera said he did not know why this had happened to Coronado. He said, "It wasn't planned. It just happened." They had planned to go to a party, but "someone" he was with had "completely flipped out." He had picked up Padilla in Santa Ana, and Padilla had asked if Coronado would sell him marijuana. They met Coronado at the shopping center, and Padilla got out of Carrera's car, jumped into Coronado's car, and drove off with him. Carrera later looked for Padilla but did not find him.

Carrera admitted he had been lying about some details, and he began a new account of the events of that night. He had picked up Padilla, and they had arrived at the Chick-fil-A around 8:00 p.m. to meet Coronado. The three left together in Carrera's car

with Carrera driving, Coronado in the front passenger seat, and Padilla in the rear. Padilla asked Carrera to stop so he could urinate. When Carrera kept driving, Coronado said to stop. Carrera looked over and he saw “just something black” like a rope over Coronado’s throat. Coronado started kicking, and Carrera did not know what to do “‘cause, you know, [Padilla’s] just, like, don’t fuckin’ do nothing stupid, you know, while, you know, he’s grabbing it, and then I noticed that the fuckin’—that the rope breaks, you know, you hear it, you know, and when that happens, dude, a fuckin’ hammer just hits me right here, bro.” Carrera said Coronado kicked the car key, the car swerved, and defendant pulled over. Padilla got out, and when Carrera got out, Padilla ordered him to get back in the car and ordered Coronado to get out. Coronado did so, and Padilla grabbed him and hit him in the head with something. Padilla looked at Carrera “and he goes, you know, don’t you fuckin’ worry, you know, you’ll get your turn” Coronado was on the ground and Padilla got in the front seat “and . . . that’s when he had the gun and he goes, just drive.” When the officers asked where the body was, Carrera said Padilla had dragged it a bit while Carrera remained in the car. Carrera denied knowing that Padilla had a hammer or a rope when he got in the car, denied he had anything to with the killing, and denied knowing it was going to happen. Afterward, he sent text messages to Coronado’s phone to cover himself. He knew Padilla had Coronado’s keys, because Padilla ordered him to drive back to Coronado’s car and then ordered him to follow Padilla in Coronado’s car to Santa Ana. He did not know about Coronado’s wallet.

Carrera stated he started out the night with \$205. His parents had given him \$260, and he had used part of it for food and bills.

Carrera insisted a letter really had been left on his car, and he denied he had made the phone call from the pay phone near his house; he believed Padilla had made the call.

While the interview was going on, Carrera disclosed that Coronado's body would be found near Cajalco Road and Lake Mathews Drive. During the interview, officers located Coronado's body based on the information Carrera provided. When told it would have taken "a little bit of effort" to get the body to its location and that there were two sets of footprints leading to the body, Carrera said that Padilla had pulled out the gun and ordered him to move the body by himself while Padilla watched.

Coronado's body was in a dirt field off Cajalco and Lake Mathews Road, 10 or 11 miles from the Crossings shopping center. The body was shirtless, and his front pants pocket was turned out. His cell phone was located in another pocket.

DNA testing showed that blood found on the front passenger seatbelt of the Corolla was Coronado's. Other potential bloodstains were observed on the right rear passenger door, in the center of the front passenger seat, on the front passenger headrest, and on the driver's seatbelt.

Dr. Mark Fajardo, a pathologist, testified that an autopsy showed Coronado had suffered at least 10 separate impact injuries to his skull. The coroner stated his opinion that he had died from "[b]lunt-force cranial cerebral trauma," and the wounds appeared to have been inflicted by both sides of a claw hammer.

Carrera said Padilla had asked if Carrera knew where Padilla could get a hundred bucks, and Carrera said, “And I was, like, I’m going to pick up an ace.” “And he’s going to run off, and I’m not going to see him. Me and [Coronado] are just going to be whatever.” Carrera had not told Padilla that Carrera had \$200 because he did not want Padilla “ripping him” off. Carrera explained he had set up Coronado and he was going to pretend to get robbed as well. Investigator Trudeau asked, “So you’re supposed to do the robbery later, but then he [Padilla] just snaps?” Carrera replied, “He was supposed to just jack him with the knife [at the party]. That’s what he had told me.”

B. Defense Evidence

Carrera testified in his own behalf. He had met Coronado in high school. They both worked at Jungle Island, a paint ball park, and regularly smoked marijuana together. They also sold marijuana, which they obtained from Gerald Jackson who also worked at Jungle Island.

Carrera had known Padilla since elementary school, but they lost contact for awhile when Padilla moved. When they reconnected, Carrera talked to Coronado about getting Padilla a job at Jungle Island. Coronado wanted to meet Padilla first. The new job Carrera referred to in his text message to Padilla was the job at Jungle Island; the new job did not refer to a robbery.

On May 8, 2009, Carrera texted Coronado about going to a party together and then about buying marijuana from him. Coronado said he did not have enough, and Carrera thought Coronado was just being stingy. Carrera texted Coronado about breaking two \$100 bills because Carrera wanted change; he was not planning to rob Coronado.

Coronado texted back that he was short \$14. They then arranged to meet at Cajalco Road at 8:00.

When Coronado met Carrera at Chick-fil-A, they were going to go to a party, and they decided to take Carrera's car. Coronado "called shotgun" and got in the front passenger seat; Padilla got in back. They passed around a marijuana pipe, and Carrera noticed Padilla was smoking a methamphetamine pipe. Carrera asked Padilla what he was doing because Padilla knew Carrera disapproved of methamphetamine. Coronado asked why Carrera had not told him that Padilla smoked meth. Carrera told Padilla to put it away, and Padilla told Carrera to mind his own business. Coronado said Carrera was trying to help Padilla, but Padilla told Coronado to mind his own business. Coronado asked Padilla to pass him the meth pipe, and when Padilla did so, Coronado threw the pipe out the window. Padilla got angry and started screaming. An argument ensued, and Padilla told Carrera to pull over so he could beat up Coronado. When Carrera refused, he felt a sharp pain on the side of his head. His vision went black, and when it returned, he was on the wrong side of the road. He looked over and saw that Padilla had his hands around Coronado's neck. Coronado was kicking, and in doing so, bent Carrera's car key. Both Padilla and Coronado told Carrera to pull over, and Carrera did so on the first street he saw. Padilla and Coronado got out of the car but Carrera remained inside. Carrera was focused on his head; he had blood coming down his neck. He heard Coronado yell, "Tony," loudly. He got out and saw Coronado on the ground. Padilla was holding a hammer and was covered in blood. Padilla ordered Carrera to get back in the car. Carrera was scared and confused, and he did so. Padilla also got back in the car and

ordered Carrera to turn around and drive. Carrera saw Padilla take a gun from his waist and put it in his pocket.

Padilla ordered Carrera to drive back to Coronado's car and not to ask any questions. Padilla said he knew Carrera's family and was not afraid to kill them. Padilla took Carrera's phone and used it to send text messages. When they got back to the Chick-fil-A parking lot, Padilla ordered Carrera to follow him and took Carrera's car registration. Padilla drove away in Coronado's car, and Carrera followed him because he did not want anything to happen to his family. Padilla parked Coronado's car on a residential street in Santa Ana, told Carrera to take him to his home, and then told Carrera to wait. Carrera waited two hours until Padilla then came out, gave Carrera back his cell phone and car registration, and said they were not friends anymore. Carrera did not go to the police and later lied to the investigators because he feared Padilla would kill his family. At 1:20 the next morning, Carrera sent someone a text message saying he was "stoned and pissed," and Coronado had never showed up and had ruined his plans. Later that day, Carrera sent a text message to Coronado's cell phone asking if he had gotten more marijuana. He wanted to see if he would get a reply from Coronado because he did not know exactly what had happened, and it had not occurred to him that Coronado was dead.

