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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
MARIA CEJA,  
  
Defendant and Appellant.

F067979  
  
(Super. Ct. No. CRM014710B)

**OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Brian L. McCabe, Judge.

Eileen S. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Galen N. Farris, Deputy Attorneys General, for Plaintiff and Respondent.

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Maria Ceja was tried with codefendant Jose Augustine Velarde<sup>1</sup> for the murder of Ana Diaz deCeja (Ana)<sup>2</sup> and the kidnapping of Ana's infant son, Anthony. The trial took

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<sup>1</sup> Velarde was found guilty of second degree murder and has filed a separate appeal (Case No. F067948).

place before two separate juries and Ceja was convicted as charged of first degree murder (Pen. Code, § 187, subd. (a)); kidnapping (Pen. Code, § 207, subd. (a)); child endangerment (Pen. Code, § 273a, subd. (a)); and solicitation to commit kidnapping (Pen. Code, § 653f, subd. (a)). The jury found true the allegations that Ceja killed the victim by means of lying in wait (Pen. Code, § 190.2, subd. (a)(15)) and during the commission of a kidnapping (Pen. Code, § 190.2, subd. (a)(17)(B)) and that the victim of the kidnapping was under the age of 14 (Pen. Code, § 208, subd. (b)). Ceja was sentenced to life without the possibility of parole, plus an additional consecutive term of 13 years in prison.

Before trial, Velarde filed a motion to sever his trial from Ceja's, citing *Aranda-Bruton*<sup>3</sup> concerns, since both defendants had given post-arrest statements to detectives that would likely be introduced by the prosecution. Implementing the procedure used in *People v. Harris* (1989) 47 Cal.3d 1047, the court denied the motion, and instead impaneled two juries. The two juries were separately selected, heard separate opening statements and closing arguments. Generally, the two juries heard all of the prosecution's evidence at the same time, with Velarde's jury excluded when Ceja's post-arrest statement to detectives implicating Velarde was presented to the jury. After Ceja's statement to the detectives was played for the jury and before Velarde's was played, Ceja waived her right to confrontation and allowed Velarde's statement to be played to her jury.

On appeal, Ceja contends (1) her *Miranda*<sup>4</sup> waiver was unknowing and involuntary. She also contends the trial court erred when it allowed: (2) the prosecution

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<sup>2</sup> Because her surname is similar to appellant Ceja, we refer to her as Ana or the victim.

<sup>3</sup> *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 (*Aranda-Bruton*).

<sup>4</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

to have two investigating officers present at trial; (3) the prosecution to publish photographs of the victim to the jury; (4) Velarde to introduce evidence of Ceja's prior bad behavior; (5) portions of one witness's testimony; and (6) the codefendants to participate in each other's defense. She also contends instructional error on (7) murder and kidnapping; (8) the uncharged conspiracy; (9) the asportation element of kidnapping; and (10) the natural and probable consequence doctrine. Finally, she contends (11) she received ineffective assistance of counsel due to counsel's failure to object during the prosecutor's closing argument and (12) cumulative error. We find no merit to her contentions and affirm.

## **STATEMENT OF THE FACTS**

### *The Prosecution's Case-In-Chief*

#### *Background*

Ceja and Velarde lived together in Planada, a small town in eastern Merced County. Ceja's three small children lived with them. Velarde had three daughters who did not live there. Evidence was presented that Velarde wanted a child with Ceja, particularly a son. Ceja was telling friends that she was pregnant in late 2010, although her pregnancy test on August 31, 2010 was negative.

Ana and her husband Luis also lived in Planada, with their five-year-old son, Luis Jr., and two-month-old son Anthony. Ana and Ceja were acquaintances.

#### *Solicitation to Kidnap (Count 4)*

In late November 2010, Jesus Castillo was sitting on a park bench in south Merced when a woman stopped in an old brown car and whistled to get his attention. Castillo walked to the passenger side of the car. The woman was alone and there was a baby car seat in back. The woman offered Castillo \$1,500 to "rob a baby and hit the lady." The woman stated the baby was her nephew and she did not want the baby staying with his mother. The woman offered him gloves. Castillo declined and the woman said she would look for someone else and left.

Several weeks later, Castillo saw Ceja on the television news and thought he recognized her. Castillo later identified the woman he spoke to in the park as Ceja in a photo lineup.

*Murder (Count 1) and Kidnapping (Count 2)*

On December 1, 2010<sup>5</sup>, Ceja and Ana saw each other at Planada Elementary School. Ana was holding her son, Anthony. They spoke about the scarves Ceja made and sold, and made plans for Ana to come to Ceja's house the next day to look at her scarves. Ceja told Ana that she was pregnant. That evening, Ana told her sister-in-law that Ceja was pregnant and due any day. Ana's sister-in-law thought that odd because she had seen Ceja at the post office a month earlier and she did not look pregnant. Ana said she was going to Ceja's home the following day to look at scarves Ceja made and sold.

Ana's mother-in-law Celia Manzo lived down the block from Ana. On the morning of December 2, Manzo walked to Ana's house to pick up Luis Jr. and walk him to the school bus stop by 6:55 a.m., as she did daily. When she left, Anthony was still asleep.

Maria Jaramillo lived in the same apartment complex as Ana and her family. Around 7:45 a.m. that morning, Jaramillo saw Ana putting something into the backseat of her running vehicle, a blue Chevy Avalanche.

Velarde arrived at work at a farm in Le Grand, southeast of Planada, at about 7:00 a.m. that day. A few hours later, he asked his friend and co-worker Gabriel Saldana for a ride home because he had a dental appointment. Velarde said Ceja could not pick him up because they had family members at the house. Saldana drove Velarde home; Velarde did not return to work until the following Monday, December 6. Velarde did not mention anything at that time about having a new child.

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<sup>5</sup> All further references to dates are to the year 2010 unless otherwise indicated.

In the past, Velarde told Saldana several times Ceja was pregnant but then lost the child. Velarde showed Saldana sonogram photos.

On the morning of December 2, Ricardo Casillas, while on Highway 59, outside of Snelling, drove by a car parked on the side of the road. Casillas stopped and asked the woman in the car if she needed help. There was a baby seat on the passenger's side covered in blankets. He was not sure if there was a baby in it. The woman appeared nervous and said she was waiting for her husband. At trial, Ceja admitted she was approached by a man as she was parked alongside a road, waiting for Velarde.

At around 10:00 a.m. that morning, Micah Zeff, an almond grower, was delivering paychecks to his employees near one of his almond orchards when he saw two cars approaching from the opposite direction, slowly and in tandem. In the lead vehicle, a Hispanic male wearing a baseball cap was driving a Chevy Avalanche pickup; a Hispanic female followed in a Ford Crown Victoria or Mercury Grand Marquis. Ten minutes later, Zeff returned on the same road and saw the woman heading back in the opposite direction, traveling at a normal speed, in the Crown Victoria or Grand Marquis. This time the man was in the passenger's seat. The Chevy Avalanche was later found abandoned in one of Zeff's orchards.

Between 11:00 and 11:30 that morning, Manzo, Ana's mother-in-law, noticed that Ana's car was still gone, so she met Luis Jr. at the bus stop. Ana's failure to meet her son at the bus stop was uncharacteristic of her.

Christian Muñoz was driving machinery in an orchard in Snelling, near Zeff's orchards, at about 10:00 a.m. on December 2 when he noticed a fire about 30 rows away. He did not think much of it, because "they're always burning [something]." But as he grew closer to the fire around 2:00 that afternoon, he and the crew smelled burnt flesh. Muñoz and another walked toward the smoke and discovered a charred body. They notified the foreman and contractor who called the police.

At 2:27 p.m. that afternoon, a Merced County sheriff located the charred body. Other detectives, including Charles Hale, responded to the scene. The body was completely burned, with little visible flesh. Hale photographed a shoe impression. Tire impressions started 20 to 25 feet from the body and led to the main roadway.

Around 4:00 p.m. that afternoon, California Highway Patrol responded to a call of a burning vehicle and found the Crown Victoria still smoking in an almond orchard outside Atwater. The car was registered to Ceja.

Late that afternoon, a woman was walking on a bike path in Merced when she noticed a baby car seat in Bear Creek. She notified police after she saw an online article about a missing baby. At trial, Ana's brother identified the baby seat as Anthony's.

At approximately 5:00 p.m. that afternoon, a woman later identified as Ceja and a man later identified as Velarde appeared on a surveillance tape using Ceja's EBT card at Walmart in Merced. Ceja was holding something covered in a blanket. A receipt showed the couple had purchased baby bottles, diapers and an infant seat, as well as other supplies and clothing.

An hour later, at 6:00 p.m. Ceja reported her tan Crown Victoria had been stolen from her driveway while she was away. When the highway patrol officer took the report, he knew the vehicle had already been recovered.

Between 7:00 and 8:00 p.m. that evening, Ana's husband called police and reported his wife Ana and son Anthony missing.

Telephone records from Ceja and Velarde's cell phones showed that, on December 2, Velarde made two short calls to Ceja at around 7:30 a.m. and one call at 8:11. Then between 9:12 and 10:06 a.m., there were 14 calls between the two cell phones. The calls stopped for about three hours and then from 1:05 to 4:00 p.m. that day, there were approximately 43 additional calls between the two phones.

The following morning, December 3, Ceja and a Hispanic male arrived at the towing yard where the Crown Victoria was taken. They were driving a van. Ceja and the man inspected the trunk of the vehicle for a few minutes and then left.

Around midday December 3, Ana's blue Avalanche was found in one of Zeff's orchards, about one and a half to two miles from her body. Detective Hale thought the tire tracks left near the Avalanche matched the track left at the scene where the charred body was discovered.

The body was identified as Ana's based on her dental records. Autopsy results indicated the cause of death as "possible asphyxia." The forensic pathologist who conducted the autopsy concluded the body was burned after she died.

