Filed 1/29/13 P. v. Aguilar CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY AGUILAR, JR., Defendant and Appellant.	F061462 (Fresno Super. Ct. No. F09903920) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Edward Sarkisian, Jr., Judge.

Stephen Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Craig S. Meyers, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In the early morning hours of July 2, 2009, Mary Bustamonte's body was found in the burned remains of the motel room where she had been living. She had suffered burns

to 85 percent of her body, and firefighters initially believed she had been the victim of an accidental fire. However, the autopsy revealed that she was a homicide victim – she had not died from the fire or smoke inhalation, but she suffered blunt force trauma to her head and internal neck injuries consistent with strangulation. Her blood was found on the shower curtain in the motel room's bathroom.

Appellant/defendant Johnny Aguilar, Jr. (defendant), had been staying with Bustamonte in the motel room. When another resident noticed smoke emerging from Bustamonte's motel room, defendant was walking away from the room and asked the resident if he had a cell phone so defendant could call 911. The resident said "no" but directed defendant to the motel's payphone, where defendant was later seen holding the receiver. As firefighters arrived at the scene, the motel's manager briefly spoke with defendant and asked him whether Bustamonte was still in her room. Defendant replied: " 'She was a few minutes ago,' " and added: " 'That's what karma gets you.' "

At trial, defendant's mother testified that defendant arrived at her house. He was sad, crying, and emotional, and said: " 'I killed somebody.' " Defendant's sister testified that defendant told her that he killed Bustamonte because she was a snitch, and that he strangled her with the shower curtain, kicked her in the head, and started the fire to make it appear as if she had fallen asleep while smoking.

After a lengthy jury trial, defendant was convicted of count I, second degree murder (Pen. Code, § 187, subd. (a)), and count II, arson of an inhabited structure (Pen. Code, § 451, subd. (b)). He admitted one prior strike, based on a juvenile adjudication. Defendant was sentenced to 15 years to life for second degree murder, doubled to 30 years to life; plus a consecutive determinate term of eight years, doubled to 16 years for arson.

On appeal, defendant's primary issue is that his trial attorney was prejudicially ineffective for failing to file pretrial motions and raise hearsay objections to the expected trial testimony of his mother and sister. Defendant asserts that his attorney should have

reviewed the preliminary hearing testimony of his mother and sister, in which they made inconsistent claims as to whether they learned certain details about the murder and arson directly from defendant, or from defendant's brother, Elias Robert Aguilar (Elias Robert). There is no evidence that Elias Robert was involved in the incident, and he never appeared at either the preliminary hearing or trial. Defendant argues that his attorney should have relied on the preliminary hearing transcript to object to the proposed testimony of his mother and sister as inadmissible multiple hearsay.

Defendant further contends the court should have modified CALCRIM No. 358, as to the jury's consideration of defendant's extrajudicial statements; or, in the alternative, that defense counsel was ineffective for failing to request modification of the instruction. Defendant also contends that the court should have excluded alleged implied hearsay testimony from the investigating officer regarding an aspect of his investigation. Defendant contends his convictions must be reversed for cumulative error, and also challenges his sentence, and the use of a prior juvenile adjudication as a strike.

We will begin with the facts about the homicide and arson from the trial record. In addressing defendant's extensive ineffective assistance claims, we will review portions of the preliminary hearing and additional sections of the trial record that are relevant to such claims.

As we will explain, we will reject defendant's ineffective assistance/hearsay arguments. His other contentions also lack merit, and we will affirm the judgment.

PART I

FACTS

In April 2009, Mary Bustamonte moved into a room at the Sahara Lodge, a two-story motel located on Belmont and Weber in Fresno. Deborah Johnson, the motel's manager, believed that Bustamonte initially lived by herself in room No. 41, located on the motel's second floor.

After Bustamonte had lived at the motel for a few weeks, she introduced defendant to Johnson and said that he was her nephew. Bustamonte said defendant was going to be visiting her.

Fresno Police Officer James Barnum testified that Bustamonte had been a paid confidential informant for the police department since 2008. Bustamonte was a prostitute and had used drugs. Bustamonte conducted undercover drug purchases for the police department about 15 to 20 times and was paid for each successful purchase. Bustamonte also helped Barnum on about 30 to 40 additional cases, which involved felons wanted for other types of crimes.

Barnum was successful with his investigations on "almost every case" involving Bustamonte's assistance. Barnum continued to work with Bustamonte up to the week before her homicide. Barnum believed that she was not using drugs when she worked with him.

THE FIRE

Andrew Robert Brand lived on the second floor of the Sahara Lodge. His nephew lived in the second floor room next to Bustamonte.

Around 5:00 a.m. on the morning of Thursday, July 2, 2009, Brand went outside his second-floor room to smoke a cigarette. He saw smoke coming out of another room on the second floor. Brand ran downstairs to the manager's first-floor room, knocked on her door, and told her that one of the rooms was on fire. Johnson ran outside and saw smoke coming out of room No. 41, where Bustamonte lived. The night manager called the fire department. Other tenants were knocking on doors to alert the residents about the fire.

Defendant asks Brand for a cell phone

In the meantime, Brand ran back upstairs and headed toward Bustamonte's room. As Brand rushed to that room, he ran into defendant, who was walking on the second

floor balcony, away from Bustamonte's room and toward Brand and the staircase. Brand did not know defendant and had not previously seen him around the motel.

Brand testified that defendant "asked me if I had a cell phone that he could use to call 911 to report a fire." Brand testified: "[Defendant] just seemed like he was in a hurry. Seeming like he just wanted to call 911, try to get, you know, the Fire Department or, you know, someone there to take care of the fire."

Brand told defendant he did not have a cell phone, but "there was a pay phone sitting by the old pool" area downstairs. Brand testified that defendant used the staircase and went down to the first floor "rather quick."

Brand ran to his nephew's room, which was located next to Bustamonte's room. Brand pounded on the door and screamed for his nephew to wake up. Brand looked downstairs and saw defendant at the payphone. Defendant was holding the receiver in his hand, and he looked upstairs at Brand. Brand noticed that defendant was wearing street clothes and a dark-colored jacket, while the other residents were in pajamas.

Brand turned back to the fire and saw the smoke emerging from under Bustamonte's door. Brand pounded on that door and yelled, " 'Is there anyone in there?' " No one responded. Brand again looked downstairs and defendant was gone.

Brand and Garcia see a body

Bobby Garcia, the motel manager's husband, ran upstairs to Bustamonte's room with a fire extinguisher. Brand also grabbed a fire extinguisher. Both Brand and Garcia tried to open Bustamonte's door but it was locked. Garcia kicked down the door.

Brand testified the room was full of smoke and flames, and there were flames against the back wall. Brand testified that someone was "[l]aying on a bed" and they "knew there was someone there." Brand and Garcia went into the room and "wiggled" that person's foot, but the person did not respond. They backed away and tried to use the fire extinguishers, but they could not control the fire and the flames spread up the wall.

Brand heard sirens and realized someone had called the fire department. The firefighters arrived on the second floor and ordered Brand to get away from the door. Brand testified that he told the firefighters that someone was on the bed in the burning room.

First responders

Shortly after 5:00 a.m., several units from the Fresno Fire Department responded to the motel. Firefighters Gabriel Lopez and Chad Brisendine went upstairs and discovered that Bustamonte's door was already open. Firefighter Lopez could see a bed directly in front of him, against the room's back wall. There were flames crawling up the wall above the bed. Brisendine stood behind Lopez and could not see very far into the room because of the smoke and flames.

Once the firefighters activated their hoses, the water turned the smoke into steam and left them with "zero" visibility of the room's interior. While there was still minimal visibility, Brisendine conducted a quick primary search of the small motel room and bathroom, and he did not see anyone in the room.

The motel room's bed consisted of two mattresses and a box spring resting on two hollow core doors, which served as a bed frame with the attached headboard. Lopez testified that flames were coming from underneath the bed, "so we moved the bed and put that fire out, also." Brisendine testified the fire was "kind of lapping out" from the right side and under the bed.

There were flames between the mattress and box spring, so the firefighters flipped over the top mattress to extinguish the flames, and pulled the bed away from the wall. Firefighter Lopez explained: "[I]t took two or three of us to flip [the bed] over. And at that time we put more water on it."

There was still minimal to zero visibility in the room when the firefighters flipped over the mattress. Brisendine testified the mattress felt heavy as they flipped it, and he thought the weight was from blankets and clothing which might have been on top of it.

The firefighters discover Bustamonte's body

The firefighters extinguished the blaze within a few minutes of their arrival. As the smoke cleared out, a fire captain discovered Bustamonte's body lying on the floor, on the left side of the bed. None of the firefighters who had fought the blaze had seen Bustamonte's body before that moment, and they did not know if she had been on the bed when they flipped it over.

Defendant's statements to Johnson

Deborah Johnson, the motel's manager, testified about her encounter with defendant on the morning of the fire. After Brand woke up Johnson and told her about the fire, she stayed on the first floor while her husband and others alerted the motel's residents. Just as the firefighters arrived, Johnson realized defendant was standing next to her.

Johnson testified that she asked defendant if Bustamonte was up in the room. Defendant replied: " 'She was a few minutes ago.' " Defendant also said: " '[T]hat's what karma gets you.' " Johnson did not understand what he meant and thought his statement was weird. Defendant spoke in a normal tone of voice, and he did not seem concerned. He walked off the property after making the statement, and she did not see him again that day.

About a half-hour after Johnson spoke to defendant, she learned the firefighters found Bustamonte's body inside the burned room.

THE INVESTIGATION

The fire investigators

Around 6:00 a.m. on July 2, 2009, Justin Simmons of the Fresno Fire Department's Arson Investigation Unit arrived to inspect the motel room. Assistant Fire Investigator Floyd Wilding was also present. Bustamonte's body was still lying on the floor.

Simmons testified there was significant smoke damage in the main living area of the motel room, all the way down to the floor, which was uncommon for such a small room. The smoke damage indicated that it was "a smoldering type fire, in which the fire smoldered for a significant period of time before it actually made it to its free-burning stage, where it actually had an open flame …. And so it just produced a lot of smoke for a fire that size." Simmons testified the smoldering could have lasted for "a period of time," from a couple of minutes to "hours," but he could not give a definite time.