On Sunday, Carrera went to his mother's house. He had two gashes on his head, which he tried to hide with a beanie, but his mother asked him about them. Over the next few days, he sent more text messages to Coronado's phone.. Carrera testified he had initially told Investigator Trudeau he had not met up with Coronado because he did not

want Padilla to find out. Carrera testified he did not leave himself the threatening voicemail.

Carrera admitted he had texted his cousin on May 7 and asked if the cousin could get him a gun with a silencer that day or the next. He wanted the gun to go to the shooting range with his roommate. On May 8, he had a conversation with his cousin about getting a “piece” for “two bills,” and the same day he asked a friend if he could borrow a Taser “[j]ust to have it.” In his text message, he said he had to take “a half pound to [S]anta [B]arbara tomorrow.” He also said the gun was not for him, but for a “homie.” Carrera testified his asking for a gun and a Taser had nothing to do with what happened to Coronado.

Carrera testified he never intended to rob Coronado, and the argument about Padilla smoking meth was the true story. He had lied to the police and others about what had happened because he was afraid for his family. He did not know how blood got in the back seat of his car, and Coronado was not killed in the car.

Carrera’s father, mother, and brother all testified he was calm and peaceable and was not capable of inflicting the injuries on Coronado that caused his death. On Mother’s Day, Carrera was wearing a beanie even though it was hot. His mother saw two deep cuts next to his ear, but he would not talk about it.

Richard Leo, Ph.D., a professor of law, testified as an expert on police interrogation, psychological coercion, and false confessions.

C. Verdicts and Sentences

The jury found Carrera guilty of murder in the first degree (§ 187, subd. (a)) in count 1 and found true the allegation that he committed the murder during the commission of a robbery (§ 190.2, subd. (a)(17)(A)); however, the jury found not true the allegation that he personally used a deadly and dangerous weapon (§ 12022). The jury also found Carrera guilty of robbery (§ 211) in count 2.

The trial court sentenced Carrera to life without parole for count 1 and stayed his sentence for count 2 under section 654.

Additional facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. Admission of Text Messages into Evidence

Carrera contends the trial court erred in admitting text messages into evidence. Carrera contends the text messages were hearsay and the text messages about the gun and Taser were irrelevant and prejudicial.

1. Additional Background

The prosecutor filed a motion in limine seeking to introduce text messages from Carrera to Padilla and to and from Coronado. Over defense objections on the grounds of hearsay, lack of foundation, and violation of the Sixth Amendment, the trial court ruled Carrera's text messages were admissible as declarations against interest and Padilla's response was admissible as statements of a coconspirator. The court ruled that Coronado's text messages to Carrera were hearsay, but were not testimonial, and they were admissible under Evidence Code section 356 because to understand the conspiracy,

“you have to have two sides to a conversation.” Later during the trial, the court ruled, over defense objection, that Carrera’s text messages about wanting a gun, silencer, and Taser would be admissible if Carrera testified.

2. *Standard of Review*

We review the trial court’s rulings on the admissibility of evidence under the deferential abuse of discretion standard. (*People v. Paniagua* (2012) 209 Cal.App.4th 499, 519.)

3. *Analysis*

The challenged messages fall into several distinct categories: (1) Carrera’s messages to Padilla and Coronado; (2) Coronado’s replies; (3) Padilla’s response; and (4) Carrera’s messages about seeking to obtain a gun, silencer, and Taser.

(a) Carrera’s messages to Padilla and Coronado

Carrera contends his messages to Padilla and Coronado were inadmissible hearsay. “‘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 the matter stated.” (Evid. Code, § 1200, subd. (a).) “Except as provided by law, hearsay evidence is inadmissible.” (Evid. Code, § 1200, subd. (b).)

Hearsay evidence is admissible when offered against a party declarant. (Evid. Code, § 1220.) Citing *People v. Allen* (1976) 65 Cal.App.3d 426, disapproved on another ground in *People v. Green* (1980) 27 Cal.3d 1, 39, defendant argues that for a statement by a party to be admissible under Evidence Code section 1220, it “must be offered to prove the truth of the matter stated, either expressly or impliedly,” and the challenged

messages do not meet that standard. However, in *People v. Guerra* (2006) 37 Cal.4th 1067, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151, the court held, “‘Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party’ In this case, the evidence was of a statement made by and offered against defendant, the declarant as well as a party to this prosecution. Regardless of whether the statement can be described as an admission, the hearsay rule does not require its exclusion when it is offered against a party declarant. [Citation.]” (*Id.* at p. 1123.)

Under *Randle*, Carrera’s own messages were plainly admissible. Even if the trial court admitted Carrera’s messages as declarations against interest rather than as party admissions, we uphold the trial court’s ruling when it is correct in law regardless of the trial court’s articulated reason for that ruling. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

(b) Coronado’s replies to Carrera

The trial court admitted Coronado’s text replies to Carrera’s messages under Evidence Code section 356, which provides, “[W]hen a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.”

The People argue that Coronado’s replies were admissible for a nonhearsay purpose, that is, to give meaning to Carrera’s text messages admitted under Evidence Code section 1220. In *People v. Turner* (1994) 8 Cal.4th 137, disapproved on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5, the defendant contended the

trial court had erred in admitting the statements of a codefendant in a conversation with the defendant in which the defendant admitted shooting two victims. (*People Turner, supra*, at p. 188.) The court held that an out-of-court statement is admissible when offered solely to give content to other admissible hearsay statements. (*Id.* at pp. 189-190.)

Here, we likewise conclude the trial court did not err in admitting Coronado's reply messages because they gave meaning to Carrera's messages, which, as discussed above, were properly admitted under Evidence Code section 1220.

(c) Padilla's response

Carrera challenges a single two-word message from Padilla. As recounted above, Carrera sent a text message to a cell phone used by Padilla saying he had a "new job" for Padilla. Padilla responded, "west up," which the trial court assumed meant "What's up." The trial court admitted the statement under the conspiracy exception to the hearsay rule. (Evid. Code, § 1223.)

We need not examine at length the propriety of that ruling because the admission of that single phrase was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Whether or not a conspiracy existed at the time of the text, overwhelming evidence showed that Carrera drove to Santa Ana, picked up Padilla, and met Coronado at the shopping center. The three left, but only two returned, and Carrera provided many different versions of what transpired.

(d) Messages about gun, silencer, and Taser

Carrera contends the text messages to his cousin and another person about acquiring a gun, silencer, and Taser were irrelevant and were more prejudicial than probative. The trial court ruled that the evidence was relevant and probative because “it fits in with evidence already in about [Padilla] maybe had a gun,” and it was not highly prejudicial or inflammatory because Coronado had been murdered with a hammer, not a gun.

We reverse the trial court’s decision to admit evidence under Evidence Code section 352 only if the probative value of the evidence is clearly outweighed by its prejudicial effect. (*People v. Valdez* (2012) 55 Cal.4th 82, 133.) The timing of the gun and Taser text messages made them relevant and probative—the messages were sent the day before and the day of Coronado’s murder. The messages were further relevant to Carrera’s claim that Padilla had a gun and to impeach Carrera’s character evidence that he was peaceful and nonviolent. (See, e.g., *People v. Ramos* (1997) 15 Cal.4th 1133, 1173 [evidence of weapons possession “would reasonably implicate a violent character”].) Moreover, Carrera himself discussed the text exchanges during his videotaped interview which was admitted at trial.

We conclude the trial court did not abuse its discretion in admitting the challenged evidence.