#### *Child Endangerment (Count 3)*

Around 6:30 a.m. on December 7, Javier Sanchez, who lived in Le Grand, was outside de-icing his windshield when he heard a mewling sound coming from his neighbor's house. Investigating, he found a naked, motionless baby boy, later determined to be Ana's son Anthony, lying in a pillowcase on the doorstep. Sanchez rang his neighbor's bell and gave the baby to Aurelia Garcia, who answered the door. The baby's head was shaved and he was cold and stiff. Garcia and her daughter and son-in-law held the baby and warmed him using body heat and heated towels. By the time paramedics arrived at 7:01 a.m., the baby had begun to move.

Paramedics treated the baby for hypothermia. The child was more active by the time they reached the hospital.

#### *Events Leading to Ceja's as a Suspect*

On December 8, police learned Ceja's cousin Jesus Robles Chavez called a local newspaper with a tip. Chavez told the officer he had been at a park when he saw Ceja drive away in her Crown Victoria. Chavez later spoke to a friend of his, Jesus Castillo, who told him Ceja had offered him money at the park if he would kidnap a baby. Chavez

had heard about burglaries Ceja had been involved in. He felt Ceja was trying to raise money to pay someone to kidnap a baby.

Castillo later went to the sheriff's office and told them about the incident in the south Merced park. On December 15, police showed Castillo a photographic line-up in which he identified Ceja as the woman in the park.

A partial tire tread from the Crown Victoria was compared to the tire impressions left at the site where the Avalanche was discovered. It appeared the impressions could have been left by the Crown Victoria's tire.

On December 15, officers executed a search warrant at Ceja and Velarde's home. Officers found diapers, baby bottles, wipes, clothing and other infant paraphernalia. They also found a photograph in the living room of Ceja and Velarde in which Ceja appeared to be pregnant. Two sonogram images were attached to the photo. One sonogram had Ceja's name, but the date of the sonogram had been removed. In one of the rooms was a calendar which listed December 2 as "Junior's B-day." Both Ceja and Velarde were arrested later that day.

#### *Police Interviews*

After advisement and waiver of her *Miranda* rights, police interviewed Ceja on December 15. Ceja gave a number of different versions of what transpired on December 2. At first she denied ever seeing Ana that day, but that she had gone to see a relative out of town. She did acknowledge she made scarves and had seen Ana the day before at the elementary school. She then said Velarde had gone with her out of town, that her car was stolen while they were gone, and that Saldana, the man with whom Velarde worked, may have had something to do with Ana's death.

Ceja then gave a third version of events in which Ana and Anthony were at her house and two gangsters tried to carjack Ana. Not wanting to upset her husband if they took her car, Ana stayed with the car and the gangsters took her. Ceja said she held onto

Anthony until she and Velarde left him five days later. According to Ceja, the gangsters took her car too and threatened to kill her son.

After confronting Ceja with the information that she had tried to solicit someone to kidnap and “hit” the mother for \$1,500, Ceja said Ana had somehow fallen over a scarf and hit her head and died. Ceja said Velarde was at the house when that happened. She acknowledged it was Velarde who was at the Walmart with her.

Eventually, Ceja implicated Velarde and said it was all his fault. After being asked how Velarde had killed Ana, Ceja said he had choked her and she did not help because she was holding the baby. She claimed it took about five minutes to strangle Ana to death. According to Ceja, Velarde threatened to kill her and rape her daughter if she did not help him dispose of the body.

Ceja admitted she had been attempting to buy a baby and knew a woman who was having a baby she did not want, although her husband did. Ceja and the woman then conspired to fake a kidnapping in order for Ceja to get the baby. During this time, Ceja faked a pregnancy. Ceja blamed Velarde, claiming it was all done to give him a son. She did acknowledge that after holding Anthony on December 1, she decided she wanted him. She also acknowledged she saw Velarde kill Ana and saw him put on latex gloves before he did so.

Ceja told the detectives she and Velarde eventually decided to drop the baby off at an address where they saw a lady outside with “kids” and she seemed “nice.” She said it was Velarde’s idea to drop him off even though it was near freezing outside.

An audio/videotape of Ceja’s interview with police was played for her jury.

Velarde was also interviewed by detectives. The interview was also recorded and the audio/videotape played for both juries. Velarde also told the detectives several versions of the events. He first said he was at work all day and came home to find Ceja’s Crown Victoria had been stolen. He acknowledged he was the one who accompanied Ceja to the towing yard to look at the Crown Victoria on December 3.

When Velarde was asked about the woman who was missing, he claimed did not know the victim, but had heard about her through coworkers. According to Velarde, Ceja was not currently pregnant, but had suffered three miscarriages and had lost a baby recently in her eighth month of pregnancy. Velarde had three daughters but wanted a baby boy and wanted to name him after himself.

Velarde eventually admitted he had gone to Walmart with Ceja on December 2. Velarde told the detectives Ceja was in charge of purchases for the family and “in charge of everything in general.”

When confronted with evidence that Ana had been at his home the morning of December 2, Velarde said he had come home because Ceja had said she was sick. Once home, Ceja told him Ana had been at the house to look at scarves Ceja made and had fallen down. He first said Ana was gone by the time he got there. He then said she was sitting on the couch talking to Ceja when he got home. When confronted with his story that Ana had fallen, Velarde said she was still breathing when he first saw her and he checked her pulse. He denied the baby was with her at the time.

On a number of occasions during the interview when asked about specifics, Velarde said something like, “[Ceja] already told you,” or “[w]hy are you asking me?” Velarde eventually admitted he loaded Ana’s body into the trunk of the Crown Victoria, and they drove it to the site where the body was dumped and burned. Ceja drove the Crown Victoria; Velarde drove the Avalanche. Velarde continued to insist Ana’s death had been an accident and he continued to deny that the baby was with them.

Velarde eventually admitted Ceja had the baby with her. Velarde acknowledged he purchased gasoline and used it to set Ana’s body on fire after they dumped the body in an orchard. Velarde said he “did what he had to do.”

After they dumped the body, Velarde and Ceja returned home, changed clothes, and he drove the Crown Victoria out to yet another orchard while Ceja followed in their

Chevy Tahoe. At the orchard, he burned the Crown Victoria and clothing they had worn earlier.

Velarde then admitted he strangled Ana by pinning her hands to her sides with his feet and using both hands to strangle her. He thought the whole process took about 10 minutes. He told the detectives he named the baby boy he and Ceja had kidnapped after himself.

#### *November 2010 Uncharged Burglary*

On November 5, 2010, methamphetamine dealer Eduardo Gutierrez Rios (a.k.a. Sinaloa) introduced Ceja to his girlfriend Laurie Hembree. Ceja offered Hembree \$500 if she would take some jewelry from Ceja's former in-laws' house. Ceja told Hembree she was pregnant and showed Hembree her stomach.

Ceja drove Hembree to her in-laws, where Ceja conversed with her former mother-in-law while Hembree asked to use the bathroom, but instead entered the bedroom and took jewelry from a drawer as instructed by Ceja.

As prearranged, Hembree then exited the house, took Ceja's car and drove it a few blocks away and abandoned it. She then went to the park across the street and handed the jewelry box to Sinaloa. Hembree received nothing for her efforts and heard Sinaloa stiffed Ceja as well.

While Hembree had never seen Ceja use methamphetamine, she believed something "had to be going on" if Ceja knew Sinaloa.

At around 10:00 a.m. that morning, Ceja called Merced police and reported her Crown Victoria was stolen while she was at her mother-in-law's. Soon thereafter, dispatch informed the police Ceja had located her car.

#### *Ceja's Defense*

Ceja testified in her own defense before both juries that she had been molested as a child and was the victim of domestic and sexual abuse and violence by each of her three husbands or partners, including Velarde. Ceja has three children.

According to Ceja, Velarde wanted a son, but Ceja could not conceive because she had a tubal ligation following the birth of her last child. In 2010, Ceja was taking medication for pain and began talking to a therapist at a local clinic. That same year, Velarde told Ceja he had had an affair with an unnamed woman and asked Ceja to fake a pregnancy. He later said he was going to have a son by the same woman. Ceja believed Velarde's mistress would relinquish custody of the unborn child, and Velarde wanted it to be treated the same as Ceja's other children. Velarde threatened to hurt Ceja's daughter if Ceja did not go along with the plan.

Ceja claimed to have dialed 911 a few times when Velarde was abusive, but never followed through.

Ceja testified Velarde had introduced her to methamphetamine and that she was a regular user. According to Ceja, she committed the burglary at her former in-law's to get money for drugs.

Ceja claimed that, when she went to the park and asked a man to kidnap a baby, she was doing so at Velarde's direction. Ceja claimed she was doing what Velarde asked her to do.

Ceja met Ana and the baby at the elementary school on December 1 and they tentatively planned to have Ana come to her house the next day to look at scarves. According to Ceja, when she told Velarde that evening that Ana was coming to their house the next day, he confessed that Ana was the woman with whom he had had the affair and the baby was his son. Velarde instructed Ceja to call him when Ana arrived so he could talk to her. He also instructed her to tell her children that she was going to have a baby the next day at the hospital. She told them as instructed.

When Ana arrived the next morning at 8:00 a.m., Ceja called Velarde, who came home. Ceja invited Ana into the bedroom to look at photographs; the baby was on the bed. Ceja excused herself to give Velarde and Ana time to talk. When Ceja returned, Velarde was on top of Ana with his hands around her neck. Ceja asked Velarde what he

was doing and told him to call an ambulance, but he said Ana was already dead. Ceja did not call the police because she believed Velarde would kill her too.

According to Ceja, Velarde carried Ana's body out of the house, came back in and told her to follow him in the other car. They left Ana's Avalanche in an almond orchard and they then traveled together in the Crown Victoria to the place where Velarde burned Ana's body. They then went home, changed their clothing, and traveled via the Crown Victoria and their Chevy Tahoe to another almond field where Velarde burned the Crown Victoria. Next, the two went to Walmart for baby supplies and then to the creek where they disposed of the baby carrier.

