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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TOMMY WILLIAM CROSS et al.,

Defendants and Appellants.

F069258

(Super. Ct. Nos. BF151133A,  
BF151133B & BF151133C)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Thomas S. Clark, Judge.

Hilda Scheib, under appointment by the Court of Appeal, for Defendant and Appellant Tommy William Cross.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant Randall Ryan Beasley.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant Andrea Vernon.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Stephen G. Herndon, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendants Randall Ryan Beasley, Tommy William Cross, and Andrea Vernon were jointly charged with burglary of a liquor store owned by Surjit Singh (Pen. Code, § 460, subd. (b)<sup>1</sup> [count 5]), criminal threats to Singh (§ 422 [count 6]), and robbery of Singh (§ 212.5, subd. (c) [count 7]) on or around October 10, 2013. Cross was separately charged with unlawfully driving or taking a vehicle without the vehicle owner's consent (Veh. Code, § 10851, subd. (a) [count 1]) between October 7 and 10, 2013; receiving a stolen vehicle (§ 496d, subd. (a) [count 2]), carrying a concealed dirk or dagger (§ 21310 [count 8]), and resisting, delaying, or obstructing a peace officer (§ 148, subd. (a)(1) [count 9]) on or around October 10, 2013. In addition, Beasley and Vernon were jointly charged with burglary of Singh's liquor store (§ 460, subd. (b) [count 3]) and robbery of Singh (§ 212.5, subd. (c) [count 4]) on or around October 9, 2013.

The information further alleged: in connection with counts 1, 2, and 5 through 8, Cross served four prior prison terms (§ 667.5, subd. (b)); in connection with counts 3 through 7, Beasley was previously convicted of a "strike" offense (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)) and served two prior prison terms (§ 667.5, subd. (b)); in connection with counts 4, 6, and 7, Beasley was previously convicted of a serious felony (§ 667, subd. (a)); in connection with counts 5 through 7, Beasley personally used a firearm in the commission of the charged offenses (§ 12022.5, subd. (a)) and in the commission of a robbery (§ 12022.53, subd. (b)); and in connection with counts 5 through 7, Cross and Vernon each knew Beasley was personally armed (§ 12022, subd. (d)).

Before trial, at the prosecution's request, the trial court dismissed count 6 with respect to Cross and Vernon and the section 12022.53, subdivision (b), firearm

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<sup>1</sup> Unless otherwise indicated, subsequent statutory citations refer to the Penal Code.

enhancement allegation on counts 5 and 6 with respect to Beasley. The court also bifurcated the recidivist enhancement allegations.

Following trial, the jury found defendants guilty as charged on the substantive offenses but was evenly split on the firearm enhancement allegations. At the prosecution's request, the trial court dismissed these allegations. In a bifurcated proceeding, the court found true the recidivist enhancement allegations.

Thereafter, Beasley and Cross each filed a motion for new trial. They claimed the prosecution violated *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) by withholding evidence undermining the credibility of Singh. The trial court denied these motions.

Beasley received an aggregate sentence of 20 years, four months: (1) 17 years on count 4, comprised of a doubled upper term of 10 years plus five years for the prior serious felony conviction and two years for the two prior prison terms; (2) two years on count 7; and (3) one year, four months on count 6. The trial court stayed execution of punishment on counts 3 and 5.

Cross received an aggregate sentence of 10 years, four months: (1) nine years on count 7, comprised of an upper term of five years plus four years for the four prior prison terms; (2) eight months on count 1; (3) eight months on count 8; and (4) a concurrent 139 days on count 9. The trial court stayed execution of punishment on counts 2 and 5.

As for Vernon, the trial court suspended imposition of sentence on counts 4 and 7 and placed her on three years' probation, provided, inter alia, she serve the first 348 days of this period in jail and refrain from coming within 100 yards of Singh or Singh's liquor store. The court stayed execution of punishment on counts 3 and 5.