B. Admission of Lay Opinion

Carrera next contends the trial court erred in admitting an investigator’s lay opinion that the voice in a “death threat” message sounded like that of Carrera.

1. Additional Background

In pretrial discussions, defense counsel objected to Investigator Trudeau giving an opinion that a threatening voicemail message Carrera received on his cell phone had actually been made by Carrera himself from a pay phone near his house. The prosecutor argued that lay opinion was proper, because the detective had actually talked to Carrera while interviewing him over the course of three days. The trial court ruled that lay opinion testimony on the subject was admissible.

Thereafter, Investigator Trudeau testified that he received a message from Carrera in which Carrera said he had had a death threat in a voicemail message. Carrera stated the person had said they were going to “get [him].” The caller said they knew Carrera had gone to the police again, they had been watching him, they had seen him waiting for Coronado that night, it was another person’s turf, they would catch him slipping just like Coronado, and they were going to kill him.

An audiotape of the threatening message was played for the jury, and the prosecutor established that before hearing the threatening message, Investigator Trudeau had spend over six hours talking with Carrera. The prosecutor asked Investigator Trudeau if he recognized the voice on the tape. Defense counsel objected on the ground that the question called for speculation. The trial court overruled the objection, and the investigator offered his lay opinion that the voice on the audiotape sounded to him like Carrera’s voice. He testified he was familiar with “the way he speaks, the terms of art he uses, and the words he uses and the phrases.”

In his motion for new trial, defense counsel argued, among other grounds, error in the admission of the investigator's opinion testimony. The trial court denied the motion, stating that any person could say he had recognized a voice.

2. *Analysis*

Evidence Code section 800 allows a witness to offer a lay opinion if the opinion is “[r]ationally based on the perception of the witness” and “[h]elpful to a clear understanding of his testimony.”

California courts have long recognized the admissibility of lay opinion testimony about voice identification. In *People v. Sica* (1952) 112 Cal.App.2d 574, 586-587, the court stated, “[I]t is clear that on the issue of identification of the participants in the conversations, testimony of a witness who recognizes a voice and uses this identification to name the speaker is properly admissible [citations] and any uncertainty of the recognition goes only to the weight of the testimony. [Citation.]” (See also *People v. Eaton* (1959) 171 Cal.App.2d 120, 123 [“testimony relating to the identity of a voice is generally considered competent, its probative value being a question of fact”]; *Connell v. Clark* (1948) 88 Cal.App.2d 941, 947 [the identification of a person by voice was the proper subject of lay opinion testimony]; *People v. Lorraine* (1938) 28 Cal.App.2d 50, 54 [the identity of a person in a telephone conversation “may be established by proof of recognition of his voice”].)

Courts have identified two predicates for the admissibility of similar testimony. First, the witness must testify from personal knowledge as to the identity of the speaker, and second, the testimony must be helpful to the trier of fact. (See, e.g., *People v. Mixon*

(1982) 129 Cal.App.3d 118, 128 [addressing lay opinion testimony about identity of persons depicted in surveillance photographs].)

Here, the first predicate was satisfied by Investigator Trudeau's testimony that he had spoken with Carrera over the telephone and in long interviews before hearing the voicemail. Carrera argues the second predicate was not satisfied because the jury could make its own identification when Carrera testified in his own behalf, and the jury heard at least seven recorded phone calls between Carrera and the investigator and nearly four hours of recorded interviews. However, at the time of Investigator Trudeau's testimony, Carrera had not yet taken the stand, nor could the trial court know whether he would do so. And even though the jury had heard recordings of approximately 30 minutes of telephone calls between Carrera and Investigator Trudeau before the challenged testimony, it had not yet heard the more extensive recorded interviews. We review the trial court's ruling on the basis of the record at the time the ruling was made, not in light of subsequent events. (See, e.g., *People v. Robertson* (2012) 208 Cal.App.4th 965, 991.) We conclude the second predicate for admissibility of the investigator's testimony was met.

Carrera further argues that Investigator Trudeau testified, in effect, that Carrera was untruthful because he left a fake voicemail message claiming to have been threatened, and police officers may not testify about the veracity of others. To support that argument, Carrera cites *People v. Sergill* (1982) 138 Cal.App.3d 34, 41, in which the court held that the admission of an officer's testimony that a child victim was being

truthful was reversible error. *Sergill* is distinguishable. In the instant case, the investigator merely testified he recognized the voice in the message as Carrera's.

There was no error in the admission of Investigator Trudeau's testimony.

C. *Brady* Claim

Carrera contends a *Brady* violation occurred, and the trial court erred in failing to grant a mistrial after the prosecutor failed to disclose that Carrera told an investigator he believed he was being followed.

1. Additional Background

Defense counsel moved in limine to exclude any reference at trial to any statement Carrera made to law enforcement until after a hearing was conducted concerning the admissibility of such statement. At the hearing on pretrial motions, defense counsel stated he was just trying to make sure he had all of Carrera's pretrial statements. The trial court told the prosecutor to remind the officer witnesses not to mention any offhand statements unless they had been reported. The court stated it was sure the prosecutor had given defense counsel all the statements he had, but reminded the prosecutor that defense counsel was concerned about offhand comments.

At trial, Investigator Trudeau testified that Carrera had said someone was following him when he was on the way to the police station to bring a threatening note Carrera had found on his windshield. The investigator sent another officer to investigate, but nothing happened, and Carrera eventually said no one was following him anymore.

Following that testimony, defendant moved for a mistrial on the ground the prosecutor had not disclosed that Carrera had reported being followed. The prosecutor

indicated he believed the information had been included in the police reports, but he had later determined it was not in the reports. Defense counsel stated the testimony was the first time he had heard the information about Carrera's report of being followed, and it put defense counsel at a disadvantage because it indicated Carrera was trying to mislead the police, and he would have brought it to the jury's attention in opening statement. Defense counsel moved for a mistrial on that basis. The trial court denied the motion, and the prosecutor apologized for failing to disclose the information.

2. *Analysis*

“Under the federal Constitution's due process clause, as interpreted by the high court in [*Brady*], the prosecution has a duty to disclose to a criminal defendant evidence that is “both favorable to the defendant and material on either guilt or punishment.” [Citation.] The prosecution's withholding of favorable and material evidence violates due process ‘irrespective of the good faith or bad faith of the prosecution.’ [Citation.] [¶] . . . [¶] Favorable evidence is material when “it could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” [Citations.] Put another way, the question is whether, deprived of the information withheld by the prosecution, the defendant received ‘a trial resulting in a verdict worthy of confidence.’ [Citation.] [¶] In deciding whether evidence not disclosed to the defense was material under these standards, we consider how the nondisclosure affected the defense investigation and trial strategy. [Citations.] A determination that the prosecution violated its disclosure obligations under [*Brady*] requires reversal without any need for

additional harmless error analysis. [Citations.]” (*In re Bacigalupo* (2012) 55 Cal.4th 312, 333-334.)

The withheld information was not favorable to Carrera; rather, it further reinforced the prosecution’s position that Carrera attempted to mislead the officers during their investigation of Coronado’s death. Moreover, the withheld information was not material. The gist of Carrera’s argument on appeal is that the late-obtained information indicated Carrera was trying to mislead the police, and he was disadvantaged because his counsel was unable to address the issue in opening statement. However, pretrial discussions make clear that defense counsel already knew the officers believed Carrera himself had left a threatening voicemail message on his own phone, in which he had disguised his voice in an attempt to shift the blame to someone else. Defense counsel also knew Carrera claimed to have received a threatening note. Carrera’s claim that he was being followed was of the same nature. Thus, it does not reasonably appear that the failure to disclose could have adversely affected the defense trial strategy. We conclude the trial court did not err in denying Carrera’s motion for mistrial. (*In re Bacigalupo, supra*, 55 Cal.4th at pp. 333-334.)

