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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID REPLOGLE et al., Defendants and Appellants.	E053711 (Super.Ct.No. INF064492) OPINION

APPEAL from the Superior Court of Riverside County. David B. Downing, Judge. Affirmed with directions.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant David Replogle.

Arthur Martin, under appointment by the Court of Appeal, for Defendant and Appellant Miguel Adolfo Bustamante.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortino and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants and appellants David Replogle and Miguel Adolfo Bustamante (collectively, "defendants") of first degree murder (count 1; Pen. Code §§ 187, subd. (a), 189, 192, subd. (a)(1)),[1] conspiracy (count 2; § 182), two counts of first degree burglary (the victim's home) (counts 3 & 9; § 459), burglary (Pacific Western Bank) (count 4; § 459), grand theft (count 5; § 487), identity theft (count 7; § 530.5, subd. (a)), procurement or offering of a false or forged instrument (count 8; § 115), and receiving stolen property (count 10; § 496, subd. (a)).[2] The jury found true allegations the murder was intentional and carried out for financial gain (§ 190.2, subd. (a)(1)) and defendants committed two or more related felonies, a material element of which was fraud or embezzlement, which involved a pattern of related felony conduct resulting in the taking of more than $200,000 (§§ 186.11, subd. (a)(3), 12022.6, subd. (a)(2)). As against Bustamante, the jury found true an allegation the murder was intentional and committed while Bustamante was lying in wait. (§190.2, subd. (a)(15).) The trial court sentenced defendants to six years' incarceration plus life without parole.

On appeal, Replogle raises eight contentions: (1) the trial court erred in declining to strike the testimony of Arthur Jimenez because it lacked sufficient indicia of trustworthiness; (2) the court erred in allowing Bustamante's statements to Jimenez that

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Defendants Daniel Carlos Garcia and Kaushal Niroula were charged in the same information as Replogle and Bustamante. On the eve of trial, after voir dire had already begun, the court severed the cases of Garcia and Niroula. Appeal from their convictions is currently pending in this court, case No. E057519. The People dismissed count 6 midtrial as to defendants.

were not against Bustamante's penal interest; (3) the court erred in allowing Jimenez to testify he believed Bustamante's statements regarding the facts of the conspiracy were accurate; (4) the prosecution committed prejudicial *Brady*[3] error in failing to disclose Jimenez's status as a jail trustee prior to the completion of trial; (5) the court committed instructional error by allowing the jury to convict Replogle for murder and conspiracy to murder based on theft related target offenses under the natural and probable consequences doctrine; (6) the court committed error in instructing the jury with CALCRIM No. 225 (circumstantial evidence of intent) instead of CALCRIM No. 224 (the general instruction on circumstantial evidence); (7) the court erred in denying Replogle's motion for new trial on the grounds of juror misconduct; and (8) the abstract of judgment must be amended to reflect the court's striking of the booking fee and correction of the court's errors in calculating the parole revocation, court facilities, and security fees and fines. Bustamante contends a juror committed prejudicial misconduct during trial and the trial court prejudicially erred in its response to a jury question. Bustamante also joins Replogle's fourth and eighth arguments. Replogle joins Bustamante's first argument. We agree Replogle's abstract of judgment and the sentencing minute orders for both defendants must be modified to reflect the correct imposition and computation of fines and fees. In all other respects, we affirm the judgment.

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

FACTUAL AND PROCEDURAL HISTORY

The victim, Christopher Lambert, was a wealthy, gay, 75-year-old man living alone in a home in Palm Springs. He would meet younger men on the internet and fly them to his home. The victim met Danny Garcia on the internet in 2008.

An e-mail dated March 27, 2008, from Garcia's account to the victim read, in pertinent part, "'I am looking forward to coming down to see you next week.'" Another e-mail sent from Garcia's account to the victim's on the same date read, in relevant part, "'Thank you for your message and your generous offer to have me come down to visit. I am very sorry to hear about your partner.'"[4] Flight records reflect roundtrip tickets were purchased by the victim for Garcia, leaving on April 2, 2008, with a return trip on April 8, 2008; the return trip was upgraded on April 7, 2008, to first class. Garcia stayed at the victim's home.

The victim's personal assistant testified the morning after Garcia left, the victim could not log on to his Apple laptop computer. On April 2, 2008, Garcia used the victim's American Express card (AMEX) to purchase a first class flight back to San Francisco. Four burglaries occurred at the victim's home after Garcia stayed with him. Paintings, jewelry, a Tiffany clock, the victim's passport, and a number of other objects were taken. A list of property stolen on April 13, 2008, included three Alexander Calder paintings named "Thoughts," "Bubbles II," and "Mobil II," a number of Pablo Picasso stone lithographs, and other prints and personal items.

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[4] The victim had divorced his domestic partner Travis Hobbs in 2006 or 2007. Hobbs died on August 6, 2007, by drowning.

Susan Tenenbaum, an appraiser and dealer in antique and estate jewelry and art, testified Garcia first came to her business in April or May of 2008. On May 2, 2008, he brought in three paintings, "Thoughts," "Bubbles II," and "Mobile II," purportedly painted by Calder. On May 5, 2008, she gave him a partial payment of $15,000 on two of the paintings with the remainder to be paid upon authentication. On the same date Garcia brought in another object for sale.

An expert later expressed an opinion the Calder paintings were not authentic. Garcia promised to reimburse the $15,000 payment, but never did. On July 11, 2008, Tenenbaum purchased eight sterling silver soup bowls, six small silver salt cellars, and four silver pepper shakers from Garcia. Tenenbaum's husband testified that in November or December 2008, Garcia asked him to look at a Tiffany clock. He testified that on December 8, 2008, Garcia brought him a diamond, ruby, and sapphire ring requesting that he remove the gems.

Matthew Herip, Garcia's partner for two years, testified they lived together in San Francisco and Sacramento. Between April 2007 and 2009, Garcia never had a job. Herip knew Niroula, who lived with Russell Manning.[5] Herip never knew Niroula to have a job. Herip also knew Replogle. Garcia had a love/hate relationship with Replogle and Niroula. Garcia mentioned in the Spring of 2008 he was staying with someone in Palm Springs who owned a Rolls Royce. Garcia was a computer expert who hacked into all of

[5] Manning was also charged in the instant case and pled guilty to fraud.

Herip's accounts including his voicemail and e-mail. Garcia mentioned the victim sometime between November and December 2008.

Manning testified he met Niroula, a Nepalese immigrant, in August 2002. Niroula and Manning had previously been charged together in San Francisco Superior Court on September 1, 2007, with grand theft and theft by false pretenses. Manning later met Replogle, Garcia, and Bustamante. Bustamante and Niroula had dated at one time. Replogle put up the money for the bail of Niroula on August 26, 2008, in a case involving grand theft and financial elder abuse. Court records show Niroula listed Replogle's address as his own. Niroula was also released from custody from immigration court on November 3, 2008, the funds for which were also provided by Replogle.

In November 2008, Niroula and Replogle told Manning they wanted him to come to Palm Springs; they had a proposal for him. Manning met with them at a restaurant in Palm Springs the last week of November 2008. Replogle told Manning they wanted him to act as power of attorney (POA) for the victim.

Niroula informed Manning he had been raped by the victim and had contracted AIDS; he contacted the victim on the internet conveying his intent to sue the victim; the victim offered a generous settlement. Manning was told the victim was worth millions, but that the victim was in prison in Mexico. Niroula told him Replogle had flown to Puerto Vallarta to have the POA documents signed. Manning was told he would be required to sign some papers in return for which he would be paid very well. Niroula called him the next day to explain he would be required to close bank accounts on behalf

of the victim. The following week Manning saw a newspaper account reflecting the victim had gone missing.

On November 25, 2008, a call was placed from Replogle's phone to the victim's home number. On December 1, 2008, Replogle paid for tickets for himself and Niroula for a flight that left Oakland at 8:38 a.m. and arrived in Burbank at 9:43 a.m. He rented a car from Alamo at 9:54 a.m. at the airport in Burbank and returned it at 5:29 p.m.; 264 miles had been added to the vehicle. A trip to the Riviera Hotel in Palm Springs from Burbank and back would have taken 240 miles. Replogle booked two reservations on a return flight leaving Burbank at 7:01 p.m., arriving in Oakland at 8:04 p.m.

A number of phone calls were exchanged between Replogle's phone to one used by Niroula, for which Replogle was financially liable, between November 24 and December 4, 2008. Bustamante's phone exchanged 10 phone calls with Niroula's on December 1, 2008. Bustamante's phone exchanged four calls with Replogle's on that same date. On December 2, 2008, 10 calls were exchanged between Replogle's and Garcia's cell phones. Calls from Replogle's phone on December 2, 2008, initially originated from the San Francisco area, but later were initiated in Palm Springs. Bustamante placed a call to the Home Depot in Indio on December 2, 2008. On that same date, his phone exchanged 20 calls with Niroula's; Bustamante's phone exchanged six phone calls with Replogle's; Bustamante and Niroula's phones exchanged three calls on December 3, 2008.

Six calls were exchanged between Garcia's and Replogle's phones on December 3, 2008. Ten calls were exchanged between Bustamante's and Replogle's phones on

December 4, 2008; three were exchanged on December 5, 2008; one call was exchanged between them each on December 6, and 7, 2008.

Five calls were exchanged between Niroula's and Bustamante's phones on December 7, 2008; 20 calls were made between them on December 12, 2008; two calls were made between Replogle's phone and Bustamante's on December 12, 2008. Three calls were exchanged between Niroula and Bustamante's phones on December 21, 2008. Three calls were also exchanged between Bustamante and Replogle that day.

On December 4, 2008, the phone number for the cell phone used by Niroula was changed to (347) 933-2995, a New York area code. Bustamante's phone exchanged five calls with that number on December 4, 2008. Five calls were exchanged between Niroula's phone and Garcia's phone on December 5, 2008. Replogle and Garcia's cell phones exchanged at least 14 calls on December 5, 2008. Replogle's phone exchanged two phone calls with Garcia's on December 6, 2008, One phone call was exchanged between Bustamante's and Replogle's phone on that same date.[6]

[6] Many other phone calls were exchanged between the conspirators at later dates, but we have recited only those calls that occurred during the crucial period of the conspiracy to commit the burglary and murder of the victim. We also note discrepancies between the testimonies of the custodians of record for the phone companies and the phone records of the conspirators regarding the number of calls placed and the dates of those calls. Although the phone records would appear to be dispositive regarding these issues, we have also found discrepancies between those phone records as to the number of calls placed between the conspirators.

Craig McCarthy testified that in late 2008, he was living with Bustamante in Daly City (just south of San Francisco).[7] Michelle McCollum, Bustamante's girlfriend, later moved in with them. Bustamante introduced McCarthy to Niroula. Bustamante wanted to introduce McCarthy to Replogle, so Bustamante drove him to a building on Harrison Street in San Francisco about a week before Bustamante went to Palm Springs. Bustamante discussed with Replogle a trip he was going to take, which was being paid for by Replogle; Bustamante said he did not want to be stranded; Replogle told him not to worry about it; they mentioned that Niroula would need money too.

Bustamante asked McCarthy to come with him to Palm Springs as Bustamante had some business to take care of; Bustamante said they would hang out, and Bustamante would pay for it. He indicated the business involved he and Niroula obtaining money from someone they knew, and that it might get "'sticky'" and involve an altercation. Bustamante said he might need McCarthy to help move some things, but that he would be compensated.

Prior to leaving, while Bustamante was present, Niroula asked McCarthy if he had to could he kill a man. McCarthy responded that if he had to he could. Niroula said it should not come to that, but if it did, not to worry; McCarthy would be paid thousands of dollars for it. Niroula and Bustamante said Replogle was funding the trip.

The plan involved Replogle coming down afterward to obtain a POA and identification for Niroula from the victim so Replogle could assume the victim's identity

[7] McCarthy was also a codefendant charged in this case. He pled guilty before trial with a promised sentence of 25 years, 4 months in exchange for his testimony.

for financial gain. Originally, Niroula wanted to kidnap the victim and use the POA, but changed his mind and decided to get rid of the victim "and take over his identity." McCarthy testified he did not believe they were serious.

On December 2, 2008, about a week after meeting Replogle, McCarthy traveled to Palm Springs with Bustamante and Niroula; Niroula arranged for McCarthy's ticket. The flight manifest reflects Bustamante, Niroula, and McCarthy were on a flight departing at 4:50 p.m. from San Francisco and arriving in Palm Springs at 6:20 p.m. on December 2, 2008. Bustamante and Niroula stayed at the Hyatt Regency Suites in Palm Springs between December 2 and 6, 2008. After arriving in Palm Springs, Niroula met the victim in a bar and left with him; Niroula did not return to the hotel room that night.

Edward Mullikan, a friend of the victim, testified he had met Garcia at the victim's house in 2008. Sometime in November or December 2008, the victim told Mullikan and his handyman, Robert Taylor, he had been contacted by a lawyer who informed him he was to inherit some artwork from Florene May. The victim excitedly exclaimed to Taylor "'I'm rich again,' 'I'm rich again.'" The victim told Taylor he was going to meet the attorney at a restaurant for dinner.

Niroula gave Bustamante the victim's home address. Niroula had placed 11 calls to the victim's cell and home numbers between December 4 and 5, 2008. On December 4, 2008, Bustamante and McCarthy went to the victim's house.[8] Niroula told them they

[8] A server at the restaurant testified she saw the victim there with another man on December 4, 2008, between 6:00 and 9:30 p.m. Ogden Edwards, a co-owner of the

[footnote continued on next page]

could enter the victim's garage through an unlocked window; they did. They were then supposed to kill the victim with objects found in the garage when the victim arrived home. McCarthy armed himself with a screwdriver. Bustamante armed himself with what appeared to be a blade from a hedge clipper. They hid in the garage.

McCarthy told Bustamante he could not kill the victim. The victim came home in a gray convertible Mercedes. He exited the vehicle and went into his home. Bustamante and McCarthy returned to their hotel. Niroula met them in the lobby and wanted to know what had happened. He was upset when he discovered they had not killed the victim; he said they had to try again.

The next day, the victim told Taylor that the attorney he met the night before was cute and he would be meeting him again that night at the victim's home. The next morning, December 5, 2005, Bustamante told McCarthy they were going to try to kill the victim again that evening; Niroula was going to be at the victim's home and set it up so they could enter the home and kill him. They went to the victim's house that evening and came through the side gate. Bustamante and Niroula were communicating via text messaging. Niroula informed Bustamante via text message he had disabled the alarm and opened the door for them. However, Niroula had forgotten to unlock the screen door. Niroula called Bustamante to ask why they had not come in yet; Bustamante told him the door was locked; Niroula came and unlocked the screen door and let them in.

[footnote continued from previous page]
restaurant who had been friends with the victim for 28 years testified the victim came into the restaurant that night with another man to discuss an inheritance.

Bustamante and McCarthy waited in the kitchen for the victim. They each grabbed a knife from a cutting block. The victim walked in; McCarthy grabbed him and pulled him further into the kitchen. Bustamante stabbed the victim in the back of the head; the victim screamed out in pain. The tip of Bustamante's knife broke off so he grabbed another knife and repeatedly stabbed the victim. The victim curled up in a fetal position on the floor making moaning and gurgling sounds.

