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

THE PEOPLE,

Plaintiff and Respondent,

v.

CUONG QUOC TRAN et al.

Defendants and Appellants.

H038262  
(Santa Clara County  
Super. Ct. No. C1109478)

Kevin Tran was charged with conspiracy to commit murder (Penal Code, §§ 182, subd. (a)(1), 187, subd. (a); count 1), kidnapping for ransom (§ 209, subd. (a); count 2), and false imprisonment (§§ 236, 237; count 3).<sup>1</sup> Kevin's brother and co-defendant Cuong Quoc Tran was also charged in count 1 with conspiracy to commit murder.<sup>2</sup> Defendants were jointly tried and found guilty. Kevin challenges his convictions, arguing ineffective assistance of counsel, evidentiary error, and cumulative error. Cuong challenges his conviction, raising sufficiency of the evidence, instructional error, and denial of due process. Cuong also contends his 25-years-to-life sentence constitutes cruel and unusual punishment, the trial court abused its sentencing discretion, and trial counsel rendered ineffective assistance at his sentencing hearing.

<sup>1</sup> Unspecified statutory references are to the Penal Code.

<sup>2</sup> Because defendants share the same surname, we will use their first names to avoid confusion, intending no familiarity or disrespect.

For reasons we will explain, we will affirm the judgments.

## **I. TRIAL PROCEEDINGS**

### **A. THE PROSECUTION'S CASE**

#### **1. Kidnapping**

Peter Lam testified to receiving a phone call from Kevin at 5:00 a.m. on Sunday, January 9, 2011. Lam had spent Saturday evening with his friend Vu and had not slept, having played video games after returning home. Kevin was upset and wanted to speak with Lam because Vu was Kevin's girlfriend, and he suspected she and Lam were having a sexual relationship. Lam reluctantly agreed to meet Kevin at Vu's San Jose home. Kevin told Lam not to tell anyone where he was going or involve the police.

Kevin and Lam talked in Lam's car outside Vu's home. Kevin asked Lam to describe his relationship with Vu. He grabbed Lam's phone to read his text messages. Lam told Kevin he and Vu had met in class and were just friends.

Kevin had Lam knock on Vu's door. When she answered, Lam stepped back and she and Kevin spoke briefly. Kevin told Lam that everything was okay, and he asked Lam for a ride home. After some persistence on Kevin's part, Lam agreed. Once in Lam's car, Kevin insisted that Lam "in good faith" show him where he lived. To appease Kevin, Lam reluctantly agreed. But when Lam exited the freeway near his house, he turned around. All the while Kevin was calling Vu using Lam's phone. Suddenly, Kevin wielded a handgun, held it to Lam's head, and told him to drive to Highway 152. Kevin said "To show you I'm not fucking around," and he fired the gun into the back seat.

Kevin told Lam he should not have meddled in his relationship with Vu, and he gave Lam three options: (1) They were going to Los Angeles where Kevin was going to kill Lam; (2) if Lam struggled, Kevin would kill him immediately, and if the police were involved Lam's family also would be killed; or (3) if Lam cooperated, Kevin might spare his life in Los Angeles but take everything Lam owned, including his car. Scared for his

life and his family, and saddled with a broken leg from a recent injury, Lam decided to cooperate.

Kevin took apart Lam's cell phone and threw it in pieces from the car window. During their drive to Los Angeles, Kevin repeated the three options and periodically pulled out his gun. Kevin told Lam he should have stayed away from Vu, and said this could be avoided if Lam would give him \$10,000 cash within the next couple of hours. Lam told Kevin that was not possible.

They arrived in Orange County where Kevin checked his computer and asked Lam about a text message from Vu. But Lam had no way to retrieve his messages because Kevin had discarded Lam's phone. Before calling Vu from a payphone, Kevin told Lam that he would live or die depending on what she said. After speaking with Vu, Kevin told Lam that he was going to his gravesite. Kevin told Lam to drive to the desert, asking whether he preferred a fast or slow death. Kevin told Lam he would spare his life if Lam would kill Vu and her family. Lam refused. Lam offered to give Kevin more money within a less-stringent timeframe, but Kevin refused.

Kevin directed Lam to a dirt road off a remote exit near Bakersfield where Lam thought Kevin would kill him. Instead, Kevin had Lam make a U-turn and return to the freeway. They headed back to San Jose, but Kevin warned Lam that he was not done with him. They arrived at Vu's around 10:00 p.m. and switched to Kevin's car. Kevin started driving and Lam closed his eyes. Kevin pressed Lam about Vu. Lam insisted they were just friends, causing Kevin to punch Lam's face with a gun in his hand and hold the gun to his neck.

Kevin told Lam he would spare his life for \$15,000 and his car. Kevin drove to an ATM, but Lam told him they should wait until morning when the bank opened because he could not withdraw enough money from the ATM. He told Kevin he needed to call his sister for some of the money. Lam called his sister from a pay phone, told her he needed about \$5,000, he would call her back, and not to call the police. Kevin drove to a

golf course and told Lam that is where he would kill him and dispose of his body if he did not get the money. After Lam called his sister a second time, she called the police.

Lam fell asleep in Kevin's car. When morning came, Kevin again threatened him and his family if he did not get the money. Kevin and Lam entered the bank, and Lam asked the teller to withdraw all possible cash from his credit cards and checking account. The teller's computer screen indicated "customer's possibly kidnapped" and to call 911. Bank employees stalled the transaction until police arrived. Kevin left the bank to use the restroom in a neighboring building. Lam did not tell bank staff he had been kidnapped, nor did he disclose his kidnapping to police when they arrived. He did not know if Kevin had fled, and he was still scared for his family's safety.

Kevin was arrested and was interviewed by police. That interview was recorded and played to the jury. First he said Lam had a gun. Then he said he had a gun and used it to scare Lam, and it was discharged during a struggle. He said he threw the gun into the ocean, at which point the matter was settled, the two agreed to let bygones be bygones, and Lam had no reason to fear Kevin for the duration of the road trip. Kevin said he punched Lam with a fist when he first met him at Vu's. He denied pistol whipping Lam, claiming Lam's facial gash was the result of a fall before the two met. Kevin denied demanding money from Lam, and he repeatedly claimed that Lam had offered him money to redeem himself after learning that Vu was Kevin's girlfriend. But he also said that Lam had offered him money to get him out of the picture so Lam could have a chance with Vu.

No gun was recovered from Kevin, Lam, or either vehicle. A small hole, bullet, and spent casing were found in Lam's back seat, and a tactical knife was found under Kevin's passenger seat.

## **2. Murder For Hire**

### **a. Communications between Kevin and Officer Davis**

While Kevin was in custody, San Jose Police Officer Theodore Davis learned from a confidential jail informant that Kevin was soliciting Lam's murder for hire. Working undercover and using the name Richard, Davis visited Kevin in jail on March 10, 2011. They spoke through a glass barrier by phone, and that conversation was recorded. Davis told Kevin that his cousin had sent him, and he asked Kevin if he knew what he was talking about. Kevin nodded several times and winked at Davis. Davis spoke with Kevin about "dismantling a bike." He told Kevin he would need to break the bikes down and would need \$4,000 per bike and tools for the job. Kevin said that would not be a problem. Davis told Kevin he would need some money up front and hardware for the job. Kevin responded, "those Indian bikes are costly." Kevin instructed Davis to send him a letter and he would "fill in" the rest. Davis pressed a Facebook photograph of Lam, with "Peter Lam" written above the image, to the glass barrier and asked Kevin if that was a bike he wanted dismantled. Kevin said yes, that he did not have a need for it anymore. Not sure how many persons Kevin wanted killed, Davis asked Kevin where the other bike was. Kevin said that bike was with him.

Davis testified that he spoke to Kevin in code because he was portraying himself as a hit man, he knew the phone conversation could be recorded, and he did not want the investigation compromised or Lam's safety jeopardized. He used "dismantle" to mean kill or murder, and "take care of it" and "fix it up" to mean kill and dispose of. "Tools" and "hardware" meant guns, and the victim was referred to as a "bike." He acknowledged that he had formed an opinion before meeting Kevin that Kevin wanted to hire him to kill Lam, that the code words were his, not Kevin's, and that Kevin never used the words murder or kill during their visit.

Per Kevin's instruction, Davis wrote Kevin a letter on March 13. He asked if Kevin was sure he wanted Davis "to get rid of the one I showed you," and said he would "need \$400 up front and some tools for the job." Davis wrote, "Have your freind [*sic*] give me a call to get the tools and the mony [*sic*]. I will take care of the rest." He provided a return address and phone number. Kevin wrote that he was "getting all the information you need put together." Kevin continued: "I don't want to risk interception of everything on one letter. I will write back soon. I'm currently positioning all the assets and tools into one location. Please be patient a little, we'll work together to get things done." The postscript read: "Don't worry about writing back. They open mail here, I'll stay in contact until I ask for a confirmation. Thanks, and destroy this letter when you're done with it."