There was fire damage in the southeast corner of the room, particularly on the bed and headboard. The doors which had been used as the make-shift bed frame had been charred, which indicated the fire started above and not below the frame. There was significant fire damage at the head area of the mattress and box spring, and the center of the headboard. The carpet under the make-shift bed frame and box spring was not burned.

Simmons testified there was a "V pattern" on the wall behind the headboard. He explained: "[W]here the fire starts, fire goes up and out as it burns … you'll have a pattern on the wall that looks like a V, and that tells you the fire started around the base of that – or at least when it contacted that object started near the base and went up and out."

An electrical outlet was in the middle of the V pattern above the headboard. Simmons and Wilding ruled it out as a source. Simmons and Wilding did not find any evidence of an accelerant being used to start the fire.

Simmons said investigators found lots of discarded cigarettes, cigarette butts, a lighter, and matches on the floor. There was an ashtray on the floor near Bustamonte's body. There were no smoking materials on the bed, but the materials could have been burned during the fire.

Simmons said the closet behind the bed's headboard showed significant charring, burn patterns, and smoke damage, but there was no evidence of an ignition source or area of origin inside the closet.

Simmons testified the fire patterns suggested the blaze started outside the bathroom. The bathroom's electrical outlets were "clean," and there was no evidence of "shorting" or fire patterns coming from the outlets.

The initial opinions from Simmons and Wilding

Simmons testified that when he examined the scene on the morning of July 2, 2009, he concluded the fire originated at the head of the mattress, it was slow-moving and smoldering, and it moved slowly from the point of origin.

> "What these fire patterns indicated to us is the fire started near the head of the bed and smoldered for a significant part – amount of time searching out oxygen, where fire needs heat and oxygen in order to, you know, sustain itself. And it burned down through the mattresses to workout to the box spring, and started to get more oxygen, and then it progressed to the headboard and the wall behind the headboard, and then also out toward the foot of the bed."

Wilding testified that his initial opinion was that it was a smoldering-type of fire, consistent with the victim possibly falling asleep with a cigarette. Wilding explained that when a fire starts on a bed, it usually "kind of burns from top down. This fire appeared to be smoldering type fire that wormed its way through the mattresses and then eventually … it managed to burn all the way through the underneath side of the mattress before it burned the actual top of the mattress."

Detective Gray sees the shower curtain

Also around 6:00 a.m., Detective Gray responded to the motel and inspected room No. 41. The fire department had just extinguished the fire, and the body was still in the room. Gray testified that the fire initially appeared to have been an accident.

Gray inspected the bathroom, and saw a plastic shower curtain hanging from a rod in the walk-in shower. It was a standard shower curtain, with individual rings attached to it, and some of the rings were hanging from the rod.

> "All the rings from the right side [of the rod] up to the end of the shower curtain were attached to the shower curtain itself. The rings to the left side of the shower curtain were unattached from the shower curtain. They were still on the rod, but they were not attached to the shower curtain itself."

Gray did not seize the shower curtain at that time, and it remained in the bathroom after the fire personnel left the area.[1]

THE AUTOPSY

Later on the morning of July 2, 2009, a few hours after the fire, Dr. Venu Gopal, the chief forensic pathologist, conducted the autopsy on Bustamonte.

Dr. Gopal testified there were no visible external injuries around Bustamonte's neck. However, she suffered several internal injuries around her head and neck. These injuries occurred before her death and were consistent with strangulation.

Bustamonte suffered a subgaleal hemorrhage on the left side of her head, consistent with being caused by trauma from a blunt object or surface, requiring a minor to moderate amount of force. She also suffered a subconjunctival hemorrhage inside the eyes, especially the left eye. This was consistent with blunt trauma or being hit on the left side of the head. This injury also could have consisted of petechial hemorrhages, resulting from strangulation or an obstruction around the neck.

Bustamonte had a hemorrhage on the left horn of the hyoid bone, which is a "C" shaped bone inside the throat. The hyoid bone, also known as the wishbone, is "way inside the upper part of the trachea above the adams apple or the thyroid cartilage." Such

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[1] As we will discuss, *post*, defendant's sister, Rebekah "Sweetie" Palacios (Palacios), later told Detective Gray that defendant said he strangled Bustamonte with the shower curtain. The police returned to the motel room and seized the shower curtain, and Bustamonte's blood was found on it.

bleeding usually occurs when localized force or pressure is applied, and it is "very, very significant" for a pathologist to find a "localized hemorrhage" in that area.

Bustamonte also suffered hemorrhages around the left side of the thyroid cartilage, which is the Adams apple; and some hemorrhaging around the Adams apple on the left side. Dr. Gopal also found hemorrhages in the epiglottis, which is inside the larynx, "and on the top of that you have what is known as a flap, a cartilage of tissue, I found some particular hemorrhages on the inner side of the epiglottis."

> "So this, again, is a localized force causing some damage to that area of the neck and the soft tissues in that area next to the hard object, the thyroid cartilage, the force causing rupture and causing this hemorrhage."

Dr. Gopal explained that a moderate degree of force could have caused the hemorrhages, and they occurred prior to Bustamonte's death.

> *"[T]o get this type of a hemorrhage by the time this is basically just next to that you have what is the airway, the windpipe. So when you have that much injury basically your airway would be blocked. So that causes asphyxia. When there's no air passage, then there is a lack of oxygen*. And the lack of oxygen, with the pressure, causes small blood vessels to rupture. And, again, in this I find evidence of small blood vessels rupture in that area itself on the inside of the vocal box. So that tells me there is a localized force around the neck causing this injury as far as the petechial hemorrhages in the epiglottis …." (Italics added.)

Dr. Gopal testified there were thermal burns from the fire on 85 percent of Bustamonte's body, including her back, shoulders, scalp, abdominal area, and upper and lower extremities. There were heat ruptures on her face, front and back chest, and part of the extremities. The thermal burns could have masked any superficial injuries that might have been on the exterior of her neck.

Dr. Gopal believed that Bustamonte suffered the thermal burns in and around the moment of her death.

> "This is a really difficult case because we have a lot of factors in this. One is the thermal burns, and they appear to have occurred in and around death. Mostly just looking at the burns itself, because of the nature of the burns,

> because of the gray blisters on these burns, they almost appear postmortem, but – however, there was some amount of soot in the trachea, that is fine carbon particles, which are being inhaled by the person. *So that makes it more perimortem because the person could have taken few breaths before dying*." (Italics added.)

Dr. Gopal explained there was a small amount of soot and carbon particles in decedent's trachea, but there was no carbon monoxide in her body. He did not believe that her death was caused by smoke inhalation.

> "Usually when you find soot it is accompanied with carbon monoxide. *So I did not have any significant carbon monoxide, that's the reason why I'm saying probably she's almost dead, maybe she did take few breaths.* [¶] … [¶] Basically tells us, when I find like this, there is – the person has not consumed or inhaled any carbon monoxide, which is also partly soot. And, also, I did not find any pink discoloration of the internal organs enclosing the trachea, lungs and the muscles. That also favors – the entire thermal burns picture tells me it is more of a perimortem or in and around that type of thermal burns." (Italics added.)

The absence of pink discoloration in the internal organs meant that the body had not inhaled carbon monoxide.

Dr. Gopal also ordered toxicology tests, which were positive for high levels of cocaine and cocaine metabolites. He believed Bustamonte had been using cocaine for some period of time, hours or days, before her death, but the effect on her depended on her tolerance levels.

Dr. Gopal's opinion about the cause of death

Dr. Gopal testified about his opinion as to Bustamonte's cause of death:

> "[I]t is a difficult case. The cause of death, because of the cocaine levels, not knowing her tolerance, whether she's used to it, or how much she takes of cocaine, there's no way we can … form an opinion as to the tolerance of a person for cocaine. *So my opinion as to cause of death is the combined effects of acute cocaine intoxication and strangulation*." (Italics added.)

Dr. Gopal testified that he could not ignore the internal neck injuries, which were "definitely one of the things which caused the death. And I have given opinions as to cause of death just strangulation finding this amount of injuries in the neck, not taking …

cocaine into consideration." There was no evidence that a ligature was used to strangle her.

> "Q But irregardless [*sic*] of the cocaine, *there was the signs and symptoms consistent with strangulation*?
>
> "A *That's correct*." (Italics added.)

Dr. Gopal testified that strangulation was a substantial factor to cause her death. However, he conceded there was a significant amount of cocaine in her system, and he could not separate cocaine intoxication from strangulation as the cause of death. He concluded that cocaine intoxication and strangulation were the "most significant factors." She was likely incapacitated or in a coma as the fire started, and could have taken "the last breaths before dying," which resulted in the small amount of soot in her trachea.

Dr. Gopal testified the perimortem thermal burns were "really very minimal" as a factor causing death. The thermal burns were "more of an arson type …. If somebody had set the fire. I mean, this is a very common thing which I have in my experience … seen …," where a fire has been set "to cover-up a crime. So I don't know all those factors." The coroner's death certificate listed strangulation and acute cocaine intoxication as the causes of death, and omitted any reference to the thermal burns.

Dr. Gopal's testimony about his conversation with Detective Gray

Dr. Gopal testified that he performed the autopsy and observed the internal neck injuries on July 2, 2009, the day of the fire.

Defense counsel asked Dr. Gopal if Detective Gray spoke to him about the case about three days after the autopsy. Dr. Gopal replied that he could have talked to Gray, and that was normal procedure. "Usually detectives … they call for some of the findings. And I may tell them what findings I have at the time. And, as I said, … it is a difficult case. I was also looking for some answers. And I probably could have told them, you know, what my findings are at that moment."

Defense counsel asked Dr. Gopal if he revised his opinion as to the cause of death after he spoke to Detective Gray, "three days after the autopsy." Dr. Gopal said, "No." He reviewed his notes and did not see any evidence that he talked to Gray, but he could have talked to him.[2]

Investigator Wilding's reaction to the autopsy

Fire Investigator Wilding was present during the July 2, 2009, autopsy, and testified that Dr. Gopal advised him about the victim's skull injuries and the small amount of soot found in the victim's lungs. At that time, Dr. Gopal did not say anything about strangulation. As a result of Dr. Gopal's information, however, Wilding returned to the motel for further investigation.