Each defendant filed an appeal. All three contend the prosecution violated *Brady* by suppressing impeachment evidence. Beasley separately contends the trial court erred by denying his motion for new trial and not staying execution of punishment on count 6. Vernon separately contends the condition of her probation requiring her to stay 100 yards

away from Singh was unconstitutionally vague. Cross “joins in all arguments advanced . . . that may affect the judgment in [his] case . . . .”

For the reasons set forth in this opinion, we conclude a *Brady* violation did not occur; the new trial motions were properly denied; and the trial court was not required to stay execution of punishment on count 6. We also accept the Attorney General’s concession the condition of Vernon’s probation requiring her to stay 100 yards away from Singh must be modified.

### **STATEMENT OF FACTS**

#### **I. Prosecution’s case.**

On October 9, 2013, at or around 2:30 or 3:00 p.m., Beasley and Vernon entered Oak Lane Liquor, located at 724 Oak Street in Bakersfield, and began taking liquor bottles from the display shelves.<sup>2</sup> When Singh, the store owner, grabbed Vernon, who was filling her purse with bottles, Beasley yelled, “Don’t touch my lady, motherfucker.” Singh went to the counter to get a baseball bat but was confronted by Beasley, who placed one of two whiskey bottles he was holding next to Singh’s head and said, “If you move, I’m going to blow your head off.” Beasley and Vernon fled with approximately 10 bottles.

Singh phoned 911 and told the dispatcher Beasley, an African-American male, and Vernon, an African-American female, “stole [his] liquor,” “tried to fight [him],” and “grabbed [his] neck” but “didn’t hit [him].” He added Beasley “want[ed] to hit [him] with [a] bottle.” Singh commented he “called 911” “a couple of days ago” but “nobody came.” The dispatcher replied, “[N]obody’s going to come for this. We’re going to give the information to the officers that are in the area. And then somebody’s going to call you over the phone to give you a report.”<sup>3</sup> When Singh was not contacted by law

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<sup>2</sup> Unspecified references to dates in the statement of facts are to the year 2013.

<sup>3</sup> The jury listened to an audio recording of this call.

enforcement during the two- to three-hour interval following this initial call, he called 911 again. At or around 9:30 p.m., Officer Nicholas Benavente arrived at the store and took Singh's statement. Singh reiterated Beasley and Vernon used force. He did not report any firearm use.

On October 10, at or around 3:00 p.m., Singh was assisting a female customer when he saw Beasley, Cross, and Vernon approaching the store. He attempted to block the entrance, but Beasley and Vernon pushed the doors open, causing him to stumble backward. As Cross and Vernon were filling a duffel bag with liquor bottles, Singh went to the counter for his phone and bat. According to Singh, Beasley pointed a gun at his head and warned, "If you call the police, I'm going to blow your head off. . . . [¶] . . . [¶] . . . Motherfucker, if you move, I'm going to blow your head off."<sup>4</sup> Singh was afraid, "start[ed] shaking," and "didn't move." Meanwhile, the female customer tried to stop Vernon, but Vernon shoved her. Cross and Vernon left the store once they filled the duffel bag. Beasley followed after taking two more bottles.

Singh grabbed his phone, went outside, and spotted defendants next to a car either 30 feet or 30 yards away on Chester Lane. Cross placed the duffel bag in the trunk. As defendants were driving off, Singh called 911. He told the dispatcher the "same people stole [his] liquor again" and "they got a gun to[o]." Singh described Beasley as an African-American male, Cross as a Caucasian male, Vernon as an African-American female, and the getaway vehicle as a gray four-door Chevrolet Impala. He also provided a license plate number. Singh stressed he "called [911 at the] same time yesterday" and Beasley and Vernon "did the same thing yesterday."<sup>5</sup>

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<sup>4</sup> Singh also testified the female customer had exclaimed, "They got a gun. They got a gun."

<sup>5</sup> The jury listened to an audio recording of this call.

