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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

VITALIY KRASNOPEROV,

Defendant and Appellant.

G047719

(Super. Ct. No. 07NF2178)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas Goethals, Judge. Reversed.

Michael Ian Garey, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

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After two trials a jury convicted Vitaliy Krasnoperov (defendant) of two counts of first degree murder with special circumstances, attempted murder, and conspiracy to commit murder. The court sentenced him to life without the possibility of parole.

Defendant contends the evidence is insufficient to support the judgment under the prosecution's theories of conspiracy and aiding and abetting, and the court erred by failing to instruct the jury on multiple conspiracies. He also claims his constitutional rights to due process and against self-incrimination were violated because the prosecution improperly used evidence obtained as a result of a proffer statement he made during plea negotiations, and because the court denied his related motion to sever.

We reject defendant's insufficient evidence contention. However, we agree the prosecution's use of defendant's proffer statement during the second trial breached the proffer agreement and violated defendant's due process rights. It also produced an irreconcilable conflict between defendant's right to limit the testimony of witness Jose Velasco, and codefendant Charles Murphy's unlimited right to cross-examine Velasco. Under these peculiar circumstances severance was required. Consequently, we reverse. In light of this disposition we do not address defendant's jury instruction contention.

## **FACTS**

### *1. The Attack on Dhanak Family*

In May 2007, Jayprakash (Jay) and Leela Dhanak and their two daughters, Karishma and Shayona, lived in Anaheim Hills near the intersection of Camino Correr and Quintana Avenue, in the vicinity of Eucalyptus Park. Shayona had been in a relationship with then 19-year-old codefendant Iftekhar Murtaza, since 2005, when she was a 15-year-old junior in high school. Through Murtaza, Shayona met Ajay Sharma, Murphy, and defendant. Shayona's relationship with Murtaza continued through her senior year of high school and into the following year when she was a freshman at the University of California, Irvine.

Murtaza lived in the San Fernando Valley, but Shayona and Murtaza continued to see each other periodically until February 2007 when Shayona decided to completely break away from Murtaza. She was then in college and had little time for him, plus her parents, devout Hindus, were not pleased Murtaza was Muslim. Shayona and Murtaza had been keeping their continued relationship a secret from her parents. But by May 2007, Shayona had revealed their continued relationship to her family and told them she wanted to break up with him.

On Monday, May 21, at around 6:30 p.m., Jay left Leela at her work to run some errands and then head home. Between 8:30 p.m. and 10:30 p.m., Leela tried several times to reach Jay on the phone, but without success. Karishma had been out with one of her friends, Ami Mehta, and Mehta drove Karishma home at about 10:00 p.m. As Karishma got out of Mehta's car, she said, "Oh, that's weird. The lights are off."

Leela arrived home at about 10:30 p.m. She noticed Jay's car was not parked in his usual spot and all the house lights were off. She entered the house through the garage. When Leela turned on a light, she immediately saw Jay standing near the kitchen sink bleeding profusely. Leela ran toward Jay, but as she did, two men came out of the dark living room and attacked her. She recognized Murtaza as one of her attackers, and later testified he slit her throat while the other man held her in place.

That evening, Ryan Sieloff and his girlfriend were at Eucalyptus Park when they observed a light colored minivan slowly driving up and down Quintana Avenue. A short time after he first saw the van, Sieloff noticed the Dhanak home was on fire. The van Sieloff had seen earlier was parked near the front of the Dhanak's house. It was running and facing the wrong direction. There was a woman lying in the Dhanak's neighbor's driveway.

In the Dhanak's front yard, Sieloff saw one man straddling and beating another man with a small baseball bat. Sieloff and his girlfriend drove toward the

Dhanak's home. On the way, Sieloff flagged down a patrol car and led it to the fire. When Sieloff got to the Dhanak's home, Leela was lying in the neighbor's driveway. Leela was covered in blood and appeared dead but survived.<sup>1</sup> Jay, Karishma, and Shayona were nowhere to be found.

Emergency personnel responding to the fire found three one-gallon containers of gasoline in the Dhanak home. Crime scene investigators discovered Jay's blood on the floor, toilet, and wall of the downstairs bathroom. They found a blood trail leading from the laundry room through the garage and onto the driveway, and they found Leela and Karishma's blood in various locations along the way.

Around 4:00 a.m. on May 22, a gate attendant at Concordia University saw a fire on a nearby bike path and reported it to police. A responding police officer soon found the charred remains of Jay and Karishma. Jay died from blunt force trauma to his head, but he had also been stabbed and burned. Karishma too suffered blunt force trauma to the head and had been burned alive, but she bled to death after her throat was slashed.

Around 7:00 a.m., a police officer located Shayona at her dorm on the University of California, Irvine campus. She had received a text message at 6:00 a.m. from Murtaza asking if she was alright, but the text message merely confused her. Shayona told the officers about Murtaza and said he was her ex-boyfriend. At trial, she testified problems had developed in their relationship months before the murders. Eventually, Shayona enlisted her parents' and sister's help to get away from Murtaza, and they agreed to support her efforts.

## *2. The Investigation*

Following the attack on the Dhanak family, the Anaheim Police Department retrieved information from various electronic devices belonging to defendant

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<sup>1</sup> Leela was stabbed five times in the stomach and her throat was cut. She was in a coma for four weeks.

and Murtaza. On March 29, 2007, at 3:21 a.m., defendant and Murtaza engaged a colloquy through AOL Instant Messenger, excerpts of which follow:

“[Murtaza]: Yo man. Shayona’s parents made us break up.

[Defendant]: WTF.

[Murtaza]: Dude, I want to kill them.

[Defendant]: How?

[Murtaza]: This is F’d.

[¶] . . . [¶]

[Defendant]: Okay fool. If you kill them now, it’s gonna be obvious. You gotta wait. If I could’ve helped you, I would’ve by now.

[¶] . . . [¶]

[Murtaza]: I don’t know how to kill them.