Wilding testified that he spoke to Dr. Gopal later that same day, or the next day, and Dr. Gopal told him about the internal neck injuries and possible strangulation as a cause of death.

Wilding testified that based on the small amount of soot found in the victim's lungs, it appeared the victim died before the fire because "it would have been hard to imagine that it was a smoking-related fire if the victim was deceased prior to the fire being ignited."

FURTHER INVESTIGATION

Within a day or two of the fire, Detective Gray was contacted by another detective, who had received a telephone call that three people had information about defendant and the motel fire: defendant's mother, Rebecca Aguilar Duarte (Duarte); his sister, Rebekah "Sweetie" Palacios (Palacios); and a family friend, Lilliana Alvarez (Alvarez).

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[2] During trial, defense counsel tried to establish that Dr. Gopal only formed his opinion about strangulation after speaking to Detective Gray, who informed Dr. Gopal about the statements of defendant's sister, Palacios, that defendant said he had strangled Bustamonte.

On or about July 4 or 5, 2009, Detective Gray had a brief telephone conversation with Duarte and scheduled an interview.

On Monday, July 6, 2009, Detective Gray went to Lilliana Alvarez's house to interview both Duarte and Palacios.

Gray testified that he initially interviewed Duarte. Alvarez was present during that interview. After speaking with Duarte, Gray separately interviewed Palacios. Palacios was crying and extremely upset, and said that she did not want to talk to Gray. Palacios did not appear under the influence of marijuana. Palacios was able to track and appropriately answer Gray's questions.[3]

Gray testified that he also spoke to Alvarez that day. He could not remember exactly what Alvarez said, but she never said that she heard defendant talk about the fire. Gray testified that "it appeared that everything that [Alvarez] had was hearsay that she was hearing from Rebecca [Duarte]," and "the information [Alvarez] was providing was information that Rebecca [Duarte] was saying." Alvarez was "regurgitating information that we were talking about and stuff that they had talked about."

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[3] As we will discuss, *post*, Duarte and Palacios testified at trial about what they told Detective Gray. Duarte testified that defendant said that he killed someone. Palacios testified that defendant said he strangled a woman, kicked her in the head, and then set the room on fire to cover up the murder. Detective Gray testified that Palacios said that defendant's statements sounded "fake" to her. Duarte said that she thought defendant was lying to her, but she later drove past the motel and "based on what she saw at the room, and everything else that was being said, she felt that he did do what he told her."

Defendant's primary issue on appeal is that Duarte and Palacios learned about the homicide and motel fire from defendant's brother, Elias Robert, and not from defendant, and that defense counsel should have moved to exclude the vast majority of the trial testimony of Duarte and Palacios as inadmissible multiple hearsay since Elias Robert never testified.

Detective Gray continues the investigation

Detective Gray testified that when he was at the motel on the morning of the fire, he initially believed the fire was an accident. Someone from the fire department mentioned that the decedent had possibly fallen asleep while smoking. However, Gray still considered the incident as a suspicious death and was waiting for the autopsy results.

Detective Gray testified that he changed his mind about the fire on July 6, 2009, after he interviewed Palacios and Duarte. Gray received information that the decedent had been suffocated with the shower curtain.

Later on Monday, July 6, 2009, Gray went to the coroner's office and had a brief conversation with Dr. Gopal. Gray told Dr. Gopal that he had information regarding strangulation and probably blunt force trauma. Dr. Gopal told Gray that he could not provide the cause of death because he was waiting for the toxicology and other laboratory reports, to determine the decedent's carbon monoxide levels.

> "Q You spoke with Dr. Gopal at some point after you had interviewed Rebecca [Duarte] and 'Sweetie' [Palacios]?
>
> "A That is correct. [¶] … [¶]
>
> "Q And did Dr. Gopal tell you whether or not that information was consistent with the information that he had found during the autopsy several days prior?
>
> "A Yes, he did. *He said some of the information I gave him was consistent with the head wounds and the throat wounds*." (Italics added.)

Defendant's arrest

Later on July 6, 2009, Detective Gray instructed officers to go to a residence and question both defendant and his brother, Elias Robert, about the homicide. When the officers arrived, defendant answered the door and identified himself as "Jay." An officer told defendant that he recognized him. Defendant hesitated and again said his name was "Jay," and he was not from that area. The officer again said that he knew defendant's

identity. Defendant eventually admitted his name, and explained that he had traffic warrants and did not want to identify himself because he was scared of being arrested.

Defendant was taken into custody. The officers went inside the residence and looked for Elias Robert, a wanted parolee, but no one else was home.

The residence was later searched pursuant to a warrant, and the officers seized several articles of clothing, including a pair of tennis shoes that had been left outside by the front door, and a sweatshirt that was in a garbage can. No evidence was found on the clothing to connect defendant to the fire.

Fire Investigator Simmons

Fire Investigator Simmons testified that he initially found the fire was a slow-moving and smoldering-type fire. He did not think it was arson and thought it could have started in a number of ways.

On July 7, 2009, Simmons received more information about the case from Detective Gray, which helped him "narrow down" his conclusion about how the fire started, and that it was an intentional arson fire.

At trial, Simmons testified that in his opinion, the fire was started "in a willful and malicious act with an open flame device … which would be a lighter or matches, in lighting common combustible materials, which could be anything from paper to wood." Simmons said his opinion was consistent with someone placing a flammable item, such as toilet paper, on or in the mattress, and lighting it on fire. On cross-examination, Simmons conceded that a fire could start if someone was smoking in bed, and the cigarette ignited the person's clothing, bed sheets, and covers. Such a fire would be a smoldering type. On further questioning, Simmons testified that such a fire would not be common because a cigarette needed a lot of heat to ignite fabric.

The shower curtain

On July 8, 2009, Detective Gray and a police investigator went back the motel. Bustamonte's room had been boarded up after the fire. The furniture and debris had been

piled in the middle of the room, but the shower curtain was still hanging from the rod in the bathroom.

The investigator seized the shower curtain. There were six rings that were affixed to the shower curtain, and the rings were affixed to a rod. The investigator removed the rings from the rod, then removed the rings from the shower curtain. She did not see any rings on the floor.

A criminalist found blood stains on the shower curtain, and the DNA profile was consistent with Bustamonte's DNA. Defendant was excluded as the source of the blood stains. There were no latent prints on the shower curtain.

TRIAL TESTIMONY OF DUARTE, PALACIOS, AND ALVAREZ

We now turn to the trial testimony of defendant's mother, Duarte; defendant's sister, Palacios; and their family friend, Alvarez; regarding what defendant allegedly said to them about the motel fire, and the source of their information.

Rebekah "Sweetie" Palacios (defendant's sister)

Palacios testified that she did not want to appear in court against defendant. Palacios testified about a conversation she had with defendant which occurred at the beginning of July 2009, when they were both living with Duarte. When she woke up that day, defendant was present at their mother's house. Palacios and defendant took a walk together in the daytime, and defendant told her about a fire. The conversation lasted for about 15 minutes, and no one else was present.

Palacios testified defendant was on crystal methamphetamine when they talked that day, and he was "not like the way he normally is." She could tell defendant was high because his eyes looked different and he acted weird. Defendant also had used cocaine. Palacios had smoked marijuana that morning and was high when she talked to defendant. She was feeling paranoid and not "in my right state of mind all the time."

Palacios testified that as she walked with defendant, he said there had been a fire at the Sahara Lodge the previous night, and he was there. Defendant said he had been in the room with a woman and another man before the fire, and they had been using drugs and getting high. Defendant said the woman was a snitch, and she had snitched on some drug dealers. Palacios knew that defendant was talking about "Mary."

Palacios testified that defendant said he carried the woman into the bathroom, he put her in the bathtub, and he wrapped her in a shower curtain. Defendant said he choked the woman with the shower curtain. Defendant said he kicked the woman in the head while she was still in the bathtub.[4] Defendant said a man walked into the room when the woman was in the bathtub. Defendant told the man to leave, and the man left.

Palacios testified that defendant said he placed the woman on the bed after he kicked her. Defendant said he "caught the bed on fire." He made a hole in the bed and put toilet paper in it, and started a fire with the toilet paper. Defendant said he left the room after lighting the toilet paper. Defendant said Mary was on the bed and unconscious when he started the fire. Defendant said "he had choked her and put her to sleep."

On direct examination, Palacios testified that she recalled speaking to Detective Gray about the case, and the conversation occurred close in time to her talk with defendant. Her memory was better when she spoke to Gray than at trial. The prosecutor showed her the transcript of her interview with Gray to refresh her recollection. Palacios testified that defendant said that when the woman was in the bathroom, he was in the bedroom and heard her making a snoring sound. Defendant said he went back into the bathroom and kicked her in the neck.

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[4] The photographic exhibits show that the motel room only had a walk-in shower and not a bathtub. In addition, Detective Gray testified the shower curtain was still hanging from the rod when he inspected the room immediately after the fire.

The prosecutor asked Palacios whether defendant said anything about a cigarette. Palacios testified that defendant said he put a cigarette in the woman's hand so it would look like the cigarette started the fire on the bed. Defendant said he didn't care about what he did because it didn't mean anything to him. Palacios testified that defendant talked about the fire "like he would say anything," like he was "just talking."

Palacios's testimony about the source of defendant's inculpatory statements

On both direct and cross-examination, Palacios offered inconsistent testimony as to whether defendant directly told her certain details about the murder and arson, or she heard this information from her other brother, Elias Robert.[5]

> "Q So you heard some information from your brother, [defendant], who is here in court, and then you heard some other information from your brother, [Elias] Robert?
>
> "A Yes, I did.
>
> "Q And the part about kicking in the neck, that was from your brother, Robert?
>
> "A Yes.
>
> "Q That's fine. [¶] I just want to concentrate and ask you only about what you brother who is here in court, [defendant], what he told you; okay?
>
> "A Uh-huh. Yes."