At or around 5:20 p.m., in response to the robbery call, Officers Robert Pair and Frank McIntyre drove in and around the vicinity of Oak Lane Liquor on the lookout for defendants. At the intersection of H Street and Brundage Lane, about one and one-half miles southeast of the store, Pair and McIntyre came across defendants in a gray four-door Honda Accord. Cross was the driver, Beasley was the front passenger, and Vernon was the rear passenger. Pair testified the trio “appeared to be looking directly at [the] patrol vehicle” and “appeared agitated or nervous . . . by [his and McIntyre’s] presence.” A license plate check showed the vehicle was reported stolen. The Honda Accord turned into a parking lot. Pair and McIntyre entered the parking lot and saw defendants standing near the vehicle. Pair and McIntyre exited the patrol vehicle. As defendants were walking away from the Honda Accord, the officers ordered them to stop. Pair detained Beasley and Vernon without incident. On the other hand, Cross argued with McIntyre and backed away. When McIntyre attempted to handcuff Cross, Cross resisted. McIntyre grabbed Cross by the shoulders and forced him to the ground. The two continued to struggle until McIntyre handcuffed Cross. McIntyre then conducted a patdown search of Cross and found a fixed-blade knife.

Pair observed the Honda Accord was still running without a key in the ignition. He verified the car was stolen via a vehicle identification number check. An automobile search revealed a duffel bag filled with approximately 16 bottles of alcohol. An inventory search of Vernon’s purse revealed two vodka bottles. No firearm was found.

Meanwhile, Officer Jesse Gracia was at Oak Lane Liquor, where he obtained Singh’s statement. Singh related all three defendants pushed the door open. Immediately thereafter, Beasley took out his gun, pointed it at Singh’s head, and directed Singh to stay behind the cash register. He threatened to “blow [Singh’s] head off” if Singh touched anything. As Beasley was leaving the store, he taunted, “Go ahead and call the police because they’re not going to come.” Next, Gracia transported Singh to the location of defendants’ arrests for an infield show-up. Singh identified defendants as the culprits.

He also recognized the getaway vehicle,<sup>6</sup> duffel bag, and alcohol bottles taken from his store.

McIntyre interviewed Cross and asked him how he came into possession of the Honda Accord. Cross claimed he was walking that morning when a stranger gave him the car and car keys for free.<sup>7</sup> Sergio Rayo, the owner of the Honda Accord, reported the car missing on October 8. Rayo did not know Cross, let alone allow him to use the vehicle.

At trial, Singh acknowledged he was previously convicted of selling tobacco to a minor (§ 308, subd. (a)) in 2008 and in 2012.

## **II. Defense's case.**

According to Officer Benavente, upon his arrival to Oak Lane Liquor on October 9, Singh remarked, "It took you guys so long to get here . . . ." Singh reported he was already behind the counter when Beasley and Vernon entered the store. When Singh confronted the pair, Beasley grabbed a bottle, "held it over his head" "[a]s if he was going to hit [Singh] with it," and "cornered [Singh]," which allowed Vernon to take more bottles unimpeded. Singh did not say that Beasley held two bottles and threatened to "blow his head off" or that either Beasley or Vernon touched him. Benavente did not see any signs of struggle inside the store.

Juanita Nations, a 911 dispatcher, testified she and other dispatchers prioritized 911 calls in the following manner:

"[I]f someone's life is in danger, it's priority one. If no one's life is in danger and it isn't cause for immediate police response or medical or fire, it's usually a two. Animal calls are categorized as priority three, and all reports are priority four unless your life was threatened."

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<sup>6</sup> Singh testified the Honda Accord was the getaway vehicle based on the color and license plate number. When he saw the car for the first time on October 10, he could not view the Honda logo.

<sup>7</sup> The jury listened to an audio recording of this interview.