Niroula came into the kitchen and told McCarthy to go through the victim's pockets for identification cards; McCarthy did so, finding a money clip with cards that he gave to Niroula. Niroula said he needed the identification cards so that he could get a check to get paid.

Niroula gave them towels, which they used to clean the blood along with solutions they found under the sink; Niroula later put the towels in the washing machine. Niroula brought some sheets and blankets from the bedroom in which to put the victim. McCarthy and Bustamante picked up the victim, put him in a blanket, rolled him up, carried him out, and put him in the trunk of the victim's Mercedes. Niroula placed the victim's dog in the backseat; he also put the towels and knives in a bag in the car. Bustamante drove them all back to their hotel in the victim's Mercedes.

Niroula exited the car and told them he was flying back to San Francisco that night. He said Replogle would "take care of the money." A woman showed up to give Niroula a ride to the airport. He told McCarthy and Bustamante to drive the victim's car back home. They brought the victim's dog with them.

They discussed burying the victim's body on the way home. On December 6, 2008, a call was placed from Bustamante's phone to a Home Depot in South Fontana. They stopped at Home Depot and purchased a shovel. Bustamante drove them to a motel in Fontana.[9] At some point after leaving the motel, Bustamante pulled over in a gravelly area where they dug a hole and buried the victim. They then headed back to their apartment.

They kept the victim's dog for approximately two weeks. They told McCollum it was McCarthy's girlfriend's dog. They eventually gave the dog to Bustamante's acquaintance. They told McCollum the Mercedes also belonged to McCarthy's girlfriend. They all rode in it.

On December 11, 2008, Glenn Turner, a mobile notary working for Advanced Mobile Notary, received a call at 4:00 a.m. from Niroula requesting an urgent notarization. He met Niroula at a hotel in San Francisco called Club Quarters. Niroula acted as the administrative assistant for a man to whom Turner was introduced as the victim. The victim was not the man to whom he was introduced; rather, Replogle was that man. Turner checked the driver's license presented and notarized a "'Signature Affidavit,'" keeping notes of the transaction in his notary journal.

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[9] Michael Wang, the manager of the motel, testified that on December 5, 2008, at 9:56 p.m., a Craig McCarthy registered and checked in at the hotel. McCarthy listed the license plate number of the vehicle he was driving as 57W2545. The license plate number of the victim's Mercedes was 5ZWZ335. Wang testified the hotel personnel do not normally enforce the policy of having guests list their vehicle's license plate numbers because guests cannot usually remember them.

Niroula opened a bank account with $100 at Wells Fargo in Nevada as sole proprietor of "Lambert Studios." Manning testified Niroula asked him to go to Pacific Western Bank (PWB) to pick up a POA form, which he did. He sent the POA form via FedEx to Replogle upon Niroula's instructions. On December 11, 2008, Manning went to PWB with Niroula and signed the POA. They were informed by a banker the victim's account had a balance of $225,000. Niroula called "David," whom Manning believed to be Replogle, to inform him of the balance. "David" told Niroula to have $185,000 transferred to Niroula's Wells Fargo account in San Francisco. The address listed on the account was Replogle's.

Manning signed the paperwork for the transfer.[10] He wrote a check to himself for $5,000 from the victim's account. On December 12, 2008, Turner received another call from Niroula around 11:30 a.m. asking him to meet Niroula at the same location. He met Niroula and Replogle there around 4:30 p.m. Turner notarized a general durable POA, a Wells Fargo Special POA, a special POA for Charles Schwab bank accounts, and a Bank of America bank account special POA—all with respect to the victim. For a POA Turner is required to take a thumbprint, so he took a thumbprint from Replogle.[11]

Upon Niroula's direction, Manning returned to the bank the next day and closed the PWB account. He had the remainder of the funds, $15,509.43, drawn on a cashier's

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[10] The victim's signature on the account did not match Manning's. This is the subject of another suit between Jenkins, as conservator for the victim's estate, and PWB.

[11] Turner was being sued for not taking a thumbprint for the POA he notarized the day before. A forensic technician compared Replogle's thumbprint to that taken by Turner in his notary journal; they matched.

check, which he sent via FedEx to Replogle's office in San Francisco; the check was made payable to Lambert Studios. Before being deposited, it was endorsed by Niroula. The reason left for closing the account was "'Customer ill. Moved to San Francisco."

Niroula subsequently deposited a total of $210,000 into the Lambert Studios account. During the same month he withdrew a total of $199,630. Niroula deposited $30,000 in Bustamante's account on December 12, 2008. On December 18, 2008, he deposited $5,000 into Replogle's account. Niroula took Manning in a limousine to San Jose on December 12, 2008, where he signed papers listing the victim's home for sale.

Mullikan testified he had not seen the victim since December 5, 2008. Prior to that he would see the victim every day or every other day. Ogden Edwards testified he received telephone messages from the victim at 11:00 a.m. and 4:00 p.m. on December 5, 2008. Taylor testified the last time he saw the victim was on December 5, 2008.

The victim had discussed attending the Festival of Lights that weekend on either December 5, or 6, 2008, with Mullikan and their mutual friend Cody. When the victim did not show, they went to his home; the victim had given Mullikan a key to his house; they observed a pack of cigarettes, Scotch, a cocktail, and cheese and crackers on the coffee table. The victim did not smoke, so they believed he might have had a date over and left.

Mullikan was unable to reach the victim the next day; Cody and he returned to the home and found the coffee table wiped clean. Mullikan reported the victim missing to the Palm Springs Police Department. Taylor showed up for work at the victim's house on December 8, 2008, but no one answered the door. Sergeant Frank Browning was

assigned on December 12, 2008, to investigate. He found the victim's mailbox overfilled and his Christmas lights still on. Browning entered the home and found the victim's Mercedes was missing.

On December 20, 2008, Gary Hirsch, a mobile notary public who worked with Turner for Advanced Mobile Notary, received a call asking if he could provide notary services the next day on short notice. Any person who calls the main line is forwarded either to him or Turner. On December 21, 2008, Hirsch received a call around 9:30 a.m. asking him to come to a location within five to 10 minutes. Hirsch responded to the address and parked, but could not locate any person who had requested a notary, so he returned home. Thirty minutes to one hour later, at around 11:30 a.m., Hirsch received a call from a "hysterical" female requesting an urgent notary for her dying grandmother. Hirsch responded to the address and noticed two men in a Mercedes he had parked behind; the driver was slouched and covering his face. Hirsch exited his vehicle and responded to the address provided by the caller; however, he was informed that no one by the name of the caller lived there.

An individual whom Hirsch had seen loitering nearby earlier grabbed Hirsch's backpack, which contained his notary journal, and demanded it from him. The man pulled Hirsch down the steps and dragged him past two residences toward the Mercedes. Eventually, the man let go. The police were called; they arrived and walked Hirsch to his car. The Mercedes was gone. Detective Simon Min obtained a search warrant for the phone records of the two calls received by Hirsch for notary services; one of them was

registered to a Lisa Miller; Bustamante had made at least nine outgoing and received four incoming phone calls from Lisa Miller's number between December 20, and 21, 2008.

Sharon La Fountain, an escrow officer with Chicago Title Company in 2008, testified she was acquainted with Niroula since at least 2006. She had also met Bustamante in 2007. La Fountain's husband, Mark Evans, was a realtor. In December 2008, Niroula came to their home with Replogle; Niroula introduced Replogle as his attorney. They asked whether an unsigned POA Replogle presented to them would be sufficient to sell the victim's property.

Herip testified Garcia purchased large quantities of items in December 2008; he saw Garcia with a large collection of silver, Louis Vuitton bags, a tea set, a sculpture, Tiffany clocks, and fur coats. The fur coats had the victim's name on them. A laptop was signed-on as "'Cliff Lambert's airport.'" Garcia told Herip that Niroula had posed as an attorney to correct a mistake regarding the inheritance of paintings, to obtain access to the victim's home. Garcia stayed at the Hyatt Regency Suites in Palm Springs from December 14, through 16, 2008.

On December 11, 2008, Niroula flew from San Francisco to Los Angeles, and from Los Angeles to Palm Springs. Bustamante told McCarthy they would be paid after Niroula returned from New York. Between Christmas and New Year's Day, McCarthy received an envelope from Bustamante containing between $4,000 and $5,000. Bustamante received a citation for speeding and lack of registration on December 15, 2008, while driving the victim's Mercedes; he failed to make the mandatory appearance.

Sometime between December 13, and 15, 2008, La Fountain and Evans saw Niroula and Replogle again; they had obtained permission to bring Niroula and Replogle to a Christmas party to which they were going. On the way home from the party, they further discussed the POA to the victim's property; Niroula wanted to list the property and have it sold as quickly as possible. The following week, Niroula and Replogle faxed La Fountain a copy of the executed version of the POA. Niroula's urgency regarding the matter and the fact that he wished to convey the property via POA, instead of court order, raised her suspicions about the transaction.

On December 15, 2008, Garcia and Niroula flew from Palm Springs to Sacramento utilizing the victim's home phone number on the flight reservations. They returned to Palm Springs from San Francisco that evening. The next day, Garcia flew back to Sacramento from Los Angeles.

La Fountain conducted an internet search of the victim's name and found he was missing; she informed Evans. Evans called the police. Browning called La Fountain; she sent him a copy of the POA. At Browning's request, La Fountain and Evans continued to accommodate Niroula's requests and kept Browning informed of the process. Niroula was attempting to get the title transferred from Manning's name to his own. La Fountain also faxed a copy of the POA to the victim's conservatorship attorney in Palm Springs, Martina Ravicz. La Fountain attempted to stall the sale of the home so Ravicz could obtain court orders negating any POAs or deeds regarding the victim's property.

Ravicz testified she last had contact with the victim on November 19, 2008, regarding estate planning. On December 19, 2008, she was contacted by a friend and

neighbor of the victim's who said the victim had been reported missing under suspicious circumstances and asked that she call the police. Ravicz called the police. On December 29, 2008, she received a call informing her of an attempted sale of the victim's home. She drafted and filed a petition for conservatorship of a missing person.

Browning recruited Min on December 29, 2008, when Evans and La Fountain informed him someone was trying to sell the victim's property. La Fountain faxed him a copy of the notarized grant deed. Browning observed Turner was the notary; he called Turner in San Francisco. Turner informed Browning of the attempted robbery of Hirsh.

On December 26, 2008, Bustamante told McCarthy he needed to get a book back from a person who had helped obtain a POA. Bustamante planned on calling the person and having another person snatch the book from him. The man hired to do so exited the Mercedes and tried to take the book, but could not get it, so he ran off. He drove off in the Mercedes leaving Bustamante and McCarthy at the scene. They walked away and caught up with the Mercedes a few blocks away.

On December 30, 2008, the court granted Ravicz's petition and Kenneth Jenkins became the conservator of the victim's estate with power to suspend any attempted transfer of the home. Any attempted grant deed afterward would not be a valid transfer of title, but would cloud title requiring the filing of a quiet title action. The victim's total worth as of December 30, 2008, was $944,425.46. Jenkins found payments from the victim's Charles Schwab equity line of credit to several of his credit card accounts; Jenkins testified by making the payments, it allowed the cards to be used continually.

On January 4, 2009, Manning flew to San Francisco; his plane fare was paid by Replogle. Manning took a cab to Replogle's office; Niroula and Replogle took him to a hotel room paid for by Niroula. On January 5, 2009, Manning signed a grant deed for the victim's home to Niroula. A grant deed from Niroula to Jay Shah was also signed that day. Both deeds were recorded on January 6, 2009.

On January 5, 2009, after discovering the grant deed to the victim's property, Ravicz filed a quiet title action; Niroula was the defendant in the suit. On September 24, 2010, Jenkins "gained quiet title back" as conservator for the victim's estate. Also on January 5, 2009, Jenkins lodged certified copies of letters of the conservatorship with the county recorder's office in order to halt any transfer of the victim's assets.

On January 7, 2009, Ravicz received a phone call from the victim's neighbor informing her a U-Haul truck was parked in front of the victim's home. She called and informed Jenkins and Browning. On the way to the victim's home, Browning pulled over a U-Haul truck driven by Jose Bran. Bran informed him he had been hired by someone named Miguel to move items out of a residence. Browning cited Bran for driving without a driver's license and released him; he obtained Bran's thumbprint. Officers arrived on the scene and found Bustamante, whom they detained. Bustamante gave police consent to search his person; a key and iPhone were found; he gave them his iPhone password; police additionally obtained a warrant to search the phone. Replogle was listed in Bustamante's contacts.

Jenkins arrived at the victim's home and gave police permission to search it. Officers used the key found in Bustamante's pocket to open the door to the victim's

home. The victim's personal property was piled in the laundry room adjacent to the garage. Bustamante was arrested for burglary.

The general manager of U-Haul in Cathedral City testified Bustamante had reserved a U-Haul truck on January 7, 2009. The general manager of Motel 6 in Palm Springs testified a reservation had been made by a "Miguewl" [*sic*] Deleon for room 120, with a check-in date of January 6, 2009, and a check-out date of January 8, 2009, using Bustamante's driver's license number. Bran later showed up at the Motel 6.

Police responded to room 120 of the Motel 6 in Palm Springs on the evening of January 7, 2009. There was property inside that appeared to belong to the victim, including Louis Vuitton luggage, some embossed with the victim's initials; statues; sheets; a flask; figurines; cards with the victim's name including his driver's license; men's shoes; the pink slip to the victim's Rolls Royce's; the keys to the Rolls Royce; DMV paperwork for title to the victim's Mercedes with an address in San Francisco; the victim's will; a grant deed; checks from the victim's Bank of America account; a checkbook ledger and checks from the victim's Schwab account; a teapot; metal plates; pens; magnifying glasses; and sundry other items.

Niroula called McCarthy at some point and told him that Bustamante had been arrested. He said not to worry because Replogle was working on getting Bustamante out of jail. On January 7, 2009, Niroula called the jail claiming to be an attorney inquiring about the details of Bustamante's arrest. The San Francisco Police Department located the victim's Mercedes on January 9, 2009, parked in front of Bustamante's apartment.

Raul Mejias, a computer forensics examiner with the Riverside County District Attorney's Office, testified he analyzed an image of Bustamante's iPhone. He extracted a number of text messages. He extracted the following text messages sent between Bustamante's and Niroula's phones between 5:39 and 6:02 p.m. on December 5, 2008, though he could not tell from who to whom the messages were sent:

"'The is the only opportunity you are inside. Street patrol is on the corner.' [¶] . . . [¶]

"'Stab, with knife.' [¶] . . . [¶]

"'Do it now.' [¶] . . . [¶]

"'98 million is too much to loose.' [¶] . . . [¶]

"'Inform.' [¶] . . . [¶]

"'Jump the wall from garage and stay on the ground.' [¶] . . . [¶]

"'Okay. Try to stab.' [¶] . . . [¶]

"'I am gonna go ask for cigarette. Alarm will be off. Get, period. In the garage then.' [¶] . . . [¶]

"'I am outside the back garage.' [¶] . . . [¶]

"'Under kitchen window.' [¶] . . . [¶]

"'We are undet the kitchen window.' [¶] . . . [¶]

"'We are ready.' [¶] . . . [¶]

"'Wait. He is looking for lighter.'" (*Sic*.)