Palacios testified that she told her mother, (Duarte), and their family friend, Alvarez, what defendant said about the fire.

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[5] As we will explain, *post*, Palacios similarly testified at the preliminary hearing that she might have learned some of the details about the murder and arson from her other brother, Elias Robert, who learned those details from defendant. In issue I, *post*, we will address defendant's primary appellate argument, that defense counsel was prejudicially ineffective for not raising multiple hearsay objections to Palacios's trial testimony.

On cross-examination, Palacios testified that before she talked to defendant about the motel fire, she overheard her mother, and her other brother, Elias Robert, talking about the incident. About one or two hours later, defendant talked to Palacios about the fire and what he did to decedent. Palacios testified she also talked with Elias Robert about the fire, both before and after her separate conversation with defendant.

> "[DEFENSE COUNSEL] So Robert was the one who told you about the fire; right?
>
> "A Yes.
>
> "Q That was the same day you spoke to [defendant]?
>
> "A Yes."

Palacios testified that during her initial conversation with Elias Robert, he told her that someone had died in the fire, but she did not know that person's identity. When she later talked with defendant, she believed that a fire occurred, but she did not believe defendant's statements about what happened.

> "[DEFENSE COUNSEL] When you're talking about the details of what you heard, are there details that you had already heard from your brother, Elias [Robert], before you talked to [defendant]?
>
> "A Yes."

Palacios testified that she did not see or hear Alvarez at her mother's house on the morning that defendant made the inculpatory statements.

On redirect examination, the prosecutor sought to have Palacios clarify whether she told Detective Gray about the source of her information about the fire:

> "Q Now, when you talked to Detective Gray did you tell him … the information you got from your brother, the Defendant …, as opposed to where you got information from your brother, Elias Robert Aguilar?
>
> "A No.
>
> "Q Ms. Palacios, isn't it true that as you were telling … Detective Gray about what your brother, the Defendant …, had told you, you then

also said, and I quote: [¶] 'But then later on one of my brothers told me that he had told him that when he went back to the restroom that's how he killed her was that she was – the head was tilted over the bathtub, and he kicked her two times until it snapped or something like that.' [¶] Do you remember that?

"A Yes.

"Q Okay. So you were telling the detective this information I'm giving you right now came from my brother, Robert Elias?

"A Yes."

The prosecutor reviewed Palacios's lengthy statement to Detective Gray, and Palacios testified that she told Gray that defendant gave her the following information: that the victim was a snitch, " 'they told him to take her out,' " someone was in the room with him, the victim was asleep on the bed, defendant ripped off the shower curtain, he wrapped it around the victim, he started to suffocate her with it, and he told the other guy to get out of the room; the victim fell asleep, and defendant put her in the bathtub.

"Q And is that – and that's when you were telling Detective Gray that's what your brother, [defendant], had told you?

"A I was telling him the story that I remembered.

"Q *Okay. Was that the story that your brother, [defendant], had told you?*

"A. *Yes, I believe so*." (Italics added.)

The prosecutor reviewed the rest of Palacios's statement to Detective Gray, and Palacios testified that defendant told her the following information: that after the victim was in the bathtub, someone knocked on the motel room door and wanted to get him high. Defendant closed the bathroom door and let the person in because he wanted to " 'take a hit.' " Defendant told Palacios that he could hear the victim snoring in the bathtub so he told the person to get out of the room. Defendant told Palacios that he went back into the bathroom and finished her off, and she was already dead when he put her in the bed. Defendant said he tried to light the bed on fire so no one would know what

happened, but it wouldn't start. Defendant said he made a hole in the mattress, put toilet paper in it, and " 'it just went really fast.' "

> "Q Okay. And I'm not going to go through it again, but right after that the interview is that when you then told Detective Gray what your brother … Elias Robert Aguilar, told you?
>
> "A That's what I remember him telling me, yes."

Palacios testified she talked to Duarte later on the same day that she spoke to defendant. She could not remember what she told Duarte. The prosecutor asked Palacios if she told Duarte that defendant said he put the victim on the bed and lit it on fire, the victim kept crying and asking him why he was doing it, and defendant said she deserved it. Palacios testified that she made these statements to Duarte, and that defendant gave her that information.

Palacios further testified that she talked to Alvarez about the same time that she spoke to Duarte. Palacios testified that she told Alvarez what defendant had said about the fire. Palacios testified that when she later drove by the motel and learned that a woman had died in the fire, defendant's statements made sense, and she realized that he had not imagined the fire.

On recross-examination, defense counsel again asked Palacios about the source of the information she provided to Detective Gray:

> "Q Ms. Palacios, when … you say you told Detective Gray the story that you remembered … where did you hear that story from?
>
> "A From my brothers, [defendant] and Robert.
>
> "Q Your brothers, [defendant] and Robert?
>
> "A Yes.
>
> "Q The details from the story, do you remember if you got the details from your brother, [defendant], or from your brother, Robert?
>
> "A I guess both of them.

"Q When you told this story to Detective Gray, did you tell him details that you got – did you tell him details that you got from both of your brothers?

"A No.

"Q What details did you tell him?

"A I don't know.

"Q The details that you told Detective Gray during the interview, do you remember were you got those details from?

"A No."

Rebecca Aguilar Duarte (defendant's mother)

Duarte testified that in July 2009, defendant was living at her house "kind of off and on." He was also living at Rice Road in a mobile home. She did not know if he spent any time at the Sahara Lodge. Duarte once met Mary Bustamonte when defendant brought her to Duarte's house.

Duarte did not want to testify in the case. Duarte testified that her "whole family" had told her not to testify. Since the case started, "my kids don't talk to me no more."

Duarte testified that she heard about the motel fire "from the kids." The prosecutor repeatedly asked Duarte what defendant told her about the fire. Duarte said she did not know and could not remember. Duarte testified that she remembered speaking to Detective Gray about the fire, she was truthful to him, but could not remember what she said. The prosecutor asked her to review the transcript of her statement to Gray.

After reviewing the transcript, Duarte testified that defendant arrived at her house around 7:00 a.m. She had not seen him for four or five days. He was sweaty and had tears in his eyes. Duarte could tell he was "all cracked out" and told him to lie down.

Duarte testified that defendant was sad, crying, and emotional. He often acted that way when he had been using drugs for a lengthy period of time. Defendant hugged

Duarte, and he said: " 'I killed somebody.' " She did not remember whether defendant said his friend was dead.

Duarte testified that defendant took off his clothes, and she was "pretty sure" that he threw his sweatshirt in the backyard trash can. He left his tennis shoes in the front yard. Duarte testified that defendant's sweatshirt smelled "like sweat and ugly" because he was high. She did not smell any smoke.

Duarte testified that Lilliana Alvarez was not present when defendant arrived home and made this statement to her. Duarte did not believe what defendant said, because he always said strange things when he was high.

Duarte testified that she later talked to Palacios about the motel fire. Palacios was scared when they talked. Palacios told her some things, but Duarte did not want to know anything else about it. Duarte explained that when defendant was using crystal methamphetamine, "he always talks about a bunch of stuff, about weird things … I don't want to hear it."

Duarte testified that they later went to Alvarez's house. Duarte and Palacios talked to Alvarez. Alvarez drove Duarte past the motel so they could see if something happened. Alvarez also called the police.

Duarte's testimony about the source of defendant's inculpatory statements

Duarte also testified about whether defendant made inculpatory statements directly to her, or she heard the information from her daughter, Palacios, and/or her other son, Elias Robert. The prosecutor asked Duarte if defendant said why he killed the person. Duarte testified: "I don't think my son exactly told me much of – *I just heard it from the kids*." (Italics added.)

> "[THE PROSECUTOR] So without telling me what you heard …. [¶] [Y]ou heard some information from your other children?
>
> "A Yes.
>
> "Q And what – what kids would that be?

"A Well, Robert and 'Sweetie [Palacios].' "

The prosecutor asked Duarte for more details about defendant's statement:

"Q Did [defendant] … tell you why he killed the woman or the person?

"A I heard because she was a rat or something, I don't know.

"*Q That's what he told you*?

"*A Yes*." (Italics added.)

The prosecutor asked Duarte if she recalled her statement to Detective Gray, that defendant acted like it was nothing to him and he " 'started bragging saying that he enjoyed it and that he'll do it again.' " Duarte testified that she did not remember that part of the statement.

"Q Did your son, [defendant], tell you what the woman was doing when he was killing her?

"A Did he tell me?

"Q Yes.

"A No.

"Q He did not tell you?

"A *Everything I heard was from the kids.*

"Q Okay.

"A *Whatever I told the detective I heard whatever they told me.*

"Q So you did not tell the detective that your son, [defendant], told you, quote, 'He said he liked how she was crying and he enjoyed that,' end of quote?

"A I might have – I probably told him that, *but that's what I heard from the kids, yes*." (Italics added.)

On cross-examination, defense counsel asked Duarte whether she told Gray "something that you heard from [defendant] or heard from your other kids." Duarte

replied "that could be a 'Yes' and a 'No,' " and explained that "some things the kids told me and some things – I just talked to [defendant] briefly like a couple words."

Lilliana Alvarez

Lilliana Alvarez, Rebecca Duarte's friend, testified for the prosecution, and was unable to identify defendant in the courtroom. Alvarez testified that she was not at Duarte's house when defendant arrived home in the morning. However, Duarte and Palacios later visited Alvarez, and they told her about what defendant said, "[W]hy he do it [*sic*] to the lady." Duarte and Palacios did not believe what defendant said, so Alvarez drove them past the motel, and they saw that there had been a fire. Alvarez testified that Duarte and Palacios stayed with her for a few days because they were scared to go home, since defendant was at the house.

Alvarez admitted that she previously gave a statement to the prosecution's investigator. However, she denied that she said that she was at Duarte's house when defendant arrived home that morning, or that she heard defendant say that he enjoyed killing the lady.

Alvarez's testimony about being threatened

The prosecutor asked Alvarez if anyone spoke to her about her testimony, and she said that defendant's mother, "Becky" Duarte, talked to her. She described Palacios, defendant's sister, as "Sweetie."

"Q Who was that?

"A Um – Becky

"Q Rebecca or 'Sweetie'?