Armed robbery, for instance, warranted a priority one call. On October 7, Nations received a “petty theft” call from Singh in which Singh claimed an African-American prostitute tried to steal a whiskey bottle.<sup>8</sup>

In Singh’s second 911 call on October 9, Singh said, “I called [911] two times . . . two days ago and today.” The dispatcher replied, “We have it as a petty theft report. An officer is supposed to call you back to take the report over the phone.”<sup>9</sup>

In summation, defendants’ attorneys did not dispute liquor bottles were taken from Singh’s store. However, they questioned the veracity of Singh, the prosecution’s key witness. Defendants’ attorneys theorized Singh lied to the 911 dispatcher about Beasley possessing a firearm on October 10, to elicit a faster response from law enforcement. They also highlighted Singh’s repeat convictions for selling tobacco to a minor, and his inconsistent statements about what exactly transpired on October 9 and 10.

## DISCUSSION

### **I. A *Brady* violation did not occur.**

#### *a. Background.*

Trial in the instant case began on January 6, 2014. The jury commenced deliberation on January 24, 2014, and rendered its verdict on January 27, 2014.

Beasley filed a motion to dismiss or, alternatively, for new trial on March 5, 2014,<sup>10</sup> and Cross filed a motion for new trial on March 6, 2014.<sup>11</sup> Defendants alleged the prosecution did not timely divulge evidence that Singh was the subject of a 2014 sting operation, which culminated in his arrest on February 7th on suspicion of receiving stolen property. In an opposition filed March 20, 2014, the prosecution maintained it had no

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<sup>8</sup> The jury listened to an audio recording of this call.

<sup>9</sup> The jury listened to an audio recording of this call.

<sup>10</sup> Cross and Vernon joined in this motion.

<sup>11</sup> Beasley and Vernon joined in this motion.

knowledge of the operation until the late afternoon of February 7th, when the Bakersfield Police Department issued a press release. On February 9th, the prosecution informed the defense about the arrest and on February 12th, the prosecution disclosed the offense report.

At a March 27, 2014, motion hearing, Detective Lonnie Mills of the Bakersfield Police Department's vice unit testified his sergeant was contacted by a local supermarket's supervising loss prevention agent in August or September 2013 concerning the presence of that supermarket's alcohol products on the display shelves at Oak Lane Liquor. A few weeks later, Mills went to the store undercover but did not find this merchandise. Suspecting Singh was aware he was being watched, the vice unit "let [the matter] sit . . . for a few months" before commencing a three-day sting operation in 2014. On those days, i.e., January 24th, February 5th, and February 7th, undercover vice officers sold Singh what were represented to be stolen liquor bottles. Singh was subsequently arrested on February 7th.

Mills, who spearheaded the sting operation, created a running offense report on January 24th. The initial report specified the vice unit conducted a sale with Singh that day and included the name and address of Oak Lane Liquor. From that point on, this "partial" report could be accessed by officers in the department, including those outside the vice unit, via the Versadex report writing system by searching under Singh's name and/or the name and address of his store. Mills eventually added information about the February 5th and 7th transactions, as well as Singh's arrest, to the report. He could not recall whether he "[composed] the narrative as continuing or if [he] did it all at the conclusion of the investigation" but was certain the report "was incomplete until the last operation." Mills did not document anything before January 24th because "[a]t that time [there was] no offense." To his knowledge, he was the only person who prepared a report.

Mills explained the vice unit operates out of the Drug Enforcement Administration (DEA) building. The DEA building is located several miles away from the Bakersfield Police Department headquarters, where the patrol unit is stationed. Patrol officers did not participate in the 2014 sting operation. Moreover, Mills was not aware of Singh's role in the instant case "until [he] was contacted after th[e] investigation had concluded."

On April 1, 2014, the trial court denied the motions, concluding, inter alia, (1) the vice unit was not part of the " 'prosecution team' "; (2) any information known to the vice unit before January 24, 2014, was not exculpatory; and (3) any information known to the vice unit after January 24, 2014, was not material. Regarding the third point, the court reasoned:

"In the instant case, the Court had already allowed the defendants to impeach Mr. Singh's credibility with [two] misdemeanor convictions for selling tobacco to minors. The entire thrust of the defense of all [three] co-defendants was to attack Mr. Singh's credibility, particularly his testimony that [Beasley] w[as] armed with a firearm. Even without the evidence which is the subject of these motions, [d]efendants' attacks on Mr. Singh's credibility were substantially successful, resulting in [six] jurors having a reasonable doubt with respect to the firearm component. Nevertheless, all 12 jurors were able to find [d]efendants guilty on the other charges because of the overwhelming amount of evidence[,] including the fact that defendants were found in the vicinity, shortly after the robbery, in a stolen car and in possession of inventory belonging to the victim.