D. Crime Scene and Autopsy Photographs and Denial of Mistrial

Carrera contends the trial court erred in allowing crime scene and autopsy photographs in evidence and in denying Carrera’s motion for mistrial after three jurors became sick after viewing the photographs.

1. Additional Background

Carrera moved pretrial to exclude, under Evidence Code section 352, photographs that showed “a lot of decomposition and a lot of actual maggot activity on [Coronado’s] body.” The prosecutor indicated he planned to use a few distant photographs of the body as it was found in the field, with no maggot activity, and a few autopsy photographs that showed the particularized injuries. The trial court ruled those few photographs would be admissible and instructed the parties to inform the court if conflict arose over a specific photograph.

At trial, nine autopsy photographs of Coronado’s head area were displayed during Dr. Fajardo’s testimony about the autopsy findings. One of the photographs showed the advanced state of decomposition of the head, and three of the photographs showed ovoid defects and separate gouges to Coronado’s skull. The trial court announced a break, and out of the presence of counsel, stated it had done so because Juror No. 4 had appeared ready to faint. The court clerk stated that Juror No. 1 had also indicated feeling faint. At defense counsel’s suggestion, the trial court questioned the two jurors. Juror No. 4 indicated she had been so overwhelmed by the photographs that it would affect her ability to evaluate the evidence, and the trial court excused her. Juror No. 1 indicated she had felt dizzy when viewing the photographs, but she felt better, and she would be able to see more photographs.

Dr. Fajardo resumed his testimony, and two more photographs were displayed. The trial court ordered another break, and the jury left the courtroom. The trial court said that Juror No. 3 had run out of the courtroom with a handkerchief over her mouth as if

she might vomit, and the clerk later stated she believed Juror No. 3 was vomiting in the restroom. Defense counsel moved for a mistrial on the ground jurors were “getting so emotionally overwhelmed by the photographs” The trial court questioned all the jurors on their ability to judge the case in light of the photographs. All said they were willing to go ahead and could be fair and impartial except for Juror No. 3, who shook her head and said she was unsure she could continue. Over defense objection, the trial court excused Juror No. 3 and denied the motion for mistrial.

At the close of the prosecution’s case, defense counsel objected to moving the crime scene and autopsy photographs into evidence on the ground they were cumulative. The trial court overruled the objection.

2. *Admission of Photographs*

(a) Standard of review

““The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citations.] The court’s exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. [Citations.]” [Citations.]” (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1272.)

(b) Analysis

Carrera argues that because the trial court had to stop the pathologist’s testimony twice and excused two jurors while a third juror also felt faint after viewing the photographs, “the photographs were clearly prejudicial” However, ““[A] court may admit even ‘gruesome’ photographs if the evidence is highly relevant to the issues raised

by the facts, or if the photographs would clarify the testimony of a medical examiner.”

[Citation.] ¶ . . . “[V]ictim photographs . . . in murder cases always are disturbing. [Citation.]” [Citation.] . . . The photographs at issue here are gruesome because the charged offenses were gruesome, but they did no more than accurately portray the shocking nature of the crimes. The jury can, and must, be shielded from depictions that sensationalize an alleged crime, or are unnecessarily gruesome, but the jury cannot be shielded from an accurate depiction of the charged crimes that does not unnecessarily play upon the emotions of the jurors. The record reflects that the experienced trial judge was well aware of his duty to weigh the prejudicial effect of the photographs against their probative value, and carefully did so. [Citation.]’ [Citations.]” (*People v. Gonzales*, *supra*, 54 Cal.4th at p. 1272.)

Here, the photographs were relevant in that they supported the prosecution’s theory of how the murder was committed. Carrera told Investigator Trudeau several versions about how Coronado had died. The photographs illustrated the pathologist’s testimony about the hammer injuries and cause of death. (*People v. Box* (2000) 23 Cal.4th 1153, 1199 [photographs that showed the victims’ wounds were relevant to support the prosecution’s theory of how the murders occurred and were not cumulative to the coroner’s and others’ testimony], overruled in part on another ground as stated in *People v. Martinez* (2010), 47 Cal.4th 911, 948; *People v. Scheid* (1997) 16 Cal.4th 1, 14-15 [photographs were relevant to establish the circumstances of the crime and to corroborate witnesses’ testimony].)

The prosecution had the burden of establishing that a murder occurred, and in meeting that burden, the prosecution was not required to “accept antiseptic stipulations in lieu of photographic evidence.” (*People v. Pride* (1992) 3 Cal.4th 195, 243.) Moreover, to the extent the photographs were gruesome, they merely reflected the brutal means by which the murder was committed and the fact that Coronado’s body was left lying for several days before being found. Moreover, the trial court excluded the most gruesome photos—those showing substantial maggot activity on the corpse.

We conclude the trial court did not abuse its discretion in admitting the challenged photographs.

3. *Denial of Mistrial*

(a) Standard of review

“““A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.”” [Citation.] Accordingly, ‘[w]e review a trial court’s denial of a motion for mistrial for abuse of discretion.’ [Citation.]” (*People v. Lightsey* (2012) 54 Cal.4th 668, 718.)

(b) Analysis

Before denying the motion for mistrial, the court questioned each juror on his or her ability to judge the case in light of the photographs. Each juror except Juror No. 4 replied that he or she was willing to go forward and be impartial. The court excused Juror No. 4. The record establishes that the trial court carefully considered whether there

was incurable prejudice before denying the motion for mistrial. In addition, the same reasons discussed above that support admissibility of the photographs likewise support the trial court's denial of the motion. We conclude the trial court did not abuse its discretion in denying a mistrial. (*People v. Lightsey, supra*, 54 Cal.4th at p. 718.)

E. Security Measures During Carrera's Testimony

Carrera contends the trial court abused its discretion by ordering a deputy to stand behind him as he testified.

1. Additional Background

Before Carrera testified, the trial court asked for counsels' comments on courtroom security. The prosecutor suggested having a deputy stand near the back door, which was the closest exit. Defense counsel objected, noting that Carrera had not suffered any disciplinary action during two years in jail, and he had been courteous and cooperative in court. Defense counsel argued the deputy should be outside the door to minimize prejudice to Carrera. The trial court stated it had seen Carrera looking around as if to see where things were situated, which made the court nervous. The courtroom deputy added he had seen Carrera eyeing the courtroom exits, and Carrera's lack of expression during the proceedings made the deputy nervous. The deputy added that Carrera was not wearing leg braces. The prosecutor again argued for having a deputy stand by the door. The trial court noted that a fellow judge had been stabbed in the neck by a witness. The trial court ruled it would "err on the side of caution and have a deputy standing over there" However, the record does not clarify what was meant by "over there."

2. *Standard of Review*

The trial court has broad power to maintain courtroom security and orderly proceedings, and we review courtroom security measures for abuse of discretion.

(*People v. Hayes* (1999) 21 Cal.4th 1211, 1269 (*Hayes*).

3. *Analysis*

In *Hayes*, the court permitted screening of all persons who entered the courtroom, including “use of a hand-held metal detecting wand, patdown of outer clothing, examination of bags and purses for weapons, locking the courtroom door, and positioning an extra deputy in the courtroom with two additional deputies outside the courtroom.”