"A Rebecca.

"Q What did she tell you about that?

"A Um – she told me that – that if I going to come to the court. And I say, 'No. Why for?' 'Why?' 'I don't know.' And she say, 'Well, you don't need to go and talk like shit, you know.' And she said, 'You need to

keep your mouth closed,' was the words that she told me. And I saw, 'Well you tell me that.' *And she say, 'Well, my sons, they are Bulldogs*.' " (Italics added.)

Alvarez testified that Duarte spoke to her about two weeks before the trial, and "Rebecca" said "that I need to keep my mouth – shut my mouth because the police …. [¶] [T]hey can find shit like that."

Alvarez's testimony about the source of her information

Alvarez testified that defendant's mother and sister, described respectively as "Becky and 'Sweetie,' " told her that defendant said "how he killed the lady."

"[THE PROSECUTOR] Okay. Did you tell my investigator that you heard [defendant] say that?

"A Not [defendant], but Becky and 'Sweetie'.

"Q Okay. Did you tell my investigator that after you heard the Defendant say that you went home and then Rebecca later came over to your house?

"A Yes.

"Q Okay. So you did tell my investigator after [defendant] said that you went home?

"A No, but I don't see him. He's inside of the room.

"Q Okay.

"A And he's inside. He's like crazy.

"Q Okay. So you did not tell my investigator … that you heard [defendant] say these things?

"A *I don't hear from him. I hear from the mom and his sister*." (Italics added.)

On cross-examination, defense counsel asked Alvarez to clarify whether she was at Duarte's house when defendant arrived home and made certain statements.

"Q But that day you hadn't seen Rebecca's son, [defendant], at all; is that correct?

"A Yes, that's correct.

"Q [D]id Rebecca talk to you about something that her son, [defendant], said? Without telling me what was said, did you hear her talking about something like that?

"A Heard, yes.

"Q Rebecca?

"A Yes.

"Q Yes. [¶] Okay. Did you hear [defendant], Rebecca's son, say anything yourself?

"A No."

Lilliana Alvarez's pretrial statement

District Attorney Investigator Michael Garcia testified he interviewed Alvarez prior to trial, and Alvarez said that she heard some information about the motel fire from Duarte and Palacios. Alvarez said she was at Duarte's house on the morning that defendant returned home. Alvarez said she heard defendant talking to "Sweetie" and the other brother, Elias Robert. Alvarez said she heard defendant say that he said something to the effect that "he enjoyed killing the lady and he was going to kill the bitch."

DEFENSE TRIAL EVIDENCE

Darren Hise, a defense investigator, went to the motel on July 13, 2009, and investigated room No. 41. There were rodents in the apartment complex and within the room's stud walls. He found cigarette lighters in the living area, and a burned cigarette in the area of the overturned bed.

Defendant's testimony

Defendant testified at trial that he had a prior conviction for assault in 1996 (which was actually a juvenile adjudication). Defendant met Mary Bustamonte and her then-boyfriend in 2005. They were not romantically involved. Defendant felt close to her. He thought of her as an aunt, and she referred to him as her "nephew."

Defendant testified that in July 2009, he was "doing loan originations" and "commercial loans." Defendant did not have a business office or a business telephone, but he "freelanced" out of other offices.

Defendant testified that he smoked rock cocaine with Bustamonte. He usually gave his real estate earnings to Bustamonte, and she purchased drugs for them to use together. He also used proceeds from an injury settlement to purchase drugs. Defendant would stay with Bustamonte in her motel room when they used drugs. He traveled back and forth between his mobile home on Rice Road, his mother's home, and the motel. Defendant knew that Bustamonte was a prostitute, and he often left the motel room when she had a client.

Defendant testified that he knew Bustamonte had dealings with the police department. He had seen Officer Barnum "harass her," and threaten to "bust" her if she did not work for him. Defendant did not know that she was a confidential informant. Defendant had no reason to want her dead.

Defendant said at the time of the fire, he had been staying with Bustamonte in her motel room. Around 1:00 a.m. on the morning of the fire, defendant and Bustamonte had been using rock cocaine with another man, Sunny Mata. Later on, a male client arrived for Bustamonte, and defendant left the motel room and went downstairs. Defendant saw an African-American man enter Bustamonte's room.

Defendant testified he stayed downstairs at the motel with Kenneth "Casper" Mulponce and a woman named Marilyn, whom he described as "a known alcoholic." It was still dark. He was downstairs for about three hours, talking with them and listening to the radio. Defendant never saw Bustamonte or the man leave the motel room. Defendant briefly left the motel and walked to a store, and then returned.

When it started to become daylight, Mulponce and the woman went into their own room, and defendant walked upstairs. Defendant noticed smoke coming from under the door of room 41.

Defendant testified he did not try to open the door to Bustamonte's room because the "first thing" that came into his head was that he should call 911. Defendant ran into Andrew Brand, and asked him whether he had a cell phone to call 911. Brand said no, but pointed out a phone booth on the first floor, near the old pool. Defendant said he "took off" downstairs and called 911. The 911 operator told him to stay on the line. Defendant saw Brand and the manager's husband pounding on Bustamonte's door with fire extinguishers. The 911 operator told defendant to tell the other people to get away from the burning building, and he shouted at them to get out of there.

Defendant testified he went back upstairs and saw Brand, the manager's husband, and other people coughing from the smoke. Defendant testified that Brand had been using a garden hose to fight the fire. Defendant "got the water hose" from Brand and tried to help put out the fire.[6] The firefighters told everyone to leave, and defendant remained on the stairwell until the second fire engine arrived. At that point, the officers erected a barricade to keep everyone away from the area.

Defendant went downstairs and saw Deborah Johnson, the motel's manager. She asked defendant if Mary was in the room, and defendant said Mary had been there the last time he saw her. Defendant testified he did not say anything else to Johnson, and he never made any remarks about "karma."

Defendant testified that he left the motel because the police were there, and he did not want to get picked up for his outstanding traffic warrants because he was supposed to serve 90 days in jail. Defendant admitted he left even though he did not know what happened to Bustamonte.

Defendant testified that he walked to his mother's home. Defendant hugged his mother and cried, and they had a brief conversation. Defendant told his mother that

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[6] Defendant conceded that he never told Detective Gray that he used a garden hose to fight the fire.

"there was a fire" and "that was my friend's room that caught on fire." Defendant also testified that he told his mother: "[T]here was a fire and that my friend, Mary, was in the room." Defendant did not know whether Bustamonte had been in the room, but he "was just feeling emotional" because he was high.

Defendant testified that he never told his mother that he had killed somebody at the fire. "I just told her that there was a fire. And that that was my friend's room." Defendant's mother said he smelled since he had been using drugs for several days. Defendant took off his clothes, and his mother put them in a plastic bag because "they really smelled of body odor, sweat of some sort."

Defendant testified that his sister and brothers were at the house. He took a shower and slept. When he woke up, everyone was gone except for his sister. Defendant and Palacios took a walk, but defendant did not tell her about the fire. Defendant testified he never made any of the statements attributed to him by Palacios, about choking Bustamonte and starting the fire.

Defendant testified he walked back to his mother's house and they argued about something. Defendant left and walked back to the motel. He saw Kenneth "Casper" Mulponce, who told him that Bustamonte had died in the fire. Defendant testified that he "was just numb" when he heard the news.

Defendant said he cooperated with the police officer who later detained him at his mother's house. Defendant admitted that he identified himself as "Jay Aguilar," but that was because he had outstanding traffic warrants.

REBUTTAL EVIDENCE

Detective Gray testified he interviewed defendant on the afternoon of July 6, 2009, and his prior statement was inconsistent with some of his trial testimony. Defendant appeared to be coherent and gave appropriate answers to questions.

Gray testified that defendant said that he had been with Bustamonte in her motel room. At some point between midnight and 2:00 a.m., defendant left the motel and

walked to a store. When he returned to the motel room, he saw Bustamonte "passed out on the bed or knocked out on the bed," and she was asleep.

Gray testified that defendant said he went downstairs. Defendant said he saw a number of people walk in and out of Bustamonte's room, but he did not know them. Defendant said he had been downstairs with "Casper" and "Marilyn" before the fire started. Gray determined that there were "two Caspers" who lived at the motel, and he spoke with both of them. The prosecutor asked Gray about his contact with Kenneth "Casper" Mulponce.

"Q You were able to find him?

"A Yes.

"Q And you talked to him?

"A Yes, I did.

"Q *Any of that information pan out from Mr. Mulponce*?

"A *No, sir, it did not*.'

"[DEFENSE COUNSEL]: Objection, it's vague and hearsay.

"THE COURT: Overruled.

"[THE PROSECUTOR]: Q What did Mr. Mulponce tell you?

"[DEFENSE COUNSEL]: Objection, hearsay.

"THE COURT: It is. Sustained." (Italics added.)[7]

Gray said defendant changed his story about seeing signs of the fire at the motel. At one point, he told Gray he saw smoke coming from the roof. At another point, he said he did not know where the smoke was coming from. He also told Gray he never saw smoke. Defendant never said he used a water hose to fight the fire.

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[7] In issue III, *post*, we will address defendant's contentions that the court erroneously allowed Detective Gray to testify about his investigation of Mulponce, and Gray's testimony constituted inadmissible implied hearsay.

During the interview, Gray suggested that defendant killed Bustamonte because she was a "snitch," but defendant did not respond to the accusation. However, defendant denied Gray's contention that he bragged about killing Bustamonte, and defendant said that anyone who said that did not know him.

PART II

PRELIMINARY HEARING EVIDENCE

As we will explain in issue I, *post*, defendant's primary appellate argument is that defense counsel was prejudicially ineffective for failing to raise pretrial hearsay objections to the expected trial testimony of Palacios and Duarte. Defendant asserts that defense counsel should have realized from the preliminary hearing testimony of Palacios and Duarte, that they were going to testify that they were not sure whether defendant made certain inculpatory statements directly to them, which would have been admissible as admissions; or whether they received information about the murder and arson from defendant's brother, Elias Robert, who never appeared at trial.