Several days later, Velarde agreed to return the baby. Velarde had shaved the baby's head so he would not be recognized. He refused to dress the baby but agreed to wrap him in a pillowcase. Ceja denied having any plans to kill Ana or kidnap Ana's baby and she did not know what Velarde was going to do.

Several people testified in Ceja's defense. The executive director of a women's center testified about the cycle of violence and how women who are the victims of domestic violence react and why they stay in abusive relationships. An internist and clinical pharmacologist testified how methamphetamine addiction leads to disorganized thinking, impairments in inhibition, and ability to control impulsivity.

A clinical psychologist testified on the psychological reactions to trauma. The psychologist interviewed Ceja at the correctional facility and administered several tests. He concluded she had dependent and borderline personality disorders and was easily swayed. He opined that she suffered from posttraumatic stress disorder exacerbated by methamphetamine use.

### Velarde's Defense

In his defense, Velarde introduced evidence of an incident which occurred after Ceja had been in custody for two years, in which she became combative and it took six or seven people to restrain her.

Ceja's mother testified she accompanied Ceja to a fertility clinic after the birth of her last child as she was having trouble conceiving again. Soon afterward, Ceja told her mother she was pregnant. Her mother thought she appeared to be pregnant in 2010, although Ceja's mother rarely saw her that year.

One of Ceja's sons testified his mother had told him in 2010 that she was pregnant and it looked like her stomach was getting bigger. He found out she had had the baby on December 2 when he called home from school. His relatives came and brought gifts. A few days later his mother told him she took the baby to the hospital because he was not breathing right.

Ceja's former husband testified Ceja had lied to police about injuries he had supposedly caused; that money disappeared during their marriage she could not account for; and that she falsely claimed he had shown their son pornography in order to affect his custody rights. Ceja's former husband described her as angry, controlling and manipulative.

## **DISCUSSION**

### **I. *MIRANDA* WAIVER**

Ceja first contends that her waiver of her *Miranda* rights and subsequent statements to police were unknowing because she was "an uneducated and Spanish speaking woman, [and] was given her *Miranda* admonitions in English and questioned mostly in English although ... the officers knew she was more comfortable in Spanish and one officer was fluent in Spanish." She also contends the statements were involuntary as they were coerced. We disagree.

#### *Background*

Ceja moved in limine to exclude her extrajudicial statement to police, claiming that her *Miranda* waiver had not been voluntary, knowing or intelligent because the advisement was given by Detective Brawley in English and Ceja had "limited abilities in

English.” The prosecution filed opposition to Ceja’s motion to suppress and a hearing was held.

At the suppression hearing, Detective Brawley testified he had been a peace officer for 11 years and a detective for about four years. Over that time, he frequently came into contact with people who spoke languages other than English. When he executed the search of Ceja’s home on December 15, 2010, he contacted Ceja and spoke to her in English. She responded in English and her answers were appropriate and responsive to his questions. Based on his experience, he believed she could comprehend and he could effectively and accurately communicate with her in English.

Detective Brawley also made contact with Velarde and immediately recognized that “there was clearly a language barrier,” so no conversation ensued between the two.

When Detective Brawley asked Ceja if she would come to the investigations office in Merced, she agreed and rode unrestrained in Detective Brawley’s vehicle. While in the vehicle, the two conversed in English. She at times initiated conversation herself and never indicated she had any difficulty understanding English. During that conversation she told Detective Brawley she had suffered abuse in the past with other boyfriends and “had put one or both of them in jail.” The conversation in the vehicle was recorded.

Once at the investigations office, Detective Brawley and Ceja were joined by Detective Ruiz, who spoke Spanish. Ceja agreed to go to the interview room, where the conversation was recorded.

During the interview, Detective Brawley asked Ceja some preliminary questions in English and she answered in English. When Detective Brawley gave Ceja her *Miranda* advisement in English, she was asked if there was anything she did not understand. She replied, in Spanish, “Uh, it’s better in Spanish.” When asked in Spanish by Detective Ruiz if she understood, she replied, in Spanish that she understood a little, but not that much. When asked again if she understood what she had been told, she

replied, in Spanish, that she had a right to remain silent, and agreed that she understood verbally and by nodding her head.

Detective Brawley testified that, whenever he asked Ceja questions in English, she did not hesitate before responding and her responses were appropriate. When Ceja wanted to speak in Spanish, she was allowed to do so. Detective Brawley testified that, during the interview, he touched Ceja on the knee, shoulder or arm several times as an act of positive reinforcement. None of the touches were aggressive or violent and Ceja did not appear to be scared or intimidated by them.

Detective Ruiz testified that he spoke both English and Spanish and had been a detective for about four years. In his experience he had come across people who understood a language but have difficulty speaking it. He used his own parents as an example and stated he spoke to them in English and they would respond in Spanish. According to Detective Ruiz, Ceja never said she did not understand English or that she had not understood her rights. According to Detective Ruiz, Ceja said twice in English that she understood her rights and also summarized her rights in Spanish. Based on his observations, Ceja understood and spoke English.

Hembree, who committed the earlier burglary of Ceja's in-laws with her, testified that she spoke Spanish but was not fluent. She spoke both English and Spanish with Ceja and believed Ceja communicated well in English.

A sheriff's deputy who spoke with Ceja on December 24, 2011, communicated with Ceja in English only. She seemed to understand what he told her and responded appropriately in English.

An expert in Spanish linguistics testified in Ceja's defense that he had interviewed her and reviewed the recordings of her statements to police and opined she did not have command of the English language well enough to answer questions in English. On cross-examination, the expert admitted he was being paid by the defense for work done in

connection with the case and that people who are bilingual are often better at comprehending a language than they are at speaking it.

In denying Ceja's motion to suppress, the trial court noted it had listened to Ceja's recorded interview multiple times and found her responses "immediate and questions direct and appropriate." He found Ceja understood and comprehended English better than she spoke it and "exhibited little lack of understanding. When she did, she did not hesitate to ask for a clarification." The trial court found that Detective Brawley had asked Ceja 193 questions in English and she answered "immediately conversationally in Spanish 146 times or 76 percent of the time." The trial court noted that Ceja responded both in body language and facial expressions.

The trial court also noted that during the 20- to 30-minute car ride before the interview, Ceja spoke in English on a variety of topics, revealing use of "a wide range" of words. The trial court did not find the defense expert credible.

In summary, the trial court found Ceja "proficient enough in English for the purposes of Miranda," and stated:

"[Ceja] has been in the U.S. for decades, speaks English, has a higher than expected cognitive ability in Spanish, responded to questions in English and Spanish without hesitation, immediately in the normal flow of a conversation, demonstrating an understanding of both languages. Her desire to use her first language as the interrogation intensified is not abnormal, but, to the contrary, normal. [¶] The reading of the Miranda rights to [Ceja] in English based on her responses, body language, repeating the gist of the rights, and coupled with the prior conversation she had with the detective solely in English in the car ride over are the acts and statements of someone who understood and comprehended what was being told to her."

The trial court noted Ceja never asked for an interpreter and that she was experienced with the criminal justice system, as evidenced by her conversation in Detective Brawley's vehicle. The trial court also noted the officers made no promises to her in exchange for a confession and "[t]here were no threats, no fear, no intimidation, no

coercion.” The trial court concluded, “[t]he evidence and the total circumstances suggest she understood.”

Applicable Law and Analysis

To establish a valid waiver of an accused person’s right to counsel and to remain silent, the People are required to show, by a preponderance of the evidence, the accused voluntarily, knowingly, and intelligently waived such rights. (*People v. Sims* (1993) 5 Cal.4th 405, 440) As a reviewing court, we determine the validity of the waiver by evaluating the “totality” of the circumstances, including background, experience, conduct of the defendant, “any language difficulties,” and defendant’s age. (*People v. Michaels* (2002) 28 Cal.4th 486, 512; *United States v. Bernard S.* (9<sup>th</sup> Cir. 1986) 795 F.2d 749, 751-752.)

In *Moran v. Burbine* (1986) 475 U.S. 412, the United States Supreme Court identified two distinct components of the inquiry:

“First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the ‘totality of the circumstances surrounding the interrogation’ reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.” (*Id.* at p. 421.)

On appeal, we accept the trial court’s resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. (*People v. Whitson* (1998) 17 Cal.4th 229, 248.)

Ceja’s claim of unknowingly waiving her rights is based on an alleged lack of comprehension of her rights due to an inability to fully understand English. But the record directly belies her claim. Detective Brawley, Detective Ruiz and Hembree testified regarding Ceja’s ability to comprehend and communicate effectively in English. The trial court also found this to be the case after watching the recorded interviews. And

finally, there was a Spanish-speaking officer present throughout the interview and yet Ceja never asked him to translate for her.

While Ceja may have been more comfortable speaking in Spanish, it did not mean she did not understand English sufficiently for *Miranda* purposes. (See *United States v. Bernard S.*, *supra*, 795 F.2d at p. 752; see also *Campaneria v. Reid* (2d Cir. 1989) 891 F.2d 1014, 1020 [defendant's limited proficiency in English did not prevent him from making a knowing and intelligent waiver of his constitutional rights].)

We find Ceja's case distinguishable from *United States v. Garibay* (9th Cir. 1998) 143 F.3d 534 (*Garibay*), on which she relies. In *Garibay*, the defendant spoke only a few words in English, did not seem to understand what was being said to him, had no previous experience with the criminal process, and had received a "borderline retarded" score following standardized intelligence testing. (*Id.* at pp. 537-539.) The record here, in contrast, amply supports the trial court's finding that Ceja's command of the English language was sufficient for her to have understood the *Miranda* advisement given her and then voluntarily, knowingly, and intelligently decided to speak with the detectives. We reject Ceja's claim to the contrary.