Mejias additionally extracted a text message dated December 30, 2008, reading, "'I am give—giving you title paper for the Rolls Royce. Period. Change the title. Sell

the car.'" Another on January 2, 2009, read, "'Where can you meet me for the title of the rolls Royce?'" One dated January 3, 2009, read, "'No that's not true, period. Books don't go like that, period. Lemme call and check. If we don't have the book we have no money and we cannot unlock the bank Accrts, period. The court ordered it locked we ned it or David and I go to jail, period. You can't go to meet rolls until we have that book nothing can happen without the book, babe, period.'" (*Sic*.)

Bustamante's phone contained pictures of the victim's social security card and California driver's license. It had the name, number, address and website for the Home Depot in Palm Springs. It contained directions to the U-Haul in Cathedral City. It had directions from San Francisco to the victim's home.

Jenkins had a locksmith change the locks to the victim's home. He later employed Taylor to continue to maintain the property. Taylor testified when he first returned to the victim's home on March 11, 2009, it appeared to be missing many objects and many objects were on the floor or had been moved around.

Manning stayed in the hotel room until January 17, 2009, when Replogle and Niroula came and told him he needed to be moved for his safety. They moved him to another hotel paid for by Niroula. On January 18, 2009, he checked out of the hotel and was taken to the airport by Replogle. He traveled to Puerto Vallarta for the purported purpose of meeting with the victim; Replogle paid for his airfare. Replogle told Manning he would be met by "Pedro" in Mexico. On January 26, 2009, he was arrested in Mexico

for possession of cocaine.[12] On August 20, 2009, Min picked up Manning at LAX airport where Manning voluntarily agreed to be transported to the Palm Springs police station.

On January 27, 2009, Browning received information from Indio County Jail Investigator Matt Diaz that an inmate at the jail had information regarding the case, of which some of the details had not been released to the media.[13] On January 29, 2009, he and Min responded to the jail where Diaz gave him a piece of paper from the inmate containing information regarding the case. Browning interviewed the inmate, Arthur Jimenez, who provided information that had not been released to the media, including additional names of persons to investigate, items stolen from the house, and the title to the Rolls Royce. Jimenez additionally gave him a detailed map to help him start looking for the victim's remains.

At the time of the interview with Jimenez, neither Browning nor Min knew of the victim's whereabouts or whether he was alive or dead. Jimenez told them Bustamante had told him Bustamante had stabbed and killed the victim. Jimenez said Replogle had been involved with the notary, will, thumbprint, and attempt to take title of the victim's house. Min testified the information provided by Jimenez essentially "changed the whole

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[12] Manning testified "Pedro" transported him to his hotel in Puerto Vallarta. Mexican police showed up at his hotel room with a search warrant. They found cocaine in his laptop bag. Manning testified he neither brought any cocaine to Mexico nor did he obtain any while there.

[13] The parties stipulated the only press releases regarding the case occurred on December 17, 2008, and March 12, 2009.

direction of [the] investigation." The map proved fruitless as numerous searches for the victim's body failed.

Jimenez testified he was an inmate at the Riverside County Jail since September 2006. In January 2009, he was housed in the Indio Jail in tank No. 5. Jimenez was the tank boss appointed by the Mexican Mafia in January 2009; he was responsible for making sure everything ran smoothly, assigned prisoners to cells, and ensured no fights occurred between inmates so they could maintain their privileges. He did not work with law enforcement.

Bustamante came into his tank during the first half of January 2009. When the other inmates asked him his name and where he was from, Bustamante refused to answer. Such behavior is typically taken by inmates as a sign of disrespect.

Jimenez spoke to Bustamante the next morning; Bustamante was scared and nervous. Jimenez explained the rules to Bustamante; Bustamante told him he was from San Francisco and gay. Jimenez put Bustamante in Jimenez's cell in order to maintain peace in the tank. He asked Bustamante for what offense Bustamante was in jail; Bustamante responded he had taken stolen property, including clothes, paintings, and pink slips to a Mercedes and Rolls Royce from a house, for which he had rented a U-Haul. Bustamante said he had received a key to the house from Replogle and Niroula.

Bustamante told Jimenez he was staying at a Motel 6. He was loading the U-Haul with objects from the home with several other men when the neighbors confronted him saying they had called the police. Bustamante told one of the men to drive off in the U-Haul truck. Bustamante was at the home when the police arrived.

At some point thereafter, Jimenez came across an article that described the burglary Bustamante had told him about, but mentioned a missing person.[14] He became concerned Bustamante was not being entirely truthful with him. Jimenez showed Bustamante the article. Bustamante told him he had been the one who killed and buried the missing person described. Bustamante said as long as there was no body, there was no crime. Jimenez asked if the body had been buried deeply enough. Bustamante asked if Jimenez could help get rid of the body.

Bustamante drew Jimenez a map to the body. Bustamante said Garcia was the main person who orchestrated the plot to kill the victim after having a relationship with him; Bustamante wrote the conspirators names on the map. He wrote Niroula's name on the map with "Nepal Boy" written underneath; he also referred to Niroula as "the Prince."[15] Bustamante said he worked in a bar where he met Niroula; he said Niroula was a con artist.

In another box on the map Bustamante had written, "David Replogle, attorney," with Replogle's office address listed. Bustamante said Replogle was "the one that was getting all the paperwork in order. He's the one that would get the power of attorney for the house, change certain documents, forge certain IDs so he could place people as power of attorneys as for the house, and he would also do that for the cars that were promised to

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[14] The parties stipulated that two articles had been printed regarding the victim; one on December 17, 2008; another on March 11, 2009, containing more details; no other articles about the instant case were printed between those dates.

[15] La Fountain testified Niroula claimed to be a Nepalese Prince.

Bustamante." Bustamante had met with Replogle and Niroula in Replogle's office to plan the murder of the victim. Replogle told Bustamante he had obtained the victim's ID and placed Replogle's picture on it.

Bustamante told Jimenez the whole group of conspirators had gotten together to pay someone to murder the victim. He told Jimenez he met Niroula and Replogle at Replogle's office three to four months before the murder, at which time they discussed the amount of money they were going to pay Bustamante for killing the victim, what items they wanted him to obtain from the victim's home as being worth a lot of money, and what items he could keep for himself. Bustamante said he was promised a million dollars and the cars.

Bustamante said he was promised $80,000 of which $30,000 would be, and was, wired to his account by Replogle. Bustamante said he went to New York prior to the killing.

Bustamante wrote the name "'Ricky Mackein'" on the map and said he was a hit man from China or Japan who had been paid $6,000 to kill the victim.[16] He wrote down all the names of the conspirators on the maps in front of Jimenez.

Niroula got the victim drunk; Bustamante and "Mackein" texted Niroula; Niroula unlocked one door, but another remained locked. Bustamante had to text Niroula again; Niroula opened the second door; the victim came into the kitchen; Bustamante grabbed a

[16] The transcript alternatively spells the name as "McCane." McCarthy testified he was a former marine, who owned a gun, and had been trained to kill. McCollum testified she believed McCarthy was "Japanese and [B]lack."

knife from a butcher block and stabbed the victim several times. He said the murder occurred at night at the beginning of December 2008.

Bustamante said they wrapped the victim in a sheet and stuffed his body in the trunk of the victim's Mercedes. Bustamante put the victim's body in the trunk himself. They cleaned the kitchen with ammonia.[17] Bustamante took the entire block of knives and also threw them in the trunk. He disposed of the knives in a dumpster at a hotel. Bustamante said he went to Home Depot where he purchased a shovel with which he buried the victim's body. He said he also took the victim's pet dog with him to San Francisco where he gave it to his girlfriend.

At some point Bustamante drew a second map because Jimenez had indicated his contacts could not find the body; Jimenez gave the second map to Browning. After discussing the local freeways with others, Bustamante drew a third map, which he believed correctly reflected the freeways, and gave it to Jimenez. Bustamante gave the third map to Diaz.[18] Bustamante gave all three maps to Jimenez without any request from Jimenez. Bustamante told Jimenez that Replogle had arranged to have an African-American male steal the notary journal from the notary's backpack. However, the thief was unable to obtain the backpack or the notary journal.

After his discussion with Bustamante, Jimenez went to Diaz, the gang task coordinator at the jail, told Diaz he had information about the case, and gave Diaz the

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[17] A crime scene technician testified she checked the victim's home for blood on January 29, 2009; she did not find any.

[18] The parties stipulated Diaz lost the third map.

first map. Diaz listened to the information Jimenez provided, but would not make any promises other than that he would relay the information to those handling the case. On January 29, 2009, he spoke with Browning; he gave Browning the second map; no promises were made. On June 15, 2009, Jimenez spoke with the prosecutor and Browning in the presence of his own attorney; no promises of lenience were made. On August 5, 2009, an agreement was reached pursuant to which he entered into a plea agreement; on August 21, 2009, he pled guilty to certain crimes in exchange for testifying truthfully in the current case, which reduced his exposure from life imprisonment to a 20-year determinate term.

Jimenez was subsequently "jumped" while in prison as a result of his testifying; he incurred skull fractures requiring steel plates and cosmetic surgery. Garcia put out a hit on Jimenez for $10,000.

Police arrested Garcia in Sacramento on March 9, 2009. Officers seized an iPhone, three Apple computers, and miscellaneous other items. One of the Apple computers, a router, a LED monitor, and several accessories totaling $5,513.94, were purchased on December 14, 2008, using the victim's name, address, and AMEX; the items were shipped to Garcia's address. Other orders were placed on December 14, 2008, in the victim's name, using a number of the victim's credit cards with goods shipped to Garcia's address in a total amount of $4,481.04. On December 23, 2008, another order was placed using the victim's MasterCard account with goods in the amount of $4,918.38 shipped to Garcia's address. Another order totaling $745.82 was

placed using the victim's AMEX on December 30, 2008, with goods shipped to Garcia's address.

Min obtained a search warrant for the account and phone used by Garcia. Min took the iPhone to Apple, Inc. in Cupertino, California, where a technician removed the pass code. Min then brought Garcia's iPhone to Eric Bachelder, a member of the Communication Technology Unit of the San Francisco Police Department. Bachelder downloaded the contents of Garcia's iPhone.

Over 30,000 text messages, 10,000 photographs, and 1,712 contacts were downloaded from Garcia's phone. The phone had contact and additional information regarding the victim including his education, social security number, Schwab checking account number, Schwab Brokerage account number, AMEX platinum number, AMEX blue number, and general AMEX number. The phone also had contact information for Replogle.

Min created a spreadsheet of the texts between Garcia and Niroula occurring between November 5, 2008, and January 25, 2009, which appeared to be relevant to the instant case. A message sent from Niroula's phone to Garcia's on November 5, 2008, read, "I am [on] cloud 9 let's make money and own re world cashii is back on . . . the gro[o]ve."[19] From Niroula's phone to Garcia's on November 11, 2008, "Let there be 12 mill okay please." A return message that day reading, "Yeah like let there be $185,000,000 in an offshore account in the Bahamas? LOL. That's what David is

[19] Niroula went by many nicknames including Cashii, Cash, Samuel Orin, [C]Sid Kahn, Banfi, Kylie, Kash, Kashi"

probably thinking right now."[20] On November 13, 2008, a message was sent from Garcia's phone to Niroula's containing the victim's address. Another read, "When you come here I'll show you everything I have on him." "I got in to schwab and now you aren't answering!" "[O]peration Craigslist" was first mentioned on November 29, 2008.

On November 30, 2008, a text from Garcia's phone to Niroula's read, "You and David both aren't answering your phones." Immediately prior to that text message, two calls were made from Garcia's phone to Replogle's phone and two to Niroula's.

On December 2, 2008, a message from Niroula's phone to Garcia's read, "Call David right now. [¶] Call David right now cause he has to get on a flight as well." A message from Garcia's phone read, "What about when he sets the alarm." The response read, "Oh I know the alarm I am his house guest tonite LOL." On December 3, 2008, a message from Niroula's phone to Garcia's read, "Okay I am at home depot buying picks and shovels and a drum and cement . . . ." Another from Niroula's phone on December 6, 2008, read, "Properties in the desert are sold as is condition . . . with furnishings and etcetra . . . . So you should simply have the personal belongings shipped. A furnished property in the desert brings higher value."

On December 6, 2008, from Niroula's phone: "I am gonna fly back with notarized POA and cash later this evening and also put all the cash we get on your net spend. From this point u are fully in charge boss." From Garcia's phone: "So we are leaving all the furniture?" From Niroula's phone: "Yes and furnishings as well, except personal

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[20] The victim owned property in the Bahamas.

belongings so get an itemized list of all furniture and furnishings. This will bring 250 k more in value to the property. Clothes luggage paperwork shoes everything else goes." From Niroula's phone: "I am breathing now. Awaiting further instructions from you. Can u check and make sure there is nothing in the washing machine as well as the hallway from door to kitchen and the whiskey bottle with the handle, pellegrino bottle and benson and hedges cigarette pack is gone as well??!?"

From Niroula's phone "Okay that might be better so David does not control everything. [¶] I'm getting on the plane. Wait for me before you go see David. I don't want him getting his hands on that jewelry, he will screw us. [¶] I hope u approve of all the backup precautions I have taken in case David became stingy? Hope you approve. [¶] . . . Just come to Davids office I made it clear to him we will deal with the jewels it is safely locked in safe as I said it's more secure to talk at davids office and later u and I can go chit chat."

On December 7, 2008, from Niroula's phone: "I am on my way to Sacramento right now I just left davids office I am leaving the building." On December 8, 2008, from Niroula's phone: "Let's tell David he is giving 10 for the stone and 500 for platinum 4500 for ruby and 500 for sapphire and 2400 for gold. [¶] So we give him 7 k and rest we use for bank accts and stuff."

On December 9, 2008, from Niroula's phone: "David needs SSN. [¶] . . . David is getting it notarized today . . . . [¶] . . . hello now where did u vanish. We need acct numbers to put on stuff to notarise. So hurry up and call." From Garcia's phone: "I know all of this. Once David has his id, he can sign the poa and we can move it. But that

can't happen until he has his id and sees the notary." From Niroula's phone: "Would u please call David and give him the damn SSN asap it's not on the paper I wrote somewhere else and lost it." "He needs to give it to the guy now. [¶] Danny get here it the bank info the [id] and notary all are ready to . . . we need to fill the forms pacific westerns POA as well. Bring all papers." "There u go again u don't call me but David. The old man will have his damn ID by 6 the notary comes to the lobby of four seasons by 6:30. What poas do we need? Schwab BOFA? What else I don't know so lemme know. Safety deposit boxes have different POA where is you."