We have already reviewed the trial testimony of Palacios and Duarte, and their inconsistent claims as to whether defendant made certain inculpatory statements directly to them, or they learned the information from defendant's brother. In order to address defendant's ineffective assistance/hearsay issues, we must also review the relevant preliminary hearing testimony of Palacios and Duarte.[8] We will also review the tactical decisions of defense counsel during trial.

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[8] Defendant was represented by privately retained counsel Stephen Quade at the preliminary hearing. We will only focus on the preliminary hearing testimony relevant to defendant's ineffective assistance claim. In doing so, however, we note that the prosecution's preliminary hearing witnesses also included the following people, who testified consistent with their subsequent trial testimony, as set forth *ante*: Andrew Brand; Deborah Johnson; Dr. Gopal; and Fire Investigator Simmons.

Palacios

At the preliminary hearing, Palacios, defendant's sister, testified that defendant said he started the fire because "he killed somebody," who was "[s]ome lady that he used to hang out with." Defendant said he strangled her, and he had to do it because "she 'snitched' " on some drug dealers. Defendant said he used a shower curtain from the bathroom, wrapped it around the woman, and suffocated her. Defendant said that after he strangled the woman, he put her in the bathtub. Defendant said he "caught the bed on fire," and the woman was in the bed.

Palacios testified that she recalled giving a statement to Detective Gray, and she was truthful with him. Palacios testified that she told Gray what defendant told her. However, Palacios also testified: "I told [Detective Gray] what I knew *and what my other brother had told me*." (Italics added.) Palacios testified that her other brother, Elias Robert, also told her about the homicide and motel fire. Palacios clarified that defendant, and not Elias Robert, told her about choking the woman and putting her in the bathtub.

Palacios testified that defendant said that after he put the woman in the bathtub, someone knocked on the motel room's door. He opened the door, and a woman wanted to get high. He closed the bathroom door, and defendant and the woman got high on the bed. Defendant said he went back into the bathroom and finished off the woman. He kicked her in the head. Defendant put her back on the bed, and she was already dead. Defendant said he stuck toilet paper in the bed and lit it on fire.

On cross-examination, Palacios testified that she spoke to her other brother, Elias Robert, on the same day that she talked to defendant.

> "Q So, also you had said something during your testimony where some of this information you're relaying came through your brother Elias.
>
> "A Yes. [¶] … [¶]

"Q *Are you clear on what was told to you by each brother or is somewhat confusing?*

"A *It's confusing. People told me two different things.*" [¶] … [¶]

"Q … Some of the things that you testified to today that you attributed to your brother [defendant] telling you that morning could actually have been things that your brother [Elias] Robert told you later that day?

"A Yes.

"Q *So some of these things that you attribute to [defendant] saying may have come from somebody besides [defendant], in other words, your brother [Elias Robert]?*

"A *Yes.*

"Q And you're not clear which is which?

"A True. Yes." (Italics added.)

Palacios testified: "I could have been mixed up on the two stories." Defense counsel asked Palacios to explain who told her about the shower curtain being used. Palacios replied: "It may have been [Elias] Robert."

"Q … As you sit here today giving this testimony that you have, once again I want to ask, are you somewhat unclear as to who told you what that day?

"A Yes.

"Q *And so you're not absolutely positive that some of the things you said [defendant] told you actually came from [defendant's] mouth, they may have come from Elias, or Robert's mouth*?

"A *Yes.*" (Italics added.)

On redirect examination, Palacios testified that she spoke to Detective Gray within one or two days of her conversation with defendant.

"Q When you talked to Detective Gray … about what you had heard had happened both from [defendant] and from your other brother, Robert Elias, were you able to differentiate when you were talking to Detective Gray as to which brother told you what?

"A No.

"Q *So you didn't tell Detective Gray what one brother told you as opposed to what a different brother told you*?

"A *No*." (Italics added.)

Duarte

Also at the preliminary hearing, Duarte, defendant's mother, testified that she couldn't remember exactly what defendant told her, but he may have said that he did " 'something wrong.' " Duarte recalled speaking with Detective Gray, which occurred within one day of her conversation with defendant.

"Q And you told [Gray] what you knew, what your son [defendant] had told you?

"A *Yes. From the information that my daughter gave me, yes*.

"Q And you said – and what you said to Detective Gray back then was the truth?

"A Yes." (Italics added.)

The prosecutor asked Duarte to review the transcript of her interview with Detective Gray, and Duarte testified that it refreshed her recollection. Duarte testified that defendant arrived home that morning and said: " 'I killed somebody.' " He did not give her any details of how he killed the person. She could not remember if he mentioned a fire.

On cross-examination, Duarte testified that she received some information about the motel fire from her daughter, "Sweetie" Palacios. Duarte testified that she never spoke to her other son, Elias Robert, about the motel fire.

"Q So some of the information you may have given Detective Gray may have been things that Sweetie passed on to you?

"A Yes.

"Q And not personal things or [defendant] said to you directly?

"A *I didn't speak to [defendant] directly. It was a few words that I spoke to [defendant] that morning. I heard everything from what my daughter told me and that's why I called*. [¶] … [¶]

"Q Do you remember specifically, though – you testified just earlier that he said he had killed somebody. Did he tell you that directly?

"A When he hugged me and he was crying.

"Q *I'm asking you if he told you those words, 'I killed somebody,' when you saw him that morning.*

"A Yes.

"Q And you remember that specifically, that's not something that came later from Sweetie or anyone else?

"A No." (Italics added.)

Detective Gray's testimony about his interview with Palacios

Also at the preliminary hearing, Detective Gray testified about his pretrial interview with Palacios. Gray testified that Palacios consistently said that she learned about the murder and arson directly from defendant. Palacios never said that she learned some information from her other brother, Elias Robert, and said that defendant made the statements directly to her.

"Q Were you specific when you were asking her as to where she had gotten this information?

"A Yes, we did. Yes, we were." (Italics added.)

PART III

DEFENSE COUNSEL'S TRIAL TACTICS

An integral part of defendant's ineffective assistance claim in issue I, *post*, is that defense counsel lacked any tactical reason for failing to raise pretrial hearsay objections to the expected trial testimony of Palacios and Duarte. Thus, we must review the pretrial

proceedings and defense counsel's tactical decisions before we can fully address defendant's contentions.[9]

As we will explain, the record demonstrates that defense counsel was well aware of the problems presented by the proposed testimony of Palacios and Duarte, and used their prior inconsistent statements to vigorously cross-examine them and attempt to impeach their credibility. The record also demonstrates that defense counsel relied on the corpus delicti rule to argue that the jury could not rely on defendant's alleged admissions to Palacios and Duarte, because there was no independent corroboration for those statements, and Dr. Gopal's opinion about strangulation failed to provide independent corroboration since his opinion was based on those same statements.

The prosecution's pretrial motion in limine on corpus delicti

The prosecution filed a pretrial motion for admission of defendant's extrajudicial statements, and argued the corpus delicti rule did not prohibit the admission of those statements. The prosecution argued there was evidence that Bustamonte died as a result of strangulation and possible cocaine intoxication, which was sufficient to satisfy the "slight or prima facie" showing required by the corpus delicti rule.[10]

Defense counsel did not raise any pretrial hearsay objections to the trial testimony of Duarte and Palacios. However, defense counsel argued that evidence of defendant's extrajudicial statements should be excluded because of corpus delicti problems. Counsel

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[9] By the time of trial, defendant's privately retained attorney, Stephen Quade, had been relieved. Deputy Public Defender Scott Baly represented defendant throughout trial.

[10] As we will discuss in issue I, *post*, the prosecution has the burden of proving the corpus delicti of the crime – that is, the injury, loss or harm, and the criminal agency as its cause. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168 (*Alvarez*).) The prosecutor cannot satisfy this burden by relying exclusively on defendant's extrajudicial statements, confessions or admissions. (*Id.* at p. 1169.) The rule is intended to assure that one cannot be falsely convicted, by his or her untested words alone, of a crime that never happened. (*Ibid.*)

stated that corpus delicti was going to be an important issue because the evidence would show that Dr. Gopal based his opinion on the decedent's cause of death by relying on statements allegedly made by defendant, "which brings this corpus delicti issue into every element of this case."[11]

The court acknowledged defendant's objections, and stated it had read the entire preliminary hearing transcript, particularly Dr. Gopal's testimony. The court held that defendant's extrajudicial statements were admissible because the corpus delicti rule was satisfied by some slight or prima facie showing of injury, loss, or harm by a criminal agency.

The court intended to instruct the jury with CALCRIM No. 358, for the jury to determine whether defendant made the statements, and CALCRIM No. 359, that defendant could not be convicted solely based on his statements unless there was some slight or prima facie evidence of the corpus delicti.

Opening statements

While defense counsel did not file any pretrial motions to exclude the testimony of Palacios and Duarte, defense counsel demonstrated through his opening statement that he was well aware of the inconsistencies in their testimony, as to whether they had obtained certain information about the motel fire from defendant and/or Elias Robert.

The prosecutor's opening statement

In his opening statement, the prosecutor previewed the evidence, and summarized the inculpatory statements which defendant made about the homicide to his mother and sister. The prosecutor further stated that defendant told his brother, Elias Robert, that decedent was a snitch and a rat, he used a shower curtain and choked her, he put her in the bathtub, he tried to choke her again, he kicked her in the head, he put her on the bed,

[11] Defense counsel also argued defendant's pretrial statement to Detective Gray was inadmissible and involuntary; and the prosecution's numerous photographs of Bustamonte's burned body in the motel room were unduly prejudicial.

and he set the bed on fire with a cigarette to make it look like an accident. The prosecutor stated that Detective Gray talked to defendant's sister, mother, and brother, to "[f]ind out what exactly the Defendant said. What were the words that came out of his mouth?"[12]

Defense counsel's opening statement

Defense counsel also used his opening statement to address the expected trial testimony of Palacios and Duarte, but stressed the witnesses' uncertainty as to whether they learned the details about the motel fire from defendant or Elias Robert. As in his pretrial arguments, defense counsel attempted to connect this uncertainty to the corpus delicti rule and Dr. Gopal's testimony.