On April 28, Davis received a second letter from Kevin dated April 12. Kevin explained he was minimizing his communications to avoid interception, that an associate would be representing him, and that associate would be contacting Davis with information on the bikes needing work. The letter continued: "I'm letting you know I'm still serious, I was just having difficulties moving all my furniture and stuff and tools to stay in constant contact with you. You do not need to write back. Please contact with my associate and I'll receive word through him." The postscript read: "Also, get what you need from the letter and dispose of it with the envelop [*sic*] too."

**b. Communications between Cuong and Officer Davis**

On April 11, 2011, Kevin's brother Cuong, who lived in Orange County, sent Davis the first of nearly 100 text messages, saying, "Hey Richard, [¶]...[¶] I was asked to contact you from Kevin regarding dismantling a bike." Davis responded, "hey, let's do this. I need some money and some equipment up front." On April 13, Cuong texted Davis, asking if he had information on the bike, saying he did not know much about it. He sent a phone number and texted "hit me up" and "ask for Mike" (the name adopted

and used by Cuong). Davis called that number, reached a Big-O Tires store, and spoke with Cuong. Davis recorded the call.

Cuong told Davis that Kevin had told him to contact Davis regarding a bike, but that he (Cuong) did not know much about it. Davis told Cuong he needed \$400 and some “hardware for the bike, some tools.” Davis asked Cuong if he knew what Davis was talking about. Cuong said he did, he could come up with the money and the equipment, and it would be easier for him to get the equipment than Davis. Davis asked when Kevin wanted it done and Cuong said “the sooner the better I would imagine,” and to give him a week. Cuong told Davis not to talk with Vu, that she was Kevin’s ex and might want to keep the bike. Davis told Cuong to let him know exactly what kind of tools he was going to get to help Davis figure out what he could do. Davis used the same code words with Cuong that he used with Kevin to maintain the operation’s integrity and Lam’s safety.

In a follow-up text the next day, Davis explained that he needed 10 percent of the money, which was \$400 cash, and a gun, and that he was going to “get rid of this guy.” Davis used explicit language because Cuong had claimed only a “vague notion” during their phone call about what was going on, and Davis wanted to be sure Cuong knew what Kevin wanted done. Cuong responded: “What I meant by not knowing, I do not know much info about the bike, like whereabouts.” Davis responded: “[O]kay, cool, when can we meet so I can get the cash and the tool.” Davis asked for the size of the tool and whether there was a way Kevin wanted it dismantled. Cuong responded that he had a “.32 ratchet” and a “762 long ass breaker bar,” and he had no dismantling specifics. Davis understood those references to mean a .32 caliber handgun and a rifle. Davis asked for both, and Cuong replied: “[T]he ratchet was a sure one,” and “pending on the breaker bar.”

On April 19, Davis texted Cuong asking when he would be in town. Cuong responded “at least another week;” that he was trying to get money. On April 26, Davis texted Cuong asking when they could meet. Cuong responded, “[I]t’s still good;” he was

trying to get some money together, and thought he could come to San Jose that Sunday. Davis responded that day was not good for him and asked if the following Sunday would work. Cuong texted back “definitely, bud, we will be in touch.”

Cuong texted Davis on May 11, “Hey, Richard, I was supposed to be there this Sunday. Didn’t pan out.” He said he would be in San Jose on May 22. On May 18 Davis confirmed by text message that Cuong would be in San Jose on the 22d. On May 20, Cuong texted that he had the tools and the cash and that a friend would deliver them that Sunday. Davis called Cuong and told him he did not want another party involved. They agreed to meet Memorial Day weekend. Cuong told Davis, “everything’s ready,” he would be the one paying Davis, and “this is the last thing that I wanted to do, you know what I mean?” Shortly after that call, Davis texted Cuong trying to advance the meeting by one week. Over the next three days, several text messages were exchanged, and the meeting was rescheduled to early June.

Davis met Cuong at a Lowe’s parking lot in San Jose on June 5. Cuong told Davis he could not get the breaker bar, but he had the ratchet and the money. Cuong retrieved a shoe box and an envelope from his trunk and gave them to Davis. They shook hands, and Davis told Cuong he would let him know when the job was done. The shoe box contained a semiautomatic hand gun with a loaded magazine. The envelope contained \$400 cash and a typed letter. The letter informed Davis: “Here is all the info I have on the ‘bike’ [¶] -Name: Peter Lam.” The letter contained Lam’s physical description and personal information. It stated: “Dismantle as best you can. Trying to prevent the bike from testifying.”

Another round of text messages was exchanged on June 14 in an effort to lure Cuong to San Jose to be arrested. Davis texted Cuong that he could not dismantle the bike with the ratchet because it was too close, and that he needed the breaker bar to dismantle the bike in the right way. Cuong responded “crap. My tool supplier is actually locked up. That’s why it’s so hard to get the breaker bar the last time.” Davis texted that

he would let Cuong know when it was done. Cuong texted that he was “real sorry about the tools,” and Davis responded “no problem. I will handle it.” Davis asked Cuong to meet him half way to show him a picture of the bike, not wanting “to get rid of the wrong shit.” Cuong texted, “you don’t want to text the pic, huh?” Davis texted that he was 99 percent sure it was the right bike. Cuong responded that one of the kickstands on the bike was broken, and Davis replied that he would handle it. Cuong was arrested the next day in Orange County.

**c. Communication between defendants—Kevin’s letters to Cuong**

While in custody in March 2011, Kevin handwrote a series of letters to Cuong. Those letters were admitted into evidence by the prosecution with no objection from either defendant. In the first letter dated March 20, Kevin told Cuong four things: (1) “be strong through this”; (2) “believe in each and every word I say”; (3) “I’ll need all of you guys to pull through this ...”; and (4) “Number 4 will be discussed later at the end.” Kevin asked Cuong to persuade the Lam family to drop the charges. He concluded the letter: “PLEASE HELP US OUT!!! I’M SCARED I’LL LOSE WITHOUT YOU GUYS!!!” (Emphasis in original.) A copy of Davis’s March 13 letter to Kevin was attached, with the following written in Kevin’s handwriting at the top of that letter: “THIS WILL BE OPTION #4. SIMPLE TO UNDERSTAND. THROW AWAY AFTER READING. THANKS.” (Emphasis in original.)

In an April 10 letter, Kevin wrote “I just got off the phone with you when I started to write this letter.” Kevin referenced Davis’s letter. He provided a physical description of Lam and a detailed description of Lam’s car. He identified Lam’s neighborhood, high school, and junior college. He also identified as witnesses Lam’s sister and a 7-Eleven clerk. Kevin wrote, “So these are the key players for Richard. [¶] I believe this was what was trying to be said during our meet.”

In an April 12 letter Kevin wrote Cuong that Vu “knows the situation” and “had been informed to confirm [a] visual of Lam,” and attorney “RICHARD Wilson is hireable [*sic*] with your discretion.” (Emphasis in the original.) The letter continued, “If I stand trial and no one can testify against me, basically I win. From my understanding victim doesn’t have anything to say so jury can only listen to me. A private attorney can by [*sic*] time.” Kevin suggested that Cuong find Lam and have a “heart to heart” with Lam’s family to drop the charges. The letter concluded: “Richard is Super Spectacular as an attorney. He might be able to help. Look up online at cases and how they are won with plaintiffs and witnesses not wanting to testify. ... Take care and keep your head up. Richard has visual confirmation with me on primary basis. He may have tracked my case’s key already. Between me and him he has discovered a [F]acebook with a visual confirm. I will write to him and notify him of taking on my case as an attorney so he knows you will ... get a hold of him.”

Kevin wrote Cuong on April 23, referencing “Super Solarium” and asking Cuong to be selective on which attorney to hire because “[d]ifferent attorneys have different defense routes.” Kevin concluded: “[M]y hands are tied and I pretty much have to rely on outside members to make some decisions for me.”

In a May 15 letter, Kevin mentioned the advice of a jail inmate who received a good deal because of a witness’s lack of credibility. Kevin wrote, “we need to find a way to discredit the victim. Make him look like a really bad person. Find a weakness, aka, ‘kiddie stuff,’ weapons, drugs, anything that would put him in here.” Kevin explained how to locate Lam’s home using the internet. The letter concluded: “If things don’t look to [*sic*] favorable within the next month or two, I will take some irrational choices. I feel I really have a 20% chance of ‘getting out.’ I ‘found a hole’ in my case I might use. I have my son I want to get back too. So if options are out I will attempt my last choice. Just to let you know.”