From Garcia's phone in response: "Schwab # is 3195-4012. [¶] Pacific west is 1000195204. [¶] Schwab checking is 440001231906." From Niroula's phone on December 10, 2008: "I saw davies id it's flawless." From Garcia's phone to Niroula's "We also have the pink slip to the rolls we can sell that in a heartbeat." From Niroula's phone on December 11, 2008: "I get it u keep the caSh I get the house. So now we have established that let's gettis done."

From Niroula's phone on December 13, 2008: ". . . I want to focus on the house cause that's cash. Everything else is a story to me. I can get the house sold in 5 days and pay the bo[y]s off then what u want done with liquid cash is what I don't even want to know. I can get it my acct and can send it where u want. The house gets me enough cash to pay the bo[y]s and. . . . Keep the cash I can have Russell wire it to an acct u want I don't care. The house after today I know will be done there is already a buyer and an appraiser ready to go all I need is personal stuff packed and gone appraiser there Tuesday j[]ust is sold an money available by followin Monday."

From Niroula's phone on December 18, 2008: "There is a missing person report Cody filed so get on your butt and call David and me."[21] "Russell just called. CL is on every local channel as a missing person. We need to talk. I need you in SF asap." "[I]f David thinks there is lots and lots of money he will take the risk and be CLS lawyer and call the detectives himself. This will calm everything fast. [¶] So I want u in SF at 9 at davids office, but we meet at 8:00??? Okay???"

From Niroula's phone on December 23, 2008: ". . . I will need some documents and info from you we can suck around 800 k from the house by Friday and have cash available but we need to get the ball rolling today no delays. If she gives check on Friday great if not great we will have cash from house so where are you."[22] From Garcia's phone on December 24, 2008: "We are drinking banfi tonight in your honor. LOL." From Niroula's phone in response: "And I am sure CL paid for it on AMEX." From Niroula's phone on December 30, 2008: "[A]s of today I am a homeowner." From Garcia in response: "LOL, not for long . . . I hear it's time to sell."[23]

Numerous text messages were exchanged between Garcia and Replogle unrelated to the conspiracy; however, all text messages between them stopped on November 5,

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[21] Cody was the mutual friend of the victim and Mullikan who was worried when the victim did not show up to the Festival of lights.

[22] The parties stipulated the value of the victim's home as of December 5, 2008, was $1,030,000.

[23] There were numerous other texts between Niroula and Garcia regarding the conspiracy adduced at trial. We have relayed only a recitation of the most relevant text messages.

2008. Garcia's phone contacts had 35 entries with variations of the name David including Dave and Davey. Min testified he could not be sure the many mentions of the name "David" in the inculpatory text messages between Niroula and Garcia referred to Replogle. However, none of the text messages, phone calls, or e-mails exchanged between March 2008 and March 2009, with any other "David" pertained to this case. Garcia and Niroula's phone records reflected repeated calls to Replogle.

On March 2, 2009, Replogle and Niroula were arrested together in San Francisco Superior Court where Niroula had a scheduled court appearance. Their cell phones were collected from Replogle's brief case; Niroula's was an iPhone for which Replogle was financially responsible. Manning was scheduled to appear in court that same day as well; however, he did not show.

In an interview on March 13, 2009, Garcia admitted using the victim's credit cards in the first weeks of December 2008 to purchase a number of items including furniture, electronics, a tanning bed, three Apple laptops, and clothing. Garcia admitted taking the victim's laptop. Garcia had copied the victim's computer profile, which included the victim's bank account information, onto the new computer he had purchased using the victim's credit card. He said the last time he was at the victim's home was on December 15, 2008.

Mejias analyzed the MacBook Pro laptop seized when Garcia was arrested. A subfolder titled "Kaushal Niroula" contained a document named "Questions," dated December 2, 2008, which purported to be from the Law Offices of Samuel Orin with the caption "Morton D. May Trust" and contained questions regarding familiarity with the

details of Morton D. May. Another subfolder titled "Fake" contained a document pertaining to the victim's Charles Schwab account and showed a creation date of November 21, 2008. A search of the computer revealed the term "Operation C.L." which referred to the victim. An iChat between a "David Replogle" and the user of Garcia's computer on February 13, 2009, recorded the following exchange:

"[O]h lord [¶] well, it ain't going to happen [¶] there is too much heat [¶] and it is only going to get hotter.

"I know [. . .] well, if he can tie that e mail to the DA it will buy him time.

"[N]o actually it wont [¶] down south is about to blow up."

On December 19, 2008, someone sent an e-mail using the victim's account to "Rosie," informing her the victim had undergone a third oral surgery, was going on a trip, could not stand being in the house without Travis, and might leave the country. On December 31, 2008, someone sent an e-mail from the victim's account to his friend reading, "'I will be back . . . in Palm Springs in mid-January, period. I think I have decided to sell my house and I have found a beautiful condo in Maui, period. Now that Travis is gone, I just can't bear to be in that big house anymore all alone, period. And after all the robberies this year, I just don't feel safe anymore, period. I'm recovering from three extensive oral surgeries I had in LA last month, and Alex and I needed some time away. I hope this finds you well. Cliff.'" The victim's dentist and periodontist testified the victim did not have any appointments in December 2008. His periodontist testified the victim had appointments on January 8, and 14, 2009, for which he had not shown; the victim did not call to cancel or reschedule those appointments.

Min wrote a search warrant for Replogle's home and office. A special master was appointed to conduct the searches.[24] While searching Replogle's office, the special master found a UPS key to a storage box originally registered to Replogle on July 18, 2008, but renewed for six months on December 16, 2008; the box was now registered in Niroula's name, but still listed Replogle's address and phone number. The box contained mail for Niroula, including mail addressed to him as an agent for Lambert Studios. A business card for Turner was found in Replogle's office, and a picture of the business card was found on Replogle's phone. Replogle's phone records for December 2008 reflected repeated calls to Bustamante, Garcia, and Niroula.

Browning interviewed McCollum on June 18, 2009; McCollum informed him Bustamante's roommate was McCarthy. On July 16, 2009, Browning interviewed McCarthy in San Francisco. McCarthy indicated he was involved in burying the victim. McCarthy agreed to go to Palm Springs to help search for the victim's body. They did so, but did not locate the victim's body. The victim's body was never found.

In an interview thereafter, McCarthy more fully explained his involvement in the victim's disappearance. McCarthy conducted a video recorded reenactment of the murder in the victim's home on July 20, 2009, which was played for the jury.

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[24] A special master conducts an in camera inspection of seized materials in order to determine whether any potential privilege, such as attorney-client or work product privileges, may apply. (See generally *People v. Superior Court* (*Laff*) (2001) 25 Cal.4th 703, 710; § 1524, subds. (c)(1) & (d).) "[A] 'special master' is an attorney who is a member in good standing of the California State Bar and who has been selected from a list of qualified attorneys that is maintained by the State Bar particularly for the purposes of conducting the searches described in this section." (§ 1524, subd. (d).)

DISCUSSION

A. ADMISSION OF JIMENEZ'S TESTIMONY ON THE BASIS OF ITS TRUSTWORTHINESS

Replogle contends the court erred in admitting Jimenez's testimony in the first place and in not striking it afterward on the basis of its untrustworthiness. We hold the court correctly admitted and refused to strike Jimenez's testimony.

1. *ADDITIONAL FACTS AND PROCEDURAL HISTORY*

Jimenez testified at defendants' preliminary hearing. On August 27, 2010, the People filed a trial brief in which they contended Jimenez's testimony was admissible. On September 7, 2010, Replogle filed a trial brief asserting he would oppose admission of Jimenez's testimony at trial, in part, based on its purported untrustworthiness. On September 13, 2010, the trial court conducted an Evidence Code section 402 hearing on the admissibility of Jimenez's testimony.

The court conducted another hearing on the matter on September 20, 2010. The court determined it needed to evaluate Jimenez's proposed testimony itself in order to make a determination as to whether Bustamante's statements to Jimenez were trustworthy: "You know, reading the prelim[inary hearing] transcript, reading the court record is one thing. Looking at a person testifying is vastly different, and I thought that I needed to do that." The court held another hearing on the matter on September 22, 2010. Jimenez testified and was cross-examined regarding his proposed trial testimony. The court concluded both Bustamante's statements to Jimenez and Jimenez's testimony were trustworthy and, therefore, Jimenez's proposed testimony would be admissible at trial.

On November 4, 2010, in the middle of trial, the court held another hearing regarding the admissibility of Jimenez's proposed testimony. The court again found Jimenez's testimony trustworthy as a recount of the statements made by Bustamante to Jimenez. On November 15, 2010, the court held yet another hearing regarding the admissibility of Jimenez's proposed testimony. The court found the reliability of Bustamante's statements to Jimenez's regarding a conversation that occurred between Bustamante, Replogle, and Niroula at a bar where Bustamante was working in 2008, were unreliable; thus, it excluded any testimony by Jimenez regarding those conversations. Nevertheless, the court concluded that in all other matters, Jimenez's proposed testimony regarding Bustamante's statements to him were trustworthy and, therefore, admissible. Jimenez testified immediately thereafter as recounted, *ante*.

During a break from Jimenez's testimony, Replogle's counsel queried, "I just want to make sure that it's clear . . . Jimenez's testimony would be admissible regarding statements from Bustamante about Replogle if the jury finds that . . . Replogle was part of a conspiracy before those statements were made. If that finding is not made, then the jury must be ordered to disregard those statements." The court responded that it would allow Jimenez to continue to testify, but would discuss the issue with the lawyers again at the completion of Jimenez's testimony. It then read to the jury again CALCRIM No. 226 (Evaluation of a Witnesses' Credibility).

Replogle's counsel moved the court to strike Jimenez's testimony in its entirety. Replogle contended Jimenez had testified to statements made by Bustamante that were demonstrably untrue as demonstrated by other evidence in the case and, thus, the court

should instruct the jury it could not consider any of Bustamante's statements against Replogle. The court observed, "I can tell you he said some things here different than he had said in the other interviews and the transcript at the prelim[inary hearing] that concern me. Yes. [Replogle's counsel] said 14 things—incidents that he brought up that are different. Yeah. They appear to be." "Do I think there are major inconsistencies between what the evidence has shown and what . . . Jimenez has testified that Bustamante told him? Yes, I do."

On November 29, 2010, the People filed opposition to Replogle's oral motion to exclude Jimenez's statements as against Replogle. They noted the court had already denied two previous section 995 motions based on Jimenez's testimony. On November 30, 2010, Replogle filed a formal motion to exclude Jimenez's testimony as against Replogle, elucidating 14 points in which Jimenez's testimony was contradicted by other evidence. On December 6, 2010, Replogle again orally moved for exclusion of Jimenez's testimony as against Replogle, arguing either all Jimenez's testimony came in against him or none of it did.

The court noted, "It appears that the Court need make a quote, fact intensive inquiry, closed quote, and the statements must be trustworthy pursuant to section 1230 of the Evidence Code. We had done that. I had done that in hearings before, early on in the 402 hearing. [¶] And we called . . . Jimenez to testify at a 402 hearing. . . . [¶] And then Jimenez testified here for two and a half days, I think. . . . I did take notes on it, and I compared my notes. So I'm well aware of what he said at the prelim[inary hearing], what he said at the [Evidence Code section] 402 [hearings], what he said at the trial. So that's

what I had done. [¶] Obviously, there are inconsistencies in what . . . Jimenez testified to here at the trial with other evidence at the trial, maybe in some instances glaring inconsistencies. That's true."

The court expressed concern that if it struck portions of Jimenez's testimony the jury would infer the nonstricken portions had been found credible by the court: "I realize Evidence [C]ode [section] 1230 says the Court shall make findings of the trustworthiness or not, and I did that prior to Jimenez's testimony after the 402—after he testified, rather, I made certain decisions on that." Jimenez "had inconsistent statements in this trial as compared to other trial evidence; yes, he did." "My problem is that some of the statements included are clearly not trustworthy, some clearly not." On the other hand, "Bustamante in this instance did not shift blame at all. As a matter of fact, he took it all. He took an enormous amount of blame." "Bustamante does not shift the blame at all." "He may name other names and other people were involved in it, but that doesn't—but Bustamante doesn't shift the blame to them. The blame in his view is the murder of [the victim]."

The court "found . . . Jimenez to be a fairly credible witness actually. I think he's wrong on some things, in some details, but I think he tried to be as honest as someone in his situation can be." "I'm not going to strike Jimenez's testimony as to Replogle, because I find . . . generally speaking, Jimenez's testimony to be truthful, and I find Bustamante's statements to Jimenez to be trustworthy. There are some exceptions because the evidence has showed they're flat out wrong on some issues. . . . [¶] . . . [¶] . . . [I]f you want me to, I will strike certain portions." The parties agreed to strike

Jimenez's testimony as to four statements purportedly made by Bustamante:

(1) Replogle had met with the victim in a San Francisco bar on a variety of occasions;

(2) Replogle sent Niroula to meet with the victim in order to *buy* drawings and paintings;

(3) Bustamante took a trip to New York *before* he participated in the killing of the victim;

and (4) *Replogle* wired the $30,000 to Bustamante. The court ordered the jury to disregard Jimenez's testimony on these matters.

2. *LAW*

"Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230)

"'The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.] '[E]ven when a hearsay statement runs generally against the declarant's penal interest and

redaction has excised exculpatory portions, the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission . . . . [¶] . . . We have recognized that, in this context, assessing trustworthiness "'requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.'"' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 584 overruled on other grounds in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305.)

"When examining what was actually said by the declarant special attention must be paid to any statements that tend to inculpate the nondeclarant. This is so because a statement's content is most reliable in that portion which inculpates the declarant. It is least reliable in that portion which shifts responsibility. Controversy necessarily arises when the declarant makes statements which are self-inculpatory as well as inculpatory of another. This is why Evidence Code section 1230 only permits an exception to the hearsay rule for statements that are specifically disserving of the declarant's penal interest. [Citation.] This is not to say that a statement that incriminates the declarant and also inculpates the nondeclarant cannot be specifically disserving of the declarant's penal interest. Such a determination necessarily depends upon a careful analysis of what was said and the totality of the circumstances. [Citations.]" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 335.) "[H]earsay statements identifying coconspirators constitute declarations against penal interest if the statements are 'an integral part of the statement in which' the declarant 'implicated himself' [citation], and do not shift blame or minimize the declarant's role in the crime [citation]." (*People v. Lawley* (2002) 27

Cal.4th 102, 174 (conc. opn. of Baxter, J.).) "Determination of whether a statement is trustworthy is entrusted to the sound discretion of the trial court. In reviewing the trial court's rulings we apply the abuse of discretion standard. [Citation.]" (*Greenberger*, at p. 335; *People v. Brown* (2003) 31 Cal.4th 518, 536.)

3. *ANALYSIS*

We hold the court acted within its discretion in determining Jimenez's testimony regarding Bustamante's statements to him had sufficient indicia of trustworthiness to be permitted for consideration by the jury. First, the court conducted extensive hearings and considered Jimenez's testimonies at the preliminary hearing, at the Evidence code section 402 hearings, and at trial before issuing its rulings. The court excluded four items of Jimenez's testimony that it did not find trustworthy. (*People v. Greenberger*, *supra*, 58 Cal.App.4th at p. 336 [no error of admission of inculpatory statements where court conducted extensive hearing to determine admissibility, considered preliminary hearing transcripts, and excluded some statements on basis of lack of reliability].) As the court noted, "You know, reading the prelim[inary hearing] transcript, reading the court record is one thing. Looking at a person testifying is vastly different, and I thought that I needed to do that."