(*Hayes, supra*, 21 Cal.4th at p. 1267.) The defendant complained on appeal that the security precautions had denied him a fair trial because they suggested he was dangerous. The court rejected that argument, explaining, “Neither due process nor any other constitutional right of a criminal defendant mandates a hearing on the necessity for courtroom or courthouse security. Appellant’s attempt to analogize the courtroom security measures of which he complains to shackling and other physical restraint of a defendant, and the reliance on authority related to that practice is unpersuasive. Both this court and the United States Supreme Court have recognized that the use of security personnel, even in the courtroom, is not so inherently prejudicial that it must be justified by a state interest specific to the trial. ‘The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers’ presence. While shackling and prison clothes are unmistakable indications of

the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. . . . Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.' [Citations.]" (*Id.* at p. 1268.)

Just as the court in *Hayes* found no prejudice in the far more extensive security practices used in that case, we find no prejudice and no abuse of discretion in the single deputy's standing somewhere in the courtroom during Carrera's testimony.

F. Spectator Misconduct

Carrera contends the trial court erred in denying a motion for new trial on the ground of spectator misconduct.

1. Additional Background

While Carrera was testifying, the trial court reminded the audience not to use cell phones in court. During a break, the court noted that two young people in the audience were "pretty emotional, angry," and had gone "out twice and finally left." The trial court stated they were "probably too young for this trial" and told the prosecutor they were not to come back. The prosecutor responded they were Coronado's brother and sister; they

had a right to be present; and leaving when they were emotional was better than sitting in the courtroom and crying.

The trial court further noted that the brother and sister had been disruptive and appeared to be using cell phones during the proceedings. The trial court had seen the brother say something to a member of Carrera's family when leaving the courtroom. The prosecutor said the siblings had not been using cell phones but had been looking at photographs of Coronado because they had just come from Padilla's sentencing hearing, and they had left the courtroom because they were trying to follow the trial court's earlier instruction to leave if they were emotionally overwhelmed.

Defense counsel stated the brother had made "some type of a gesture . . . like a hand into a fist" when Carrera was describing how Padilla had hit Coronado, and he believed the siblings should be excluded from the courtroom. The trial court stated the brother had put his head down and pounded his own forehead with his fist during some difficult testimony. The trial court ultimately ruled that the siblings could continue to view the proceedings.

Days later, the court excluded the siblings from the courtroom during defense counsel's argument but ruled they could return for rebuttal. The next day, the trial court, on its own motion, told the prosecutor the siblings would be excluded from the courtroom for the verdict because they could not control themselves.

Defense counsel later moved for a new trial on the ground, among others, of spectator misconduct. He asserted that Coronado's "family repeatedly and demonstrably reacted to testimony and argument . . . in front of the jury . . . in an attempt to influence

the jury's verdict." To support the motion, he filed declarations of Carrera's mother and father, which stated the siblings had been disruptive based on the incidents described above and on the parents' observations of their facial expressions, audible comments, and crying during the trial.

The trial court denied the motion, finding the siblings' conduct "was not that major" and was unrelated to Carrera's guilt or innocence. The court concluded the conduct would not have influenced the jury's verdict.

2. *Forfeiture*

The People contend Carrera forfeited his claim because he failed to request a curative admonition. (*People v. Hill* (1992) 3 Cal.4th 959, 1000, overruled on another ground by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) To the extent Carrera argues error in the trial court's failure to admonish the jury, we agree the issue was forfeited.

3. *Standard of Review*

Because the trial court is in the courtroom when a spectator engages in misconduct in the jury's presence, the trial court is in the best position to determine whether such misconduct has affected the fairness of the trial. The trial court therefore has broad discretion to evaluate the effects of claimed spectator misconduct, and we review the trial court's determination for abuse of discretion. (*People v. Cornwell* (2005) 37 Cal.4th 50, 87, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

4. Analysis

In spectator misconduct cases, prejudice is not presumed. (*People v. Hill, supra*, 3 Cal.4th at p. 1002.) Spectator misconduct constitutes a ground for new trial if it is “of such a character as to prejudice the defendant or influence the verdict.” (*People v. Lucero* (1988) 44 Cal.3d 1006, 1022.) In that case, the defendant was convicted of murdering two young girls who had been reported missing from a park. (*Id.* at p. 1012.) When the jury was preparing to leave the courtroom to begin deliberations, the mother of one of the victims cried out that there had been screaming from the ball park and asked why that had not been brought up. (*Id.* at p. 1022.) After the mother was escorted from the courtroom, her outburst could nonetheless be heard from the corridor. The trial court admonished the jury to disregard the disruption. (*Ibid.*) The defendant moved for a mistrial, but the trial court denied the motion, and the appellate court affirmed, noting it had found “no California cases which reverse a judgment because of spectator misconduct.” (*Id.* at p. 1024, fn. 10.) Defendant attempts to distinguish *Lucero* on the ground that in the instant case, the jury was not admonished to disregard the spectators’ conduct. That argument is unavailing—there was no admonishment because none was requested.

Moreover, the trial court observed the proceedings firsthand and found that the siblings’ conduct was “not that major.” We find no abuse of discretion in the trial court’s ruling. (*People v. Cornwell, supra*, 37 Cal.4th at p. 87.)

G. Prosecutorial Misconduct

Carrera contends the prosecutor committed misconduct by shifting the burden of proof to the defense in argument.

1. Additional Background

In argument to the jury, defense counsel asserted that Carrera and Coronado were close friends and that it was “inconceivable” that defendant would have set up his good friend. During rebuttal, the prosecutor argued that defense counsel “wanted you to remember that [Carrera] was . . . good friends with [Coronado]. But you know he has the power of subpoena just like I do.” Defense counsel objected on the ground of burden shifting, and the trial court overruled the objection. The prosecutor continued that Carrera could have called other friends to the stand to corroborate Carrera’s close friendship with Coronado, but instead had called only his family members.

To explain Carrera’s conduct and reactions after the murder, defense counsel also argued that Carrera “ran away . . . emotionally, psychological[ly]” after seeing his close friend murdered. He argued that when defendant testified, the jury could “see that he’s kind of a calm, reserved person. He would not have killed [Coronado] the way that [Coronado] was killed.” Defense counsel repeated the theme over and over during argument that the killing had been violent and brutal, and defendant was a calm, nonviolent person who was not capable of such an act as shown through his family members’ testimonies and by his calm demeanor in court and while testifying.

During rebuttal, the prosecutor argued that defense counsel had “talked to you about this psychological thing that [defendant] was psychologically and emotionally

scared and that he just wanted to distance himself from that. There are people for that too. You can call a witness. You can call a psychologist. You can call a psychiatrist, someone who can evaluate him and sit there and tell you that, ‘You know what that flat affect is; he has some psychological problems. He’s just that way.’” Defense counsel objected on the ground of burden shifting, and the trial court stated the prosecutor could continue.

Defense counsel argued to the jury that the prosecution had not tested all of the blood found in Carrera’s car. In rebuttal, the prosecutor stated that defense counsel had the same opportunity to do so. Defense counsel objected, and the trial court overruled the objection.

Both counsel reminded the jury during argument of the prosecution’s burden of proof beyond a reasonable doubt.

Defense counsel filed a motion for new trial on the ground, among others, that the prosecutor’s argument had impermissibly shifted the burden. The trial court denied the motion.