In an undated letter postmarked June 1, Kevin laid out a plan to discredit Lam. The letter opened: “So this is the plan. It’s less chance of leaving a bad trail. It will be to discredit the main part of my case. The primary concern will have very nasty charges on hand. Drugs, firearm, possibly kiddie stuff. This is for leverage.” The letter continued: “The first step is already done and the next will require a G to get going. This is for supply purchasing. This is where it will get complicated. Because timing is crucial we will need to have the finances ready on the fly. You will be contacted to meet but I know you are of far distances. I do not know if you can make a drive up if you are contacted. Therefore, a drop might have to be made before hand. I will have the details cleared up before I see you.”

The last letter, dated June 6 (the day after Cuong delivered the money and gun to Davis) and postmarked June 9, explained that a friend will be contacting Cuong asking for a \$1,300 Western Union money gram, and that Cuong will need to send another money gram for \$1,000 once Lam is in custody.

## **B. CUONG’S CASE<sup>3</sup>**

### **1. Cuong’s Testimony**

Cuong is five years older than Kevin. They had a falling out over their mother’s care when Kevin moved from Orange County to San Jose in 2007. Thereafter, they saw each other only twice before Kevin’s kidnapping arrest—at their mother’s funeral in 2009 and at Thanksgiving in 2010. In January 2011, Cuong learned of Kevin’s arrest and reached out to him by letter. He wrote: “When I learned of what happened to you, I cried as I drove home from work. I still can’t believe all this is happening. ... I miss you and love you very much. You will always have a place in my heart. I will visit as often as I’m allowed to. [¶] I will help out as much as I can. [¶] You will always be loved. ... Take care, I love you brother.” Cuong visited Kevin in jail in February and

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<sup>3</sup> Kevin presented no evidence in his defense.

April. Those visits occurred by telephone through a glass barrier. The April 11 visit was recorded and admitted into evidence. Kevin called Cuong several times from jail. Cuong moved into evidence a series of recorded calls between March 19 and May 28. Cuong recalled speaking with Kevin in February, but no evidence was presented that those calls were recorded.

On March 19, Kevin told Cuong he had sent Vu a letter. He also was sending Cuong a letter but that letter would trail Vu's letter. Kevin asked Cuong to read his letter carefully, that "there's basically two last hopes on this." On March 21, Kevin told Cuong he would know what was going on after he got "your end" and Vu received "the other side of it," and to call Vu and tell her it would be "an easier joint effort." Kevin said that Vu would have a better understanding of the letter and Cuong understood that Vu would have information for him. On March 27, Kevin pressed Cuong that it was important that he speak with Vu.

On April 2, Cuong told Kevin that he and Vu had received their letters. Kevin said he sent Vu more information, and he conveyed that Vu would be able to explain his letter. Cuong testified that his letter—the March 20 letter—was not clear and he did not understand what he was supposed to do with the information in that letter. He thought that Davis's March 13 letter had no relevance to his letter, and he did not know why it was included. Cuong understood his letter to be asking for him to reach out to the Lam family so Lam would drop the kidnapping case.

On April 9, Kevin asked Cuong to confirm that Vu had received a packet containing three sealed envelopes. Cuong testified that he followed up with Vu regarding the envelopes. Cuong was trying to hire a private attorney for Kevin, and he testified that his comment to Kevin that he did not need anything from him referred to anything an attorney might need. On April 10 Cuong travelled to San Jose to visit Kevin and meet Vu. Kevin asked Cuong during that visit, "Anything else you need to know?" Cuong answered "[n]o." Cuong testified that he understood Kevin's question to be referencing

the March 20 letter and, although he said no, at the same time he mouthed “What” and hand gestured to Kevin to convey “What are you saying?”

That evening Cuong received a call from Kevin while he was in his motel room waiting for Vu. Kevin told Cuong that his letter to Vu was more detailed. Although Vu met Cuong with “a bundle of paperwork” and Cuong’s first words to Kevin when Kevin called again that night were “Hey, I got everything dude,” Cuong testified that Kevin’s letter to Vu was very apologetic, and nothing in the letter was directed at him. Cuong could not remember what Kevin meant on that call when Kevin said that he had written a letter “for both you guys to read.”

Cuong testified that Vu had a copy of Davis’s letter, and they initially thought it was a request to do motorcycle repair work. According to Cuong, Vu told him she had been exchanging phone calls and text messages with a man named Richard and that Kevin had asked her to drive Richard to Al’s house for firearms to plant on Lam. Cuong and Vu discussed the letter and together concluded that it related to that plan. Cuong then understood “tools” to mean “firearms,” and that “getting rid of the one I showed you” meant having Lam arrested. He texted Davis the next day to implement that plan.

Kevin called Cuong the following evening asking if he needed any particular information. Cuong responded “car” because he wanted information on where to plant the firearms. Cuong testified that Kevin’s comment on that call—that Vu would be able “to verify [¶]...[¶] [f]or visual purposes”—was a reference to Lam’s car.

## **2. Vu’s Testimony**

Vu testified that in January 2011 Kevin had been her boyfriend for almost four years and they were on the verge of breaking up. She had met Lam, whom she liked, and she took that new relationship “to another level.”

On April 10, Vu and Cuong read her letter from Kevin in the motel room. She did not keep the letter, but she remembered it being apologetic. She did not remember if Cuong showed her a letter or whether they compared letters. She did not recall getting a

letter from Kevin with a note from Richard (Officer Davis). She testified that Richard called her a couple of times in February. He told her that he owed Kevin a favor but he was not specific about what he wanted. After meeting with Cuong in the motel room and at Cuong's request, Vu texted Richard asking that he meet with Cuong.

### **3. Impeachment Evidence Regarding Officer Davis**

Officer Davis's ex-girlfriend testified regarding a fight she and Davis had in 2007 driving home from a bar after a night of heavy drinking. The two were arguing and Davis restrained her from getting out of the car. Davis held her arm and head. He also twisted her arm behind her back once they were home, and she called the police. Photographs showed bruising on her cheek.

## **C. JURY VERDICTS AND POST-VERDICT PROCEEDINGS**

The jury found defendants guilty on all counts, and found true a section 12022.53, subdivision (c) firearm enhancement as to count 2 and a section 12022.5, subdivision (a) firearm enhancement as to count 3. Kevin was sentenced to life with the possibility of parole on count 2 consecutive to 20 years for the firearm enhancement, consecutive to 25 years to life on count 1. On count 3, the court dismissed the firearm enhancement and imposed a concurrent two-year mid-term sentence. A section 12022.1 on-bail enhancement related to counts 2 and 3 was also dismissed. Cuong was sentenced to prison for 25 years to life, after the court denied his motion for a new trial, which included a cruel and unusual punishment challenge to a potential indeterminate life sentence.

## **II. DISCUSSION**

### **A. KEVIN'S CLAIMS**

#### **1. Ineffective Assistance for Failing to Assert Fifth Amendment Claim**

Kevin argues that he unambiguously invoked his right to counsel five times during his post-arrest interview, but instead of honoring those requests and ceasing questions,

police told Kevin he could not speak to his lawyer until he was taken to jail, and continued questioning him. Kevin submits that trial counsel's failure to move to suppress all statements made after he invoked his right to counsel constituted ineffective assistance of counsel.

During the interview police asked Kevin if they could see his cell phone to corroborate his story. Reluctant to turn over his phone because he said it contained communications related to his dependency case, Kevin asked, "Can I talk to my attorney – in general just before anything else is that possible?" The officer responded, "Um, well, not here. [¶]...[¶] But you'd be able to give him a call once you get over to jail and talk to him." The police said, "We'll come back and talk to you," Kevin asked, "[C]an I sit here and talk to you a little bit?" and the interview continued. Later, Kevin said, "The – the only (unintelligible) right now I would like to counsel with my attorney, you know what I mean? (Unintelligible) you know what I mean? Because I don't want to say the wrong things, I don't want to say –I mean you – you understand?" Police continued the interview. A short time later, Kevin asked, "Can I counsel with my lawyer at all?" and was again told he could do so at the jail. Kevin said, "All right," and the police explained, "we're not calling somebody out for you to come over here." Kevin said "all right" and proceeded to ask the police about potential charges. As the police broached the subject of a written apology, Kevin said "Yeah, I think to have this rather discuss m- with my lawyer if I get a chance to." The conversation continued, with the police explaining that they were not in a position to name Kevin's charges. The police left the room shortly after Kevin requested "the opportunity to make a phone call, at least let my lawyer know ahead of time."

"The privilege against self-incrimination provided by the Fifth Amendment of the federal Constitution is protected in 'inherently coercive' circumstances by the requirement that a suspect not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right ... to the presence of an attorney[.]"

(*People v. Cunningham* (2001) 25 Cal.4th 926, 992.) The suspect must clearly assert the right to counsel, after which interrogation must cease until counsel is made available unless the suspect initiates further communication. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484–485.)