[Defendant]: I don’t know either. Burn the house down.

[Murtaza]: We can?

[Defendant]: Hit-and-run.

[Murtaza]: With them in it?

[Defendant]: You’re upset right now. You gotta wait to make this kind of decision. I mean we’re not professional killers. Probably better if we hire someone, nigga.

[Murtaza]: Yeah, I want to. I’m sick of crying, dog. This is f’g gay.

[Defendant]: Yeah, that sucks, man. You think maybe Harry knows someone.

[Murtaza]: Maybe.

[Defendant]: He might. I’ll ask him. I tried calling him today. He didn’t answer. Don’t trip though. Shayona will come around, I mean either way.

[Murtaza]: I’m down to do it myself with the proper gear.

[¶] . . . [¶]

[Defendant]: Fool, it'll be obvious.

[Murtaza]: But either way, it's good to have someone do it.

[Defendant]: Like crazy. We gotta make it look like an accident.

[Murtaza]: How do we do that?

[¶] . . . [¶]

[Defendant]: But I still think we should hire.

[Murtaza]: N Kill them with a silencer.

[¶] . . . [¶]

[Defendant]: Smoking people on our own.

[Murtaza]: Her parents have haters, n I know stories.

[Defendant]: Blowing up their house. I'm trying to think of the best way to do it.

[Murtaza]: I don't know which is safer, blowing up if they are in there.

[Defendant]: Let me find out if Harry knows someone.

[Murtaza]: But that's not an accident.

[Defendant]: I know these Russians in Tarzana that used to do this kind of stuff, but I lost contact with them.

[Murtaza]: Yeah, man. I thought everything was perfect.

[Defendant]: I know a girl. Hold on.

[Murtaza]: After Dland. N then this happens.

[Defendant]: Let me text her.

[Murtaza]: Okay.”

Nine minutes after this conversation with Murtaza, defendant texted Elena Kokorina, a friend he met in high school. Defendant then called Murtaza using his landline and they spoke for over an hour. Around noon, Kokorina called defendant and they had a brief conversation. At trial, Kokorina denied this conversation was about finding a hit man. Around 3:00 p.m., defendant first called Murtaza and then he called

one of his contacts labeled, “HARRY4REAL.” Over the next few hours, defendant and Kokorina exchanged three phone calls.

Just after midnight on April 25, Murtaza used AOL to engage defendant in the following discussion:

“[Murtaza]: Am I going with you 2MM?

[Defendant]: Not sure yet. He said sometime after 2. Not 100%.

[Murtaza]: All right. Let me know I guess. [crossing fingers emoticon] . . . gnite. I’m going riding for a bit.

[Defendant]: All right.

[Murtaza]: I’m away from my computer right now (automated response).

[Defendant]: I’ll know [emoticon] tomorrow. I think he said he wants details so text her address. Or wait, I’ll get it from you.

[Murtaza]: Take me with you?

[Defendant]: Don’t text.

[Murtaza]: All right. Whatever you feel is chill.

[Defendant]: I don’t know if you want that. I’ll let you know if we want that.

[Murtaza]: Okay . . . just don’t want to get robbed, especially during [sic] all this other money I had to pay. Had to pay a shitload of taxes.

[Defendant]: Yeah, okay. If they see that you are Indian, I would think.

[Murtaza]: What?

[Defendant]: They’d rip you. I dunno.

[Murtaza]: Oh.

[Defendant]: You are welcome to come but –

[Murtaza]: Yeah, no. They’re your peepz.

[Defendant]: I’ll ask. I made it seem like a Russian thing.

[Murtaza]: I’d rather have ‘em think they’re doing it for the same country.

[Defendant]: Might need pictures.

[Murtaza]: AKA you.

[Defendant]: All of them n shit.

[Murtaza]: You serious? Might have mom and sister of course. How to get pics of 'em? I'll ask her to show me pics of her India trip I guess. Let me know when we need pics 'cause I'll have to be slick with it.

[Defendant]: ASAP. Get'em.

[Murtaza]: All right.”

About 12 hours after this conversation with defendant, Murtaza contacted Shayona through AOL Instant Messenger. Murtaza told Shayona he was waiting for a conference call and he wanted to look at some pictures of her family. Shayona sent family photographs from a recent trip to India. A few minutes after this conversation, defendant and Murtaza had a telephone conversation via landline that lasted just under one hour.

As April gave way to May, Murtaza continued to try and reestablish his relationship with Shayona through Facebook and e-mail. On May 21, a few minutes after noon, Murtaza called Shayona. They talked for approximately 45 minutes. Shayona tried to first deflect then confront Murtaza about his obsession, but eventually she blurted out that she had a date with someone else. Shayona said, “I don't even want you as a friend” and “just accept that I am moving on.”

Murtaza then called Murphy and Velasco, an employee of Murtaza's business, and he sent a text to defendant. Murtaza and Murphy exchanged the following text messages between 1:37 p.m. and 1:46 p.m.:

“[Murtaza]: Yo call me. This is important.

[Murphy]: I'll call you. Wats good?

[Murtaza]: Someone offering 30k for a job. I don't know how down you are.

[Murphy]: What do I do?

[Murtaza]: Gotta talk in person. It's a big deal. I'm doing it myself.

[Murphy]: Okay. Come get me. Come to my house. I'm at home.

[Murtaza]: Yeah, I will. Give me 10.

[Murphy]: All right. I'll see you when you get here."

Two minutes later, Murtaza called Velasco and asked him to provide an alibi if anyone asked. He also called his friend, Timothy Coronado, to cancel their planned workout, and Murtaza said his girlfriend's parents had died in a car accident. Call records placed Murphy and Murtaza close to their respective homes during these exchanges, and later, the records indicated Murtaza was in Murphy's neighborhood.