Second, although there were additional discrepancies between Jimenez's testimony and other evidence admitted at trial, under a totality of the circumstances, we agree with the court's determination Jimenez's testimony regarding Bustamante's statements to him was basically trustworthy. (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 176 [even taking discrepancies into account, totality of circumstances

surrounding statement support its trustworthiness].) Jimenez's initial relay of information to law enforcement, "changed the whole direction of [the] investigation," and initiated inspection into some of the key players in the conspiracy heretofore unknown, including Replogle, Garcia, and Niroula. It led to the investigation of Bustamante for murder rather than simply the possession of stolen property for which he was initially arrested. It corroborated most of McCarthy's testimony. Indeed, because Jimenez and McCarthy had never met, Jimenez's testimony regarding the details of the conspiracy confirmed the trustworthiness of Bustamante's statements to him, because Jimenez otherwise would have had no basis to know those particulars. Thus, though Jimenez's testimony regarding Bustamante's statements contained some inconsistencies, overall it was trustworthy.

Third, we agree with the trial court's determination that, to the extent Jimenez's testimony regarding Bustamante's statements contained discrepancies with other evidence adduced at trial, it was the province of the jury to render credibility determinations regarding that evidence. Replogle's counsel noted for the record that Jimenez's testimony was "coming in subject to the fact that the jury makes a finding that . . . Replogle is part of a conspiracy." The court proposed to read the jury CALCRIM No. 226, the pattern jury instruction on determining the credibility of witnesses. Replogle's counsel replied, "Excellent idea." The court did so, as it had previously done before trial began, and as it did after trial ended. Thus, the jury was properly instructed it could disregard those portions of Jimenez's testimony it found inherently unreliable or incredible because it was contradicted by other evidence adduced at trial.

Replogle contends the trial court erroneously focused its examination of trustworthiness pursuant to Evidence Code section 1230 on Jimenez's testimony, rather than properly on the actual declarant, Bustamante. Thus, he maintains the court committed prejudicial error in failing to conduct the proper analysis of trustworthiness. The court repeatedly, during the many hearings on this issue, acknowledged its focus was on Bustamante's trustworthiness; however, it also recognized that the only vehicle for such an examination was through the testimony of Jimenez: "Based on my analysis here, the statements by Bustamante to Jimenez were reliable. And this is a fact based inquiry as to each statement"; "I have to decide whether he's credible, reliable and whether the statements made to him by Bustamante are trustworthy"; "the statements made by the declarant—the declarant in this case, . . . Bustamante, must be trustworthy. [¶] The only way I could determine the trustworthy part is have the only person who talked to . . . Bustamante; that is, . . . Jimenez, testify and tell me about it."

"Do I feel comfortable that what . . . Bustamante told . . . Jimenez and what . . . Jimenez relayed to us, either at [the] prelim[inary hearing] or today, was credible, trustworthy, the admission. And the answer is 'yes.'" "I feel that under [Evidence Code section] 1230, all the statements made in the prelim[inary hearing] transcript by Jimenez attributable to Bustamante are both trustworthy and I adopt them . . . ." "So the only way I can determine the credibility of . . . Bustamante is to examine . . . Jimenez, the only person that we know of that is a witness here to talk with . . . Bustamante." "[I]t isn't so much how trustworthy . . . Jimenez is. The . . . issue is how trustworthy are . . .

Bustamante's statements to him?" "So I find [Jimenez] credible, and I find the . . . statements of Bustamante to him to be credible."

"I found and do find . . . Jimenez's testimony credible. I don't think that's what the question is. The question is was the statement made by . . . Bustamante to Jimenez credible. There's two credibility issues here. I can't—for obvious reasons I cannot examine . . . Bustamante directly because he has Fifth Amendment rights. So I have to look at what Jimenez says and look at other evidence that I've heard and try to figure out, as best as I can, whether" Bustamante's statements are reliable. "[T]he reliability determination is the reliability of what . . . Bustamante told . . . Jimenez." "I found . . . Jimenez was very credible and said so. [Replogle's counsel], you pointed out to me that credibility finding was really as to what . . . Bustamante told . . . Jimenez. I remember my response was, yeah, I know, but I [have] got to get through Jimenez first. We don't have Bustamante telling us anything in this trial, so I can't ask him anything." Thus, the court made the adequate determination that both Bustamante's statements to Jimenez and Jimenez's testimony bore sufficient indicia of trustworthiness that Jimenez's testimony should be admitted and not stricken thereafter.

Finally, even if the court erred in admitting Jimenez's testimony or in not striking it in its entirety, we find it is not reasonably probable a result more favorable to defendant would have been reached in the absence of any such error. (*People v. Loy* (2011) 52 Cal.4th 46, 67.) In November 2008, Niroula and Replogle told Manning they wanted him to come to Palm Springs; they had a proposal for him. He met with them at a restaurant

in Palm Springs the last week of November 2008. Replogle told him they wanted him to act as POA for the victims.

Bustamante discussed with Replogle a trip he was going to take which was being paid for by Replogle; he said he did not want to be stranded; Replogle told him not to worry about it; they mentioned that Niroula would need money too. On November 25, 2008, a call was placed from Replogle's phone to the victim's home number.

Niroula informed McCarthy that Replogle was funding the trip; Bustamante confirmed Replogle was funding the trip. The plan involved Replogle coming down to obtain a POA and identification for Niroula from the victim so he could assume the victim's identity for financial gain. Originally, Niroula wanted to kidnap the victim and use the POA, but changed his mind and decided to get rid of the victim "and take over his identity." Niroula said Replogle would "take care of the money."

On December 1, 2008, Replogle paid for tickets for himself and Niroula for a flight that left Oakland and arrived in Burbank. He rented a car from Alamo at the airport in Burbank and returned it that night with mileage consistent with a trip to the Riviera Hotel in Palm Springs from Burbank and back. Replogle booked two reservations on a return flight leaving Burbank and arriving in Oakland.

A number of phone calls were exchanged between Replogle's phone to one used by Niroula, for which Replogle was financially liable, between November 24 and December 4, 2008. Bustamante's phone exchanged four calls with Replogle's on December 1, 2008. On December 2, 2008, 10 calls were exchanged between Replogle and Garcia's cell phones. Calls from Replogle's phone on December 2, 2008, initially

originated from the San Francisco area, but later were initiated in Palm Springs. Likewise, on that same date, Bustamante's phone exchanged six phone calls with Replogle's. Ten calls were exchanged between Bustamante's and Replogle's phones on December 4, 2008. Three were exchanged between them on December 5, 2008.

Replogle and Garcia's phones exchanged at least 14 calls on December 5, 2008. One was exchanged between Bustamante's and Replogle's phones each on December 6, and 7, 2008. Two calls were made between them on December 12, 2008. Three calls were also exchanged between them on December 21, 2008.

Niroula introduced Replogle as the victim to Turner. Turner checked the driver's license presented and notarized a "'Signature Affidavit,'" keeping notes of the transaction in his notary journal. Manning sent the Wells Fargo Account POA form via FedEx to Replogle upon Niroula's instructions. Niroula called "David," whom Manning believed to be Replogle to inform him of the balance. "David" told Niroula to have $185,000 transferred to Niroula's Wells Fargo account in San Francisco. The address listed on the account to which the money was transferred was Replogle's.

Turner met Niroula and Replogle on December 12, 2008. He notarized a general durable POA, a Wells Fargo special POA, a special POA for Charles Schwab bank accounts, and a Bank of America special POA for a bank account all of which belonged to the victim. Turner took a thumbprint from Replogle. A forensic technician compared Replogle's thumbprint to that taken by Turner in his notary journal; they matched. Manning had funds amounting to $15,509.43 in one of the victim's accounts, drawn on a

cashier's check, which he sent via FedEx to Replogle's office in San Francisco. On December 18, 2008, Niroula deposited $5,000 into Replogle's account.

In December 2008, Niroula came to the home of La Fountain and Evans with Replogle; Niroula introduced Replogle as his attorney. They asked whether the unsigned POA Replogle presented them would be sufficient to sell the victim's property.

A few days later, sometime between December 13, and 15, 2008, La Fountain and Evans saw Niroula and Replogle again. They further discussed whether a general POA would allow them to sell the victim's property; Niroula wanted to list the property and have it sold as quickly as possible. The following week, Niroula and Replogle faxed La Fountain a copy of the executed version of the POA.

On January 4, 2009, Manning flew to San Francisco; his plane fare was paid by Replogle. He took a cab to Replogle's office. Replogle was listed in Bustamante's contacts. Niroula called McCarthy at some point and told him that Bustamante had been arrested. He said not to worry because Replogle was working on getting him out of jail.

Manning stayed in the hotel room Replogle and Niroula had taken him to until January 17, 2009, when Replogle and Niroula came and told him he needed to be moved for his safety. They moved him to another hotel. On January 18, 2009, he checked out of the hotel and was taken to the airport by Replogle. He traveled to Puerto Vallarta; Replogle paid for his airfare. Replogle told Manning he would be met by "Pedro" in Mexico.

On November 30, 2008, a text from Garcia's phone to Niroula's read, "You and David both aren't answering your phones." Immediately prior to that text message, two

calls were made from Garcia's phone to Replogle's phone and two to Niroula's. On December 2, 2008, a message from Niroula's phone to Garcia's read, "Call David right now. [¶] Call David right now cause he has to get on a flight as well."

A text from Niroula's phone read, "Okay that might be better so David does not control everything. [¶] I'm getting on the plane. Wait for me before you go see David. I don't want him getting his hands on that jewelry, he will screw us. [¶] I hope u approve of all the backup precautions I have taken in case David became stingy? Hope you approve. [¶] . . . Just come to Davids office I made it clear to him we will deal with the jewels it is safely locked in safe as I said it's more secure to talk at davids office and later u and I can go chit chat."

On December 7, 2008, a text message from Niroula's phone read, "I am on my way to Sacramento right now I just left davids office I am leaving the building." On December 8, 2008, another text from Niroula's phone read: "Let's tell David he is giving 10 for the stone and 500 for platinum 4500 for ruby and 500 for sapphire and 2400 for gold. [¶] So we give him 7 k and rest we use for bank accts and stuff."

On December 9, 2008, a text message from Niroula's phone read, "David needs SSN. [¶] . . . David is getting it notarized today . . . . [¶] . . . hello now where did u vanish. We need acct numbers to put on stuff to notarise. So hurry up and call." One from Garcia's phone read, "I know all of this. Once David has his id, he can sign the poa and we can move it. But that can't happen until he has his id and sees the notary." Others from Niroula's phone read, "Would u please call David and give him the damn SSN asap it's not on the paper I wrote somewhere else and lost it." "He needs to give it

to the guy now. [¶] Danny get here it the bank info the [id] and notary all are ready to . . . we need to fill the forms pacific westerns POA as well. Bring all papers." "There u go again u don't call me but David. The old man will have his damn ID by 6 the notary comes to the lobby of four seasons by 6:30. What poas do we need? Schwab BOFA? What else I don't know so lemme know. Safety deposit boxes have different POA where is you."

Text messages from Niroula's phone on December 10, 2008, read, "I saw davies id it's flawless." "[I]f David thinks there is lots and lots of money he will take the risk and be CLS lawyer and call the detectives himself. This will calm everything fast. [¶] So I want u in SF at 9 at davids office, but we meet at 8:00??? Okay???"

Numerous text messages were exchanged between Garcia and Replogle unrelated to the conspiracy; however, all text messages between them stopped on November 5, 2008. Nevertheless, none of the text messages, phone calls, or e-mails exchanged between March 2008 and March 2009 with any other "David" pertained to this case. Garcia and Niroula's phone records reflected repeated calls to Replogle.

On March 2, 2009, Replogle and Niroula were arrested together in San Francisco Superior Court where Niroula had a scheduled court appearance. Their cell phones were collected from Replogle's brief case; Niroula's was an iPhone for which Replogle was financially responsible. Manning was scheduled to appear in court that same day as well; however, he did not show.

While searching Replogle's office, the special master found a UPS key to a storage box originally registered to Replogle on July 18, 2008, but renewed for six

months on December 16, 2008; the box was now registered in Niroula's name, but still listed Replogle's address and phone number. The box contained mail for Niroula including mail addressed to him as an agent for Lambert Studios. A business card for Turner was found in Replogle's office and a picture of the business card was found on Replogle's phone. Replogle's phone records for December 2008, reflected repeated calls to Bustamante, Garcia, and Niroula.

Thus, overwhelming evidence outside of Jimenez's testimony established Replogle had contacts with all but one of the conspirators during the crucial period of the conspiracy, from both before the murder to the financial crimes afterward. This included phone calls, made before text messages, in which Garcia and Niroula referred to "David," the most incriminating of which reflected that "David" was not answering his phone immediately after Garcia had attempted to call Replogle on November 30, 2008. This was significant, if not dispositive, evidence that the "David" referred to in the relevant text messages during all pertinent times of the conspiracy was Replogle. Indeed, none of the text messages, phone calls, or e-mails exchanged between March 2008, and March 2009, from Garcia's phone with any other "David" pertained to this case. Likewise, the text messages mentioned information "David" needed to obtain POA over the victim's assets, an act committed by Replogle afterward. Thus, the text messages exchanged between Niroula, Garcia, and Bustamante mentioning Replogle are evidence of Replogle's participation in the conspiracy to commit murder and financial crimes against the victim.

Replogle made a trip to Palm Springs in November 2008, where he met with Niroula and Manning to discuss the POA over the victim's assets. Replogle called the victim's home and made a trip to Palm Springs a few days before the murder. Replogle paid for the airfare for most of the conspirators to Palm Springs where the murder and subsequent financial crimes took place. Replogle posed as the victim with fake identification in order to obtain POAs with which to commit the financial crimes. Replogle appeared with Niroula in attempts to list the victim's home for sale. Replogle financially benefitted from the conspiracy. Thus, it is not reasonably probable a result more favorable to defendant would have been reached in absence of any such error.

B. ADMISSION OF JIMENEZ'S TESTIMONY NOT DISSERVING TO BUSTAMANTE'S INTERESTS

Replogle contends that even if Jimenez's testimony was not wholly inadmissible, the trial court erred in allowing or declining to strike portions of his testimony that were not disserving to Bustamante's penal interests. In particular, Replogle argues Bustamante made statements to Jimenez that were disserving of only Replogle's interests, not Bustamante's, and that such statements should not have been admitted or should have been stricken. The People maintain Replogle forfeited the argument by failing to object on this specific basis below. In the alternative, the People claim that, taken as a whole, any statements regarding Replogle's activity in the conspiracy alone were properly admitted because Bustamante was charged with involvement in a conspiracy, which involved Replogle. We agree with the People that Replogle forfeited this issue by failing to object on this specific ground below. Moreover, we agree that regardless of any

forfeiture, Jimenez's testimony regarding Replogle's activities in the conspiracy were properly admitted. Finally, to the extent the court erred in admitting or failing to strike the evidence, we hold it harmless.