"There is absolutely no reason to believe that the jur[ors] would have decided otherwise if they had been exposed to unadjudicated accusations that . . . Mr. Singh had purchased allegedly stolen liquor while they were deliberating."

b. *Standard of review.*

An appellate court independently reviews the question of whether a *Brady* violation occurred, but affords great weight to a trial court's factual findings that are supported by substantial evidence. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176; *People v. Salazar* (2005) 35 Cal.4th 1031, 1042 (*Salazar*); see *People v. Johnson*

(1980) 26 Cal.3d 557, 576 [“Evidence, to be ‘substantial’ must be ‘of ponderable legal significance . . . reasonable in nature, credible, and of solid value.’ ”].)

c. *Analysis.*

Under the due process clause of the Fourteenth Amendment, as interpreted by the United States Supreme Court in *Brady* and *Brady*'s progeny, a prosecutor must disclose evidence that is favorable to a criminal defendant, notwithstanding the prosecutor's good faith and the defendant's failure to request such disclosure. (*People v. Williams* (2013) 58 Cal.4th 197, 255-256; *Salazar, supra*, 35 Cal.4th at p. 1042; *People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 47.) “Evidence is ‘favorable’ if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses.” (*In re Sassounian* (1995) 9 Cal.4th 535, 544 (*Sassounian*); accord, *People v. Ruthford* (1975) 14 Cal.3d 399, 408 [“We conclude that the suppression of substantial material evidence bearing on the credibility of a key prosecution witness is a denial of due process within the meaning of the Fourteenth Amendment.”], overruled in part by *Sassounian, supra*, at p. 545, fn. 7.) If such evidence is suppressed and prejudice ensues, then a *Brady* violation occurs. (*Salazar, supra*, 35 Cal.4th at p. 1043.) In this context, prejudice “focuses on ‘the materiality of the evidence to the issue of guilt or innocence’ ” (*Salazar, supra*, at p. 1043), which requires the defendant to “ ‘show a “reasonable probability of a different result” ’ ” (*ibid.*).

In sum, “[t]here are three components of a . . . *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282; accord, *Salazar, supra*, 35 Cal.4th at p. 1043.)

With respect to the information known to the vice unit before January 24, 2014, we find this information was not favorable to defendants. Mills testified there was no evidence of incriminating conduct until the first day of the sting operation. (See *People*

*v. Mena* (2012) 54 Cal.4th 146, 160 [nonexistent evidence cannot be either favorable or material]; see also *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052 [testimony of a single witness may constitute substantial evidence].)

With respect to the information known to the vice unit on and after January 24, 2014, we find this information was immaterial.

“The materiality of undisclosed information which could have served to impeach a government witness is affected by the importance of the witness’s testimony, as well as the importance of the [un]disclosed information to the impeachment of the witness.” (*U.S. v. Spinelli* (2d Cir. 2008) 551 F.3d 159, 165.)<sup>12</sup> “Impeaching information is more likely to be deemed material ‘if the witness whose testimony is attacked supplied the only evidence linking the defendant[] to the crime.’ [Citation.]” (*U.S. v. Spinelli, supra*, at p. 165.) However, “if the information withheld is merely cumulative of equally impeaching evidence introduced at trial, so that it would not have materially increased the jury’s likelihood of discrediting the witness, it is not material.” (*Ibid.*; accord, *U.S. v. Paladin* (1st Cir. 2014) 748 F.3d 438, 446; *U.S. v. Brodie* (D.C. Cir. 2008) 524 F.3d 259, 268-269; *U.S. v. Dweck* (7th Cir. 1990) 913 F.2d 365, 371; *U.S. v. Polizzi* (9th Cir. 1986) 801 F.2d 1543, 1553.) Undisclosed impeachment evidence is cumulative “where the defendant already had available to him evidence that would have allowed for impeachment on the same or similar topics.” (*U.S. v. Paladin, supra*, 748 F.3d at p. 447; cf. *Maxwell v. Roe* (9th Cir. 2010) 628 F.3d 486, 512 [suppressed impeachment evidence about prosecution witness’s plea deal and his experience as jailhouse informant pertained to witness’s sophistication and motivation in his capacity as an informant whereas