Ineffective assistance of counsel requires showings of both deficient performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 215–216 (*Ledesma*)). The touchstone for the performance inquiry is “whether counsel’s assistance was reasonable considering all the circumstances.” (*Strickland*, at p. 688.) “When a defendant makes an ineffectiveness claim on appeal, the appellate court must look to see if the record contains any explanation for the challenged aspects of representation. If the record sheds no light on why counsel acted or failed to act in the manner challenged, ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation’ [citation], the case is affirmed [citation].” (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) To establish prejudice, the defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland*, at p. 694.)

We need not decide whether any of Kevin’s statements amounted to unequivocal invocations warranting suppression because Kevin has failed to show deficient performance or prejudice. Counsel’s closing argument reveals a tactical reason for allowing the interview into evidence: Although counsel acknowledged that Kevin had changed his story throughout the interview, she pressed the importance of Kevin telling the police at the end of the interview about an agreement he and Lam had to cover each other if police intervened. Kevin argued that the escapade was “a road trip, not a kidnapping,” because “Who has an agreement with the victim of a kidnapping?” In urging the jury to accept Kevin’s testament to an agreement with Lam, counsel noted that

Kevin's interview took place without an attorney. She told the jury that the absence of counsel was not improper, that it actually showed that the claimed agreement was not the result of a counseled defense. In counsel's closing argument, Kevin's professed agreement was critical to undermining Lam's kidnapping account. Kevin's insistence that he never demanded money from or threatened Lam, and that he threw the gun into the ocean, corroborated such agreement. By allowing the interview to be admitted into evidence, Kevin was able to present a defense without subjecting himself to cross-examination. That strategy reflects a tactical reason for waiving any Fifth Amendment objection to the Kevin's interview.

Nor can Kevin show that he was prejudiced by the interview because he cannot show that there is a reasonable probability that the results of the proceeding would have been different had the interview been suppressed. (*Strickland, supra*, 466 U.S. at p. 694.) Without the interview, the jury would have been left with Lam's testimony, Lam's sister's testimony, Kevin's letters to Cuong,<sup>4</sup> and physical evidence including a fresh cut on Lam's face and a bullet hole in the back seat of Lam's car, all unrefuted credible evidence pointing to Kevin's guilt.

## **2. Kevin's Credibility as a Non-Testifying Defendant**

Kevin filed a motion under Evidence Code section 352<sup>5</sup> to exclude evidence that he had sexual intercourse with Vu when she was a minor. Counsel explained at the in limine hearing that Kevin had no objection to evidence showing a sexual relationship with Vu, only the fact that she was under 18 during the relationship. The prosecutor

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<sup>4</sup> Kevin wrote "Truly I did the things I did out of a 'crime of passion.' I was jealous and did what I did." He also wrote "the fact is I still used a gun."

<sup>5</sup> Evidence Code section 352 provides the court with "discretion [to] exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

stated his intention not to introduce evidence about Vu's age unless Kevin took the stand. In that case, he intended to impeach Kevin with "all moral turpitude actions and conduct and arrests." The court was concerned that Vu's age would be referenced at some point, given the prosecution's intention to prove that Vu was Kevin's girlfriend and the reason Kevin approached Lam. The court ruled, "I don't think we need to dwell on the fact that the specific conduct was necessarily [a] violation of law. But insofar as one of the reasonable inferences is there's some sort of jealousy motive that started this thing, the fact that there's a relationship between the two seems important and the nature and depth of that relationship may be important to a reasonable juror, particularly if they have a child in common." The court observed, "[a]s long as we're trying not to emphasize that, if it comes out accidentally, I don't think the world is going to end," and it instructed the parties to "try not to discuss her age at the relevant periods."

The motion was revisited before the prosecution played Kevin's police interview, because Vu's age was mentioned on the recording. The prosecutor had redacted the beginning of the interview containing Kevin's biographical information, pending cases, and Vu's age, but he did not redact any interview content. Kevin maintained his objection to the references to Vu's age as prejudicial because they would show he had an ongoing sexual relationship with Vu when she was a minor, but he clarified he was not objecting to other portions of the interview including references to his dependency case and having been arrested. The prosecutor and Cuong argued that Kevin's sexual relationship with a minor was admissible to impeach Kevin in his capacity as a hearsay declarant. Cuong further pressed that Vu would be called as a witness, and her age was relevant to her credibility.

The court ruled that the redacted recording could be played with a limiting instruction, which it paraphrased as: "These facts, if believed, are not admitted for the purpose of determining defendant Kevin Tran's bad character. In other words, that he's more or less likely to have committed the crimes of which he's accused. The exception,

that these facts may be considered if the jury believes that they have an effect on the credibility or believability of the statements of Kevin Tran.” Kevin agreed that the proposed instruction was satisfactory.

Before playing the nearly two-hour recording, the court instructed the jury: “[I]t is possible that you will hear on the tape discussions, if you believe they’re true, that would suggest that Mr. Kevin Tran had or has at one point additional pending charges; that there is an ongoing action in juvenile or dependency court concerning a child of his and some description of some of the age [*sic*] of the other participants in the case, including Ms. Vu. [¶] If you believe those statements, you are instructed to not use them for the purpose of determining the character of Mr. Kevin Tran. In other words, those facts should not suggest to you that it is either more or less likely that he committed the crimes with which he’s charged. They’re simply other facts that may or may not exist. [¶] The one exception to that is that these facts, if you believe, may be used by you in determining what effect, if any, it might have on the believability or the credibility of the statements of Mr. Kevin Tran. You may not use the information of those other circumstances in determining whether or not he’s more likely to be guilty of the offenses but you may, if you wish, are entitled to use the other circumstances, if you believe them, in judging the believability or credibility of Mr. Kevin Tran’s statements.”

Later, during Cuong’s direct examination, the court overruled Kevin’s hearsay objection to Cuong’s statement that he had received a phone call from a bail bondsman in 2010 regarding Kevin. That exchange prompted the court to again caution the jury, “Ladies and gentlemen, you remember we talked a little bit about there having been another case involving Kevin Tran involving allegations of misconduct with a child? Remember, that is not offered to show that Kevin Tran is more or less likely to have committed the offenses he’s charged with. Don’t use it for that purpose at all. [¶] It helps explain the context, communications, and relationships between some of the people. You may use that to determine credibility or believability here in court.”

On appeal, Kevin argues that the trial court erred by “allowing the jury to consider [his] prior bad acts and bad character to assess his credibility ... because [he] had not placed his credibility at issue,” and that this error violated his due process and fair trial rights. Citing *People v. Fritz* (2007) 153 Cal.App.4th 949 (*Fritz*), Kevin contends that his credibility could not be impeached because he did not testify or otherwise put his credibility at issue. When questioned after a shoplifting arrest, the defendant in *Fritz* denied knowing that his girlfriend had been stealing from a store while he was waiting in a car outside. He then falsely volunteered that he had never shoplifted in the past. (*Id.* at p. 954.) The trial court admitted the false statement, together with prior shoplifting convictions, to show the defendant’s consciousness of guilt. (*Id.* at p. 955.) The *Fritz* court found error on three grounds: First, it concluded that the prosecution had no right to impeach the defendant because it was the party who had offered the defendant’s hearsay statement into evidence. (*Id.* at p. 956.) Second, *Fritz* concluded that the false statement was irrelevant and thus not subject to impeachment, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 748, prohibiting a party from “ ‘elicit[ing] otherwise irrelevant testimony on cross-examination merely for the purpose of contradicting it.’ ” (*Fritz*, at p. 956.) Third, *Fritz* rejected consciousness of guilt as a basis for collectively admitting the false statement and prior theft convictions. (*Id.* at pp. 957–960.)

*Fritz* is inapposite because there the prosecution was introducing an irrelevant statement made by the defendant in order to impeach that statement with the defendant’s prior convictions. In contrast here, the prosecution was not introducing the references to Vu’s age to impeach Kevin. Rather, it was offering Kevin’s interview with police in its entirety, which contained admissions against his interest and was probative of his guilt. The references to Vu’s age were incidental in the two-hour interview, and the trial court properly admonished the jury that her age could not be used to establish Kevin’s guilt. The court’s credibility exception was also a proper admonition. “A hearsay declarant is subject to the same credibility standards as if ‘the declarant [had] been a witness at the

trial.’ (Evid. Code, § 1202.)” (*People v. Tully* (2012) 54 Cal.4th 952, 1022.) Thus, the jury could consider any statements made by Kevin during his interview, including references to Vu’s age, in assessing his credibility.

We find no abuse of discretion in the court’s handling of Kevin’s in limine motion. (*People v. Edwards* (1991) 54 Cal.3d 787, 817 [evidentiary ruling reviewed for abuse of discretion].) Kevin did not advance his due process claim in the trial court. On appeal, he may nevertheless pursue the argument that an additional legal consequence of the asserted evidentiary error (admitting references to Vu’s age) rendered his trial so fundamentally unfair as to offend due process. (*People v. Partida* (2005) 37 Cal.4th 428, 438.) We reject that claim, as the prosecutor never suggested that Vu’s age factored into Kevin’s guilt, the references to her age were isolated, and the trial court specifically instructed the jury that it was not to consider Vu’s age to assess Kevin’s guilt.