The failure to object on the specific ground raised on appeal forfeits appellate challenge on that ground. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 120-121; *People v. Riggs* (2008) 44 Cal.4th 248, 324; *People v. Coffman* (2004) 34 Cal.4th 1, 113.) Here, Replogle never objected to Jimenez's testimony on this ground below; thus, he has forfeited this contention on appeal. Indeed, Replogle argued below Jimenez's testimony should be admitted or stricken in its entirety, not that portions of it should be allowed while others were stricken. Nevertheless, even if not forfeited, we reject Replogle's challenge on the merits.

"[T]he absence of any legislative declaration to the contrary, we construe the exception to the hearsay rule relating to evidence of declarations against interest set forth in section 1230 of the Evidence Code to be inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant." (*People v. Leach* (1975) 15 Cal.3d 419, 442.) "Only statements that are specifically disserving to the hearsay declarant's penal interests are admissible as statements against penal interests. [Citations.] Self-serving and collateral statements are not against one's penal interest, and therefore are not admissible. [Citations.]" (*People v. Vasquez* (2012) 205 Cal.App.4th 609, 621.)

Replogle enumerates six items of Jimenez's testimony regarding Bustamante's statements to him that Replogle contends were not disserving of Bustamante's interests.

However, in each fact, Bustamante was either present or identified as a member of the conspiracy. Thus, all the evidence was disserving of Bustamante's interest because they indicated his participation in a conspiracy to commit murder and financial crimes against the victim. (*People v. Valdez* (2012) 55 Cal.4th 82, 143-144 [viewed in context of circumstances as a whole, statements that demonstrate conspiracy of which the declarant is part are appropriately viewed as inculpatory].) Therefore, the court acted within its discretion in admitting the evidence to which Replogle now objects. In any event, as discussed *ante*, we find harmless any error in the admission of the evidence.

C. ADMISSION OF JIMENEZ'S TESTIMONY THAT HE BELIEVED BUSTAMANTE WAS ACCURATELY REPORTING THE EVENTS OF THE CONSPIRACY

During Jimenez's testimony on cross-examination, Replogle's counsel elicited from Jimenez that he did not believe Bustamante's statement that he put the victim's body in the car by himself. Subsequently, the following exchange occurred:

"[Replogle's Counsel:] Just so I am real clear. The attorney, you are saying Bustamante told you . . . Replogle said he knew [the victim], they had been friends in San Francisco, and that he was sending Niroula in to buy from [the victim]?

"[Jimenez:] Yes.

"[Replogle's Counsel:] Did they refer to this guy, Micky McCain, as a Chinese hit man?

"[Jimenez:] That is what Bustamante said. Yes.

"[Replogle's Counsel:] Did you believe him when he said that?

"[People:] Objection, relevance.

"[Replogle's Counsel:] It is highly relevant if he believes Bustamante.

"The Court[:] One can be asked a lay opinion. Whether he believes somebody or not—you can ask that question. So, yes, overruled. You can answer it.

"[Jimenez:] I didn't believe him."

Later, during redirect, the People and Jimenez engaged in the following colloquy:

"[People]: What was it about what he told you about murdering [the victim] that made you say, 'This is the time I am going to go to the police?'

"[Jimenez]: Can I explain?

"[People]: Yes.

"[Jimenez]: He is an older man, and the way he told me that all of them got together to plot this and to murder him to get his money and get all his belongings, his house and everything, and he kept saying of how fragile and how small this man was, how old he was, that he was a diabetic and everything, and while he was telling me, he didn't show any feelings or anything, and it just got to me, the more he mentioned about how fragile this man was.

"[People]: Did you believe the information he was giving you was accurate?

"[Replogle's Counsel]: Objection, relevance.

"The Court[:] Well, no. He can answer.

"[Bustamante's Counsel:] Speculation.

"The Court[:] Listen, folks, it is a lay opinion. We all evaluate what people tell us, and we either believe them or not, and this witness is doing the same thing. He can tell you if he believed him or not. [¶] You may answer, sir.

"[Jimenez]: I can answer it?

"The Court[:] Yes. Go ahead.

"[Jimenez]: When he was telling me that, I felt it was true what he was telling me."

Replogle contends the court committed prejudicial error in allowing admission of Jimenez's opinion regarding the truthfulness of Bustamante's recount of the conspiracy. The People respond any error was invited because Replogle's counsel earlier elicited Jimenez's opinion regarding the veracity of Bustamante's statements arguing it was "highly relevant." If not invited error, the People contend the court erred first in permitting Jimenez's opinion testimony on cross-examination, but corrected the error by allowing opinion testimony on redirect. In any event, the People contend the error was harmless. We agree with the People the error was invited. Even if not invited, the error was harmless.

"'The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal.' [Citation.]" (*People v. Bailey* (2012) 54 Cal.4th 740, 753 [ostensible failure to request instruction on lesser included offense].) "If one party believes that questions on cross-examination leave the jury with an incorrect impression,

it can ask clarifying questions on redirect examination. In the same way, if an attorney believes questions on direct examination may have been incomplete or misleading, the attorney can explore the topic on cross-examination." (*People v. Valencia* (2008) 43 Cal.4th 268, 282.)

Replogle argues the invited error doctrine does not apply to evidentiary rulings noting the People have cited no authority that it does. However, neither has Replogle cited any authority that it does not. (*People v. Sheldon* (1994) 7 Cal.4th 1136, 1140 [the defendant's introduction of inadmissible evidence was invited error].) We agree with the People that by asking Jimenez's opinion regarding the veracity of Bustamante's statements and arguing to the trial court such opinion testimony was "highly relevant," Replogle invited the People to do the same.

Nonetheless, to the extent the court erred in allowing Jimenez's opinion testimony, we hold the admission harmless. "Lay opinion about the veracity of particular statements by another is inadmissible . . . . [T]he reasons are several. With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. Qualified experts may express opinions on issues beyond common understanding [citations], but lay views on veracity do not meet the standards for admission of expert testimony. A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where 'helpful to a clear understanding of his testimony' [citation], i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. [Citations.] Finally, a lay opinion about the veracity of particular statements does not constitute properly founded character or reputation

evidence [citation], nor does it bear on any of the other matters listed by statute as most commonly affecting credibility [citation]. Thus, such an opinion has no 'tendency in reason' to disprove the veracity of the statements. [Citations.]" (*People v. Melton* (1988) 44 Cal.3d 713, 744 [imputation of investigator's testimony he did not believe parolee's statements regarding involvement of another person in the murder harmless error]; *People v. Sergill* (1982) 138 Cal.App.3d 34, 40 [prejudicial error in admitting testimony of officers regarding their belief in the veracity of victim's report of molestation].)

Here, there does not appear to be any basis for allowing Jimenez's opinion testimony on redirect other than in response to his opinion testimony on cross-examination. Nevertheless, any error was harmless. (*People v. Sergill* (1982) 138 Cal.App.3d 34, 40 ["We must examine the entire cause, including the evidence, and determine whether it is reasonably probable that a result more favorable to appellant would have been reached had this evidence not been admitted"].) As discussed above, any error in the admission of any portion of Jimenez's testimony was harmless. Indeed, here at least, Replogle elicited several incidents in which Jimenez stated he disbelieved the statements of Bustamante regarding particular matters. That he later appeared to endorse Bustamante's statements in entirety was self-impeaching and could only lead to the inevitable credibility determination to be made by the jury, as it was thrice instructed to do by the court.

D. *BRADY* ERROR IN PROSECUTION'S FAILURE TO DISCLOSE JIMENEZ'S STATUS AS JAIL TRUSTEE

After defendants' convictions, the People disclosed on April 5, 2011, that Jimenez was a paid tank trustee from June 2, 2008, to April 20, 2009. Corporal Gareth Lewis, who worked for the classification unit of the Riverside County Jail at Indio, declared Jimenez's "duties as tank trustee [were] keeping his assigned housing unit clean and acting sort of as a janitor. Jimenez would mop floors, pick up trash, and assist during meal times in passing out and picking up trays. The benefit of being a tank trustee is that you have the freedom to move about and be out of your cell hours at a time. [¶] The other benefit of being a tank trustee is that you receive monetary compensation of [50] cents a day. The money is placed in your jail account which allows you to purchase commissary goods. [¶] . . . Jimenez was never solicited or paid in any manner for relaying information to law enforcement. Jimenez was never in charge of any inmates or given any other responsibilities."

Replogle contends the prosecution committed prejudicial *Brady* error in failing to disclose Jimenez's status as a jail trustee prior to trial. Bustamante joins. We disagree.

In *Brady*, the United States Supreme Court established due process requires the prosecution to disclose to the defense evidence that is both favorable to the defendant and material on either guilt or punishment. (*Brady*, *supra*, 373 U.S at p. 87.) "Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses. [Citation.]" (*In re Sassounian* (1995) 9 Cal.4th 535, 544.) This includes evidence that reflects upon the credibility of material witnesses. (*Giglio v.*

United States (1972) 405 U.S. 150, 154-155; *People v. Ruthford* (1975) 14 Cal.3d 399, 408, overruled on another ground in *Sassounian*, at pp. 545-546, fn. 7.)

Evidence is "material" for purposes of *Brady* "'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different.' [Citations.]" (*In re Sassounian*, *supra*, 9 Cal.4th at p. 544.) Such a reasonable probability exists where the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Kyles v. Whitley* (1995) 514 U.S. 419, 435, fn. omitted; see also *In re Williams* (1994) 7 Cal.4th 572, 611.) "'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.' [Citation.]" (*People v. Fauber* (1992) 2 Cal.4th 792, 829.) The "defendant has the burden of showing materiality." (*People v. Hoyos* (2007) 41 Cal.4th 872, 918.) """In general, impeachment evidence has been found to be material where the witness at issue 'supplied the only evidence linking the defendant(s) to the crime' [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case [citation]."' [Citation.]" (*People v. Letner* (2010) 50 Cal.4th 99, 177.)

The prosecutorial obligation to disclose relevant materials in the possession of the prosecution includes information within the possession or control of the prosecution or to which the prosecutor has reasonable access. (*In re Littlefield* (1993) 5 Cal.4th 122, 135.) The duty of disclosure "is not limited to evidence the prosecutor's office itself actually knows or possesses, but includes 'evidence known to the others acting on the

government's behalf in the case, including the police.' [Citation.]" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132, overruled on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Here, the classification unit of the correctional division of the Riverside County Sheriff's Department was not one of the agencies connected to the investigation or prosecution of the charges against defendants. Thus, the People had no obligation under *Brady* to disclose Jimenez's status as a jail trustee, specifically because the People had neither actual nor constructive knowledge of this fact either before or during trial. Moreover, Jimenez's status as a jail trustee during the time Bustamante confided in him was not material to the case. The fact that Jimenez performed light janitorial duties in exchange for more freedom of movement about the tank, and his ability to earn 50 cents an hour would not have impeached his testimony. It certainly would not have put the entire case in a different light that would undermine confidence in the verdict. Neither was Jimenez's testimony the only evidence linking either Replogle or Bustamante to the crimes. Furthermore, Lewis declared, "Jimenez was never solicited or paid in any manner for relaying information to law enforcement." Indeed, Jimenez's testimony that he testified in return for a plea agreement, which reduced his exposure from life imprisonment to a 20-year determinate term was far more impeaching of his credibility. Thus, the prosecutor committed no *Brady* error.

E. INSTRUCTIONAL ERROR IN APPLICATION OF THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE TO THE TARGET OFFENSES

The court instructed the jury with CALCRIM No. 417 as follows: "A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit no matter which member of the conspiracy commits the crime. A member of a conspiracy is also criminally responsible for . . . any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan. [¶] Under this rule a defendant who is a member of the conspiracy does not need to be present at the time of the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing usual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances as established by the evidence. A member of a conspiracy is not criminally responsible for the act of another member if the act does not further the common plan or is not a natural and probable consequence of the common plan. To prove that the defendant is guilty of the crimes of murder as charged in Count 1 and conspiracy to commit murder in Count 2, the People must prove that the defendant conspired to commit one of the following crimes: Grand theft, identity theft, theft by false pretenses[,] and forgery; two, a member of the conspiracy committed burglary and first-degree murder for financial gain to further the conspiracy; and burglary and murder for financial gain were [the] natural and probable consequence[s] of the common plan or

design of the crime that the defendant conspired to commit. [¶] The defendant is not responsible for the act[s] of another person who was not a member of the conspiracy even if the acts of the other person helped to accomplish the goal of the conspiracy. [¶] A conspiracy member is not responsible for the acts of other conspiracy members that are done after the goal of the conspiracy had been accomplished." (Italics added.)

Prior to giving the instruction, the court discussed it with counsel on several occasions. The People requested the instruction. The People exposited, "[O]ur theory . . . is that [murder] was a natural and probable consequence. You cannot steal everything someone owns; their cars, their house, everything in their house, drain their bank accounts and not expect a natural and probable consequence to be that the person you're stealing everything from is killed to avoid detection and being a witness." The court responded, "Again, you're talking about kidnapping or robbery, the result of that is often murder, but theft with a fountain pen, the result of that isn't often murder."

In a later discussion regarding the instruction, the People opined, "I think the conspiracy and the common goal and plan was to eliminate him so as to drain his entire estate, so we have this massive conspiracy and these crimes that need to be committed within the conspiracy to reach the common goal and plan . . . ." The court noted CALCRIM No. "417 I think is the linchpin jury instruction, at least from my point of view."

In yet another discussion of the instruction, Replogle's counsel argued that if the jury found Replogle had participated only in events occurring after the murder, he could not be found guilty for murder even under a conspiracy theory because a natural and

probable consequences of something that occurred after the murder could not be the preexisting homicide: "How is the homicide the natural and probable consequence of conduct that took place after the homicide?" "A homicide cannot be a natural and probable consequence of a crime that has not happened yet." Nevertheless, neither defense counsel objected to instruction of the jury with CALCRIM No. 417.[25]

Later still, Replogle's counsel argued, "The natural and probable consequences theory is just upside down on this case. The forgery and the theft happened well after the homicide . . . ." The discussion continued more as it related to the conspiracy instructions, CALCRIM Nos. 400, 401, and 402, than the natural and probable consequences instruction, CALCRIM No. 417. Still, no objection to instruction with CALCRIM No. 417 was raised by defense counsel. In his closing argument, the prosecutor specifically went over the natural and probable consequences doctrine as elucidated in CALCRIM No. 417.

On appeal, Replogle argues the court erred in instructing the jury with CALCRIM No. 417. We disagree.

"'"The general rule is well settled that where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine . . . . *Each is responsible for everything done by his*

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[25] Replogle states his counsel below did object to instruction with CALCRIM No. 417; however, the record does not support this. Rather, Replogle's counsel argued instruction with CALCRIM No. 402 not be given.

confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. Nevertheless the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design.'" [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 260-261 (*Prettyman*) [where the jury could reasonably find a defendant conspired not only to commit the charged crimes, but to protect all members of the group from arrest or detection, death is a natural and probable consequence of an unlawful enterprise].) "The trial court, moreover, need not identify *all* potential target offenses supported by the evidence, but only those that the prosecution wishes the jury to consider." (*Id.* at p. 269, fn. omitted.)