Ceja also claims that her statements to Detectives Brawley and Ruiz were involuntary due to "police overreaching and coercion." Specifically, Ceja contends the questioning by two law enforcement officials and their acts of touching her shoulder and knee were coercive because she had been sexually abused since childhood and, as the detectives were aware, had been the subject of domestic abuse. We find no coercive tactics were employed in order to obtain Ceja's waiver of her rights.

The prosecution is barred by the federal and state constitutions from using a defendant's involuntary confession. (*People v. Massie* (1998) 19 Cal.4th 550, 576; *Jackson v. Denno* (1964) 378 U.S. 368, 376.) The waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." (*Moran v. Burbine*, *supra*, 475 U.S. at p. 421.)

Turning to the facts here, we reject Ceja's assertion that waiver of her *Miranda* rights was involuntary because it was the product of intimidation or coercion. There is no indication that the simple acts of touching her knee or shoulder, which the detectives testified they had done only a couple of times during the interview as a means of positive reinforcement, were in any way aggressive, threatening or violent. Ceja never voiced any objections to them during the interview. Ceja did not appear to have been under any undue pressure from the investigating officers.

We find no coercive tactics were employed in order to obtain Ceja's waiver of her rights and reject her claim to the contrary.

## II. MOTION TO ALLOW TWO INVESTIGATING OFFICERS

Ceja contends the trial court committed structural error when it permitted the prosecution to have two investigating officers sit through trial. We disagree.

### Background

Prior to trial, the trial court granted a motion by the prosecution to designate two investigating officers, Detective Sanchez and Detective Ruiz. Ceja's counsel was not present. The prosecutor argued there were essentially two trials going on at the same time, that this was a very big case with "eight to nine files" and "120 police reports," and that the investigative work was essentially split between the two detectives. The trial court agreed and granted the motion as to Velarde.

Several days later, with Ceja's counsel present, the prosecutor asked that the trial court's previous ruling be put on the record for Ceja's counsel. The trial court asked Ceja's counsel's position on the matter, but indicated it was inclined to rule the same as it had done in Velarde's case. When Ceja's counsel stated he had not heard Velarde's counsel's position, the trial court explained Velarde's counsel had objected to designating two investigating officers. Ceja's counsel responded, "I'll simply concur with those comments and submit it."

The trial court then ruled as it had previously, stating it would:

“permit Detective Ruiz as being the assigned officer, investigating officer, for [Ceja], and Detective Sanchez for [Velarde,] that there are unique aspects to this case noting that the Court has allowed in single jury cases for officers to switch out. I even had two in a one jury case. [¶] This case is peculiar because it has two juries, because of the volume of information, documentation, which all counsel have concurred is enormous, and that each of them took a lead with a particular defendant and, therefore, are jury assigned for that defendant. And it makes sense for the Court to have that individual track the one defendant and be with that jury the entire time, noting even on opening statements we have [Velarde] on Thursday and [Ceja] on Friday. So there are different things happening at different levels, and the Court finds it appropriate to allow the designation.”

### Applicable Law and Analysis

Evidence Code section 777, subdivision (a)<sup>6</sup>, permits the trial court to exclude witnesses from the courtroom, but subject to subdivisions (b) and (c) of that section. Subdivision (b) prohibits the trial court from excluding a “party to the action.” Subdivision (c) provides, “If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present.” The word “person” includes a “public entity” (§ 175) such as the People of the State of California. Therefore, the prosecutor, the attorney for the People, could designate an officer or employee who was “entitled to be present.” (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 950-951 [officer who interviewed witness during investigation of capital murder, as person designated by deputy district attorney, was entitled to be present in courtroom when witness testified at trial].)

The refusal to exclude witnesses from the courtroom lies within the discretion of the court. (*People v. Willingham* (1969) 271 Cal.App.2d 562, 571.) As was said in *People v. Nunley* (1904) 142 Cal. 441, 445: “It cannot be held that the court abused its discretion in allowing the sheriff ... who was a witness for the prosecution, to remain in the courtroom during the trial.” And, as noted in *People v. Chapman* (1949) 93

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<sup>6</sup> All further statutory references are to the Evidence Code unless otherwise specified.

Cal.App.2d 365, 373-374, “It is the common and usual practice that at least one peace official may remain during the presentation of evidence during the entire case.” (See *People v. Gonzalez, supra*, 38 Cal.4th at pp. 950-951.)

Ceja acknowledges this basic premise but argues that, in doing so, the trial court failed to consider the detriment to her “if two of the prosecution’s key witnesses remained in the courtroom.” Ceja, however, fails to support her allegation by any specific showing as to how she actually suffered detriment as a result of both investigating officers’ presence. Instead she merely speculates that the investigating officers “had the advantage of hearing the testimony of the other witnesses” and “the testimony of one of the officers could have easily jogged or skewed the other’s memory of events.”

Ceja’s allegation of potential unfairness arising from the presence of two investigating officers is too speculative to establish error. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 378; *People v. Gonzalez, supra*, 38 Cal.4th at p. 951.) Ceja’s defense remained free to bring to the trial court’s attention any alleged misconduct that did materialize, and to seek appropriate relief. (*People v. Bryant, Smith and Wheeler, supra*, at p. 378.) Without a showing of detriment, it cannot be said that the trial court abused its discretion in permitting the two investigating officers, particularly considering the unique aspects of this case which lent itself to having two investigating officers instead of one.

Ceja also argues the trial court violated her constitutional rights by deciding this issue adverse to her position “without the presence of ... counsel.” We disagree. While Ceja is correct that the issue was first discussed in connection with co-defendant Velarde’s case without Ceja or Ceja’s counsel present, Ceja and Velarde had separate case numbers and dual juries. As noted by the trial court, the ruling in Velarde’s case was not technically a ruling in Ceja’s case. More importantly, before making the

decision in Ceja's case, Ceja was represented by counsel, who was given the opportunity for input before the ruling was made.

### III. ADMISSION OF PHOTOGRAPHS OF THE VICTIM

Ceja contends the trial court violated her constitutional rights when it allowed the prosecution to publish inflammatory photographs of the charred victim without giving Ceja an opportunity to be heard. She also contends the admission of the photographs violated section 352. We disagree.

#### Background

Ceja moved in limine to exclude photographs of Ana's burned body as unduly prejudicial. Ceja's counsel indicated that Velarde's counsel wished to be included in the motion as well. The trial court reserved ruling until Velarde's counsel was able to weigh in on the objection.

The prosecutor then argued the photographs were highly probative because they showed a body was discovered on the date witnesses said it was discovered; that a murder occurred; and showed Ceja and Velarde's consciousness of guilt and the steps they took to hide evidence of the identity of the victim in order to cover up the kidnapping, the motive for the murder.

Ceja's counsel responded that there was no evidentiary value to the photographs because the death had been strangulation and witnesses would testify that the victim was already deceased at the time the body was burned. Ceja's counsel argued the photographs were "very highly graphic, inflammatory, and prejudicial."

The trial court reserved its ruling in order to look at the photographs and to allow Velarde to address the issue.

Several days later, the trial court brought up the issue of the photographs and explained that it had issued a ruling for Velarde, who had stipulated to two of the photographs being used at trial. The trial court explained that it would give Ceja's counsel the opportunity to look at the two photographs and decide whether or not he

would similarly stipulate. The trial court also explained that it was prepared to rule on Ceja's motion to exclude the photographs.

Later that day, the trial court asked Ceja's counsel whether the prosecutor had shown him the two photographs and whether he had any "comments or opinions." Ceja's counsel responded that he objected to any of the photographs coming into evidence, that he had not heard Velarde's counsel's argument or the stipulation, and he wished to see the stipulated to photographs. The trial court then ruled that the same two photographs admitted in Velarde's case would be admitted in Ceja's case, as their probative value was not outweighed by their prejudicial effect. The trial court stated it excluded photographs that were "close up" and would not permit them, but described the two admitted photographs as not being "close up," but rather one "mid range" (Exh. 514) and the other "far range that shows the entire environment of the orchard" (Exh. 516).

When the prosecutor showed the photograph depicting the charred body to the jury, Velarde's counsel objected, noting that the "blowup" of the photograph was about three feet by two feet and on the "ELMO screen" would be six feet by six feet. The exhibit was published but not yet admitted. Ceja's counsel joined the objection, which the trial court overruled.

#### Applicable Law and Analysis

The evidence was admissible. "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.]" [Citation.]' [Citations.]" (*People v. Howard* (2010) 51 Cal.4th 15, 33.) Photographs are routinely admitted to establish the nature and placement of an injury and to clarify the testimony of prosecution witnesses regarding the crime scene, "even if other evidence may serve the same purposes. [Citation.]" (*Ibid.*) Here, the trial court properly ruled the challenged two photographs

were relevant as they tended to corroborate the timeline of events and the motive for killing and burning of Ana's body.

As to undue prejudice, we have reviewed the photographs at issue. "As is usually the case in a murder, they are unpleasant." (*People v. Bryant, Smith and Wheeler, supra*, 60 Cal.4th at p. 423.) But the trial court did not exceed the bounds of reason in finding that the probative value of the photographs was not substantially outweighed by the risk of undue prejudice. (§ 352.) This is so especially in light of the fact that the trial court excluded other, more "close up," photographs proffered by the prosecution.

We also reject Ceja's argument that the trial court violated her constitutional rights to due process "when it decided an issue based on a hearing held out of her and her attorney's presence." However, as before, the trial court gave Ceja's counsel a full opportunity to be heard before ruling on the motion. Ceja's counsel was able to argue the motion fully and was not bound by Velarde's stipulation. We reject Ceja's claim to the contrary.

#### IV. EVIDENCE OF CEJA'S CONDUCT IN CUSTODY DURING VELARDE'S DEFENSE

Ceja next contends the trial court prejudicially erred when it admitted evidence during Velarde's case-in-chief defense of an incident two years after the charged murder in which Ceja became combative during an emergency psychiatric evaluation. We find no prejudicial error.