### **3. Child Abuse References**

Kevin argues that child abuse references made during Cuong’s case-in-chief violated his due process and fair trial rights under the Sixth and Fourteenth Amendments to the United States Constitution. Kevin moved in limine to exclude “any evidence relating to a pending child abuse case.” (Supp CT 24:2-17) The court granted the motion and ordered the People (not Cuong) not to introduce evidence of child abuse or domestic violence without leave of court. The People adhered to that order. The court denied Kevin’s request that each objection posed in the in limine motion constitute a continuing objection to admission, instructing: “Let me decline. If you object, I can fix things. If there’s something objectionable, please object.”

#### **a. Vu’s testimony**

The jury heard several recorded conversations between Kevin and Vu during Vu’s testimony. Cuong’s attorney asked Vu to explain what Kevin meant during one of those conversations when he said that everyone in Southern California had “sold him out.” Vu explained “I think that was during the investigation with the child abuse case.” Kevin

objected to that answer as speculative, and it was stricken. Cuong's attorney then asked Vu: "[J]ust before these events in January, was there a different investigation regarding child abuse?" Vu answered yes, and the court overruled Kevin's relevancy objection to that response. Vu clarified that Kevin's reference to discovery packets pertained to the child abuse investigation.

The court's relevancy ruling during Vu's direct examination was not an abuse of discretion, nor did it have the additional legal consequence of violating Kevin's due process rights. (*People v. Partida, supra*, 37 Cal.4th at p. 439.) Vu was a key witness, having had dealings with Kevin, Cuong, and Davis, and her knowledge of and involvement in a plan to have Lam killed was probative of both Kevin's and Cuong's culpability. She was asked about the child abuse investigation to provide context to her recorded conversations with Kevin.

**b. Cuong's testimony**

During Cuong's direct examination, the court referenced "another case involving Kevin Tran involving allegations of misconduct with a child," and Cuong's attorney referred to a child abuse investigation after Cuong had testified about his involvement in Kevin's dependency case. Cuong testified that he understood Kevin's reference during a phone call to "my first case" to be to "the domestic violence on the child abuse case" and Kevin's reference to his "second case" to be to the kidnapping case. Cuong also testified that Kevin's reference in a letter to "the other case" was to the kidnapping case because the letter had already addressed "the alleged child abuse case."

Kevin acknowledges that he did not object to those references at trial, but he argues that he has preserved his claims for appeal because further relevancy objections would have been futile. We disagree with Kevin's futility argument in light of the court's in limine ruling prohibiting the prosecution from introducing evidence of child abuse absent leave of court, and the express instruction to object if something is objectionable. Accordingly, Kevin has forfeited his argument on appeal regarding child abuse references

during Cuong's direct examination. (*People v. Hines* (1997) 15 Cal.4th 997, 1041; *People v. Partida, supra*, 37 Cal.4th at p. 435.) But even if Kevin had preserved his objections to Cuong's direct examination, those child abuse references were relevant to assist the jury in understanding Kevin's letters and phone conversations with Cuong, and did not render his trial fundamentally unfair.

**c. Ineffective assistance of counsel**

Counsel was not ineffective for failing to object to the child abuse references in Cuong's case-in-chief under Evidence Code section 352, as Kevin argues. Counsel may have been of the view that the responses were no more inflammatory than the letters and conversations themselves,<sup>6</sup> and tactically chose to not call attention to the testimony with objections that would likely be overruled. Kevin also has failed to show prejudice. Given the compelling evidence against him on all counts, we see no reasonable probability of a more favorable outcome absent those references.

**4. Cuong's Testimony Regarding Family Dynamics**

Cuong was questioned on direct examination about the nature of his relationship with Kevin. Cuong explained, over Kevin's relevancy objection, that they had a disagreement regarding their mother's care in 2007 when Kevin left Orange County for San Jose. Cuong testified that his mother had suffered a series of strokes leaving her disabled and needing care. Kevin did not object to that testimony, but the court sustained Kevin's relevancy objections to a series of questions regarding their mother's care, commenting, "I think the jurors may know they had a disagreement and the falling out. Beyond that, I don't think that's helpful." Cuong explained that he and Kevin had stopped speaking to each other as the result of the 2007 disagreement, and they did not

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<sup>6</sup> Kevin's April 12 letter to Cuong spoke of losing the abuse and neglect charges, and needing a private attorney to help get the unlawful sexual intercourse charge dropped.

see each other again until their mother's funeral in August 2009. The court sustained a relevancy objection when Cuong was asked whether Kevin had visited his mother between 2007 and 2009, but allowed Cuong to testify, over relevancy and undue prejudice objections, that Kevin did not help with her care.

After the court sustained Kevin's relevancy objection to the question whether, in the days leading to her death, his mother had said anything to Cuong about his relationship with Kevin, a discussion was held outside the jury's presence. Cuong's attorney explained she wanted the jury to understand the complexity of the relationship between Kevin and Cuong, including their falling out and their mother's dying request for Cuong to forgive Kevin, to show Cuong's state of mind when Kevin asked for help. Kevin disagreed that family dynamics—who helped their mother, whether she was upset, who attended her funeral—had any bearing on whether Cuong entered into a conspiracy with Kevin, and would undermine Kevin's right to a fair trial.

The court agreed that Cuong's state of mind regarding his relationship with Kevin did not constitute a defense, but it ruled that it would “permit a limited amount of the nature of the bias that exists between the brothers.” It further noted that the jury was entitled to understand whether the brothers did or did not like each other, and that Cuong was free to explain his state of mind at any relevant time. The court cautioned that it would consider each question going forward to determine whether the details were inflammatory and not helpful to understanding the brothers' relationship, but that from what the jurors had heard so far, they could infer the brothers were not getting along very well. Counsel did not question Cuong further about his relationship with Kevin.

Kevin argues that evidence that he did not meet his filial obligations to his sick mother, leaving Cuong to shoulder her care, was irrelevant and unduly prejudicial. We find no abuse of discretion in the court's rulings. Cuong's relationship with his brother provided a context for his testimony, and was relevant to his own credibility. Nor was the testimony unduly prejudicial. Nearly all Kevin's objections were sustained, and the

answers Cuong did provide were not the sort of evidence that would cause the jury to evaluate the evidence improperly. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1091–1092.)

### **5. Officer Davis’s “Dismantle” Testimony**

Kevin argues that the court erred by allowing Officer Davis to testify as to his understanding of the term “dismantle” because his understanding of that term was irrelevant to Kevin’s state of mind. Kevin claims he repeatedly objected to that testimony, but he cites only Cuong’s trial court objections. Kevin filed two motions in limine to exclude evidence, but neither referenced Davis’s testimony. Nor did Kevin join in Cuong’s written motions addressing the issue, or voice any objection during the hearings on those motions or during Davis’s direct examination. By failing to object in the trial court, Kevin has waived this issue on appeal. (Evid. Code, § 353; *People v. Williams* (1997) 16 Cal.4th 153, 250 [failure to raise objection to admissibility of evidence on specific grounds results in waiver of claim on appeal].)

The claim also fails on the merits. The testimony provided context to Davis’s communications with both defendants. The prosecution’s theory of the case was that both defendants understood “dismantle” to mean “murder.” Davis’s understanding and use of the term “dismantle,” taken together with both defendants’ reactions and responses to his use of that word, and the absence of any request to clarify that term or correct Davis’s understanding of what Kevin wanted done to Lam, was relevant to show that both defendants shared Davis’s understanding that “dismantle” meant kill. Further, the jury was admonished that Davis could not speculate as to what Kevin did or did not understand.<sup>7</sup>

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<sup>7</sup> Kevin objected to Davis’s testimony as speculative that Kevin “knew what I was talking about,” when he responded to Davis’s request for money and hardware for the job with “those Indian motorcycles are costly.” The court struck that testimony and instructed the jury: “[U]ltimately you as the jurors have the total responsibility for

(Continued)

## 6. Cumulative Error

Based on our foregoing conclusions, we reject Kevin’s cumulative error claim.

### B. CUONG’S CLAIMS

#### 1. Insufficient Evidence

Cuong argues there was insufficient evidence that he formed a specific intent to kill Lam because the record contains no evidence that he understood the phrase “dismantling a bike” to be code for murdering Lam. According to Cuong, the record only showed that he intended to prevent Lam from testifying.

“When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) We will affirm a conviction if “ ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” [Citations.]” (*People v. Alvarez* (1996) 14 Cal.4th 155, 224, italics omitted.) “When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.” (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478–479.)