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<sup>12</sup> Although lower federal court decisions are not binding upon California courts, they are persuasive and entitled to great weight. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58; *People v. Cleveland* (2001) 25 Cal.4th 466, 480; *People v. Bradley* (1969) 1 Cal.3d 80, 86.)

impeachment evidence produced at trial, i.e., lies about his level of education and number of felony convictions, pertained to witness’s general propensity for dishonesty].)

Materiality, which is a defendant’s burden to establish (*Strickler v. Greene, supra*, 527 U.S. at p. 291; *Sassounian, supra*, 9 Cal.4th at p. 550), “requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction ‘more likely’ [citation], or that using the suppressed evidence to discredit a witness’s testimony ‘might have changed the outcome of the trial’ ” (*Salazar, supra*, 35 Cal.4th at p. 1043). Instead, a defendant “ ‘must show a “reasonable probability of a different result.” ’ [Citation.]” (*Ibid.*) “The requisite ‘reasonable probability’ is a probability sufficient to ‘undermine[] confidence in the outcome’ on the part of the reviewing court. [Citations.] It is a probability assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract. [Citation.]” (*Sassounian, supra*, 9 Cal.4th at p. 544; see *People v. Superior Court (Meraz), supra*, 163 Cal.App.4th at p. 53, fn. 12 [“Speculation does not constitute a probability.”].)

Here, Singh was the prosecution’s sole percipient witness as to the robberies charged on counts 4 and 7, the criminal threat charged on count 6, and the firearm enhancement allegations.<sup>13</sup> The defense prudently contested Singh’s credibility. It

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<sup>13</sup> Singh’s testimony was not significant as to the crimes charged on counts 1, 2, 8, and 9.

“A burglary is committed when the defendant enters one of the premises specified in [section 459] with the intent to steal something” (*People v. Magallanes* (2009) 173 Cal.App.4th 529, 535-536) and “both the fact of entry and the required burglarious intent may be established by circumstantial evidence” (*People v. Jones* (1965) 232 Cal.App.2d 538, 540). (See, e.g., *People v. Morales* (1993) 19 Cal.App.4th 1383, 1391 [“[A]n intent to permanently deprive someone of his or her property may be inferred when one unlawfully takes the property of another”].) As for counts 3 and 5, while Singh was the prosecution’s sole percipient witness as to the charged burglaries, there was separate corroborating evidence: On October 10, 2013, police officers spotted defendants in the vicinity of Oak Lane Liquor inside a gray four-door sedan, which was described as the

proposed the theory that Singh, who was unhappy with the response of law enforcement, or lack thereof, to his “petty theft” calls, lied to the 911 dispatcher about Beasley having a firearm on October 10, 2013, to ensure a “priority one” designation. In addition, the jury was made well aware of Singh’s inconsistent statements as well as his repeat convictions for selling tobacco to a minor in 2008 and 2012. (Cf. *Amado v. Gonzalez* (9th Cir. 2014) 758 F.3d 1119, 1139 [absent suppressed impeachment evidence about prosecution witness’s previous felony conviction, probation status, and prior gang membership, defense solely challenged witness’s eyesight on cross-examination].) The jury ultimately deadlocked on the firearm enhancement allegations, evincing its acceptance of the defense’s theory. Yet, the jury still convicted defendants on the substantive offenses, meaning it necessarily credited the rest of Singh’s testimony, including: (1) during the October 9, 2013, incident, Beasley threatened to injure Singh with whiskey bottles if the latter resisted (see *People v. Morehead* (2011) 191 Cal.App.4th 765, 775 [“[F]ear may be inferred from the circumstances in which the property is taken.”]); (2) during the October 10, 2013, incident, Singh tried to barricade the store’s entrance, but Beasley and Vernon pushed the doors open, causing Singh to stumble backward (see *People v. Burns* (2009) 172 Cal.App.4th 1251, 1259 [“ ‘ “[A]ll the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim’s resistance . . . .” ’ ”]); and (3) during the October 10, 2013, incident, Beasley repeatedly