2. *Analysis*

A prosecutor has a duty to prosecute vigorously, but he must refrain from improper methods calculated to produce a wrongful conviction. (*Berger v. United States* (1935) 295 U.S. 78, 88.) Under the federal Constitution, a prosecutor commits misconduct by using “deceptive or reprehensible methods to persuade the jury . . . [that] infect the trial with such “unfairness as to make the resulting conviction a denial of due process.” [Citations.]” (*People v. Parson* (2008) 44 Cal.4th 332, 359.) Under the state

Constitution, a prosecutor commits misconduct even when his actions “do not result in a fundamentally unfair trial.” (*Ibid.*)

It is generally permissible for a prosecutor to comment on the state of the evidence or on the defendant’s failure to call logical witnesses, introduce material evidence, or rebut the prosecution’s case. (*People v. Medina* (1995) 11 Cal.4th 694, 755; see also *People v. Gonzales, supra*, 54 Cal.4th at p. 1275 [“it is neither unusual nor improper [for a prosecutor] to comment on the failure to call logical witnesses”].) However, a prosecutor may not suggest that “a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.)

In *People v. Cook* (2006) 39 Cal.4th 566, a criminalist testified that the bullets used in two murders had been fired from the same weapon. (*Id.* at p. 607.) The court held that the prosecutor did not impermissibly seek to shift the burden of proof by asking the criminalist “if the defense could have subjected the autopsy bullets to its own testing by an independent laboratory.” The court observed that “the prosecutor did not ask whether the defense had a duty to do independent testing, merely whether the defense had an opportunity to do so. [Citation.]” (*Ibid.*) The court concluded that “[p]ointing out that contested physical evidence could be retested did not shift the burden of proof.” (*Ibid.*)

In *People v. Bradford, supra*, 15 Cal.4th 1229, the prosecutor pointed out in argument that “no evidence has been introduced by [the defense] on [the] issue [of whether a stain on a mat in the trunk of the defendant’s vehicle was blood].” (*Id.* at p.

1339.) The prosecutor also noted that “the defense did not call an expert witness to testify contrary to the conclusions reached by the coroner with regard to the time frame of [the victim’s] death, although defendant ‘certainly is free to call his own witness to testify to those facts.’” (*Id.* at pp. 1338-1339.) The court held that the prosecutor’s arguments did not impermissibly shift the burden of proof to the defendant. (*Id.* at p. 1340.)

The challenged statements are of the same nature found to be permissible in *Cook* and *Bradford*. As in those cases, the prosecutor did not impermissibly attempt to shift the burden of proof.

H. Instruction on Theft

Carrera contends the trial court erred in failing to instruct the jury on theft as a lesser included offense of robbery.

1. Additional Background

Defense counsel requested instructions on theft by larceny as a lesser included offense to robbery in count 2. Counsel argued that the jury could believe the car and keys had been taken to hide that Padilla had killed Coronado and consequently that the theft occurred after the application of force. The trial court stated substantial evidence showed that a robbery had occurred because Coronado’s wallet and \$186 were missing even if the intent to take the car was formed later. The trial court denied the request to give the theft instruction.

2. Analysis

When there is substantial evidence that an element of the charged offense is missing, but that the defendant is guilty of a lesser included offense, the trial court must instruct on the lesser included offense even in the absence of a request to do so. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) “Substantial evidence is evidence sufficient to ‘deserve consideration by the jury,’ that is, evidence that a reasonable jury could find persuasive.” (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) Theft is a lesser included offense of robbery, which includes the additional element of force or fear. (*People v. Ortega* (1998) 19 Cal.4th 686, 694.) When an intent to steal arose only after the victim was assaulted, the element of force or fear is absent, and the offense committed is theft, not robbery. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055-1056.)

Carrera argues that the only things stolen from Coronado were his car keys and car, and the fact that the car was destroyed suggested the taking was done to avoid detection for the killing. To support his argument, he cites *People v. Ramkeesoon* (1985) 39 Cal.3d 346 (*Ramkeesoon*) and *People v. Kelly* (1992) 1 Cal.4th 495 (*Kelly*). In *Ramkeesoon*, the defendant testified he had not thought about stealing the victim’s property until an assault was completed. The court stated the evidence was sufficient to warrant an instruction on the lesser offense of theft. The court explained, “Although the jury was not required to believe defendant’s testimony, it was credible enough to have supported a verdict of theft instead of robbery. [Citation.]” (*Ramkeesoon, supra*, at p. 351.) In *Kelly*, the court held the trial court had prejudicially erred in failing to instruct

on theft as a lesser included offense of robbery (*id.* at p. 530) when the defendant argued his intent to steal arose after rather than before the victim's death, and he had told the police he had found the victim's rings in a trash can. (*Id.* at pp. 528-529.)

In contrast, in *People v. Lewis* (1990) 50 Cal.3d 262, the court stated “[t]here was no evidence that the offense, if committed by defendant, was other than robbery. The victim had been brutally murdered and some of his property was missing. He was in possession of his car when last seen alive, and it was missing when his body was discovered.” (*Id.* at p. 277.) Moreover, “[t]here was nothing more than sheer speculation to support the scenario now advanced by defendant that the idea of taking the victim's property did not arise until after the victim was dead.” (*Ibid.*; accord, *People v. Duncan* (1991) 53 Cal.3d 955, 971.)

Carrera told investigators he and Padilla planned a robbery in which Padilla would rob Coronado with a knife. In contrast, at trial Carrera testified he had no intent to rob Coronado, and he claimed Padilla alone was responsible for the killing. Carrera further testified he did not know Padilla had taken Coronado's car keys or his money. However, Coronado's pockets had been emptied of everything except his cell phone. Thus, the evidence supported a finding either that Carrera and Padilla had preplanned to rob Coronado or that Padilla alone had perpetrated the murder and theft. As in *Lewis* and *Duncan*, nothing more than speculation supports Carrera's contention that the jury should have been instructed on theft as a lesser included offense.

I. Carrera's Absence During Readback of Testimony

Carrera contends the trial court erred in denying defense counsel's request for Carrera's presence during the readback of testimony.

1. Additional Background

Defense counsel informed the court after the jury began deliberations that he wanted to be present in person if the jury requested readback. The trial court responded, "Whatever the questions are, we'll just call you and bring you over here. [¶] And the defendant, we'll have him waiting downstairs. So he can come up if we have to get together in person for something."

During deliberations, the jury asked to view the videotape of Carrera's May 20 interview. After discussions with counsel, the trial court replied that there was no videotape in evidence. The jury then requested to read the transcript of that interview. The trial court replied that the court reporter would read back Investigator Bowen's testimony about the interview. Defense counsel stated he would like that done in open court, and he had not waived Carrera's presence. The trial court denied the request for Carrera's presence, ruling that Carrera's Sixth Amendment right to confrontation did not apply.

2. Analysis

Although a criminal defendant has the right to be present at all critical stages of trial (*Rushen v. Spain* (1983) 464 U.S. 114, 117), the United States Supreme Court has never declared readback of testimony to be a critical stage. Our own Supreme Court has held that it is *not* a critical stage. (*People v. Cox* (2003) 30 Cal.4th 916, 963, disapproved

on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Nonetheless, in the absence of a written waiver, a defendant has a *statutory* right to personally be present at all criminal proceedings, including readback of testimony to the jury. (§ 977, subd. (b)(1), (2).)

The People concede Carrera's statutory right was violated but argue the error was harmless because it was not reasonably probable the result would have been more favorable without the error. (*People v. Riel* (2000) 22 Cal.4th 1153, 1196.) We agree. Although Carrera argues his presence would have reminded the jury of his "youth, lack of sophistication, and the likelihood that he had simply parroted what the police wanted to hear," the readback request covered less than 13 pages of the reporter's transcript. The jury already had the opportunity to observe Carrera over eight days of trial, had seen him testify, and had been provided with a videotape of his lengthy interview with investigators. There is no reasonable possibility his presence during the brief readback would have affected the outcome of the trial.

J. Cumulative Error

Carrera contends the cumulative error doctrine requires reversal. As discussed above, we have determined only that Carrera's statutory right to be present during readback of testimony was violated. We conclude that any errors, whether considered singly or cumulatively, did not result in a miscarriage of justice. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1236.) We therefore reject Carrera's contention of cumulative error.