##### Background

Velarde's defense was that Ceja had the strength to strangle Ana while acting alone. Velarde called Sheriff's Deputy Alfredo Armenta to testify that on December 16, 2012, he was instructed to take Ceja to the hospital for an interview with a doctor. The prosecutor objected and a sidebar conducted off the record. Deputy Armenta then testified that, while at the hospital, Ceja made numerous religious references and wanted to be unshackled so she could leave the hospital. A subsequent struggle with Deputy

Armenta ensued and it took about seven people to restrain Ceja. Deputy Armenta, who was six feet three inches tall and weighed 250 pounds, described Ceja as “very strong” and combative.

Ceja’s counsel did not object during Deputy Armenta’s testimony. Later the trial court memorialized the sidebar, stating the prosecution’s concern was that Velarde would raise the issue that Ceja had been taken to a mental facility. Because the relevance was Ceja’s strength, rather than her mental condition, the trial court held any inquiry into Ceja’s mental condition was irrelevant.

Applicable Law and Analysis

Here, Ceja’s assertion is that the evidence was irrelevant. However, ““It is, of course, ““the general rule”” – which we find applicable here – ““that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.””” (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) Ceja never made an objection on that basis below.

However, even if Ceja preserved a claim for review, she fails on the merits. Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) Speaking more particularly, it examines for abuse of discretion a decision on admissibility that turns on the relevance of the evidence in question. (*Ibid.*) Evidence is relevant if it has any tendency in reason to prove a disputed fact. (§ 210.)

Any claim by Ceja that the trial court erred in ruling on the admissibility of Deputy Armenta’s testimony about his struggle with Ceja and her strength, on the ground such testimony was irrelevant, would not succeed. Plainly, it would not have been unreasonable for the trial court to have concluded, as it effectively did, that the testimony had at least some tendency in reason to prove Velarde’s defense that Ceja killed Ana and had the physical capability of doing so.

Even if the evidence was erroneously admitted, such error was harmless. Evidence of Ceja's guilt was overwhelming and the evidence was hardly inflammatory in light of the other evidence in the case. It is not reasonably probable Ceja would have fared better had the evidence of this one combative incident two years after the murder and kidnapping not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) [standard for determining whether an error constitutes a "miscarriage of justice" is whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"]; *People v. Marks* (2003) 31 Cal.4th 197, 226-227 [holding with respect to error in admitting evidence that application of the ordinary rules of evidence "does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of *Watson*"].) We find no prejudicial error and reject Ceja's claim to the contrary.

#### V. INADMISSIBLE HEARSAY

Ceja next contends the trial court denied her constitutional right to confrontation when it admitted unreliable hearsay evidence during Velarde's cross-examination of Hembree. We find no prejudicial error.

#### Background

After the prosecution called Hembree to testify about the burglary she and Ceja committed in November 2010, Velarde's counsel established Hembree and Ceja had been housed in the same area when they were in custody in 2011 at a local correctional facility. Velarde's counsel asked Hembree whether Ceja had a "reputation that you knew of showing her breasts to the male correctional officers there?" Ceja objected that this was beyond the scope of direct examination.

The trial court overruled the objection and Velarde's counsel again questioned Hembree on the topic. Hembree at first said, "No," but after seeing a report of her interview by an investigator in June of 2011 to refresh her recollection, Hembree stated "Yes. There was an incident." Hembree also agreed, after seeing the report, that she

believed Ceja was treating one of the correctional officer as her boyfriend, although that was also something she did not have an independent recollection of. She further acknowledged that she remembered telling the investigator that Ceja told Hembree her “boyfriend” “does everything for me, and I play him like a puppet.”

When Ceja’s counsel cross-examined Hembree, she clarified that Ceja’s reference to a boyfriend was to Sinaloa, not Velarde. On redirect by the prosecution, Hembree again said Ceja was not referring to Velarde, but might have been referring to the correctional officer. Hembree acknowledged that she never saw Ceja flash the guards, nor did Ceja ever talk to Hembree about it.

On recross, Ceja again asked Hembree if the statements “he does everything for me” and “playing a person like a puppet” were remarks she heard from someone else, but Hembree could not recall.

After Hembree’s testimony, Ceja’s counsel moved to “strike a portion of that testimony” where Hembree said “He does everything for me, and I’m playing him like a puppet,” noting Hembree had first said she was referring to Sinaloa, then that she had heard it from a “bunkie,” and then that she was not sure who she had heard say it. Ceja’s counsel moved to strike because “it’s obviously hearsay because she either heard it from a bunkie or doesn’t really know where it came from. And she could not say that she heard it directly from my client.”

The prosecutor argued he did not think there was anything the trial court could “surgically remove from what she testified because it was all somewhat ambiguous with regard to that particular issue.” He further stated he did not think anyone “understood completely when it was all said and done to which she was referring.” The trial court denied the motion.

#### Applicable Law and Analysis

Section 1200 defines hearsay evidence as “evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the

truth of the matter stated.” Section 702, subdivision (a), provides that “the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.”

Here, Hembree indicated, after having her recollection refreshed, that she remembered telling the investigator Ceja had a reputation for showing her breasts to the correctional officer and there had been “an incident.”

Even assuming that Hembree’s testimony was hearsay and erroneously admitted, Ceja cannot establish she suffered prejudice as a result. The testimony was vague, inconsistent and likely inconsequential in the scope of the entire case. Given the overwhelming evidence of Ceja’s guilt, it is not reasonably probable Ceja would have fared better had the jury not heard the complained of testimony from Hembree. (*Watson, supra*, 46 Cal.2d at p. 836.) Nor can Ceja establish that the evidence rendered her trial fundamentally unfair or otherwise violated her right to due process (*People v. Partida* (2005) 37 Cal.4th 428, 436), and any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

#### VI. PARTICIPATION IN EACH OTHER’S DEFENSE

Ceja makes numerous contentions relating to the trial court’s decision to permit Ceja and Velarde to participate in each other’s defense cases-in-chief. Specifically, she argues (1) the trial court erred in allowing Velarde’s counsel to cross-examine Ceja and present evidence in front of her jury as Velarde had no standing to do so; (2) because Velarde had no statutory duty to disclose evidence to Ceja, he was not held to the same ethical standards as the prosecutor; (3) the trial court limited Ceja’s ability to deal with Velarde’s actions when it ruled she had limited standing to object; and (4) counsel for Velarde committed the equivalent of misconduct during his cross-examination of Ceja during closing argument.

#### Background

We will address each of Ceja's contentions in turn, but first state: "The United States Supreme Court has held that, because jurors cannot be expected to ignore one defendant's confession that is 'powerfully incriminating' as to a second defendant when determining the latter's guilt, admission of such a confession at a joint trial generally violates the confrontation rights of the nondeclarant." (*People v. Fletcher* (1996) 13 Cal.4th 451, 455.) Separate juries were used here because of the anticipated introduction of Ceja and Velarde's out-of-court statements, each implicating the other, which could not be introduced in the presence of the jury for the nondeclarant codefendant, thus avoiding *Aranda-Bruton* error.

However, before Velarde's out-of-court statement was played for the jury, Ceja waived her confrontation rights and consent to have her jury present when Velarde's out-of-court statements were introduced. In doing so, Ceja was told that, if she waived the issue, she would have no right to cross-examine Velarde unless he took the stand. Ceja said she understood. During the discussion on the waiver, the prosecutor stated he wanted Ceja to know:

"we sought to have these two trials together, two juries together, to protect her right to prevent exactly what is being discussed here, the presence of her co-defendant's jury hearing statements that [Velarde] made that clearly discuss her participation in these crimes. And the whole purpose of doing this was to protect her rights."

When questioned again, Ceja reiterated that she understood and again stated she wished to waive her rights. Ceja's counsel stated that there was a "strategic reason" for doing so. Ceja does not now contest the validity of the waiver.

### Applicable Law and Analysis

#### *1. Participation in Each Other's Defense*

After the close of the prosecution's case-in-chief to both juries, Velarde's counsel argued that, if Ceja's jury was not going to be excused for the presentation of Velarde's defense, he would object to Ceja's counsel asking any questions, noting Ceja did not have

standing and was not a “prosecutor against me.” Counsel argued this issue had nothing to do with *Aranda-Bruton*, but that this was a trial being conducted concurrently by the People against two defendants and defended by each defendant individually. Counsel made the distinction between a joint trial and a dual trial and argued Ceja’s counsel should not be able to present evidence during Velarde’s defense, or vice versa.

The prosecutor argued that both juries should be present and Ceja’s counsel should have the right to cross-examine the anticipated witnesses. According to the prosecutor, when Velarde put on his defense, “just like any case with multiple defendants,” Ceja’s jury would hear the evidence and should have the right to cross-examine those witnesses. In other words, both juries would be present and both defense counsel would be allowed to question the witnesses.

Ceja’s counsel agreed with Velarde’s counsel’s argument, noting Velarde and Ceja were each putting on a separate defense to what the People alleged. The trial court noted that, if there had been no *Aranda-Bruton* issue to begin with, “there would be two co-defendants on trial in front of one jury” and counsel for each defendant would be allowed to cross-examine the other defendant’s witnesses. So, as noted by the trial court, “[b]ut for the *Aranda-Bruton*, we would not be having this discussion, and counsel would be actively engaged without question.” The trial court then went off the record to research the issue.