A defendant's "'knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, *not the specific intent that is an element of the target offense,* which . . . must be found by the jury.' [Citations.]" (*People v. Hardy* (1992) 2 Cal.4th 86, 188.) "The trial court should grant a prosecutor's request that the jury be instructed on the 'natural and probable consequences' rule only when (1) the record contains substantial evidence that the defendant intended to encourage or assist a confederate in committing a target offense, and (2) the jury could reasonably find that the crime actually committed by the

defendant's confederate was a 'natural and probable consequence' of the specifically contemplated target offense. If this test is not satisfied, the instruction should not be given, even if specifically requested." (*Prettyman, supra,* 14 Cal.4th at p. 269.)

"For a criminal act to be a 'reasonably foreseeable' or a 'natural and probable' consequence of another criminal design it is not necessary that the collateral act be specifically planned or agreed upon, nor even that it be substantially certain to result from the commission of the planned act." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 530.) "[T]he issue is a factual question to be resolved by the jury in light of all of the circumstances surrounding the incident. [Citations.] Consequently, the issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant. [Citations.]" (*Id*. at p. 531.)

We hold substantial evidence supported a determination by the trial court the jury could reasonably find the victim's death was a natural and probable consequence of the specifically contemplated target offenses. It is true that no court has explicitly ruled on the propriety of application of the natural and probable consequences doctrine to a crime committed *before* (in this case, murder) the not inherently or potentially violent target offenses were committed. (*People v. Kaufman* (1907) 152 Cal.331, 334 [natural and probable consequences doctrine properly applied].) However, it is also true that no case has prohibited its application to non-violent offenses committed afterward.

Indeed, we believe the frontiers of the doctrine first announced in *Kaufman* and reiterated in *Prettyman* do not restrict application of the doctrine so narrowly as to apply to only specific crimes, but rather, require the court to make a determination as to whether the jury could reasonably find, considering all the circumstances of the case at hand, whether the target crimes in that particular factual scenario would naturally and probably result in the death of the victim. (See *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 844 [death was natural and probable consequence of staging of vehicle collisions to commit insurance fraud].); *People v. Luparello* (1986) 187 Cal.App.3d 410, 436-438 [man who hired detective to locate mistress properly held liable for conspiracy to commit murder under natural and probable consequences doctrine when detective killed witness].) Moreover, as noted in *Prettyman*, a defendant need not even be charged with a target crime in order for the doctrine to apply. (*Prettyman*, *supra*, 14 Cal.4th at pp. 266-268.) We agree with defendant that in many, if not most, circumstances where the target offense is an inherently non-violent offense, murder will not be a natural and probable consequence of such offenses, particularly where the latter occurs after a murder.

Here, however, where the evidence supported an expansive conspiracy to obtain possession of the victim's house, cars, bank accounts, identity, and all personal possessions contained in the home, it is difficult to see how such a plan could be accomplished without the killing of the victim. As *Nguyen* noted, "it is not necessary that the collateral act be specifically planned or agreed upon, nor even that it be substantially certain to result from the commission of the planned act." (*People v. Nguyen*, *supra*, 21

Cal.App.4th at p. 530.) The issue is a factual one to be resolved by the jury as to whether "under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*Id*. at p. 530.)

Here, substantial evidence supported a determination that Replogle was a member of a conspiracy, prior to the murder of the victim, the goal of which was to attain complete control over all the victim's assets down to his shoes. Bustamante gave Jimenez a flowchart with all the members of the conspiracy listed; on it was reflected "David Replogle, attorney" with Replogle's office address. Bustamante said Replogle was "the one that was getting all the paperwork in order. He's the one that would get the power of attorney for the house, change certain documents, forge certain IDs so he could place people as power of attorneys as for the house, and he would also do that for the cars that were promised to Bustamante." Bustamante had met with Replogle and Niroula in Replogle's office to plan the murder of the victim. Replogle told Bustamante he had obtained the victim's ID and placed Replogle's picture on it.

Bustamante told Jimenez the whole group of conspirators had gotten together to pay someone to murder he victim. He told Jimenez he met Niroula and Replogle at Replogle's office three to four months before the murder, at which time they discussed the amount of money they were going to pay Bustamante for killing the victim, what items they wanted him to obtain from the victim's home as being worth a lot of money, and what items he could keep for himself. Bustamante said he was promised $80,000 of which $30,000 would be, and was, wired to his account by Replogle.

In November 2008, Niroula and Replogle told Manning they wanted him to come to Palm Springs; they had a proposal for him. He met with them at a restaurant in Palm Springs in the last week of November 2008. Replogle told him they wanted him to act as POA for the victim.

Bustamante told Jimenez he had received a key to the house from Replogle and Niroula. Bustamante discussed with Replogle a trip he was going to take that was being paid for by Replogle; he said he did not want to be stranded; Replogle told him not to worry about it; they mentioned that Niroula would need money too. On November 25, 2008, a call was placed from Replogle's phone to the victim's home number.

Niroula informed McCarthy that Replogle was funding the trip; Bustamante confirmed Replogle was funding the trip. The plan involved Replogle coming down to obtain a POA and identification for Niroula from the victim so he could assume the victim's identity for financial gain. Originally, Niroula wanted to kidnap the victim and use the POA, but changed his mind and decided to get rid of the victim "and take over his identity." Niroula said Replogle would "take care of the money."

On December 1, 2008, Replogle paid for tickets for himself and Niroula for a flight that left Oakland and arrived in Burbank. He rented a car from Alamo at the airport in Burbank and returned it that evening with added mileage consistent with a roundtrip to the Riviera Hotel in Palm Springs. Replogle booked two reservations on a return flight leaving Burbank and arriving in Oakland at that evening.

A number of phone calls were exchanged between Replogle's phone to one used by Niroula, for which Replogle was financially liable, between November 24, and

December 4, 2008. Bustamante's phone exchanged four calls with Replogle's on December 1, 2008. On December 2, 2008, 10 calls were exchanged between Replogle and Garcia's cell phones. Calls from Replogle's phone on December 2, 2008, initially originated from the San Francisco area, but later were initiated in Palm Springs. Likewise, on that same date, Bustamante's phone exchanged six phone calls with Replogle's. Ten calls were exchanged between them on December 4, 2008. Three were exchanged between them on December 5, 2008. Replogle and Garcia's cell phones exchanged at least 14 calls on December 5, 2008.

Even if the jury found defendant had not conspired to kill the victim, a reasonable person in Replogle's position would have or should have known that murder was a natural or probable consequence of the complex acts of fraud and theft of such substantial portions of the victim's property including his real estate, all his personal property, and the contents of all his bank accounts. Thus, the court acted appropriately in instructing the jury with CALCRIM No. 417.

F. INSTRUCTIONAL ERROR REGARDING CIRCUMSTANTIAL EVIDENCE

After the completion of the parties' respective cases, but before closing arguments, the court stated, "I'm pretty much satisfied with all the instructions up through [CALCRIM No.]226." The People subsequently argued, "Sir, I disagree that [CALCRIM No.] 225 should be given. I believe [CALCRIM No.] 224 should be given, and the use—[CALCRIM No.] 224 applies to circumstantial evidence in general. [CALCRIM No.] 225 is circumstantial evidence only as it pertains to intent. The use

notes underneath both seem to strongly suggest that both are not to be given, and in this case, the People are relying on circumstantial evidence for much more than intent in this case. We are relying on it for conclusions, for the conspiracy, for elements of the crime."

The parties then engaged in the following colloquy:

"[The People]: I'm saying give [CALCRIM No.] 224 and not [CALCRIM No.] 225. The use note at the very, very bottom under bench notes under [CALCRIM No.] 224 say: 'If intent is the only element proved by circumstantial evidence, do not give this instruction, give [CALCRIM No.] 225.' Well the People's theory of the case rests very largely on circumstantial evidence, not simply intent. [¶] So the People would request [CALCRIM No.] 224 be given.

"The Court: I'm giving [CALCRIM No.] 224. [¶] . . . [¶]

"[The People]: And then under [CALCRIM No.] 225, the use—the bench note paragraph two: 'If other elements of the offense also rest substantially or entirely on circumstantial evidence, do not give this instruction; give [CALCRIM No.] 224.' So I personally think that the law requires [CALCRIM No.] 225 to come out."

The People further argued, "[CALCRIM No.] 224 is broad; it covers circumstantial evidence for everything. [CALCRIM No.] 225 is narrowed for intent only, and People are relying on circumstantial evidence for much of its case." Replogle's counsel argued for a modified version of CALCRIM No. 224. The People additionally contended, "My point is we are relying on circumstantial evidence for much more than specific intent or a mental state. We are relying on it for other elements of the crimes. And I think if you take [CALCRIM No.] 224 away, then the jury's not being instructed."

Replogle's counsel argued, "I think that [giving CALCRIM No. 225 is] the better way to do it." "I think [CALCRIM No.] 225 covers more territory than [CALCRIM No.] 224." The court determined to instruct the jury with CALCRIM No. 225.

The court instructed the jury with CALCRIM No. 225 as follows: "The People must prove not only that each defendant did the acts charged but also that he acted with a particular intent and/or mental state. The instruction for each crime explains the intent and or mental state required. An intent and/or mental state may be proved by circumstantial evidence. Before you may rely on circumstantial evidence to conclude that a fact necessary to find each defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. Also, before you may rely on circumstantial evidence to conclude that each defendant had the required intent and/or mental state, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that each defendant had the required intent and/or mental state. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that each defendant did have the required intent and/or mental state and another reasonable conclusion supports the finding that the defendant did not, you must conclude that the required intent and/or mental state was not proved by the circumstantial evidence; however, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

Replogle contends the court erred in giving CALCRIM No. 225. We disagree. We hold Replogle invited the error by arguing that the court should give CALCRIM No.

225 instead of CALCRIM No. 224 as requested by the People.[26] Moreover, we disagree that giving CALCRIM No. 225 constituted error. Regardless, we hold any error harmless.

The court must give CALCRIM No. 224 "on its own motion when the proof of guilt rests substantially on circumstantial evidence. [Citations.] But the instruction need not be given when the circumstantial evidence merely corroborates other evidence [citations], because in such cases the instruction may confuse the jury regarding the weight to which other evidence is entitled. [Citation.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 142; *People v. Heishman* (1988) 45 Cal.3d 147, 167.)

"The general instruction on sufficiency of circumstantial evidence is a more inclusive instruction on sufficiency of circumstantial evidence than the instruction on sufficiency of circumstantial evidence to prove specific intent or mental state, and the former is the proper instruction to give unless the only element of the offense that rests substantially or entirely on circumstantial evidence is that of specific intent or mental state. [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1222.)

Regarding juror instruction, "Invited error . . . will only be found if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction. [Citations.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 115 [trial court declines to issue instructions on lesser included offenses upon defense counsel's

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[26] We note Replogle's counsel effectively argued CALCRIM No. 224 during his closing argument. Similarly, the People in their rebuttal argued the jury may only adopt reasonable interpretations of acts, as required in CALCRIM No. 224.

request].) Replogle's counsel argued CALCRIM No. 225 covered the same legal ground as CALCRIM No. 224 by virtue of the language reading: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find each defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt."

In other words, Replogle's counsel contended CALCRIM No. 225 covered all aspects of CALCRIM No. 224, including the bar on the use of circumstantial evidence to prove all elements of the crime, including the actus reus. Replogle's counsel argued, "I think [CALCRIM No. 225] covers more territory than [CALCRIM No.] 224." Thus, Replogle's counsel argued a deliberate tactical purpose in refusing to accede to the People's request for instruction with CALCRIM No. 224. Implicit in this claim is that the actus reus elements of the crimes were not in question so much as Replogle's intent in engaging them, i.e., whether he simply intended to engage in the conspiracy for the purpose of depriving the victim of his assets or whether that intention carried over into the victim's murder. CALCRIM No. 225 focuses on intent where CALCRIM No. 224 does not. Thus, CALCRIM No. 225 would force the jury to focus on Replogle's intent more so than CALCRIM No. 224, which would inevitably inure to his benefit. Hence, Replogle invited any error.

Even if any error was not invited, we agree with the People that Replogle's guilt did not rest substantially on circumstantial evidence. Indeed, despite the People's argument below, overwhelming direct evidence of Replogle's guilt supported the verdict such that the similarly vast circumstantial evidence corroborated that direct evidence.

Jimenez testified Bustamante told him all the conspirators, including Replogle, met together to pay someone to murder the victim. Bustamante met with Niroula and Replogle four months before the murder; they discussed the amount of money they were going to pay Bustamante for killing the victim, what items they wanted him to obtain from the victim's home, and what items he could keep himself. Bustamante said he was promised $80,000 of which $30,000 would be wired to his account by Replogle prior to the burglary of the home. Bustamante said Niroula and Replogle told him to take items from the victim's home, which had been identified by Garcia as being worth a lot of money. The volume of text messages, phone records, flight records, and executed financial documents pointing to Replogle's involvement in the conspiracy were corroborative of the direct evidence.

Even if the error was not invited, we hold it was harmless. (*People v. Rogers* (2006) 39 Cal.4th 826, 886 ["Because (CALCRIM No. 225) was given, the failure to give (CALCRIM No. 224) could have affected only the issue of identity. On that issue, the evidence supporting the jury's determination that defendant killed [the victim], while circumstantial, was strong"].) At issue in the instant case, with regard to Replogle, was not his involvement in a conspiracy, but whether his intent in that conspiracy was obtained under duress and extended to the murder of the victim. Thus, because CALCRIM No. 225 was given, the failure to give CALCRIM No. 224 could have affected only the issue of Replogle's acts. Since the evidence of Replogle's acts, both direct and circumstantial, supporting the jury's verdict that Replogle conspired to kill and commit various theft offenses against the victim was strong, any error was harmless.

G. DENIAL OF NEW TRIAL MOTION ON THE GROUNDS OF JUROR MISCONDUCT

Replogle's counsel filed a motion to dismiss and request for new trial based upon purported juror misconduct. Attached to the motion was a transcript of an interview between Juror No. 12 (JN12) and Replogle's counsel, with a declaration by JN12 indicating the attached transcript was a true and correct transcription of the interview. In that interview, JN12 responded to Replogle's counsel's question as to whether the jurors discussed why Replogle did not inform the jury why he let the conspirators use his airline miles: "We did. We remembered from your opening statement that we were going to hear from him, so we're sitting there waiting thinking that he would testify as defense witness number two.[27] [¶] . . . [¶] We felt that maybe you advised him not to testify, because you are his attorney. And then we felt, well maybe he doesn't want to testify because we're going to send questions to the judge, which we're allowed to do. So we felt those two things were reasons why he didn't testify."