Conspiracy to commit murder requires both the specific intent to conspire and the specific intent to commit murder. (*People v. Cortez* (1998) 18 Cal.4th 1223, 1229.)

“ ‘[W]here the conspirators agree or conspire with specific intent to kill and commit an

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deciding what, if anything, was going on in either or both of the defendants’ minds in regard to the charges. [¶] The fact that the officer thinks or doesn’t think that they thought a certain thing is not helpful to you. So the officer normally is not permitted to testify about what someone else is thinking. So I will strike that last portion. It is ultimately a question for you guys.”

overt act in furtherance of such agreement, they are guilty of conspiracy to commit express malice murder.’ ” (*Ibid.*) Conspiracy is complete upon the commission of an overt act, and no subsequent action can exonerate the conspirator of that crime. (*People v. Sconce* (1991) 228 Cal.App.3d 693, 702.) Conspiracy to commit murder, including the specific intent to kill, may be proven by direct or circumstantial evidence. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1025.)

Viewed in a light most favorable to the jury’s verdict, substantial evidence supports the jury’s finding that Cuong agreed with Kevin to have Officer Davis kill Lam. Cuong conceded the evidence at trial showed Kevin conveyed his intent to kill Lam to Davis on March 11 when Davis visited Kevin in jail. Davis introduced the word “dismantle” at that meeting. On April 11, Cuong initiated contact with Davis, using the same code language Davis and Kevin had used. Cuong texted, “Hey Richard, I was asked to contact you about dismantling a bike.” That text shows an agreement between Kevin and Cuong to “dismantle” a bike, and the jury could infer that Cuong’s understanding of the word “dismantle” was the same as Kevin’s.

Cuong’s intent to kill is corroborated by his ongoing communications with Davis. After their April 13 phone call when Cuong told Davis that his knowledge about the bike was vague, Davis followed up with a blunt text: “[H]ey, you said you don’t know much about this, but I need \$400 cash and a gun. [¶]...[¶] When I get rid of this guy, I am gonna need the rest of the cash.” Cuong responded: “What I mean by not knowing, I do not know much info about the bike, like whereabouts.” Cuong understood the plan was for Davis to “get rid of” Lam, and he never indicated to Davis that he understood “get[ting] rid” of Lam to mean planting a firearm on him. Before contacting Davis, Cuong had received Kevin’s letter incorporating Davis’s letter as “Option 4,” and Davis’s letter also spoke about “get[ting] rid of” Lam, not planting evidence. Cuong delivered a handgun, loaded magazine, and \$400 to Davis. In a follow-up text message exchange, he expressed no confusion or ignorance when Davis asked him for a rifle because he could

not “dismantle” Lam at close range. The jury could have inferred from Cuong’s actions that he understood “dismantle” to mean “kill.”

Although Cuong testified that Vu had told him that Kevin asked her to drive Richard to Al’s house for firearms to plant on Lam, the jury could have rejected that testimony as not credible. Cuong also testified that nothing in Vu’s letter was directed at him, but his testimony squarely conflicted with Kevin’s repeated assurances that his letter to Vu would contain information for Cuong. Vu’s testimony did not corroborate Cuong’s claim about a plan involving Richard planting a gun. Finally, the two letters Kevin wrote to Cuong shortly before he delivered a gun, loaded magazine, and money to Davis on June 5, and a third letter Kevin wrote to Cuong on June 6 do not corroborate Cuong’s claim that Vu told him about a plan to have Richard plant firearms on Lam, given the letters’ failure to mention Richard, and Davis’s ignorance of any such plan. The jury could have found that plan unrelated to the plan to have Davis kill Lam, since it was later formulated and would have required Cuong to send two Western Union Moneygrams totaling \$2,300 to someone other than Davis.

## **2. The Joint Trial**

The trial court denied defendants’ pretrial motion to sever, ruling that a substantial amount of evidence would be cross-admissible, that the evidence in both cases was substantial, that neither case was unduly inflammatory, and that there was not a substantial danger of jury confusion. Cuong does not challenge that ruling. Instead, citing *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 281, recognizing a due process violation when a joint trial results in gross unfairness, Cuong presses a due process argument that the joint trial had a substantial prejudicial influence on the jury’s verdict. In Cuong’s view, the evidence supporting the kidnapping case showed Kevin as morally depraved, and the joinder created a prejudicial association with Kevin.

Cuong argues that the joint trial is analogous to the trials found prejudicial in *People v. Chambers* (1964) 231 Cal.App.2d 23 (*Chambers*) and *People v. Earle* (2009)

172 Cal.App.4th 372 (*Earle*). In *Chambers*, the defendant was jointly tried for an assault with a co-defendant who, at the same time, was tried for several other assaults against the same victim—an elderly man at a state-licensed home for the disabled. Inflammatory character evidence against the co-defendant, compounded by irrelevant evidence suggesting an intimate relationship between the co-defendants, focused moral responsibility on the defendant, who had recently purchased the care facility from the co-defendant. (*Chambers*, at pp. 27–28.) The defendant’s attorney, who also represented the co-defendant, waived evidentiary error by failing to object at trial, and the evidence against the defendant was thin. (*Id.* at pp. 25, 28.) The prosecution’s only witness suffered from memory lapse on cross-examination, and the defendant’s documented alibi showed him not present on the date the assault was alleged to have occurred. (*Id.* at p. 29.) Given the “unusual combination of commonplace elements, in part quite permissible, in part erroneous but not assignable as error in the absence of objection,” the court concluded that the defendant was convicted under circumstances depriving him of a fair trial. (*Id.* at p. 27.)

In *Earle*, *supra*, 172 Cal.App.4th at p. 378, the defendant was separately charged with indecent exposure and sexual assault. The cases were consolidated and the defendant’s motion to sever was denied, even though “the charges arose from entirely distinct and dissimilar incidents with no apparent historical connection to one another.” (*Ibid.*) The defendant tacitly conceded the indecent exposure charge, but he denied the assault charge based on victim misidentification (*id.* at pp. 378, 384), and the prosecution used the indecent exposure as modus operandi evidence to show that the defendant, as opposed to someone else, committed the assault. (*Id.* at p. 393.) *Earle* concluded that the consolidated trial was so grossly unfair as to deny the defendant due process. (*Id.* at p. 379.)

The record here does not present the prejudicial concerns shown in *Chambers* or *Earle*. Although evidence of Lam’s kidnapping was admitted in the joint trial, there was

no suggestion that Cuong was involved in or condoned Kevin's conduct. While the kidnapping arrest formed Kevin's motive to conspire to commit murder, the prosecution never suggested that the kidnapping established Cuong's guilt. The kidnapping evidence was not unduly inflammatory, placing no moral culpability on Cuong. The court also instructed the jury to "separately consider the evidence as it applies to each defendant," and to "decide each charge for each defendant separately." Cuong contends that instruction was insufficient because it was given at the close of evidence instead of during the presentation of the prosecution's kidnapping case. But the instruction was given at the appropriate time, before the jury started deliberating.

### **3. Jury Instructions**

Cuong argues that the trial court committed prejudicial error by failing to instruct the jury sua sponte on both attempted murder and conspiracy to commit attempted murder as lesser included offenses of conspiracy to commit murder. The trial court is required to instruct sua sponte on a lesser necessarily included offense when substantial evidence shows the defendant is guilty only of the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 118 (*Birks*).)

#### **a. Conspiracy to commit attempted murder**

Conspiracy to commit attempted murder is a "conclusive legal falsehood, ... a nonexistent offense." (*People v. Iniguez* (2002) 96 Cal.App.4th 75, 79.) "[T]he crime of attempted murder requires a specific intent to actually commit the murder, while the agreement underlying [a] conspiracy [to commit attempted murder] contemplate[s] no more than an ineffectual act. No one can simultaneously intend to do and not do the same act, here the actual commission of a murder." (*Ibid.*) Put differently, "one cannot conspire to *try* to commit a crime" because conspiracy requires an agreement to commit a crime, not an agreement to attempt to commit a crime. (*People v. Johnson* (2013) 57 Cal.4th 250, 264.) No error occurred by not instructing on this nonexistent offense.

**b. Attempted murder**

The elements of attempted murder are the specific intent to kill and a direct but ineffectual act toward accomplishing the intended killing. (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7.) Attempted murder may be a lesser included offense of conspiracy to commit murder if the accusatory pleading sets forth facts showing the elements of attempted murder so that the conspiracy cannot be committed without also committing attempted murder. (*Birks, supra*, 19 Cal.4th at p. 117.) The overt act supporting attempted murder “must go beyond mere preparation and show that the killer is putting his or her plan into action[.]” (*Decker*, at p. 8.) “ ‘The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.’ ” (*Ibid.*)

The information alleged six overt acts supporting the conspiracy charge. One of those acts alleged that Cuong met with and gave Officer Davis \$400, a semiautomatic hand gun, and detailed information about Lam. Even if we were to assume that the same overt act necessary to prove conspiracy went beyond mere preparation to kill Lam so as to constitute an attempted murder, we find no error in not instructing sua sponte on attempted murder. That is because substantial evidence did not support a finding that Cuong committed only the purported lesser offense of attempted murder but not the greater offense. (*Birks, supra*, 19 Cal.4th at p. 118.) The jury could not have found Cuong guilty of attempted murder but not conspiracy to commit murder, because the record contains no evidence that Cuong’s intent to kill Lam derived from anything other than his agreement to help execute Kevin’s murder for hire plan.