Back on the record, the trial court cited two cases – *People v. Jackson* (1996) 13 Cal.4th 1164, 1207-1209 and *People v. Cummings* (1993) 4 Cal.4th 1233, 1287 – “for the proposition ... whether a co-defendant in a dual jury trial has standing to participate specifically and cross examine witnesses in the co-defendant’s case in chief.” Not finding anything directly on point, the trial court nonetheless found its thinking was consistent with both cases, namely that:

“But for the *Aranda-Bruton* issues, we would not have two juries. We’d have one jury, and this issue would be moot. Both counsel would

participate and vigorously participate in the cross examination of the co-defendant's witnesses. [¶] ... [I]t appears to the Court that our system is built on due process, and there's nothing more fundamental in due process than a defendant's right to confront and cross examine witnesses that appear and appear against them. The key here is opportunity. [¶] Now whether counsel have a tacit agreement or not to not participate, then the Court will note that that's their decision to make on a strategic basis not to participate. But it's ... incumbent on the Court to assure that the fundamental right, which is the opportunity to confront and cross examine such witnesses, be had. [¶] ... [G]uiding the Court, based on those principles and based on the limited information, the Court is going to permit both defendants and their juries to sit through the presentation of the cases in chief of the other co-defendant. [¶] The court would note the only thing that's really constricting it are the [*Aranda-Bruton*] issues .... In one case, [Ceja] has waived, and [Velarde] has not. And, therefore, we excused [Velarde's] jury for the last day and a half, those portions dealing specifically with the interview and the interrogation where [Velarde] would not be afforded a right of cross-examination, not knowing whether [Ceja] would take the stand was cured by the excusing of the [Velarde] jury."

The trial court then held that Ceja had standing to participate in Velarde's case in chief, and Velarde had standing to participate in Ceja's. "It's in both defendants' strategy to decide how much, if any, they're going to participate in the cross examination of the other defendant's witnesses in their case in chief." Finally, the trial court noted that it was "not lost on the Court that [Ceja] has waived the *Aranda-Bruton*. And if [Velarde] for some reason takes the stand and I have excused the [Ceja] jury, there's no way of undoing it."

Ceja first contends it was structural error to permit Velarde to participate in her trial, particularly to allow Velarde's counsel to cross-examine her and present a defense in front of her jury. However, Ceja has misinterpreted the dual jury procedure employed by the trial court because Ceja and Velarde were not granted separate trials, they were granted separate juries.

Had Ceja and Velarde been tried separately, Ceja would not have been subject to cross-examination by Velarde nor would Velarde have been allowed to present evidence. But Ceja was not tried alone and had no right to a separate trial. (See *People v. Wallace*

(1970) 13 Cal.App.3d 608, 616; *People v. Baa* (1944) 24 Cal.2d 374, 377.) As explained above, Velarde's jury was excluded for the portions of the trial that involved Ceja's out-of-court statements implicating *Aranda-Bruton* and were not cross-admissible. But other than when that evidence was introduced, the trial court proceeded similarly to as if it had been a joint trial with only one jury, i.e., the prosecution's witnesses were cross-examined by counsel for Ceja and Velarde, and Ceja and Velarde each participated fully in the other's defense case-in-chief, just as they would have had it been a joint trial with one jury.

We reject Ceja's claim that she was prejudiced by this procedure. In rejecting a similar claim, the court in *People v. Jackson, supra*, 13 Cal.4th 1164, noted the defendant failed to identify any evidence brought out on cross-examination "that would have been inadmissible at a separate trial. The mere fact that a damaging cross-examination that the prosecution could have undertaken was performed instead by a codefendant's counsel did not compromise any of defendant's constitutional or statutory rights." (*Id.* at p. 1208; see *People v. Cummings, supra*, 4 Cal.4th at p. 1286, fn. 25.) Here, too, the fact that any damaging testimony to Ceja was elicited during Velarde's defense case, rather than during the prosecution's case-in-chief, did not compromise any of Ceja's constitutional or statutory rights.

Similarly, the fact that Velarde's defense may have been antagonistic towards Ceja did not require the exclusion of Ceja's jury. "That defendants have inconsistent defenses and may attempt to shift responsibility to each other does not compel severance of their trials [citations], let alone establish abuse of discretion in impaneling separate juries." (*People v. Cummings, supra*, 4 Cal.4th at p. 1287; accord *People v. Boyde* (1988) 46 Cal.3d 212, 232-233, overruled on another point in *People v. Johnson* (2016) 62 Cal.4th 600, 648.)

2. *Velarde's Counsel's Duty to Disclose Evidence or be held to a Heightened Ethical Standard*

Ceja also contends Velarde's counsel was not subject to the same statutory discovery requirements as the prosecutor or "held to a prosecutor's heightened ethical standard." However, this was no different than any joint trial with one jury, and we reject her claim to the contrary.

3. *Limiting Ceja's Standing to Object*

Ceja next claims the trial court violated her right to due process by limiting her "to hearsay objections throughout much of Velarde's examination of witnesses." To support her claim, Ceja points to two instances.

In the first, during Hembree's testimony, Hembree was asked by Velarde's counsel what Ceja had done in order to convince Hembree she was pregnant. Ceja's counsel objected, stating the question was beyond the scope of direct examination. The trial court initially sustained the objection, but the prosecutor argued that it was the prosecution's "scope," not Ceja's, and a sidebar was conducted.

The trial court memorialized what occurred during the sidebar for the record and explained that the prosecutor argued he alone had standing to object to exceeding the scope in this instance and Ceja was limited to a hearsay objection. The prosecutor further stated he was not objecting, but would request to re-open and delve into the issue, mooted the beyond-the-scope objection if granted. The trial court explained it wished "to note the standing issue" and would permit Velarde's counsel to proceed with questioning "contingent on the prosecution delving into the issue, as well, which they've indicated they will."

In the second instance, Ceja's counsel similarly objected when Velarde's counsel asked Hembree whether Ceja "[h]ad a reputation that [she] knew of showing her breasts to the male correctional officers there." A similar sidebar and ruling ensued.

Based on these two instances, Ceja claims she did not “have available the full range of trial objections to protect her right [to] a trial based only on reliable evidence” and that she was improperly limited “to hearsay objections throughout much of Velarde’s examination of witnesses.”

We do not find the record supports Ceja’s claim. In the two instances mentioned, the trial court did not hold Ceja lacked standing to raise her objection. Instead, both objections involved questions regarding areas of inquiry the prosecution wished to delve into and this was a prosecution witness. Had the trial court granted Ceja’s beyond-the-scope objection, it would likely have granted the prosecution’s request to re-open and delve into those areas if Velarde’s counsel did not.

The trial court has discretion to “limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.” (Pen. Code, § 1044; see also Evid. Code, §§ 765, subd. (a) [“court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth”] and 774 [court has discretion to allow counsel to re-open examination of witness].)

We find no error on the part of the trial court.

#### 4. *Misconduct of Velarde’s Counsel*

Finally, relying on *People v. Estrada* (1998) 63 Cal.App.4th 1090 (*Estrada*), Ceja contends Velarde’s counsel committed the equivalent of misconduct during his cross-examination of her and during closing argument. We find no merit to Ceja’s claim.

As Ceja points out, the court in *Estrada* applied the principles of prosecutorial misconduct to a claim of misconduct by a codefendant’s counsel. (*Estrada, supra*, 63 Cal.App.4th at pp. 1095-1096.) However, if those principles are applied here, Ceja’s claim has been forfeited by her counsel’s failure to object to the many questions and statements by Velarde’s counsel she now claims are objectionable. (See *People v. Crew*

(2003) 31 Cal.4th 822, 839 [“[A] claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury. [Citation.]”].)

Even addressing the issue on the merits, we find Ceja’s claim lacks merit. “‘A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process.’ [Citations.] Under California law, a prosecutor who uses deceptive or reprehensible methods of persuasion commits misconduct even if such actions do not render the trial fundamentally unfair. [Citation.]” (*People v. Doolin* (2009) 45 Cal.4th 390, 444.) We review claims of misconduct to determine whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Friend* (2009) 47 Cal.4th 1, 29.)

Ceja first claims Velarde’s counsel engaged in a pattern of conduct designed to appeal to the passion and prejudice of the jury and to “portray [Ceja] as badly as possible.” As evidence of this, Ceja points to Velarde’s counsel use of the term “home invasion robbery” when describing Ceja’s and Hembree’s actions at Ceja’s mother-in-law’s. While the term “robbery” was used instead of “burglary” to describe the event, Velarde’s counsel did not misrepresent the facts testified to surrounding that event. In addition, Ceja herself referred to the crime as a “robbery” instead of a “burglary” during her testimony.

Ceja also complains Velarde’s counsel’s questioning of her concerning her pregnancy, whether she had had an abortion, whether she had chlamydia, and whether she had lied to her son’s father about his paternity in order to get him to support her were improper questions, especially as some constituted questions used solely for the purpose of getting before the jury facts inferred therein. All of these questions were, however, within the proper scope of cross-examination as they concerned Ceja’s credibility and particularly whether she had faked a pregnancy in order to carry out the kidnapping.

Ceja next contends Velarde's counsel improperly asked questions aimed at having her evaluate the credibility of other witnesses by asking her several times if other witnesses were lying when they testified. But again, those questions concerned Ceja's credibility, as Velarde's counsel was confronting her with the inconsistencies in her own testimony and the inconsistencies between her statements and those of other witnesses. (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 199 [in general, permissible scope of cross-examination is very broad]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139 [by taking the stand, defendant put his own credibility in issue].)

Ceja also claims Velarde's counsel "[m]ocked" (boldface omitted) her by using the term "idiots." Velarde's counsel, however, was repeating the term Ceja had used when she described herself and two others as "the idiots who went and committed the robbery" in response to the previous question asked by Velarde's counsel.

Ceja next claims Velarde's counsel improperly "suggested facts not in evidence" (boldface and capitalization omitted) by asking one witness if he knew kidnapping was primarily a crime committed by women. And in the subsequent line of questioning in which Velarde's counsel confronted Ceja with Velarde's theory that she, not Velarde, had masterminded both the burglary and the murder and kidnapping plot, and that she, not Velarde, had actually strangled Ana. But again, these questions were within the permissible scope of cross-examination and did not rise to the level of misconduct. (See *People v. Letner and Tobin, supra*, 50 Cal.4th at p. 199; see also *People v. Gutierrez, supra*, 28 Cal.4th at p. 1139.)