Around 7:00 p.m. on May 21, Murtaza texted Shayona, "Have a great date." Around 8:30 p.m., Murphy checked his voicemail. His call used a cell tower approximately three quarters of a mile from the Dhanak home. Between 8:48 p.m. and 10:53 p.m., calls placed to Murphy's cell phone went directly to his voicemail, which indicated his phone was probably turned off. At approximately 10:00 p.m., Murtaza phoned Shayona, but she did not answer his call. As noted above, he texted Shayona the following morning and asked if she was alright.

Around 5:00 p.m. on May 24, Murtaza and Sharma went to the Anaheim Police Station at to be interviewed. They left just two hours later, but police officers were following them. Murtaza then drove to defendant's home. Defendant and Murtaza went to a shopping center and walked around for about 30 minutes. They returned to Murtaza's car and talked for about 20 minutes. About 10:30 p.m., Murtaza drove defendant home.

Around 11:30 p.m., Murtaza left his home and drove to Phoenix. During the approximately seven-hour drive, Murtaza and defendant exchanged 84 text messages, and Murtaza texted Shayona, "Good luck with the funeral. I'm going." Later that

evening, Murtaza was arrested at the Phoenix Airport. He had a ticket to Bangladesh and \$11,000 cash.

On May 28, defendant was interviewed at the Anaheim Police Station. Defendant said he met Murtaza in high school and later worked at Murtaza's mortgage company. Defendant confirmed Murtaza had dated Shayona for about two years. He claimed Murtaza and Shayona had a good relationship, but they had split up recently. According to defendant, Murtaza blamed Shayona's parents for their breakup.

Defendant, who had injured his arm in a motorcycle accident a couple of weeks before the murders, said he had been home that night. He knew the police had already questioned Murtaza and Sharma, but he said neither one told him very much about it. Defendant acknowledged he had been with Murtaza the same day Murtaza was interviewed by the police, but defendant seemed to have difficulty remembering the sequence of events. He said Murtaza told him his father was making him go to Bangladesh.

In late June, police officers searched defendant's residence. There were two working computers in defendant's room, but both computers' hard drives had been reformatted on June 4.

In July, police officers seized a Honda Odyssey van belonging to Murtaza's father, Sekinder Murtaza. The van had been returned to the dealer at the end of its lease with missing front seat headrests, middle seat, and floor mats. Although the van was clean inside, police investigators discovered blood traces that DNA testing later determined to be from Jay and Karishma.

In August, detectives interviewed Murphy. Murphy had talked to Murtaza in May, but they simply talked about two girls they had met. Murphy said he was in Lancaster on the night of the murders, but there was no evidence his cell phone had been used in Lancaster that night.

### *3. The Testimony of Velasco*

Velasco was called as prosecution witness during the People's case-in-chief. Velasco testified he met Murtaza in 2007 when he became a subcontractor in Murtaza's mortgage brokerage. He socialized with defendant, who also worked for Murtaza, but he denied socializing with Murtaza.

Sometime before the murders, Murtaza asked Velasco, "Would you happen to know anybody, like a hitman?" Murtaza then explained the reason for his request as, "Man, I just can't be with my girl. I was wondering if you know anybody who can . . . [¶] . . . [¶] get me a hitman." Murtaza also specified he wanted the hit man to kill his girlfriend's parents. In fact, Murtaza told Velasco there was money to be made if Velasco would kill his girlfriend's parents.

Although Murtaza had just said he wanted to kill his girlfriend's parents, Velasco testified he did not take Murtaza seriously because people can say "a lot of bad things out of anger," and Murtaza had expressed his anger toward his girlfriend's parents on previous occasions. However, Velasco also recounted an incident when Murtaza had shown him a video depicting someone on his knees begging for Murtaza's forgiveness.

As will be discussed in much more detail below, after a break in the prosecution's direct examination of Velasco during which he was granted immunity, Velasco testified Murtaza offered him around \$100,000 if Velasco would commit the murders. Velasco declined, and gave him the name "Jim" just to get him to stop asking if Velasco knew a hit man.

Velasco also testified defendant was present for many of the hit man discussions with Murtaza, and defendant had also asked Velasco for the name of a hit man. Velasco told defendant there was a guy in his neighborhood who was going to jail and needed money.

Velasco did not immediately associate his many conversations with Murtaza about hiring a hit man to kill the Dhanaks with the actual murders. Eventually,

however, he realized the two events were probably related. Velasco also admitted Murtaza asked him to provide an alibi for him for the night of the murders, but Velasco testified he refused to do so.

#### *4. Other Evidence*

Coronado testified that Murtaza seemed fixated on killing Shayona's family. Murtaza repeatedly said he wanted Shayona's parents dead, or that he wanted to kill them. In May 2007, Murtaza asked Coronado if he wanted to "take care of . . . a couple of middle-aged people who live in Anaheim." Murtaza told Coronado there would be a large cash reward, somewhere between \$70,000 and \$100,000, for completing the job. Coronado declined the offer.

### **PROCEDURAL HISTORY**

#### *1. The Pleadings, the Proffer, Consolidation, Severance, and the First Trial*

In June, 2007, the prosecution filed a complaint charging Murtaza alone with special-circumstance murder and attempted murder in connection with the attack on the Dhanak family. Shortly thereafter, the prosecution filed a first amended complaint charging both Murtaza and defendant with these crimes.

In July, defendant, his then attorney, and Deputy District Attorney Howard Gundy entered into a proffer agreement which stated: "[T]he People will not use any statements made by [defendant] at the [proffer] interview, and any evidence obtained directly or indirectly from those statements, in any prosecution of him." The proffer agreement included exceptions, "for the purpose of cross-examination should [defendant] testify, or to rebut any evidence, argument or representations offered by or on behalf of [defendant]." The proffer agreement was also conditioned upon defendant's truthfulness.

A recorded proffer interview was conducted the same day. Defendant provided material information which unquestionably advanced the investigation. Specifically as relevant here, defendant said he sought a hit man for Murtaza through Velasco. Velasco told defendant he knew a guy who was willing to do it, because he was

going to jail for a long time and needed money. The parties later stipulated the prosecution had not known about Velasco until he was identified by defendant during the proffer interview.