#### **4. Sentencing Issues**

##### **a. Cruel and unusual punishment**

Cuong argues that his 25-years-to-life sentence constitutes cruel and unusual punishment under the California and United States constitutions.<sup>8</sup> The Eighth Amendment to the United States Constitution prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime. (*Ewing v. California* (2003) 538 U.S. 11, 21.) Article I, section 17 of the California Constitution prohibits a punishment “grossly disproportionate to the offense as defined or as committed, and/or to the individual culpability of the offender.” (*People v. Dillon* (1983) 34 Cal.3d 441, 450 (*Dillon*)).) When making an as-applied cruel or unusual punishment challenge, as here, *Dillon* instructs that we consider the facts of the crime, including the defendant’s motive, the extent of his involvement, the consequences of his acts, and the manner in which the crime was committed. (*Id.* at p. 479.) We also examine the defendant’s individual culpability considering factors such as age, criminal history, personal characteristics, state of mind, and the circumstances existing at the time of the offense. (*Id.* at pp. 479, 481.) Ultimately, the test is “whether the punishment ‘shocks the conscience and offends fundamental notions of human dignity.’ ” (*Id.* at p. 487, fn. 38, quoting *In re Lynch* (1972) 8 Cal.3d 410, 424.)

In *Dillon*, the California Supreme Court reduced a 17-year-old’s first-degree felony murder conviction to second-degree murder. (*Dillon, supra*, 34 Cal.3d at p. 489.) The trial court had initially sentenced the minor to the Youth Authority, noting his immaturity, absence of a criminal record, and lack of dangerousness. (*Id.* at p. 486.) After the prosecution collaterally attacked that commitment based on statutory

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<sup>8</sup> The federal Constitution prohibits cruel and unusual punishment (U.S. Const., 8th Amend.), while California’s Constitution prohibits cruel or unusual punishment. (Cal. Const., art. I, § 17.)

ineligibility, the court, left with no alternative, resentenced the minor to life imprisonment in state prison. (*Id.* at p. 487.) *Dillon*'s proportionality analysis focused largely on the minor's intellectual, social, and emotional immaturity at the time he committed the murder, and the view held by both the trial court and the jury that life imprisonment was an excessive punishment in relation to the minor's true culpability. (*Id.* at pp. 483, 487.)

Cuong argues that his sentence is unconstitutional under *Dillon* because his culpability was minimal in that he was not the mastermind behind the murder-for-hire plot and would not have been involved but for his manipulative brother. He also refused to obtain a rifle for Davis, and Davis's involvement guaranteed that the murder would not actually occur. Cuong points to the absence of a criminal record, his good standing in the community, his role as a family provider, and the likelihood of not reoffending.

This case is notably different from *Dillon* in that Cuong was not an adolescent but a mature, capable adult who knowingly agreed to help his brother kill a witness. In denying Cuong's request for probation, the trial court observed that Cuong provided a stolen gun to someone he thought was a hit man to kill a witness, undermining the criminal justice system, and his participation—conspiring with a jail inmate and delivering money and an untraceable stolen weapon to a perceived hit man—demonstrated sophistication and active involvement in the conspiracy. Further, Cuong did not refuse to provide a rifle to Davis; he actually expressed dismay at his inability to satisfy Davis's request, explaining that his supplier was "locked up." A life sentence for Cuong, who took steps to sacrifice another man's life to thwart his brother's kidnapping prosecution, does not "shock[] the conscience and offend[] fundamental notions of human dignity." (*In re Lynch, supra*, 8 Cal.3d at p. 424.) It is not grossly disproportionate under either the United States or California constitutions.

**b. Sentencing discretion**

Cuong argues that his sentence should be reversed and his case remanded for a new sentencing hearing because the trial court was unaware of the full scope of its sentencing discretion. Specifically, he argues that the trial court was unaware of its authority under *People v. Bailey* (1983) 140 Cal.App.3d 828 (*Bailey*) to fashion a multi-year county jail sentence as a condition of probation, and that the court would have been receptive to a nine year sentence—the sentence proposed by the prosecution as part of a joint pre-trial plea offer. Although Cuong failed to preserve his claim by actually asking the trial court at sentencing to impose a multi-year county jail sentence as a condition of probation, we will address his argument in order to foreclose his claim that his trial counsel was ineffective for failing to make this request below.

In *Bailey*, the defendant pleaded no contest to auto theft and endangering the life or health of a child. (*Bailey, supra*, 140 Cal.App.3d at p. 830.) The defendant was sentenced to three years in prison, the midterm on the greater child endangerment offense. (*Ibid.*; former § 273a, subd. (1).) He had requested probation with a three-year county jail commitment, which the trial court had rejected because former section 19a (now section 19.2) limited county jail terms to one year.<sup>9</sup> (*Bailey*, at p. 830). The appellate court reversed, concluding that the defendant could waive the one-year statutory restriction on county jail time as a condition of probation “in those cases where a one-year term of local confinement seems inappropriately brief and a prison commitment unduly harsh,” reasoning that section 19a was enacted solely for the benefit of the defendant. (*Bailey*, at p. 831.) The *Bailey* court further observed “it may be an exceedingly rare instance in which the sentencing judge acts upon the waiver,” but that

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<sup>9</sup> In relevant part, section 19.2 provides: “In no case shall any person sentenced to confinement in a county or city jail ... as a condition of probation upon conviction of either a felony or a misdemeanor ... be committed for a period in excess of one year[.]” (§ 19.2.)

fact “cannot justify a denial of greater sentencing latitude in an appropriate case.” (*Id.* at p. 832.)

*Bailey* is distinguishable because in that case the defendant, facing a three-year prison commitment for child endangerment, was seeking to serve the same term in county jail instead of state prison. Here, in contrast, Cuong faced a 25-to-life sentence for conspiring to kill a witness (§§ 182, subd. (a)(1), 187, subd. (a)), and he is not asking to serve that indeterminate sentence locally. Instead, Cuong seeks an intermediate sentence consisting of an extended jail commitment imposed as a condition of probation. Defendant reads *Bailey* too broadly when he argues that the trial court has the “power to avoid the imposition of a life term and impose a lengthy determinate sentence as a condition of probation” *Bailey* specifically limited its application to cases in which “a one-year term of local confinement seems inappropriately brief and a prison commitment unduly harsh.” (*Bailey, supra*, 140 Cal.App.3d at p. 831.) Thus, *Bailey* applies, if at all, only where the trial court does not believe a state prison sentence is warranted, not in cases where the trial court simply believes that the length of punishment prescribed for the defendant’s crime is too long. *Bailey* would not allow the trial court in this case to impose a nine-year jail term as a condition of probation as an alternative to the 25-years-to-life sentence that is prescribed as the punishment for conspiring to kill a witness.

Moreover, the separation of powers doctrine precludes Cuong’s reading of *Bailey*. “[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is ‘properly within the province of legislatures, not courts.’ ” (*Harmelin v. Michigan* (1991) 501 U.S. 957, 998.) “Defining offenses and prescribing punishments (mandatory or alternative choices) are legislative functions designed to achieve legitimate legislative goals and objectives.” (*People v. Navarro* (1972) 7 Cal.3d 248, 258; *In re Lynch, supra*, 8 Cal.3d at p. 413.) Those legislatively mandated punishments “devolve a duty upon the Court authorized to pass sentence, to

determine and impose the punishment prescribed.” (§ 12.) Thus, the judicial branch can only impose sentences within the legislatively prescribed limits.

In light of the Legislature’s role in prescribing criminal punishment, *Bailey* cannot properly be read as authorizing a sentencing court to essentially disregard the Legislature’s sentencing laws, here 25-years-to-life for conspiracy to commit murder. Under the separation of powers doctrine, the prosecutor had the sole discretion to file charges against Cuong. (See *People v. Jerez* (1989) 208 Cal.App.3d 132, 137.) Thus, for Cuong to receive a sentence less than 25-years-to life after being found guilty of conspiracy to commit murder, the prosecutor would have had to file a new charge carrying a determinate sentence. Aware of the prosecutor’s function, the court encouraged a settlement, and Cuong’s sentencing expert acknowledged the sentence Cuong sought would require the prosecution to add charges. But the prosecution was unwilling to do so.