In any event, even if we find some of the complained of conduct to be misconduct, given the vast inconsistencies and implausible nature of Ceja's own testimony, there is no reasonable probability the jury would have found Ceja's testimony credible even if they had not heard the complained of questioning by Velarde's counsel. This is not a case where Velarde's counsel's "acts of misconduct, inadequately checked by the trial court, were so egregious they infected the trial with such unfairness they denied appellant due

process.” (*Estrada, supra*, 63 Cal.App.4th at pp. 1106-1107.) We reject Ceja’s claim to the contrary.

## VII. JURY INSTRUCTIONS ON MURDER AND KIDNAPPING

Ceja contends the trial court erred in instructing the jury on murder and kidnapping because together the instructions were confusing and erroneous, and permitted the jury to convict her on an improper legal theory. We find no prejudicial error.

### Standard of Review

In considering a claim of instructional error, we must first ascertain what the relevant law provides, and then determine what meaning the instructions given convey. (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) “The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant’s rights. In making this determination, we consider the specific language under challenge and, if necessary, the instructions as a whole. [Citation.]” (*Ibid.*) “[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” [Citations.]” (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

### Applicable Law and Analysis

Ceja was convicted as charged with first-degree murder (Pen. Code, § 187, subd. (a)), with the special circumstances of lying in wait (Pen. Code, § 190.2, subd. (a)(15)) and murder in the commission of a kidnapping (Pen. Code, § 190.2, subd. (a)(17)(B)); kidnapping (Pen. Code, § 207, subd. (a)), and that the victim was under the age of 14 (Pen. Code, § 208, subd. (b)); child endangerment (Pen. Code, § 273a, subd. (a)); and with solicitation to commit kidnapping (Pen. Code, § 653f, subd. (a)).

Ceja argues “problems arose” when the jury was instructed on an uncharged conspiracy and the natural and probable consequence doctrine. Instruction on the

uncharged conspiracy theory (CALCRIM No. 416) was given, in pertinent part, as follows:

“To prove that the defendant was a member of a conspiracy in this case, the People must prove that: One, the defendant intended to agree and did agree to commit murder, kidnapping, and later child endangerment .... [¶] ... [¶] The People contend that the defendant conspired to commit the following crime[s]: murder, kidnapping, and later child endangerment. You may not find the defendant guilty under a conspiracy theory unless all of you agree that the People have proved that the defendant conspired to commit at least one of these crimes, and you all agree which crime she conspired to commit. You must also agree on the degree of the crime.”

The jury was further instructed on the liability of a co-conspirator’s acts, in pertinent part, as follows:

“A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy commits the crime. [¶] ... [¶] A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy.... [¶] A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes.... [¶] ... [¶] To prove that the defendant is guilty of the crimes charged in Counts One, Two and Three, the People must prove that: One, the defendant conspired to commit one of the following crimes: murder, kidnapping, and child endangerment; two, a member of the conspiracy committed the crimes of murder, kidnapping and child endangerment; and, three, the killing of [Ana], the taking and later abandonment of Ana[’s] ... son, Anthony, was a natural and probable consequence of the common plan or design of the crime that the defendant conspired to commit.”

Ceja argues these instructions were deficient because, when the jury was instructed on the uncharged conspiracy and the natural and probable consequence doctrine, the prosecution failed to delineate which crimes were the target offenses and which crimes occurred as the natural and probable consequence of each target offense. Ceja argues the jury was instructed that “all charged crimes were natural and probable consequence of the unnamed crime [Ceja] planned to commit when there was no

evidence to support this theory ....” As a result, Ceja contends the instructions permitted the jury to find her “guilty of a conspiracy to commit murder and kidnap based on the later uncharged conspiracy to abandon the baby that supported [the] child endangerment offense.” She further claims kidnapping could not have been a natural and probable consequence of a conspiracy to commit murder and that the child endangerment offense could not have been a natural and probable consequence of the originally contemplated kidnapping and murder.

However, as acknowledged by Ceja, the jury found true the special circumstance allegations that Ceja intentionally killed Ana my means of lying in wait and that she committed the murder while engaged in the commission or attempted commission of the crime of kidnapping. In order to find the lying in wait special circumstance true, the jury was instructed the prosecution had to prove Ceja was an accomplice or part of a conspiracy to intentionally kill Ana, and that she aided and abetted in the commission of the murder by means of lying in wait.

And, in order to find the kidnapping special circumstance true, the jury was instructed the prosecution had to prove Ceja was a member of a conspiracy to commit kidnapping; that she intended that one or more members of the conspiracy commit kidnapping; that if she did not personally commit kidnapping, then another perpetrator, with whom Ceja conspired, personally committed kidnapping; that Velarde did an act that was a substantial factor in causing the death of another person; that Ceja intended that the other person be killed; that the act causing the death and kidnapping were part of a continuous transaction; and that there was a logical connection between the act causing death and the kidnapping.

Thus, even assuming that the instruction on the natural and probable consequence doctrine was deficient for failing “to delineate which crimes were the target offenses and which crimes occurred as the natural and probable consequence of each target offense,” such error was harmless under any standard as to the murder and kidnapping counts. By

finding the two special circumstance allegations true, the jury necessarily found true beyond a reasonable doubt that Ceja was an accomplice or part of a conspiracy to intentionally kill Ana; that she aided and abetted in the commission of the murder by means of lying in wait; that she was also a member of a conspiracy to commit kidnapping; that she intended the kidnapping and murder be committed; and that there was a logical connection between the act causing death and the kidnapping and that the acts were part of one continuous transaction. Based on the jury's true findings on the two special circumstances, it is clear that the jury did not rely on the natural and probable consequence doctrine at all in finding Ceja guilty of the murder and kidnapping.

As for the child endangerment count, the jury could have reasonably concluded the abandonment of the baby was a natural and probable consequence of the conspiracy to commit murder and kidnapping, as it is reasonably foreseeable that Ceja and Velarde would find it necessary, at some point after the murder and kidnapping, to abandon the baby in an attempt to avoid detection. In any event, even assuming error to instruct the jury that they could convict Ceja of child endangerment as a natural and probable consequence of an earlier conspiracy to commit murder and/or kidnapping, any such error was harmless because the evidence overwhelmingly established Ceja was guilty of child endangerment as a direct perpetrator or as Velarde's accomplice.

We find the complained of error harmless even under *Chapman, supra*, 386 U.S. at p. 24, the more stringent of the two standards which normally apply to instructional error. (*People v. Salas* (2006) 37 Cal.4th 967, 984.) Under *Chapman*, the court must reverse the conviction unless it is convinced beyond a reasonable doubt that the error was harmless, i.e., that it did not contribute to the conviction. There is no reasonable possibility Ceja was convicted based on the improper legal theory Ceja contends and we reject her claim to the contrary.

#### VIII. JURY INSTRUCTIONS ON UNCHARGED CONSPIRACY

Ceja next contends the trial court erroneously instructed the jury that it could find her guilty of murder, as an uncharged coconspirator, based on overt acts which occurred after the murder was completed. We find no prejudicial error.

As set forth earlier, the jury was instructed on uncharged conspiracy based on CALCRIM No. 416. The jury was instructed that, in order to find Ceja was a member of a conspiracy, the prosecution had to prove, inter alia, that she “committed at least one of the following overt acts to accomplish murder, kidnapping, and later child endangerment.” The instruction listed 12 potential overt acts, including a number of potential overt acts that occurred after Ana was killed.<sup>7</sup>

It is true that “[a]cts committed by the conspirators subsequent to the commission of the crime which is the primary object of the conspiracy are not overt acts in furtherance of the conspiracy.” (*People v. Tatman* (1993) 20 Cal.App.4th 1, 10.) Based on the evidence outlined above, however, there is no reasonable possibility that one or more jurors found Ceja guilty of murder as an uncharged coconspirator based on overt acts which occurred after the murder was complete. (*Chapman, supra*, 386 U.S. at p. 24.) We reject Ceja’s claim to the contrary.

#### IX. ASPORTATION INSTRUCTIONS

Ceja next contends her conviction for kidnapping and the special circumstance of murder in the commission of kidnapping must be reversed because jury instructions on asportation were confusing and incomplete. We find no prejudicial error.

Ceja was convicted of kidnapping (Pen. Code, § 207, subd. (a)) and subjected to an increased sentence because the jury found true the person kidnapped was under 14

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<sup>7</sup> Overt acts after Ana was killed were: (1) aided in disposal of Ana’s car; (2) abandoned and burned Ceja’s car; (3) purchased baby paraphernalia at Walmart; (4) proclaimed to family and friends that Anthony was their newborn son; (5) reported Ceja’s car stolen; (6) submitted claim to insurance for loss of Ceja’s car; and (7) abandoned Anthony on door step.

years of age (Pen. Code, § 208, subd. (b)). In addition, the jury found true the allegation that Ana's murder was committed while Ceja was engaged in the commission of the crime of kidnapping (Pen. Code, § 190.2, subd. (a)(17)(B)).

To prove the crime of kidnapping, the prosecution must establish three elements: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance. (Pen. Code, § 207, subd. (a); *People v. Jones* (2003) 108 Cal.App.4th 455, 462.)