Following the proffer interview the prosecution and defendant engaged in bona fide settlement negotiations. The prosecution made an offer to settle with defendant in exchange for his truthful testimony against Murtaza and Murphy. Defendant made a counteroffer. Ultimately, the settlement negotiations broke down.

In early 2008, the prosecution successfully moved to consolidate a separate case filed against Murphy with this case against Murtaza and defendant. Later, the prosecution filed an information charging Murtaza, defendant and Murphy with special-circumstance murder, attempted murder and conspiracy to commit murder.

In October 2010, defendant filed a motion to sever his trial from Murtaza and Murphy, contending a joint trial would necessarily result in a breach of the proffer agreement. Defendant argued, among other things, disclosure of his proffer statement to codefendants Murphy and Murtaza would violate the proffer agreement.

The motion to sever was denied without prejudice. Regarding the proffer statement, the court warned Gundy: “This is just not the type of thing that you want to come up and keep secret until the middle of trial because it would be a disaster. So I think the sooner the better. This is discoverable.”

For reasons not readily apparent in the record provided to us, defendant was tried separately from Murtaza and Murphy in April and May 2011. This first trial ended in a mistrial after the jury was unable to reach a verdict.

During the first trial, defendant’s first trial counsel, Mr. Brent Romney, called Velasco as a defense witness. On direct examination by Romney, Velasco testified Murtaza had asked him if he knew a hit man to kill his girlfriend’s parents, and he told Murtaza he did not know a hit man

On cross-examination and without defense objection, Gundy asked Velasco several times whether defendant had also asked him for the name of a hit man, and if Velasco had provided a name of someone who was headed to jail and wanted to make some money. Velasco responded each time he did not recall talking to defendant about a hit man, or giving Murtaza a name.

On redirect examination by Romney, Velasco testified defendant never asked him if he could find a hit man, and no one other than Murtaza ever asked him about a hit man. On recross-examination, and this time over defense objections, Gundy repeatedly asked Velasco if defendant had also asked him about a hit man, and each time Velasco said, “I don’t remember.”

After the first trial, the prosecution moved again to consolidate defendant and Murphy for trial. The court granted the motion to consolidate, but explained: “If at some point in the future a basis to sever should reappear – for example, we haven’t talked about statements and those traditional *Aranda-Bruton* issues.<sup>[2]</sup> If any of those should resurrect, I’m not saying that you couldn’t renew your motion to sever . . . .”

## 2. *The Second Trial, Velasco, Immunity, and the Renewed Motion to Sever*

Shortly before the second trial, Frederick McBride substituted in as counsel for defendant. McBride and Gundy agreed the People could call Velasco as a witness for the prosecution, but Gundy would only ask him about his hit man conversations with Murtaza, not about any hit man conversation with defendant.

On November 14, 2011 all parties answered ready and the joint trial of defendant and codefendant Murphy began. Murphy was represented by Michael Molfetta. On the morning of November 22, Gundy called Velasco as a witness during the prosecution’s case-in-chief. In relevant part, Velasco testified as he had in the first trial, that Murtaza asked him for the name of a hit man, and that this was the only time

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<sup>2</sup> *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*); *People v. Aranda* (1965) 63 Cal.2d 476 (*Aranda*).

anyone ever asked him for a hit man. A short time later, but before Gundy completed his direct examination of Velasco, the trial was adjourned for the lunch recess.

During the lunch recess, Velasco told Gundy he wanted to talk because Velasco was concerned about saying something that was going to get him in trouble, and because he wanted to know what Gundy knew about his involvement. Gundy and his investigator talked to Velasco, and Velasco told them, contrary to his testimony in the first trial, he did have a conversation with defendant about a hit man, and he had actually given Murtaza a name and number.

After the lunch recess, the court said: “I have just had a conversation with counsel off the record in which I was informed of some information which . . . cause[d] me to believe . . . Mr. Velasco, that you may have some criminal exposure here and, therefore, I’m going to appoint a lawyer to represent you.” After further discussion the court decided to interrupt Velasco’s testimony, but recognized: “His direct testimony is not yet complete . . . . So I fully intend . . . to complete his testimony and subject him to cross-examination at some time in the future.” Gundy then called another witness for the prosecution and the trial resumed.

The next day, the court held a hearing to discuss Velasco’s testimony and defendant’s rights under the proffer agreement. At the outset, the court remarked: “It sounds to me like Mr. Velasco’s testimony that he gave yesterday morning when considered in conjunction with the testimony he gave at [defendant’s] prior trial and certain strategies adopted by both defense counsel up to this point in this trial raises some issues that counsel would like to talk about.”

McBride replied: “I think this issue arose yesterday when it was disclosed to me by Mr. Molfetta that he was aware – he desired to go into areas for the benefit of his client that occur not in any police reports, not by prior transcripts. The factual basis for those things was solely in the proffer that we’ve discussed.” McBride previously

thought the proffer statement was confidential, but had just learned Gundy had given it to Molfetta under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

McBride stated: “I think if it was *Brady* material . . . that would have been a very strong motion to sever the trial, ‘cause only way to protect both [Murphy and defendant] would be to have Mr. Molfetta be able to elicit whatever information he could from the information in that proffer. And for [defendant] to have . . . to eat what he said in the proffer even though he didn’t testify, because of co-defendant’s *Brady* rights, that’s a pretty strong argument for a severance.” In the same vein McBride argued: “That’s . . . the only way to protect both defendants – because the viability and understanding regarding the proffer agreements should not be diluted because there happens to be a co-defendant. [¶] But if they were separate trials, Mr. Molfetta could go after Mr. Velasco with all this stuff without hurting us.”

For his part, Molfetta confirmed Gundy had given him defendant’s proffer statement. Acknowledging Velasco only came to light because of the proffer statement, Molfetta stated: “I am not interested in what [defendant] said about Mr. Velasco. I’m interested in the interactions between Mr. Velasco and Mr. Murtaza and the subsequent interaction between Mr. Velasco and [defendant].”