"[W]e decided well yeah, why isn't [Replogle] testifying, and we started thinking, well first it's his right, second [defense counsel] may not want him to get on the stand, and thirdly, he may not want to get our questions." "Because at first I guess you could say 15 or 20 minutes we tried to figure out why he didn't testify." Their foreman told them they were not supposed to talk about it, that they had to base their decision on the

[27] During opening statement, Replogle's attorney mentioned he expected Replogle would testify.

evidence. When they rendered the verdict they "were just going by what was in front of [them]." "We went by the evidence at the end."

Replogle's counsel also interviewed Juror No. 11 (JN11). Replogle's counsel questioned whether the prosecutor's statement that she believed Replogle was going to testify had any effect upon them.[28] JN11 replied, "No, and in all honesty, I didn't expect either one of them to testify. You know, I just didn't expect that to happen. As far as you can tell, whenever you watch legal cases on television anymore, the advice of lawyers is not to testify, because you open up a can of worms there otherwise." She did not discuss Replogle's failure to testify with the other jurors and did not remember anyone else discussing it.

The court found both jurors' statements admissible. It then "conclude[d] as to [JN12] that if it was misconduct, it certainly was not prejudicial because in the end the verdict was clearly based upon the evidence and not based at all on the fact that . . . [Replogle] didn't testify." "I think in this case this jury made the decision based on the evidence they had. That's my conclusion." The court further exposited, "[T]he jury was led to believe on the first day of trial that . . . Replogle would indeed testify. And when he didn't, they were obviously curious. But that's all they were; they were just curious.

[28] After Replogle rested, the prosecutor, when asked whether she had any rebuttal witnesses, stated, "Well, your Honor, since we've been told he was going to testify for the past . . . ." Replogle immediately objected. The court excused the jury and held a hearing upon Replogle's oral motion to dismiss based on the prosecutor's comment on Replogle's failure to testify. The court denied the motion.

[JN12] was quite clear that the verdict was based upon the law and the evidence, not on the fact that . . . Replogle didn't testify." The court denied the motion for new trial.

"'[T]he purpose of the rule prohibiting jury discussion of a defendant's failure to testify is to prevent the jury from drawing adverse inferences against the defendant, in violation of the constitutional right not to incriminate oneself.' [Citation.]" (*People v. Loker* (2008) 44 Cal.4th 691, 749 [several jurors commented on the defendant's decision not to testify, but were reminded by foreperson they were not allowed to discuss it].) "'[B]y violating the trial court's instruction not to discuss [the] defendant's failure to testify, the jury committed misconduct. [Citations.] This misconduct gives rise to a presumption of prejudice, which "may be rebutted . . . by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm."' [Citation.] '"Whether prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court's independent determination."' [Citation.] 'However, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence."' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 726-727 (*Avila*) [two jurors commented on the defendant's failure to testify, but were immediately reminded they could not consider that fact].)

"We first determine whether there was any juror misconduct. Only if we answer that question affirmatively do we consider whether the conduct was prejudicial. [Citation.]" (*People v. Collins* (2010) 49 Cal.4th 175, 242.) "'On appeal, a trial court's ruling on a motion for new trial is reviewed under a deferential abuse of discretion

standard. [Citation.] Its ruling will not be disturbed unless defendant establishes "a 'manifest and unmistakable abuse of discretion.'"' [Citation.]" (*People v. Homick* (2012) 55 Cal.4th 816, 894.)

Here, the trial court never made a determination as to whether juror misconduct occurred. Rather, the court found that if JN12's conduct constituted misconduct, it was not prejudicial because the jury did not consider Replogle's choice not to testify against him in finding him guilty. We observe that of the 12 jurors contacted, only two responded. Only one, JN12, stated the jurors had discussed Replogle's election not to testify. JN11 stated neither she nor any other jurors had discussed Replogle's determination not to testify. (*Avila, supra,* 46 Cal.4th at p. 727 ["[T]he circumstance that only two jurors recalled that any juror had commented on defendant's failure to testify indicates that the discussion was not of any length or significance"]; *People v. Hord* (1993) 15 Cal.App.4th 711, 727-728 ["The fact that only some of the jurors recalled the comments tends to indicate that this was not a discussion of any length or significance"].)

Although, JN12 indicated such discussion had occurred at some length (*Avila, supra,* 46 Cal.4th at p. 727 ["'Transitory comments of wonderment and curiosity' about a defendant's failure to testify, although technically misconduct, 'are normally innocuous, particularly when a comment stands alone without any further discussion'"]), JN12 stated the jurors were told by the foreman not to discuss the matter of Replogle's choice not to testify; they had to decide the case on the evidence presented at trial. (*Id*. at p. 727 [reminder that jurors could not consider the defendant's choice not to testify relevant in

determination of prejudice from misconduct]; *People v. Loker* (2008) 44 Cal.4th 691, 749 [same].)

We hold Replogle suffered no prejudice. The fact that JN11 declared none of the jurors discussed Replogle's choice not to testify strongly suggests no such discussion occurred or, if it did, it was transitory in nature. Moreover, JN12 reported the foreperson informed them any discussion of Replogle's election not to testify was inappropriate. Finally, JN12's assertion the jury had reached its verdicts based solely upon the evidence, not any reliance upon Replogle's failure to testify, supported the court's finding any misconduct was not prejudicial.

H. JUROR MISCONDUCT BY JUROR NO. 5 (JN5)

After the testimonies of Detective Min and Investigator Blanck regarding their numerous unfruitful searches for the victim's body, JN5 came forward during a recess asking to go back in chambers to speak with the court staff and lawyers. JN5 had drawn a map describing where he believed the victim's body might be buried from the descriptions given in the testimonies. The court stopped JN5's attempts to relay this information to the prosecution; JN5 had not communicated his speculation to the other jurors.

The court queried JN5, "The evidence so far before all the jurors is that they have looked for the body at many places and haven't found it. Okay. That's the state of the evidence. You know, so at this point, [JN5], can you be fair and impartial, or are you at the point now where you're so concerned about, apparently, they didn't search where you're talking about that you can't be fair about all this[?]" "The bottom line for all the

jurors . . . is can you look at the evidence and be fair and impartial and not impose on your verdict on other things, like you know the area and they didn't look in the right place or other things?" JN5 responded, "Yeah, I would be impartial. And a person's innocence or guilt is based on facts, period. If they didn't look in a certain area for whatever reason, that's fine." The court asked, "But I, again, have to be really careful that this isn't going to affect your verdict one way or the other." JN5 replied, "It's not."

The court refused JN5's map and told him not to discuss the issue with the other jurors. The court then instructed the entire jury panel: "There was testimony from Investigator Blanck about looking for [the victim's] body, and he talked about going on on-ramps and off-ramps and 210 and 15, and whatever, the Grapevine, et cetera. Those of us who live in Southern California may be familiar with those areas, or not. [¶] Please don't let curiosity rule here, and don't get on Google Maps and try to find those places or anything like that. Obviously, jurors, when you come to the door of the courtroom, you don't leave your common sense and experience behind. Obviously, you bring it with you. [¶] But the verdict here, whatever it may be at the end of this trial, has to be based on what you hear from the witness stand, so you can't consider whether the 215, the off-ramp at whatever flows left to right or has a tower or whatever there. Just don't consider those things, please, because you can't. You've got to make your verdict based on the evidence you hear. So please don't think anything like that."

On appeal, Bustamante contends JN5 committed prejudicial misconduct because by drawing a map of where he believed the victim's body might be buried, JN5 had prejudged the case already having determined the victim had, in fact, been killed.

Replogle joins Bustamante's argument. The People maintain defendants forfeited the issue by failing to object below. We agree defendants forfeited the issue, but address the merits to forestall defendants' ineffective assistance of counsel argument. We disagree with counsels' contention JN5 committed prejudicial misconduct.

"A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. [Citations.] A defendant is 'entitled to be tried by 12, not 11, impartial and unprejudiced jurors. "Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." [Citations.]' [Citation.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) "Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias. [Citations.]" (*Ibid*.)

"'"'"[W]hether a defendant has been injured by jury misconduct in receiving evidence outside of court necessarily depends upon whether the jury's impartiality has been adversely affected, whether the prosecutor's burden of proof has been lightened and whether any asserted defense has been contradicted. If the answer to any of these questions is in the affirmative, the defendant has been prejudiced and the conviction must be reversed. On the other hand, since jury misconduct is not per se reversible, if a review of the entire record demonstrates that the appellant has suffered no prejudice from the misconduct a reversal is not compelled.' [Citation.]" [Citation.]' [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 950.) Failure to object to juror misconduct forfeits the

claim on appeal. (*Ibid.*; *People v. Lewis* (2009) 46 Cal.4th 1255, 1308; *People v. Foster* (2010) 50 Cal.4th 1301, 1341.)

We discern no misconduct from JN5's actions. The drawing of the map of where he believed the victim's body might be buried did not establish he had prejudged the case against either defendant. Rather, his map was an obvious response by someone who was familiar with the area and heard much testimony regarding maps and locations in that area. JN5's drawing neither established he believed a body would be discovered where his own map would have led investigators nor that if one was found, it would necessarily have been the result of a killing. JN5's drawing of the map could just have easily proved exculpatory in his mind in that if a body was not found at that location, it could have proved dispositive to him that the victim was not actually dead. Moreover, if one was found, it would not be inconsistent with a natural or accidental death; nothing in his drawing of the map indicated JN5 believed the victim to have been killed as a result of a conspiracy to obtain his assets. Finally, JN5 twice indicated his drawing of the map had not affected his impartiality. Thus, no misconduct occurred.

I. ERROR IN COURT'S RESPONSE TO JURY QUESTION

During deliberations, the jury posed the following question to the court: "Can a defendant be found guilty of 1st degree murder in Count 2, yet a lesser degree of murder in count 1?" The court proposed to answer that if the jurors hypothetically convicted Bustamante of conspiracy to murder in Count 2, "they had to have done it on a conspiracy theory which forecloses any other murder except murder in the first degree."

Bustamante argued the jury should be instructed to determine each count individually. The court responded, "If they have convicted him of murder of [the victim] in Count 2, it has to be murder in the first degree. That is their only choice on the verdict forms. That will foreclose them from convicting Bustamante of anything other than first degree murder in Count 1." Counsel for Bustamante submitted on the matter and proposed the answer to the question should be "No." The court so instructed the jury.

Bustamante contends on appeal the court should have referred the jury back to CALCRIM No. 3515 because a "person could conspire to murder a victim, and then be caught off guard by the victim and kill without the kind of premeditation and deliberation that constitutes first degree murder."[29] Bustamante acknowledges, "This may have the ring of a fantastic defense hypothetical, but the fact is the jury asked the question." Bustamante maintains the court's response effectively directed a verdict of first degree murder against him. We hold Bustamante forfeited the issue by acquiescing in the court's response. To the extent he did not forfeit the issue, we hold the court did not err in giving the response it did. Moreover, even if error, we hold it harmless.

"'When a jury asks a question after retiring for deliberation, "[s]ection 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law.' [Citation]" [Citation.] 'This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full

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[29] CALCRIM No. 3515, as read to the jury in this case, read: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict from each count and each defendant."

and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. . . . But a court must do more than figuratively throw up its hands and tell the jury it cannot help. . . . It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given.' [Citation.] 'We review for an abuse of discretion any error under section 1138. [Citation.]' [Citation.]" (*People v. Hodges* (2013) 213 Cal.App.4th 531, 539, fn. omitted.)

"It has long been recognized that a trial judge 'may not direct a verdict of guilty no matter how conclusive the evidence.' [Citations.]" (*People v. Figueroa* (1986) 41 Cal.3d 714, 724.) "The prohibition against directed verdicts 'includes perforce situations in which the judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of so doing by eliminating other relevant considerations if the jury finds one fact to be true.' [Citation.]" (*Ibid.*) Counsel's acquiescence to a court's proposed response to a jury's question forfeits any complaint on appeal. (*People v. Loza* (2012) 207 Cal.App.4th 332, 357.)

Although counsel for Bustamante initially, effectively argued the court should refer the jury back to CALCRIM No. 3515, he later agreed with the court it should simply reply "'No'" to the jury's question. This is precisely how the court answered the jury's question. Thus, Bustamante forfeited the issue by acquiescing in the court's proposed response.

Even if Bustamante did not forfeit the issue, we hold the court acted within its discretion in answering the juror question as it did. "[A]ll conspiracy to commit murder

'is necessarily "conspiracy to commit [premeditated] first degree murder"' [citation] and is therefore punishable in the same manner as first degree murder pursuant to the provisions of . . . section 182." (*People v. Cortez* (1998) 18 Cal.4th 1223, 1226.) Moreover, there was simply no evidence adduced at trial the killing of the victim was the result of being caught off guard. Nor did counsel argue this "fantastic[al]" theory to the jury. Thus, the court acted within its discretion in informing the jury that if it found Bustamante guilty of conspiracy to commit murder, he was necessarily guilty of first degree murder in Count 1.

Finally, any error was harmless. "Section 1138 error due to the trial court's failure to adequately answer the jury's question is subject to the prejudice standard of *People v. Watson* (1956) 46 Cal.2d 818, 836[,] i.e., 'whether the error resulted in a reasonable probability of a less favorable outcome. [Citation.] In this context, "'reasonable probability'" means "'merely a *reasonable chance*, more than an *abstract possibility*,'"" of an effect of this kind. [Citation.]' [Citation.]" (*People v. Hodges*, *supra*, 213 Cal.App.4th at p. 539.) As noted above, no evidence supported the "fantastic[al]" theory Bustamante killed the victim when caught off guard, and counsel for Bustamante did not argue any such theory to the jury. Thus, any error was harmless.

J. ABSTRACT OF JUDGMENT

Replogle argues the abstract of judgment must be amended to correct errors regarding the imposition and computation of fines and fees. Bustamante joins. The People concede the issue. We agree and will direct the superior court to amend the

abstract of judgment and sentencing minute orders for defendants to reflect correctly the imposition and computation of fines and fees.

"It is well settled that '[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]' [Citation.] When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties. [Citation.]" (*People v. Jones* (2012) 54 Cal.4th 1, 89.)

The trial court found Replogle had no ability to pay the booking fee and deleted it; however, the abstract of judgment reflects imposition of a $414.45 booking fee.[30] Thus, we shall order Replogle's abstract of judgment be amended to reflect no imposition of the booking fee.

Additionally, as to both defendants, the court imposed restitution fines of $2,000, security fees of $400, and court facilities fees of $300 based on a computation of $200 per count for restitution, $40 per count for security, and $30 per count for facilities fees. However, defendants were only convicted of nine counts; count 6 was dismissed midtrial. Thus, the sentencing minute orders and abstracts of judgment for each defendant should reflect a total of $1,800 for restitution, $360 for security, and $270 for court facilities fees.

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[30] Bustamante's abstract of judgment correctly reflects no imposition of a booking fee.

DISPOSITION

The superior court is directed to modify defendants' sentencing minute orders dated May 6, 2011, and abstracts of judgment, to reflect the imposition of $1,800 for restitution, $360 for security, and $270 for court facilities fines and fees. The superior court is additionally directed to correct the abstract of judgment with respect to defendant Replogle to reflect deletion of the booking fee. The corrected abstracts of judgment and minute orders shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

RICHLI
J.