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getaway vehicle by Singh to the 911 dispatcher. After defendants were arrested, officers searched the vehicle and found 16 liquor bottles in a duffel bag, supporting Singh’s claim defendants stole a duffel bag full of liquor bottles from his store that day. Officers also found two vodka bottles in Vernon’s purse, supporting Singh’s claim Vernon slipped liquor bottles into her purse the day before.

The above-mentioned evidence also established several elements of robbery. (See *People v. Myers* (2014) 227 Cal.App.4th 1219, 1225-1226 [“To prove [a defendant] guilty of robbery, the prosecution was required to demonstrate [the defendant] took personal property in the possession of another from his person or immediate presence, against his will, by means of force or fear, and with the specific intent permanently to deprive the person of such property.”].)

threatened to injure Singh if the latter attempted to call the police or otherwise move, which made Singh fearful (see *People v. Lipsett* (2014) 223 Cal.App.4th 1060, 1064 [to prove the offense of criminal threat, the prosecution must establish (1) the defendant willfully threatened to commit a crime that would result in death or bodily injury to the victim; (2) the defendant intended his words to be taken as a threat; (3) the threat was sufficiently unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and an immediate prospect of execution of the threat; (4) the threat actually caused the victim to be in sustained fear for his own safety; and (5) the victim's fear was reasonable under the circumstances]). As the sole judge of credibility, the jury had the prerogative to reject part of Singh's testimony while accepting or believing other portions of his testimony. (*Whitechat v. Guyette* (1942) 19 Cal.2d 428, 434-435; *Lindemann v. San Joaquin Cotton Oil Co.* (1936) 5 Cal.2d 480, 503-504; *People v. Flores* (1968) 267 Cal.App.2d 452, 457; *People v. Harris* (1964) 231 Cal.App.2d 214, 218; *People v. Bodkin* (1961) 196 Cal.App.2d 412, 414.)

We believe the information known to the vice unit on and after January 24, 2014, i.e., Singh purchased what were represented to be stolen liquor bottles from undercover vice officers on January 24, February 5, and February 7, 2014, and was consequently arrested, was “simply another illustration of [Singh]’s untruthfulness rather than evidence ‘almost unique in its detrimental effect’ on [Singh]’s credibility” (*U.S. v. Brodie, supra*, 524 F.3d at p. 269) and thus cumulative of the evidence of Singh’s repeat convictions introduced at trial. Accordingly, we conclude defendants failed to establish a probability sufficient to undermine confidence in the jury’s verdict. A *Brady* violation did not occur.<sup>14</sup>

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<sup>14</sup> We recognize the parties extensively briefed the issue of whether the vice unit was part of the “ ‘prosecution team’ ” and therefore subject to the *Brady* rule. We need not decide this issue since we dispose of defendants’ claim of a *Brady* violation on other grounds. (See, e.g., *People v. Clark* (2011) 52 Cal.4th 856, 982.)