Regarding the revelation that Velasco had not only talked to defendant about a hit man, but had actually given Murtaza a name, Molfetta said: “If Mr. Gundy wanted to use that against [defendant], yeah, he’s got derivative use issues. I don’t. I’m not married to it. I’m not a party to it. I can’t be bound by it. . . . [¶] . . . [¶] I believe I should be permitted to talk about this triangle between Velasco, [defendant] and Murtaza, and this piece of information that passed . . . .”

Later, after indicating he had no need to refer to the proffer statement itself when cross-examining Velasco, Molfetta observed: “The problem that Mr. McBride then faces is I am doing something that Mr. Gundy wouldn’t be allowed to do because it’s

derivative use technically, although I'm not bound by that rule. . . . [¶] . . . [¶] The problem is no proffer [statement], no Velasco; No Velasco, no questions.”

Recalling Velasco had been a witness in the first trial, the court remarked: “So I don't see how that – so his existence is [not] excludable. He's here. He's testified before. . . . He's testified again. [¶] . . . [¶] And since the way this has evolved is we have this problematical witness, we're not going to act like he doesn't exist. I don't think we could do that. If he exists and he's testified, it seems to me – forgetting all the fact there's a proffer – the co-defendant has a right to ask him questions without any reference to the fact that a proffer exists to see what he is going to say. I'd let any lawyer do that under the circumstances, whether there was a proffer or not.”

In turn, Gundy reiterated he was not seeking to go as far with Velasco as he did in the first trial. Gundy said: “I think there's a basis for me to argue that I should be permitted to ask this witness about his conversations [with defendant] as reported in the proffer, but I'm not going that far. What I want to do is keep my questions focused on the conversations between defendant, Murtaza and this witness. [¶] Now Mr. McBride may open a door through his questions. And if he does that, then I'll ask on cross to be able to go to those places. But I don't know that this should restrict Mr. Molfetta to have a good faith basis to ask the witness these questions.”

The court made no final rulings that day. Instead it went forward on the assumption Velasco would be granted immunity, would be examined further by Gundy on direct, and would then be cross-examined by McBride and Molfetta. Thereafter, the trial continued with other witnesses.

On November 30, McBride filed a memorandum of law which renewed defendant's motion to sever and argued: “Should the challenged evidence be admitted, the result will be evidence of defendant's direct conduct aiding the conspiracy, showing a certainty of purpose not shown by any other evidence.”

That same day, the court conducted another hearing to resolve the issues regarding the proffer agreement and the testimony of Velasco. Molfetta reaffirmed his desire to question Velasco about his conversations with Murtaza and defendant about a hit man, and about whether Velasco provided a name. McBride objected only to the conversation between Velasco and defendant about a hit man. McBride argued it was a due process issue, analogous to *Aranda-Bruton*, because it was like a codefendant's confession that would hurt him badly in a joint trial, but would not be admissible in a separate trial.

Gundy argued he should have been permitted to go farther with Velasco in the first trial, and the renewed motion to sever was untimely.

McBride reiterated he and Gundy had agreed, before the start of the second trial, Gundy "was not going to do what happened in the last trial; that he was not going to ask Mr. Velasco about his conversations with [defendant]."

At the conclusion of the hearing, the court denied the renewed motion to sever. The court found the prosecution had an obligation to provide defendant's proffer statement to Murphy under *Brady*. The court also found Molfetta had an unlimited right to cross-examine Velasco for Murphy, even though Velasco's testimony "was the result of a series of events that, taken in whole, constituted an impropriety with respect to [defendant]."

The court went on to explain: "That brings us to the last question of severance since I'm going to permit that cross-examination. And respectfully, I've thought a lot about that, Mr. McBride, because I knew or I suspected this was where we would end up. That's why I asked you that question a few minutes ago about what would the result have been if this came up a month ago. I struggled with that, but my conclusion is I would not have granted it.

"Perhaps some different decisions would have been made had this all been fleshed out earlier. We'll never know I guess, but I don't think the fact . . . that evidence

may come out in a joint trial that hurts one defendant or another defendant is not a basis for severance unless really it rises to the level of a due process violation.

“And I don’t find that this does, given the nature of my prior ruling, with respect to the scope of the cross-examination that will be permitted of Mr. Velasco. I don’t think it rises to the level of a due process issue. I think there’s also a timeliness issue. But because of that, the fact that inconsistent defenses may be presented is a fact of life in joint trials. It happens. . . . So respectfully, the request to sever is denied.”

When Velasco’s testimony resumed on continued direct examination by Gundy, Velasco admitted lying earlier. Velasco testified Murtaza asked him many times about a hit man. Velasco said he did not know a hit man but gave Murtaza a fake name “Jim” to get Murtaza to stop asking. Velasco also testified defendant was often present when Velasco had these discussions with Murtaza about finding a hit man.

On cross-examination by Molfetta, Velasco revealed he talked to defendant about finding a hit man, after Velasco gave Murtaza the name Jim. On redirect by Gundy, Velasco testified he had a discussion with defendant about finding a hit man, and he told defendant there was a guy in his neighborhood who could do it because he would soon be incarcerated and needed the money.

## **DISCUSSION**

### *1. The Evidence is Sufficient to Support the Judgment.*

Defendant challenges the sufficiency of the evidence to prove he conspired with or aided and abetted Murtaza in the commission of the murders and the attempted murder. He asserts no evidence proves he had knowledge of Murtaza’s criminal enterprise, or had the specific intent to further that plan. Relying on *People v. Blakeslee* (1969) 2 Cal.App.3d 831, defendant also claims the evidence fails to establish he “had the specific intent to agree to the commission of the offense, or that he had the specific intent to commit the elements of the underlying offense.” Finally, defendant claims the fact that all of his communications with Murtaza about the murders occurred “almost a

month before,” coupled with the lack of evidence he actually perpetrated the crimes, establishes his innocence. We disagree.