On this record, we find no abuse of sentencing discretion. The trial court understood its limited discretion to impose either probation or an indeterminate 25-years-to-life prison sentence. After considering all the factors for and against probation, the trial court found probation inappropriate: “When I weigh and balance all of these things against each other, having sat through trial, the jurors unanimously thought [Cuong] conspired to kill a witness. I agree with them. I don’t think conspiring to kill a witness is a probation-worthy crime.”

Finding no abuse of discretion, we necessarily reject Cuong’s ineffective assistance of counsel argument. Cuong’s attorney was not ineffective for failing to seek an unauthorized sentence in the trial court.

### III. DISPOSITION

The judgments are affirmed.<sup>10</sup>

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<sup>10</sup> We dispose of the petitions for writ of habeas corpus, filed by Kevin and Cuong during the pendency of their appeals, by separate orders filed this day.

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Grover, J.

**I CONCUR:**

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Bamattre-Manoukian, Acting P.J.

## **Mihara, J., Concurring in the Judgment.**

I agree with my colleagues that the trial court did not make its sentencing decision in ignorance of the full scope of its discretion and therefore did not abuse its discretion in denying Cuong Quoc Tran probation. Unlike my colleagues, I do not agree that we may properly distinguish *People v. Bailey* (1983) 140 Cal.App.3d 828 (*Bailey*). The holding in *Bailey* is incorrect, and we should so hold.

In *Bailey*, the trial court had rejected the defendant's request for probation with a three-year jail term as a condition of probation. The trial court concluded that a jail term of more than one year was "jurisdictionally barred" by the statute that prohibits a jail term of more than one year as a condition of felony probation. (*Bailey, supra*, 140 Cal.App.3d at p. 830.) The Fifth District Court of Appeal assigned no significance to the fact that the three-year jail term sought by the defendant was the *same length* as the authorized prison term. The Fifth District never mentioned that fact in the court's analysis of this issue. Instead, the Fifth District, in the very first paragraph of the opinion, stated that "[t]he primary issue is whether Penal Code section 19a, which places a one-year ceiling on county jail confinement as a condition of probation in felony cases, precludes a grant of probation conditioned upon county jail confinement *in excess of one year* when requested by defendant." (*Bailey*, at p. 830, italics added.) The Fifth District's analysis was devoted to the question whether the statutory prohibition could be "waived" by the defendant. (*Bailey*, at p. 831.) The court reasoned that the statutory prohibition was waivable because, in its view, the statutory prohibition was "designed exclusively for the defendant's protection." (*Ibid.*)

The fact that the jail term sought by the defendant in *Bailey* was the same length as the authorized prison term played no role in the Fifth District's analysis. Consequently, I cannot accept my colleagues' reliance on that fact as a ground on which to distinguish the holding in *Bailey*.

Nor is there any other ground for distinguishing the holding in *Bailey*. My colleagues assert that the Fifth District held in *Bailey* that the court's discretion to accept a waiver exists only where the court finds that *any time at all* in prison would be "unduly harsh." Nowhere in the Fifth District's decision did it say that its holding was limited in this respect. After the Fifth District reached the conclusion that the statutory prohibition could be waived by the defendant, it made the statement that my colleagues rely upon: "This [(the waiving of the statutory prohibition)] permits the sentencing court at least to consider whether the defendant merits a grant of probation in those cases where a one-year term of local confinement seems inappropriately brief and a prison commitment unduly harsh." (*Bailey, supra*, 140 Cal.App.3d at p. 831.) Nothing in this sentence purports to limit the trial court's power to accept a waiver of the statutory prohibition to those cases where the court finds that it would be "unduly harsh" for the defendant to spend *any time in prison*. Such a limitation would have undermined the court's holding. It seems unlikely that a trial court that believed that it would be "unduly harsh" for a defendant to spend *any time in prison* would have nevertheless imposed a prison term and rejected probation simply due to the one-year jail term limitation.

For these reasons, I cannot accept either of the grounds upon which my colleagues base their attempt to distinguish *Bailey*. The holding in *Bailey* was premised on the Fifth District's erroneous conclusion that the statutory prohibition could be waived by the defendant because it was "designed exclusively for the defendant's protection." (*Bailey, supra*, 140 Cal.App.3d at p. 831.)

An examination of the legislative history of the statutory prohibition demonstrates the invalidity of the Fifth District's assumption that it was "designed exclusively for the defendant's protection." The original version of former Penal Code

section 19a<sup>1</sup> read: “In no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year.” (Stats. 1933, ch. 848.) In 1935, the California Supreme Court held that the original version of former section 19a did not apply to jail terms imposed as a condition of felony probation, and it rejected a challenge by a defendant to a four-year term as a condition of felony probation. (*In re Marquez* (1935) 3 Cal.2d 625, 627-629.)

In 1957, section 19a was amended<sup>2</sup> to explicitly apply to a jail term imposed as a condition of probation.<sup>3</sup> The relevant statutory language has not been changed since 1957.<sup>4</sup> The Fifth District’s conclusion that the statutory prohibition was “designed

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<sup>1</sup> Subsequent statutory references are to the Penal Code.

<sup>2</sup> A 1941 amendment made no change to this language in the original version of the statute. (Stats. 1941, ch. 552.) The statute was amended in 1949 to read: “In no case shall any person sentenced to confinement in a county or city jail, *or in a county or joint county penal farm, road camp, work camp, or other county adult detention facility, or committed to the sheriff for placement in any such county adult detention facility*, on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year.” (Stats. 1949, ch. 1390, italics added.)

<sup>3</sup> “In no case shall any person sentenced to confinement in a county or city jail, or in a county or joint county penal farm, road camp, work camp, or other county adult detention facility, or committed to the sheriff for placement in any such county adult detention facility, on conviction of misdemeanor, *or as a condition of probation upon a conviction of either a felony or misdemeanor . . .* be committed for a period in excess of one year . . . .” (Stats. 1957, ch. 139, § 2, italics added.)

<sup>4</sup> The statute was renumbered as section 19.2 in 1989. It currently reads: “In no case shall any person sentenced to confinement in a county or city jail, or in a county or joint county penal farm, road camp, work camp, or other county adult detention facility, or committed to the sheriff for placement in any county adult detention facility, on conviction of a misdemeanor, or as a condition of probation upon conviction of either a felony or a misdemeanor, or upon commitment for civil contempt, or upon default in the payment of a fine upon conviction of either a felony or a misdemeanor, or for any reason except upon conviction of a crime that specifies a felony punishment pursuant to subdivision (h) of Section 1170 or a conviction of more than one offense when consecutive sentences have been imposed, be committed for a

(Continued)

solely for the defendant's benefit" was premised on the reasoning provided in the California Law Revision Commission's report that was the basis for the 1957 amendment. The report was based on input from judges, lawyers, law enforcement, and probation officers. (Recommendation and Study Relating to the Maximum Period of Confinement in County Jail (Oct. 1956) 1 Cal. Law Revision Com. Rep. (1957) p. A5.) It stated: "The reason universally given for this opinion was that in most counties there is no adequate provision for rehabilitation of prisoners in the county jail and that incarceration without a rehabilitation program for more than one year not only does not benefit the prisoner but is actually harmful to him. The commission has concluded and recommends that no prisoner should be kept in a county jail for more than one year for a single offense. The reason for this recommendation is not that penalties as such should be reduced but that when confinement for more than a year is deemed necessary such confinement should not be in a county jail which does not have adequate facilities for rehabilitation." (*Ibid.*)

Because the report premised the prohibition on the inadequacy of rehabilitation facilities and programs in jails, the Fifth District reasoned that the one-year limitation was "designed exclusively for the defendant's protection." (*Bailey, supra*, 140 Cal.App.3d at p. 831.) This unsupported reasoning was the source of the Fifth District's error. Rehabilitation does not "exclusively" benefit the criminal defendant. *Society* is the primary beneficiary of rehabilitation because the primary purpose of rehabilitation is to protect society by turning criminal offenders into law-abiding citizens. "A major purpose of rehabilitation is protection of the public." (*Diaz v. Watts* (1987) 189 Cal.App.3d 657, 665; see also *Pell v. Procunier* (1974) 417 U.S. 817, 823 ["since most offenders will eventually return to society, another paramount

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period in excess of one year; provided, however, that the time allowed on parole shall not be considered as a part of the period of confinement." (§ 19.2.)

objective of the corrections system is the rehabilitation of those committed to its custody.”].) The statutory prohibition was designed to benefit *society* by rehabilitating criminals. Hence, a criminal defendant does not have the right to waive the prohibition. As a result, a trial court has no power to accept a waiver of the statutory prohibition and may not impose a jail term of more than one year as a condition of felony probation.

The holding in *Bailey* is unsupported and erroneous. The trial court in this case did not fail to exercise discretion to accept a waiver of the statutory prohibition because the statutory prohibition cannot be waived.

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Mihara, J.