Defense counsel stated that the fire investigators and pathologist initially decided that decedent died from an accidental fire and there was no evidence of foul play. Defense counsel conceded that defendant told his mother: " 'I killed a person,' " but asked the jury to listen closely to the mother's testimony about that statement. Defense counsel also asked the jury to listen closely to the testimony of defendant's sister and brother, and noted that he wasn't sure if Elias Robert was going to testify.

> "But [defendant's] sister, who testified at the preliminary hearing, and I expect her to testify the way she did at the preliminary hearing, she said that on the day that she talked to her brother, [defendant], here in court, that same day she also talked to her other brother, Elias [Robert]. And she talked to both of them before she talked to Detective Gray. And that … she said at the preliminary hearing that she was high on marijuana the day she had these conversations with her two brothers. *But she says – she said she was confused as to how much information she got from one brother and how much information she got from another brother*. The statements in the context of these statements you need to pay attention to the statements and what happens with the statements. Because what happens is that there's a conversation now between his mother and his sister and the police officer. *You'll hear how the police officer takes that statement and he takes it to*

[12] Defense counsel did not object to the prosecutor's opening statement or his reference to Elias Robert, who did not testify at either the preliminary hearing or trial.

> *Gopal … and to the Fire Department who then takes these statements and revises their conclusion as to the cause of the fire*." (Italics added.)

Defense counsel stated that Dr. Gopal changed his opinion about the cause of death to strangulation based on the information provided to Detective Gray, even though the decedent did not have any visible injuries showing strangulation on the outside of her neck, while decedent had elevated levels of cocaine in her system. In addition, defense counsel pointed out that contrary to the statements from defendant's family, the motel room only had a stand-up shower and not a bathtub.

Defense counsel read CALCRIM No. 359, the corpus delicti instruction, to the jury, and declared:

> "[I]t has to do with independent evidence of a charged crime. And the instruction says: 'That the Defendant may not be convicted of any crime based on his out-of-court statement alone. You may rely on an out-of-court statement to convict him if you conclude that other evidence shows that the crime charged was committed.' "

Defense counsel asked the jury to keep an open mind as it heard the evidence and return verdicts of not guilty.

The trial testimony of Palacios and Duarte

As set forth in the factual statement, *ante*, Palacios and Duarte testified as prosecution witnesses about the inculaptory statements that defendant made to them about the murder and arson. Also as set forth *ante*, Palacios and Duarte gave inconsistent testimony as to whether defendant made these statements directly to them, or they received the information from another source. Palacios was extensively cross-examined by defense counsel as to whether defendant made the inculpatory statements directly to her, or she heard the story about the homicide and fire from Elias Robert.

Also at trial, defense counsel extensively questioned Detective Gray about whether he spoke to Dr. Gopal and the fire investigators after he interviewed Palacios and Duarte. Defense counsel also cross-examined the fire investigators about their initial determination that the fire was accidental, and questioned Dr. Gopal about whether he

initially determined the decedent's death was accidental, and whether they changed their minds after receiving information from Detective Gray.

Based on his cross-examination strategy, defense counsel tried to show that their opinions about the decedent's death were based on information supplied by Detective Gray, Detective Gray's information was based on the statements of Palacios and Duarte, and Palacios and Duarte may have received information about the homicide and fire from defendant's brother and not from defendant himself.

Closing arguments

The prosecutor's closing argument

The prosecutor extensively discussed all the evidence and argued it supported the charges of first degree murder and arson. The prosecutor also argued defendant's own statements corroborated Dr. Gopal's observations about the evidence of strangulation, and "matched right up with what the Defendant told his sister, 'Sweetie.' So you don't have to rely only on Dr. Gopal, you can consider what the Defendant said as well." The evidence was also corroborated by the decedent's blood on the shower curtain. "Again, how do we know the Defendant committed the act? His statement to his mother," and his "detailed, graphic statement to his sister, telling, again, how he killed Mary Bustamonte," that he hit the decedent in the head, strangled her, and set the bed on fire.

Defense counsel's closing argument

Defense counsel argued that the fire investigators and pathologist believed the incident was an accidental fire, and summarized the evidence that the motel room fire was a slow, smoldering fire, and that it could have been started by cigarettes or the electrical outlet above the bed. Defense counsel stressed that the pathologist changed his mind only because Detective Gray told him about the statements attributed to defendant by his mother and sister.

> "Consider that … this statement attributed to [defendant] … by his sister and his mother, considering that statement, *you need to have independent*

> *evidence that it's true in order to consider it*. You need something to consider that that statement is true in order … to consider that statement. And … Detective Gray knew that when … he had the statements and he needed … something else." (Italics added.)

Defense counsel argued that there was no blood or other evidence on the clothing and shoes seized from defendant to connect him to the fire. While decedent's blood was on the shower curtain, she lived in that motel room and her blood could have been on it for many reasons. In addition, the shower curtain was still hanging on the bathroom rod, in contrast to the statements allegedly made by defendant, that he pulled it off and strangled decedent with it.

Defense counsel argued that both defendant and his sister were high when they spoke, and defendant's sister admitted that she was confused as to whether defendant or her other brother, Elias Robert, told her certain things. Defendant's mother also admitted that she heard the information from her children, and that defendant said strange things when he was on drugs.

Defense counsel concluded his closing argument by urging the jury to review the jury instructions about how to consider evidence of defendant's extrajudicial statements:

> "[T]his is an instruction relating to statements attributed to [defendant]. This … instruction has to do with evidence of his statements.… *If you decide that the Defendant made a statement, consider the statement along with all other evidence in reaching your verdict. It is up for you to decide how much importance to give the statements.* And there is a section that says, consider with caution any statements made by the Defendant tending to show his guilt, unless the statement was written or otherwise recorded. *You can use this instruction to consider statements attributed to [defendant]. You can use this instruction in the police interview.* And you can consider this instruction attributed to him as you consider what his mother and his sister … said. And this is … an instruction that is related to corpus delicti.… It says, the Defendant may not be convicted based on an out-of-court statement alone. You may only rely on the Defendant's out-of-court statements to convict him if you conclude that … other evidence shows that the crime was committed. It says that the other evidence may be slight and only need to be enough to support a reasonable inference that the crime was committed.… *But it says, you need to find something else that's*

> *not an accidental fire, that's not an outlet, that's in addition to his statement. And what you're looking at is Gopal. Because Gopal is saying that strangulation is the cause of death.… Gopal didn't say anything about strangulation until after he heard about the [defendant's] same statement. The same statement that you need to have something to corroborate it with.… They needed something, and they don't have it to corroborate his statement*." (Italics added.)

Defense counsel argued that defendant could not be convicted because Gopal's expert opinion could not corroborate defendant's statement to his sister, since Gopal's opinion was based on that same statement.

The prosecutor's rebuttal argument

In rebuttal, the prosecutor reminded the jury that Dr. Gopal observed the strangulation injuries to decedent's neck when he initially conducted the autopsy, and before he spoke to Detective Gray about the additional homicide evidence.

The prosecutor conceded that Palacios testified that she might have been confused about the source of her information, whether it was from defendant or Elias Robert. When she initially spoke to Detective Gray, however, she said that she learned about the motel fire from defendant. While Palacios thought defendant's story might have been "fake," the prosecutor pointed out that decedent actually suffered head and neck injuries consistent with strangulation, and her blood was found on the shower curtain.

Instructions

The court instructed the jury with the following instructions regarding defendant's extrajudicial statements. CALCRIM No. 358 stated:

> "You have heard evidence that the defendant made oral statements before the trial. You must decide whether the defendant made any such statements in whole or in part. If you decide that the defendant made such statements consider the statements along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements.

"Consider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded."[13]

The court also instructed the jury with CALCRIM No. 359:

"The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime or a lesser included offense was committed.

"That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.

"The identity of the person who committed the crime and the degree of the crime may be proved by the defendant's statements alone.

"You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

The jury received only one instruction on the prosecution's burden of proof – CALCRIM No. 220, that the prosecution's burden was proof beyond a reasonable doubt: "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt."

As to count I, murder, the court instructed the jury on first and second degree murder. The jury did not receive additional instructions on any other lesser offenses for count I. Defendant was convicted of second degree murder.

DISCUSSION

I. Ineffective assistance; defense counsel's failure to raise hearsay objections to the expected trial testimony of Palacios and Duarte

Defendant contends that his trial attorney was prejudicially ineffective for failing to raise pretrial hearsay objections to the expected trial testimony of both Duarte and Palacios. Defendant's ineffective assistance argument is based on the preliminary hearing testimony of Duarte and Palacios, where they claimed that they might have

[13] In issue II, *post*, we will address defendant's challenges to the final paragraph of CALCRIM No. 358.

learned certain details about the murder and arson from both defendant and his brother, Elias Robert. Defendant asserts that based on the preliminary hearing testimony of Palacios and Duarte, defense counsel should have realized the potential hearsay objections in anticipation of their trial testimony. Elias Robert did not testify at either the preliminary hearing or the trial, thus raising multiple hearsay issues.

Defendant contends defense counsel was ineffective for failing to take the following steps: (1) defense counsel should have reviewed the preliminary hearing transcript, and then moved to exclude the entirety of the proposed trial testimony of Palacios and Duarte, based on their preliminary hearing testimony that they weren't sure whether defendant made certain inculpatory statements to them; or (2) defense counsel should have requested a pretrial hearing pursuant to Evidence Code section 402, so that the court could have determined whether Palacios and Duarte were testifying about statements directly made by defendant, which would have been admissible as admissions, or whether all or part of their testimony was inadmissible because it was based on hearsay statements made by Elias Robert; and/or (3) defense counsel should have asked the court to instruct the jury to determine the preliminary fact, as to whether defendant made the statements attributed to him by Palacios and Duarte.[14]

We have already reviewed the relevant preliminary hearing and trial testimony, and defense counsel's actions during trial. We will determine that defense counsel was well-aware of the serious problems posed by the expected trial testimony of Palacios and Duarte, and made the apparent tactical decision to focus on his argument that defendant could not be convicted based on the corpus delicti rule, that the statements attributed to

[14] Defendant has not challenged the admissibility of Lilliana Alvarez's trial testimony, but notes that it was potentially subject to the same type of hearsay problems, given her contradictory statements about whether she heard defendant made inculpatory admissions, or Duarte and/or Palacios told her about defendant's statements.

him by Palacios and Duarte served as the only basis for Dr. Gopal's conclusions about the decedent's cause of death.