The standard of review which applies when a defendant challenges the sufficiency of the evidence to prove a conviction is oft repeated: The appellate court reviews the entire record in the light most favorable to the verdict and determines whether there is substantial evidence—evidence that is reasonable, credible, and of solid value—such that a reasonable juror could find the defendant guilty beyond a reasonable doubt. (*People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Davis* (1995) 10 Cal.4th 463, 509.) We do not reevaluate witness credibility or resolve conflicts in the evidence (*People v. Young* (2005) 34 Cal.4th 1149, 1181), and we must accept logical inferences the jury might have drawn from any circumstantial evidence (*People v. Maury* (2003) 30 Cal.4th 342, 396). While it is the jury’s duty to acquit where circumstantial evidence is subject to two reasonable interpretations, one which points to guilt and one which points to innocence (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054), where circumstances reasonably justify a jury’s findings of fact, a reviewing court’s conclusion that such circumstances might also reasonably be reconciled with contrary findings does not justify reversal (*id.* at p. 1054).

With these principles in mind, we consider the evidence of conspiracy and aiding and abetting. “A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act ‘by one or more of the parties to such agreement’ in furtherance of the conspiracy. [Citations.]” (*People v. Morante* (1999) 20 Cal.4th 403, 416.) “‘Evidence is sufficient to prove a conspiracy to commit a crime “if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct,

relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy.” [Citations.]” (*People v. Maciel* (2013) 57 Cal.4th 482, 515-516.)

Here, leaving aside the testimony of Velasco, the evidence shows the following: (1) Defendant and Murtaza, friends and coworkers, engaged in extensive online chats and texts discussing the murder of Shayona’s parents, (2) they discussed the best method of murder and coverup, advice Murtaza took to heart and utilized, (3) defendant acted on his stated belief that hiring a hit man would be better than personally committing the murders, the circumstantial evidence of which is his contact with Kokorina and HARRY4REAL, and his appointment with an unidentified Russian that he counseled Murtaza to skip, and (4) on the basis of the unidentified hit man’s recommendation, defendant asked Murtaza to get photographs of Shayona’s family, something Murtaza did within 12 hours of the request. Finally, defendant met with Murtaza after Murtaza’s police interview and shortly before Murtaza left for the Phoenix Airport. The reasonable inference from this series of events, and defendant’s subsequent statement to the police, is defendant continued to aid, encourage and counsel Murtaza in his efforts to avoid prosecution. In short, the plan initially discussed by Murtaza and defendant is the one Murtaza followed. Thus, the evidence is more than sufficient to prove there was a conspiracy between defendant and Murtaza to kill the Dhanaks.

Defendant argues there was no evidence he had prior knowledge of Murtaza’s decision to commit the crimes himself, or to enlist the aid of Murphy, or even any knowledge that “Murtaza had finally ‘flipped’ to the point where he was actually going to commit the offenses.” However, “The law has been settled for more than a century that each member of a conspiracy is criminally responsible for the acts of fellow conspirators committed in furtherance of, and which follow as a natural and probable consequence of, the conspiracy, even though such acts were not intended by the conspirators as a part of their common unlawful design. [Citations]” (*People v. Guillen* (2014) 227 Cal.App.4th 934, 998.)

Defendant also argues the events of May 21 and 22 were “distinct from anything involving” him, relying on the month long gap between his last message with Murtaza and the murders. But, of course, “Conspiracy is an inchoate crime. [Citation.] It does not require the commission of the substantive offense that is the object of the conspiracy. [Citation.] “As an inchoate crime, conspiracy fixes the point of legal intervention at [the time of] agreement to commit a crime . . . .”” (*People v. Morante, supra*, 20 Cal.4th at pp. 416-417.) As such, defendant’s frequent, explicit, and damning communications with Murtaza establish his liability for the crimes at the time he agreed to help Murtaza kill the Dhanaks. Furthermore, it was not necessary for defendant to be present and personally participate in the crimes. (*Id.* at p. 417.)

Defendant next argues “there does not appear to be even a showing of a *corpus delicti*, apart from the pre-offense statements of intent evidenced in the statements attributed to [him and Murtaza] and some speculation.” Not so. The method of the murders and the burning of the house provide the slight corroboration necessary to surmount the corpus delicti rule. Defendant’s reliance on *People v. Powers-Monachello* (2010) 189 Cal.App.4th 400 is misplaced. In that case, the question was whether the corpus delicti rule was still viable following the passage of the 1982 “Right to Truth-in-Evidence” amendment to the California Constitution. (*Id.* at pp. 406-410.)

With respect to aiding and abetting, defendant argues there is “no evidence in the record to establish [he] ever agreed to the actual commission of the plot,” or “that any act committed by [him] in fact aided in the plan.” Again we disagree.

“The actual perpetrator must have whatever mental state is required for each crime charged. . . . An aider and abettor, on the other hand, must ‘act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.’ [Citation.]” (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) Furthermore, “Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the

evidence and reasonable inferences must be resolved in favor of the judgment.’ [Citation.]” (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

“‘Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.’ [Citation.]” (*People v. Campbell, supra*, 25 Cal.App.4th at p. 409.) In this situation, defendant’s conduct before and after the crimes establish his aiding and abetting liability. His absence from the scene matters little in light of the evidence that at a minimum he encouraged Murtaza to murder the Dhanaks with the requisite intent. Plus, based upon the circumstantial evidence it is reasonable to infer he assisted in Murtaza’s efforts to hire a hit man by contacting Kokorina, HARRY4REAL and the unidentified Russian, again leaving aside the Velasco testimony.

Defendant places great weight upon the fact that Murtaza ultimately recruited Murphy, and there is no evidence he played a role in this recruitment. However, even if defendant knew nothing of Murphy before he and Murtaza committed the crimes, the fact Murtaza ultimately relied on someone other than a Russian hit man makes little difference. He and Murtaza planned the murders, and he assisted Murtaza after they were committed by deflecting blame away from Murtaza. Thus, the evidence is sufficient to support the judgment under either prosecution theory.