IV. DISPOSITION

The judgment is affirmed.

DEFENDANT ROCKY PADILLA

I. INTRODUCTION

Defendant Rocky Padilla appeals from his conviction of first degree robbery murder (§§ 187, subd. (a), 190.2, subd. (a)(17)(A); count 1) and robbery (§ 211; count 2). He contends the trial court erred in (1) failing to instruct the jury that it had to find the existence of a conspiracy before considering evidence of a confederate's text messages; (2) failing to instruct the jury sua sponte on theft as a lesser included offense; and (3) failing to stay his sentence for robbery under section 654. The People concede, and we agree, that Padilla's sentence for robbery should be stayed. The People also concede, and we agree, that the trial court erred in failing to instruct the jury on conspiracy, but the error was harmless. We find no other error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

On May 10, 2009, Jeane Graves reported that her 19-year-old son, Daniel Coronado, was missing. She had last seen him at about 8:00 p.m. two days earlier. On May 12, Coronado's white Honda Civic was found engulfed in flames in an alley in Santa Ana. The fire had been purposely set by someone who poured accelerant in the passenger compartment.

Meanwhile, Investigator Jason Trudeau obtained Coronado's cell phone records, which showed multiple calls and text messages from a phone number belonging to Tony Carrera. Trudeau then obtained Carrera's phone records.

Earlier in the day, Carrera had sent texts to a cell phone used by Padilla, who lived in Santa Ana. The first message stated, "If you can cn you rocky to gimme a call. I got a new job for him." At 4:36 p.m., Carrera texted Padilla that he would come over and "[s]coop you up"; a 4:56 p.m. message stated that Carrera was on the way. Cell phone tower records showed that Carrera's phone traveled from Riverside to Santa Ana and back around that time.

Starting at about 5:30 p.m. on May 8, Carrera and Coronado exchanged messages about attending a party in Canyon Lake. Carrera then texted, "U got .5?' or a half." Coronado replied, "Dog I don't have shit." Carrera texted, "Can u break 2 bills," (apparently meaning \$100 bills) and Coronado replied that he could not. Carrera texted back, "Wata bout 1. My parnts gave me bills." Coronado replied that he could break one, and further messages established that he had about \$180.

At 7:15 p.m. on May 8, Carrera texted Coronado, "[m]eet me at [C]ajalco," and Coronado agreed to meet at 8:00 p.m. At 7:49 p.m., Carrera texted Coronado, "We buy [M]acaroni [G]rill. Hurry up" At 7:57 p.m., Coronado texted "Here," and Carrera texted back, "We buy chik.fila."

About half an hour later, Carrera started sending half a dozen text messages to Coronado's phone asking him where he was, stating he could not wait much longer, and finally stating he was going to leave. Coronado did not reply.

Investigator Trudeau viewed surveillance videotapes from the Crossings shopping center at Highway 15 and Cajalco Road in Corona. At 7:46 p.m., a silver Toyota Corolla pulled into a parking stall near the Chick-fil-A restaurant. Carrera drove a silver Corolla. At approximately 8:00 p.m., Padilla was inside the restaurant ordering food. At 8:02 p.m., Coronado's white Civic was parked in a stall about three spaces away from the Corolla. At 8:10 p.m., the Corolla drove away while the Civic remained. At 9:21 p.m., the Corolla returned and parked head on with the Civic. Two minutes later, both cars pulled out of the parking lot.

Sheriff's Investigator Gary Bowen interviewed Carrera, who eventually disclosed that Coronado's body would be found near Cajalco Road and Lake Mathews Drive. On May 16, investigators found Coronado's body about 100 feet from the roadway in that area, about 10 or 15 miles from the Crossings shopping center. The body was shirtless and his pants pocket was turned out. Coronado's cell phone was located in another pocket; however, his wallet was never found.

DNA testing showed that blood found on the front passenger seatbelt of the Corolla was Coronado's. Other potential bloodstains were observed on the right rear passenger door, in the center of the front passenger seat, on the front passenger headrest, and driver's seatbelt.

An autopsy showed Coronado had suffered at least 10 separate impact injuries to his skull. The coroner stated his opinion that he had died from "[b]lunt-force craniocerebral trauma," and the wounds appeared to have been inflicted by both sides of a claw hammer.

Padilla was arrested on May 17, 2009. After waiving his *Miranda*⁶ rights, he told Investigator Bowen⁷ he had known Carrera since sixth grade. He initially claimed he did not know Coronado, had not seen him on May 8, and did not go to Riverside that day. When confronted with the surveillance video from the Chick-fil-A, he admitted he had gone to Riverside with Carrera, but he denied seeing Coronado. He said that Carrera owed him \$115, and the “new job” about which Carrera texted him involved selling marijuana or working at Carrera’s place of employment. Eventually, he admitted he had left the shopping center with Carrera and Coronado in Carrera’s car. Carrera drove, Coronado sat in the front passenger seat, and Padilla sat behind Coronado. They drove around for awhile smoking “weed” and listening to music but not talking. They stopped, and all three got out, but Coronado never got back in. Padilla said that “some things were better left unsaid” when he was asked what had happened. Padilla claimed he could not recall things and said that if he was going to “jack” somebody, he wouldn’t need to kill him. When he was shown photographs of Coronado’s body, Padilla said he could not recall doing “that” and did not put the body there “like that.” He repeatedly denied killing Coronado and he denied going through Coronado’s pockets.

The jury found Padilla guilty of first degree robbery murder (§§ 187, subd. (a), 190.2, subd. (a)(17)(A); count 1) and robbery (§ 211; count 2). The trial court sentenced

⁶ *Miranda v. Arizona* (1966) 384 U.S. 436.

⁷ An edited videotape of the interview was played for the jury, and the videotape was introduced into evidence as a defense exhibit.

him to life without the possibility of parole for count 1 and to a concurrent term of three years for count 2.

III. DISCUSSION

A. Instruction Regarding Evidence of Codefendant's Text Messages

Padilla contends the trial court erred in failing to instruct the jury that it had to find the existence of a conspiracy before considering evidence of Carrera's text messages.

1. Additional Background

The prosecution moved in limine to introduce into evidence text messages from Carrera to Coronado's cell phone and the cell phone Padilla was using. It does not appear a hearing was held on the motion, and the text messages were admitted as evidence at trial without objection. As recounted above, in one message, Carrera said he had a "new job" for Padilla. In other messages, Carrera asked Coronado how much money he had, and Coronado replied that he had about \$180. The prosecutor argued the messages were admissible under Evidence Code section 1223 as statements made during a conspiracy. Defense counsel did not request the trial court to instruct the jury with CALCRIM Nos. 416 [Evidence of Uncharged Conspiracy] and 418 [Coconspirator's Statements], and the trial court did not instruct the jury with those instructions sua sponte.

2. Standard of Review

We review de novo Padilla's claim that the trial court failed to properly instruct the jury on applicable principles of law. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823.)

3. Analysis

A conspiracy is “an agreement between two or more persons (with specific intent) to achieve an unlawful objective, coupled with an overt act by one of the conspirators in furtherance thereof. [Citations.]” (*People v. Earnest* (1975) 53 Cal.App.3d 734, 745.) The conspiracy must be established independently of the statement of the coconspirator. (*People v. Leach* (1975) 15 Cal.3d 419, 423-424.) Evidence Code section 1223 provides: “Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by the declarant while participating in a conspiracy to commit a crime . . . and in furtherance of the objective of that conspiracy; [¶] (b) The statement was made prior to or during the time that the party was participating in the conspiracy; and [¶] (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court’s discretion as to the order of proof, subject to the admission of such evidence.”