Ceja acknowledges the jury was instructed with CALCRIM No. 1215 (kidnapping) and CALCRIM No. 1201 (kidnapping of child or person incapable of consent), both of which instructed the jury that Ceja must have moved the victim for a substantial distance, meaning more than slight or trivial, and that in making that determination, it must consider all the circumstances relating to the movement. But she claims the trial court prejudicially erred when it omitted the following bracketed phrase in each instruction that further defined what the jury could consider in deciding whether the asportation element of kidnapping had been met:

“[Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.]” (CALCRIM No. 1201.)<sup>8</sup>

Ceja points to *People v. Martinez* (1999) 20 Cal.4th 225, 237, for the proposition that “contextual factors, whether singly or in combination, will not suffice to establish

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<sup>8</sup> The corresponding bracketed phrase in CALCRIM No. 1215 is slightly different: “[Thus, in addition to considering the actual distance moved, you may also consider other factors such as [whether the distance the other person was moved was beyond that merely incidental to the commission of \_\_\_\_\_ <insert associated crime>], whether the movement increased the risk of [physical or psychological] harm, increased the danger of a foreseeable escape attempt, or gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection.]”

asportation if the movement is only a very short distance.” As argued by Ceja, the jury was given no guidance on how to evaluate the evidence of the number of times the baby was moved. She contends this is important because several of the “asportations” were insufficient to support the offense of kidnapping, namely the movement from his home to Ceja’s home before Ana was strangled; from the living room to the bedroom in Ceja’s small apartment before Ana was strangled; from Ceja’s home to the orchard where Ana’s body was burned and back to Ceja’s; and to the Walmart where Ceja bought clothes and other baby items for him and then back to Ceja’s.

However, as stated in *People v. Cortez* (1992) 6 Cal.App.4th 1202, 1209, “Kidnapping is a substantial movement of a person accomplished by force or fear” and, “[a]s long as the detention continues, the crimes continues.” (*Ibid.*) Here, the evidence at trial revealed no interruption in Ceja and Velarde’s detention of Anthony. The kidnapping began when Ceja and Velarde murdered Ana and took her son and ended when they dropped Anthony off on the doorstep of a house several days later, i.e., when the “forcible detention” of Anthony ceased. Each movement of Anthony by Ceja and Velarde while the detention continued was part of the same, continuous offense. (See *People v. Masten* (1982) 137 Cal.App.3d 579, 588, disapproved on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8.)

Given that evidence was overwhelming that Ceja and Velarde moved Anthony a substantial distance across Merced County, the bracketed portions of CALCRIM Nos. 1201 and 1215 were unnecessary; the jury did not need to consider any other factors in deciding whether the asportation element of kidnapping had been met. (*People v. Martinez, supra*, 20 Cal.4th at p. 237 [if the movement was substantial, the jury need not consider other factors].)

In any event, there is no reasonable probability the jury would have found the asportation element of kidnapping had not been met had it been instructed on the bracketed portions of CALCRIM Nos. 1201 and 1215. (*People v. Flood* (1998) 18

Cal.4th 470, 487; *Watson, supra*, 46 Cal.2d at pp. 836-837.) For the same reasons, any error was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.)

#### X. NATURAL AND PROBABLE CONSEQUENCE DOCTRINE

Relying on *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), Ceja contends the trial court erred when it instructed the jury on uncharged conspiracy and the natural and probable consequence doctrine. Ceja contends the instruction permitted the jury to convict her of first degree premeditated murder based on an improper legal theory. We find no prejudicial error.

In *Chiu*, our Supreme Court held that an aider and abettor may be convicted of first degree premeditated murder based on direct aiding and abetting principles, but “an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine.” (*Chiu, supra*, 59 Cal.4th at pp. 158-159, 166.) The court explained that although first degree and second degree murder share the common elements of an “unlawful killing of a human being with malice aforethought, ... [first degree murder] ... has the additional elements of willfulness, premeditation, and deliberation, which trigger a heightened penalty”; “[t]hat mental state is uniquely subjective and personal”; and “the connection between the defendant’s culpability and the perpetrator’s premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequence doctrine[.]” (*Id.* at p. 166.)

Because a defendant cannot be convicted of first degree premeditated murder under the natural and probable consequence doctrine, the question in *Chiu* was whether giving the instructions was harmless. “When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground.” (*Chiu, supra*, 59 Cal.4th at p. 167.) In *Chiu*, the court found no such valid ground. Instead, it found from jurors’ questions and comments that the jury “may have been

focusing on the natural and probable consequences theory of aiding and abetting.” (*Id.* at p. 168.)

Here, the jury was instructed on both aiding and abetting and uncharged conspiracy. Unlike in *Chiu*, the jury was not instructed on the natural and probable consequences doctrine in connection with aider and abettor liability, but it was instructed on the natural and probable consequence doctrine in connection with liability as a coconspirator.

Even if we assume *Chiu*'s holding applies to the natural and probable consequences doctrine in the context of coconspirator liability, we find any error harmless in light of the jury's true findings on the two special circumstance allegations.

As set forth above, the jury found true the special circumstance allegations that Ceja (1) intentionally killed Ana by means of lying in wait; and (2) committed the murder while engaged in the commission or attempted commission of the kidnapping. By finding the lying-in-wait special circumstance true, the jury found true beyond a reasonable doubt Ceja was an accomplice or part of a conspiracy to intentionally kill Ana and aided and abetted in the commission of the murder by means of lying in wait. And the verdict established the elements of felony-murder, i.e., that Ceja committed a kidnapping, and Ana's killing was committed in the commission of the kidnapping.

Consequently, this is not a case in which increased penalties for first degree murder were imposed, based on the natural and probable consequence doctrine, on a defendant who only aided and abetted (or conspired to commit) a lesser offense. (*Chiu, supra*, 59 Cal.4th at p. 166.) Thus, there is no possibility the natural and probable consequence instructions caused the jury to reach a murder verdict they otherwise would not have reached, and we reject Ceja's claim to the contrary.

#### XI. INEFFECTIVE ASSISTANCE OF COUNSEL

Ceja contends she was denied effective assistance of counsel when counsel failed to object to the prosecutor's improper closing argument. We find no prejudicial error.

## Background

During closing argument, the prosecutor argued:

“Now sometimes as lawyers, we make things more complicated than they need to be. You’ve probably seen that in this trial, if not in other aspects of your life. The jury instructions are very, very long, and they encompass all of the law applicable in this case. [¶] But the jury instructions are not intended to substitute for your own common sense. They’re not intended to replace what you know right in your very heart and souls as to what took place in this particular crime. [¶] This isn’t complicated. You don’t need to wade through pages and pages of jury instructions in order to figure out what happened in this case. You know. You know what happened. You’ve sat here. You’ve listened to all of the evidence. You’ve heard this testimony. You know right down to your shoes what happened on December 2<sup>nd</sup>. [¶] She killed Ana. Whether she put her hands on Ana’s throat or not, she was every bit as guilty as Velarde. Every bit as guilty.”

Ceja’s counsel did not object.

## Applicable Law and Analysis

A prosecutor enjoys wide latitude during closing argument. (*People v. Williams* (1997) 16 Cal.4th 153, 221.) His argument may be vigorous and incorporate appropriate epithets as long as it amounts to fair comment on the evidence, and it may include reasonable inferences drawn from the evidence. (*Ibid.*) “[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) “In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]” (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.) Generally, a defendant may not raise a claim of prosecutorial misconduct on appeal unless he timely objects to the alleged misconduct at trial. (*Samayoa, supra*, at p. 841.)

Anticipating the forfeiture rule, Ceja contends she was denied effective assistance of counsel by virtue of counsel’s failure to object to the prosecutor’s comments. Ceja

contends the prosecutor's statements constituted misconduct because they urged the jury to disregard the law and instructions and listen to their "heart and soul" instead. But the gist of the prosecutor's comments was not to disregard the law or instructions, but rather to simply emphasize that, when evaluating the evidence, which was strong, the jury not lose sight of their common sense. (See, e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 427.)

In any event, even if the prosecutor's comments were misconduct, it cannot be said that Ceja's counsel's failure to object to them constituted ineffective assistance of counsel.

"A criminal defendant's federal and state constitutional rights to counsel [citation] include the right to *effective* legal assistance. When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*People v. Mai* (2013) 57 Cal.4th 986, 1009; *Strickland v. Washington* (1984) 466 U.S. 668, 690-694.)

The failure to object to evidence or argument "rarely constitutes constitutionally ineffective legal representation ....' [Citation.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 252; accord *People v. Ghent* (1987) 43 Cal.3d 739, 772-773 [rejecting contention counsel's failure to object during prosecutor's closing argument amounted to ineffective assistance because counsel may have tactically assumed an objection would draw closer attention to the prosecutor's isolated comment]; see also *People v. Harris* (2008) 43 Cal.4th 1269, 1290 [same].) Ceja's counsel may have chosen not to object to the prosecutor's comments because he did not want to draw further attention to the argument. Thus, Ceja cannot establish her counsel's performance was deficient. (See *People v. Huggins, supra*, at p. 252 ["[I]f the record on appeal fails to show why counsel acted or

failed to act in the instance asserted to be ineffective ... unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.’ [Citation.]”.)

In addition, the jury was instructed with CALCRIM No. 200 that, if they believed the attorneys’ comments conflicted with the trial court’s instructions, they were to follow the instructions as given by the trial court. The jury is presumed to understand and follow the instructions of the trial court. (*People v. Archer* (1989) 215 Cal.App.3d 197, 204.) And, given the overwhelming evidence of Ceja’s guilt, she cannot show a reasonable probability that she would have fared better had her counsel objected to the complained-of portion of the prosecutor’s argument. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1177; *Strickland v. Washington, supra*, 466 U.S. at p. 694.)

## XII. CUMULATIVE ERROR

Finally, Ceja contends the jury would have reached a more favorable result but for the cumulative effect of the alleged errors. As we have “either rejected on the merits [Ceja’s] claims of error or have found any assumed errors to be nonprejudicial,” we reach the same conclusion with respect to the cumulative effect of any claimed errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236; see also *People v. Butler* (2009) 46 Cal.4th 847, 885.)

## DISPOSITION

The judgment is affirmed.

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FRANSON, J.

WE CONCUR:

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HILL, P.J.

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GOMES, J.