## *2. The Prosecution Breached the Proffer Agreement.*

Defendant claims the prosecution breached the proffer agreement by asking Velasco about his hit man conversations with defendant, which in turn violated his federal and state constitutional rights to due process of law and against self-incrimination. We agree.

Penal Code section 1192.4 prohibits use of a withdrawn plea of guilty against a defendant. Evidence Code section 1153 also prohibits such use of a withdrawn plea, and prohibits use of an offer to plead guilty against a defendant. The purpose of these two statutes is to promote the public interest by encouraging the settlement of

criminal cases without the necessity of a trial. (*People v. Sirhan* (1972) 7 Cal.3d 710, 745, overruled on other grounds as stated in *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 593, fn. 7.) These exclusionary rules have been extended to encompass admissions, incidental or otherwise, made by a defendant during the course of bona fide plea negotiations. (*People v. Tanner* (1975) 45 Cal.App.3d 345, 351-352.)

The interpretation of plea, immunity and proffer agreements is governed by principles of contract law. (*United States v. Cantu* (5th Cir. 1999) 185 F.3d 298, 302.) Accordingly, a prosecutor cannot use a defendant's statement in violation of a promise not to do so. (*People v. Quartermain* (1997) 16 Cal.4th 600, 616-623.) Because a prosecutor's promise induces a defendant to waive his constitutional right to remain silent, fundamental fairness and constitutional due process require a prosecutor to strictly adhere to it. (*Id.* at p. 620.)

Recognizing these principles, there is no dispute the prosecution was required to honor the promises it made in the proffer agreement. Furthermore, the parties agree those promises extended to both use and derivative use of defendant's proffer statement. Thus, by the express terms of the proffer agreement and as a matter of due process, the prosecution was barred from using any evidence obtained directly or indirectly from defendant's proffer statement, in any prosecution of him.

Whether the prosecution breached the proffer agreement is a question of law which we review de novo. (*United States v. Saling* (5th Cir. 2000) 205 F.3d 764, 766.) In determining whether a breach occurred, we ask whether the conduct was consistent with the parties' reasonable understanding of the proffer agreement. (*United States v. Gonzalez* (5th Cir. 2002) 309 F.3d 882, 886.)

On appeal, defendant does not challenge Gundy's direct examination of Velasco, before the lunch recess on November 22, about his hit man conversations with Murtaza. Rather defendant contends Gundy's continued direct and redirect examination

of Velasco on November 30, about his hit man conversation with defendant, breached the proffer agreement.

In relevant part, on continued direct examination Gundy asked if defendant was in Murtaza's office in Van Nuys on many occasions when Velasco had discussions with Murtaza about finding a hit man. Velasco answered "yes."

Similarly, on redirect examination that same day, Gundy asked Velasco if he had told defendant that Velasco knew a guy who was interested in being a hit man because the guy was going to jail and needed the money. Velasco again said yes. Velasco also admitted lying about this before, and testified he did have a conversation with defendant about finding a hit man for Murtaza.

Accordingly, it appears Gundy's examination of Velasco about his hit man conversation with defendant breached the proffer agreement. The exception which permitted such use to rebut evidence offered on behalf of defendant in the first trial did not apply, because Velasco was called as a witness by the prosecution in the second trial.

The People maintain the prosecution did not breach the proffer agreement, because they were permitted to introduce evidence obtained from an independent source. (*United States v. Cantu, supra*, 185 F.3d at p. 302.) On this point, the People acknowledge they had the burden of proving by a preponderance of the evidence that the evidence used was derived from a legitimate source wholly independent of the proffer statement. (*Ibid.*; *Kastigar v. United States* (1972) 406 U.S. 441, 460.)

The People argue they met that burden because: (1) Velasco's testimony about his hit man conversations with Murtaza was based on his testimony in the first trial, (2) Velasco autonomously confessed to lying in the first trial, and (3) Velasco's testimony about his hit man conversations with defendant was elicited by Murphy's counsel, not the prosecution. We are not persuaded.

Velasco gave no such testimony in the first trial. To the contrary, in the first trial each time Gundy asked Velasco about a hit man conversation with defendant, Velasco responded he did not recall or did not remember.

As for Velasco's confession to lying in the first trial, we do not agree it was "autonomous" as the People contend. Rather the record reveals Velasco's confession was prompted by Gundy's use in the first and second trials of the specific information gleaned from defendant's proffer statement, such as Velasco's conversation with defendant about the guy who was going to jail and needed the money.

Similarly, Molfetta's cross-examination of Velasco about his hit man conversation with defendant was not derived from an independent source either. Molfetta's questions were based on defendant's proffer statement and on Gundy's direct examination. Even so, Murphy was not a party to the proffer agreement and Molfetta had a right to cross-examine Velasco, once he was called as a witness by the prosecution.

In sum, defendant received an explicit promise that his proffer statement would not be used against him in any prosecution. The People breached that promise by using defendant's proffer statement to examine Velasco and elicit testimony that defendant was present when Velasco had hit man conversations with Murtaza, and that Velasco had a conversation with defendant about finding a hit man.

As a result, defendant's due process rights were violated. (*People v. Quartermain, supra*, 16 Cal.4th at pp. 616-620.) "By the prosecution's use of his statement contrary to the agreement, defendant was made an unwilling witness against himself." (*Id.* at p. 621.)

Given the due process violation, we must decide "whether the error was harmless beyond a reasonable doubt—that is, whether it is clear beyond a reasonable doubt that use of the statement did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under this test, the appropriate inquiry is 'not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but

whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.’ [Citation.]” (*People v. Quartermain, supra*, 16 Cal.4th at pp. 616- 621.)