The trial court must sua sponte instruct the jury with CALCRIM Nos. 416 [Evidence of Uncharged Conspiracy] and 418 (Coconspirator’s Statements) when conspiracy is not charged, and the prosecutor introduces hearsay statements of coconspirators. (*People v. Jeffery* (1995) 37 Cal.App.4th 209, 215.) Before a coconspirator’s hearsay statements may be used to convict the accused, the jury must find that the statements were made in the course of the conspiracy. (*People v. Brawley* (1969) 1 Cal.3d 277, 291.) Thus, to consider the text messages against Padilla as statements of a coconspirator, the jury would have to have found that (1) the statements were made by

the declarant “while participating in a conspiracy to commit a crime”; (2) the statements were made “in furtherance of the objective of that conspiracy”; and (3) Padilla must have been in the conspiracy or would later participate in the conspiracy. (Evid. Code, § 1223.) The conspiracy must have been in existence at the time the statements were made. (*People v. Brawley, supra*, at p. 292.) The People properly concede the trial court failed in its duty to instruct on those principles. We therefore examine whether Padilla was prejudiced by the error.

Padilla argues that the standard of *Chapman v. California* (1967) 386 U.S. 18 governs our review of the error. However, in *People v. Prieto* (2003) 30 Cal.4th 226, the court found error in failing to instruct the jury on the criteria for considering a coconspirator’s hearsay statements was harmless because “[e]ven if the jury had not considered the few hearsay statements defendant identified, it is not reasonably probable the jury would have reached a different result.” (*Id.* at p. 251, citing *People v. Sully* (1991) 53 Cal.3d 1195, 1231.) In other words, the court in *Prieto* applied the standard of review set forth in *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Even without the challenged evidence, it is not reasonably probable the jury would have reached a different result—the case against Padilla as a participant in the robbery murder was overwhelming. First, the jury heard about the “new job” message through Padilla’s interview with Investigator Bowen, in which Padilla said the “new job” Carrera texted about referred to selling marijuana or working at Carrera’s place of employment. Cell phone tower records and Padilla’s own admissions show that Carrera drove to Santa Ana to pick up Padilla, and they then returned to the shopping center in Corona.

Videotapes from security cameras at the shopping center confirmed Carrera and Padilla met Coronado there, and the three drove away together. Padilla admitted being in the car with Coronado and Carrera. However, only Carrera and Padilla returned about an hour later. Coronado's car was then driven away, followed by Carrera's car. Coronado's shorts pocket had been turned inside out, and his car keys were missing. Because Coronado's car was driven away so quickly, the evidence compellingly showed that Padilla and Carrera had taken his keys. We conclude the instructional error was harmless.

B. Instruction on Lesser Included Offense

Padilla contends the trial court erred in failing to instruct the jury sua sponte on theft as a lesser included offense to robbery.

1. Analysis

When there is substantial evidence that an element of the charged offense is missing, but that the defendant is guilty of a lesser included offense, the trial court must instruct on the lesser included offense even in the absence of a request to do so. (*People v. Breverman, supra*, 19 Cal.4th at p. 162.) “Substantial evidence is evidence sufficient to ‘deserve consideration by the jury,’ that is, evidence that a reasonable jury could find persuasive.” (*People v. Barton, supra*, 12 Cal.4th at p. 201, fn. 8.)

Theft is a lesser included offense of robbery, which includes the additional element of force or fear. (*People v. Ortega, supra*, 19 Cal.4th at p. 694.) When the intent to steal arose only after the victim was assaulted, the element of force or fear is absent,

and the offense committed is theft, not robbery. (*People v. Bradford, supra*, 14 Cal.4th at pp. 1055-1056.)

Padilla argues that the only things stolen from Coronado were his car keys and car, and the fact that the car was destroyed suggested the taking was done to avoid detection for the killing. To support his argument, he cites *Ramkeesoon, supra*, 39 Cal.3d 346, and *Kelly, supra*, 1 Cal.4th 495.

In *Ramkeesoon*, the defendant testified he had not thought about stealing the victim's property until an assault was completed. The court stated the evidence was sufficient to warrant an instruction on the lesser offense of theft. The court explained, "Although the jury was not required to believe defendant's testimony, it was credible enough to have supported a verdict of theft instead of robbery. [Citation.]"

(*Ramkeesoon, supra*, 39 Cal.3d at p. 351.) In *Kelly*, the court held the trial court prejudicially erred in failing to instruct on theft as a lesser included offense of robbery (*Kelly, supra*, 1 Cal.4th at p. 530) when the defendant argued his intent to steal arose after rather than before the victim's death, and he told the police he had found the victim's rings in a trash can. (*Id.* at pp. 528-529.)

Kelly and *Ramkeesoon* are distinguishable because in each of those cases, the defendants specifically stated their intent to steal arose after they murdered their victims. (*Kelly, supra*, 1 Cal.4th at pp. 528-530; *Ramkeesoon, supra*, 39 Cal.3d at p. 351.) In contrast to those cases, in *People v. Lewis, supra*, 50 Cal.3d 262, the court stated "[t]here was no evidence that the offense, if committed by defendant, was other than robbery. The victim had been brutally murdered and some of his property was missing. He was in

possession of his car when last seen alive, and it was missing when his body was discovered.” (*Id.* at p. 277.) Moreover, “[t]here was nothing more than sheer speculation to support the scenario now advanced by defendant that the idea of taking the victim’s property did not arise until after the victim was dead.” (*Ibid.*; accord, *People v. Duncan*, *supra*, 53 Cal.3d at p. 971.)

In his reply brief, Padilla argues that in his interview with the police, he repeatedly said he would not have to kill a person if he robbed him, and he also denied going through Coronado’s pockets. However, his assertion that he did not go through Coronado’s pockets indicates he did not steal anything rather than that he formed the intent to steal after Coronado was dead.

As the People persuasively argue, “Coronado had been brutally murdered and some of his property was missing. He was in constructive possession of his car when he drove off with Padilla and Carrera, but he was deprived of that possession just 20 minutes later. A reasonable jury would conclude such a killing was for purposes of robbery.” The People further assert that “[c]ontrary to his claim on appeal . . . Padilla did not deny robbing Coronado; rather, he denied killing him and denied going through his pockets. [Citation.] Padilla discussed robbery, calling it ‘jacking.’ In the course of denying that he killed Coronado (and intimating that Carrera did), Padilla reasoned that even if he had ‘jacked’ Coronado, he would not have had to kill him because Coronado did not know Padilla. [Citations.] Significantly, defense counsel did not suggest in closing argument that there was evidence showing the intent to steal was formed after Coronado was killed; instead, counsel argued it was unclear when Padilla’s intent to steal arose. [Citation.]

Moreover, there was no other apparent reason for killing Coronado. Indeed, Padilla specifically denied that any argument took place that might have led to Coronado's death."

We conclude that as in *Lewis and Duncan*, there was nothing more than speculation to support Padilla's contention that the jury should have been instructed on theft as a lesser included offense. There was no error.

C. Section 654

Padilla contends the trial court erred in failing to stay his sentence for robbery under section 654. The People concede, and we agree, that Padilla's sentence for robbery must be stayed. When a defendant is convicted of felony murder, he may be punished only for the more serious offense, the murder. (*People v. Meredith* (1981) 29 Cal.3d 682, 695-696.)

IV. DISPOSITION

The minute order of the sentencing hearing and the abstract of judgment shall be corrected to reflect that Padilla's sentence for count 2 is stayed under section 654. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

RICHLI

J.