## II. The trial court did not abuse its discretion when it denied Beasley's and Cross's new trial motions.

### a. Standard of review.

“ ‘We review a trial court’s ruling on a motion for a new trial under a deferential abuse-of-discretion standard.’ [Citations.]” (*People v. Thompson* (2010) 49 Cal.4th 79, 140.) “ ‘ “A trial court’s ruling on a motion for new trial is so completely within that court’s discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.” ’ [Citations.]” (*Ibid.*) “Although this standard of review is deferential, ‘it is not empty . . . . [I]t asks in substance whether the ruling in question “falls outside the bounds of reason” under the applicable law and the relevant facts [citations].’ [Citation.]” (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659.) “The appellant has the burden to demonstrate that the trial court’s decision was ‘irrational or arbitrary,’ or that it was not ‘grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.” [Citation.]’ [Citations.]” (*Ibid.*)

### b. Analysis.

“When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial . . . [¶] . . . [¶] . . . [w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.” (§ 1181, subd. 8.) “When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given . . . .” (*Ibid.*)

“To entitle a party to a new trial on the ground of newly discovered evidence, it must appear,—‘1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable

diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.’ [Citation.]” (*People v. Sutton* (1887) 73 Cal. 243, 247-248; accord, *People v. Delgado* (1993) 5 Cal.4th 312, 328; *People v. Soojian* (2010) 190 Cal.App.4th 491, 511-512.)

We conclude the trial court did not abuse its discretion when it denied the new trial motions. As discussed above, the undisclosed information about Singh’s February 7, 2014, arrest was merely cumulative; it did not support a reasonable probability of a different result.

### **III. The trial court was not required to stay execution of punishment on count 6.**

#### *a. Standard of review.*

“The question of whether the acts of which defendant has been convicted constitute an indivisible course of conduct is primarily a factual determination, made by the trial court on the basis of its findings concerning the defendant’s intent and objective in committing the acts.” (*People v. Lee* (1980) 110 Cal.App.3d 774, 786; accord, *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657.) “We review the court’s determination of . . . ‘separate intents’ for sufficient evidence in a light most favorable to the judgment, and presume in support of the court’s conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence.” (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271; see *People v. Blake* (1998) 68 Cal.App.4th 509, 512 [“A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.”].)

#### *b. Analysis.*

“An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a).) Moreover, “because [section 654] is intended to ensure

that defendant is punished ‘commensurate with his culpability’ [citation], its protection has been extended to cases in which there are several offenses committed during ‘a course of conduct deemed to be indivisible in time.’ [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

“It is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible.” (*People v. Harrison, supra*, 48 Cal.3d at p. 335.) “[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.” (*Ibid.*) “If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.]” (*Ibid.*)

Beasley claims section 654 prohibited punishment on count 6 because “counts [6] and [7] resulted from a single indivisible course of conduct in which the conduct in count [6] was in fact a necessary element for a conviction on count [7].” We disagree. The record, which we view in the light most favorable to the judgment, demonstrates the October 10, 2013, robbery, the objective of which was to steal liquor bottles, could have been accomplished without Beasley’s threat: defendants forcefully entered the liquor store by pushing the doors open, which overcame Singh’s resistance, and absconded with a duffel bag full of liquor bottles against Singh’s will. Beasley’s threat, on the other hand, was in response to Singh’s attempt to call 911. The objective of the threat was to “avoid detection . . . by dissuading and intimidating the victim.” (*People v. Nichols, supra*, 29 Cal.App.4th at p. 1657.) Hence, we conclude section 654 did not require the trial court to stay execution of punishment on count 6.

**IV. The condition of Vernon’s probation requiring her to stay 100 yards away from Singh will be modified.**

a. *Standard of review.*

An appellate court may review the constitutionality of a probation condition, even if no challenge was raised below, so long as the issue can be resolved as a matter of law without reference to the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889; *People v. Barajas* (2011) 198 Cal.App.4th 748, 753.)

b. *Analysis.*

“A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. [Citation.]” (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

Vernon contends the trial court’s stay-away order is unconstitutionally vague because “it contains no knowledge requirement as to the contact itself.” The Attorney General agrees. We accept this concession.

**DISPOSITION**

We direct the trial court to modify its stay-away order to prohibit defendant Andrea Vernon from knowingly coming within 100 yards of Surjit Singh. In all other respects, the judgments are affirmed.

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DETJEN, J.

WE CONCUR:

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GOMES, Acting P.J.

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KANE, J.