Defendant contends, “The evidence so elicited was extremely prejudicial, and provided the only direct evidence that [defendant] had inquired of anyone about arranging a hitman for Murtaza.” It is true the only direct evidence defendant assisted in Murtaza’s efforts to hire a hit man consisted of Velasco’s testimony about the conversation he had with defendant. The rest of the evidence linking defendant to efforts to hire a hit man was circumstantial, and was largely undisputed, including the evidence defendant contacted Kokorina, HARRY4REAL and the unidentified Russian.

The People correctly point out some of Velasco’s damaging testimony about his hit man conversation with defendant was elicited on cross-examination by Molfetta and McBride. But again, Molfetta’s cross-examination was based in part on Gundy’s direct examination. Also, once Velasco testified, McBride had no choice but to try and limit the prejudice to defendant by attacking Velasco’s credibility.

The prosecution extensively argued all of the circumstantial evidence against defendant to the jury. McBride argued there were other reasonable inferences to be drawn from the circumstantial evidence. The prosecution also argued defendant’s hit man conversation with Velasco showed defendant was part of the conspiracy. McBride responded only by arguing Velasco was not a credible witness.

On this record, we cannot say it is clear beyond a reasonable doubt that the prosecution’s use of defendant’s proffer statement to question Velasco did not contribute to the verdict, or that the verdict “was surely unattributable to the error.” (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Thus, we conclude the error was not harmless.

3. *The Court Abused Its Discretion by Denying Defendant’s Renewed Motion to Sever.*

Defendant also contends his federal and state constitutional rights to due process of law and against self-incrimination were violated when the court denied his renewed motion to sever. Once more, we agree.

Our Legislature has expressed a strong preference for joint trials. (Pen. Code, § 1098.) However, the court may ““order separate trials if, among other reasons, there is an incriminating confession by one defendant that implicates a codefendant, or if the defendants will present conflicting defenses.’ [Citations.] ‘Additionally, severance may be called for when “there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.”” [Citations.]” (*People v. Souza* (2012) 54 Cal.4th 90, 109.)

““We review a trial court’s denial of a severance motion for abuse of discretion based upon the facts as they appeared when the court ruled on the motion.’ [Citations.] ‘If we conclude the trial court abused its discretion, reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result at a separate trial” [Citations.] . . . ‘[H]owever, we may reverse a judgment only on a showing that joinder ““resulted in ‘gross unfairness” amounting to a denial of due process.”” [Citations.]” (*People v. Souza, supra*, 54 Cal.4th at p. 109.)

The possible denigration of defendant’s due process rights to limit the testimony of Velasco was recognized early on. As noted above, before the first trial defendant moved to sever, contending disclosure of his proffer statement and a joint trial would necessarily result in a breach of the proffer agreement. This motion was denied without prejudice. But the court warned Gundy about the potential for mid-trial disaster.

Before the second trial, the prosecution moved to again consolidate the cases against defendant and Murphy. That motion was granted. Nevertheless, the court invited defendant to renew his motion to sever if a basis for severance later appeared.

During the second trial, Gundy initially questioned Velasco about his hit man conversations with Murtaza. Then Velasco had a change of heart and was granted immunity. At that point McBride learned Gundy had given the proffer statement to

Molfetta. And Molfetta asserted the right to cross-examine Velasco about his hit man conversation with defendant, without regard to the proffer agreement.

Thus, the potential disaster foreseen when defendant's first motion to sever was denied came to pass in the middle of the second trial. The court was faced with an irreconcilable conflict between defendant's constitutional right to limit the testimony of Velasco, and Murphy's constitutional right to cross-examine Velasco. So McBride did what the court had previously invited him to do and renewed defendant's motion to sever.

At that point, the court found the conflict between defendant's constitutional rights and Murphy's constitutional rights did not rise to the level of a due process violation, because the court had ruled there was to be no explicit mention of the proffer agreement or defendant's proffer statement. Still that ruling left Molfetta free to use the contents of defendant's proffer statement to question Velasco.

The court also found there was an issue with respect to the timeliness of defendant's renewed motion to sever. But any responsibility for failing to foresee the conflict between the constitutional rights of defendant and Murphy rests solely with the prosecution, not defendant.

It was the prosecution's decision to consolidate the cases for trial, to call Velasco as a witness for the People, and to question him about his hit man conversations with Murtaza. And while perhaps no one could have foreseen Velasco's sudden concern about his exposure for untruthful testimony, it was the prosecution's decision to grant him immunity and continue. These decisions set the stage for the inevitable collision between the constitutional rights of defendant and Murphy.

Finally, defendant was certainly prejudiced by the court's denial of his renewed motion to sever, and that prejudice resulted in gross unfairness amounting to a denial of due process. As discussed above, when Gundy's direct examination of Velasco resumed under immunity, the proffer agreement was breached because Gundy asked if

defendant was in Murtaza's office on numerous occasions when Velasco had discussions with Murtaza about finding a hit man.

And then, on cross-examination by Molfetta, Velasco testified for the first time that he talked to defendant about finding a hit man, after Velasco had given Murtaza the name Jim. On redirect by Gundy, again in breach of the proffer agreement, Velasco testified he had a discussion with defendant about finding a hit man, and he told defendant about the guy in his neighborhood who could do it because he was going to jail and needed the money. None of this testimony could have been elicited from Velasco if the renewed motion to sever had been granted and defendant had been tried alone.

Under these circumstances, it is reasonably probable defendant would have obtained a more favorable result in a separate trial and reversal is required. Without the testimony from Velasco about his hit man conversation with defendant, the case against defendant in a separate trial would have been based almost entirely on the circumstantial evidence, much like the first trial which ended in a hung jury.

On the record before us, after considering the factors set out above, we conclude defendant has carried "his burden of making the clear showing of prejudice required to establish that the trial court abused its discretion" by denying defendant's renewed motion to sever. (*People v. Soper* (2009) 45 Cal.4th 759, 783.) In the end, the joint trial of defendant and Murphy resulted in "gross unfairness depriving the defendant of due process of law." (*Ibid.*)

**DISPOSITION**

The judgment is reversed.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.