We will also find that even if defense counsel had relied on the preliminary hearing transcript to raise hearsay objections to the expected trial testimony of Palacios and Duarte, the court would have likely admitted the evidence subject to an instruction, and that the jury was properly instructed to determine whether defendant made the statements attributed to him.

A. Ineffective assistance

"In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.)

"In determining whether counsel's performance was deficient, we exercise deferential scrutiny. [Citations.] [Defendant] must affirmatively show counsel's deficiency involved a crucial issue and cannot be explained on the basis of any knowledgeable choice of tactics. [Citations.]" (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1147.)

The failure to object is considered a matter of trial tactics "as to which we will not exercise judicial hindsight. [Citation.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) We defer to counsel's tactical decisions in examining ineffective assistance claims and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

[Citation.]" (*Strickland v. Washington* (1984) 466 U.S. 668, 689; *People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

"If 'counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed.' [Citation.] When, however, the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons. To engage in such speculations would involve the reviewing court ' "in the perilous process of second-guessing." ' [Citation.] Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, rather than on appeal. [Citation.]" (*People v. Diaz* (1992) 3 Cal.4th 495, 557-558.) If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.)

B. <u>The corpus delicti rule</u>

As demonstrated by the entirety of the record, defense counsel was not oblivious to the problems posed by the expected trial testimony of Palacios and Duarte. The record demonstrates that defense counsel made the tactical decision to rely on the corpus delicti rule to argue that defendant could not be convicted based on the extrajudicial statements, because there was no independent corroboration for those statements, and Dr. Gopal's opinion that the decedent died from strangulation was also based on those same statements.

"In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.]" (*Alvarez*, *supra*, 27 Cal.4th at pp. 1168-1169.)

The corpus delicti rule "generally requires the prosecution to prove 'the body of the crime itself' independent of a defendant's extrajudicial statements." (*People v. Sapp* (2003) 31 Cal.4th 240, 303.) The corpus delicti consists of (1) the fact of injury, loss or harm, and (2) the existence of a criminal agency as its cause. (*Alvarez, supra*, 27 Cal.4th at p. 1168.) The identity of the defendant as the perpetrator is not part of the corpus delicti; identity may be established by the defendant's words alone. (*People v. Frye* (1998) 18 Cal.4th 894, 960, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Moreover, "the modicum of necessary independent evidence of the corpus delicti, and thus the jury's duty to find such independent proof, is not great. The independent evidence may be circumstantial, and need only be 'a slight or prima facie showing' permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues." (*Alvarez, supra,* 27 Cal.4th at p. 1181.)

After the enactment of article I, section 28, subdivision (d) of the California Constitution in 1982 (Proposition 8), "there no longer exists a trial objection to the *admission in evidence* of the defendant's out-of-court statements on grounds that independent proof of the corpus delicti is lacking. If otherwise admissible, the defendant's extrajudicial utterances may be introduced in his or her trial without regard to whether the prosecution has already provided, or promises to provide, independent prima facie proof that a criminal act was committed. [¶] However, section 28(d) did not eliminate the independent-proof rule insofar as that rule prohibits *conviction* where the only evidence that the crime was committed is the defendant's own statements outside of court." (*Alvarez, supra*, 27 Cal.4th at p. 1180, italics in original.) "Thus, section 28(d) did not affect the rule to the extent it (1) *requires an instruction to the jury that no person may be convicted absent evidence of the crime independent of his or her out-of-court*

statements or (2) allows the defendant, on appeal, directly to attack the sufficiency of the prosecution's independent showing. (*Ibid*., italics added.)

During the pretrial motions, the prosecution initially raised the corpus delicti issue to ensure that defendant's admissions to Palacios and Duarte would be admissible. Defense counsel objected and argued there was no independent corroboration for defendant's statements and the evidence should be excluded under the corpus delicti rule. The court properly overruled the objections to the admission of defendant's extrajudicial statements, and agreed to instruct the jury with CALCRIM No. 359, that the jury could not *convict* defendant based on his admissions without independent corroboration. (*Alvarez, supra*, 27 Cal.4th at p. 1180.)

During trial, defense counsel refocused his attack to argue that the jury could not rely on defendant's statements to convict him, since there was no independent corroboration for those statements. In his opening statement, defense counsel cautioned the jury that the pathologist's opinion was based on Detective Gray's information that decedent had been strangled, which was based on the statements he obtained from Palacios and Duarte about what defendant allegedly told them. Defense counsel effectively cross-examined the witnesses to show that Palacios and Duarte received some of their information about the murder and arson from both defendant and Elias Robert, and they claimed that they were not sure which inculpatory statements they heard from which brother. Defense counsel also established that Detective Gray advised Dr. Gopal and the fire investigators about his interviews with Duarte and Palacios, and counsel tried to raise the inference that Dr. Gopal and the fire investigators believed decedent was the victim of an accidental fire until Gray told them about defendant's inculpatory statements to Palacios and Duarte.

In his closing argument, defense counsel argued that the jury could not rely on defendant's extrajudicial statements to convict him of murder, because there was no independent corroboration for those statements and no independent evidence of a

homicide. Defense counsel cited CALCRIM No. 359, the corpus delicti instruction, and argued there was no evidence of a homicide aside from Dr. Gopal's opinion, and Dr. Gopal's opinion about strangulation was based on the statements defendant allegedly made to Palacios and Duarte, as communicated to Gopal by Detective Gray. Defense counsel argued that defendant could not be convicted because there was no independent evidence of a murder.

Defense counsel was faced with a formidable task and attempted to establish that the jury could not rely on defendant's statements to convict him of murder, because the only corroboration for those statements was based on Dr. Gopal's opinion about the cause of death, and Dr. Gopal's opinion may have been influenced by those same statements made by defendant.

Given the nature of the record, we cannot find that counsel was ineffective given his apparent tactical decision to rely on the corpus delicti rule to argue that the jury could not convict defendant of murder given the alleged lack of independent corroboration of defendant's extrajudicial statements. Defense counsel's efforts were not successful, primarily because Dr. Gopal insisted that he detected the blunt force trauma and strangulation-type injuries in decedent's head and neck during his initial autopsy, and completely independent of any conversation he may have had with Detective Gray. Dr. Gopal also explained that he delayed making any initial findings on decedent's cause of death until he received the toxicology report, and not because he relied on any information provided by Detective Gray. In any event, we will not second guess defense counsel's tactical decision in light of the record in this case.

C. <u>Hearsay, preliminary fact determination, instructions</u>

Defendant asserts that defense counsel should have requested a pretrial hearing pursuant to Evidence Code section 402, for the court to determine whether defendant's statements to Palacios and Duarte were admissible as hearsay objections, or should have been excluded as multiple levels of hearsay. Defendant further argues that defense

counsel should have requested the court to instruct the jury to determine the preliminary fact as to whether defendant made the statements attributed to him, in order to consider those statements during trial. In reviewing these contentions, we must determine whether any of these motions would have been successful in light of the record that was before the trial court.

"Evidence of a statement made by a defendant in a criminal action is not made inadmissible by the hearsay rule when offered against that defendant, and may therefore be admitted for the truth of the matter asserted in the statement. [Citations.]" (*People v. Kovacich* (2001) 201 Cal.App.4th 863, 892; Evid. Code, § 1220.) "The statement of a party is the most straightforward of the hearsay exceptions. Simply stated, and as a general rule, if a party to a proceeding has made an out-of-court statement that is relevant and not excludable under Evidence Code section 352, the statement is admissible against that party declarant. 'The exception to the hearsay rule for statements of a party is sometimes referred to as the exception for *admissions* of a party. However, Evidence Code section 1220 covers all *statements* of a party, whether or not they might otherwise be characterized as admissions. [Citations.]' [Citation.]" (*People v. Castille* (2005) 129 Cal.App.4th 863, 875-876.)

In the instant case, Palacios and Duarte testified at both the preliminary hearing and trial that defendant made certain statements to them about how and why he murdered Bustamonte, and that he set the motel room on fire to make the murder look like an accidental death. The evidence consisted of statements, the witnesses testified that defendant was the declarant, the statements were offered against him, and he was a party to the action. Accordingly, their testimony would have been admissible under Evidence Code section 1220, the exception to the hearsay rule for statements of a party/opponent. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1049.)

However, defendant asserts that the trial testimony of Palacios and Duarte was actually based on multiple levels of inadmissible hearsay. As we have explained, at both

the preliminary hearing and trial, Palacios claimed that in addition to speaking directly with defendant, she also spoke to her other brother, Elias Robert; Elias Robert told her what defendant told him about the murder and arson; and she was not sure which details she learned from which brother. While Duarte unequivocally admitted that defendant told her that he had killed someone, she also claimed that she obtained certain information about the murder and arson from both Palacios and Elias Robert.

Multiple hearsay is admissible if each layer falls within an exception to the hearsay rule. (§ 1201; *People v. Nelson* (2012) 209 Cal.App.4th 698, 707*; People v. Thoma* (2007) 150 Cal.App.4th 1096, 1103.) Each layer of hearsay must meet the foundational elements of a hearsay exception or the evidence is inadmissible. (*People v. Reed* (1996) 13 Cal.4th 217, 224-225.) The parties apparently agree that every layer of defendant's statements to Elias Robert, and Elias Robert's statements to Palacios and Duarte, would not have been admissible as multiple hearsay: while defendant's statements to Elias Robert would have been admissible under Evidence Code section 1220, Elias Robert never testified, and the hearsay accounts offered by Palacios and Duarte of what they learned from Elias Robert would not have been admissible under any hearsay exception. Based on the record before this court, it would have been a valid tactical decision for defense counsel to raise hearsay objections to the expected trial testimony of Palacios and Duarte, based on their preliminary hearing testimony.

1. Preliminary fact determinations

The next question is how the trial court would have ruled if faced with defense counsel's hearsay objections based on the preliminary hearing transcript. Defendant asserts the court should have conducted a pretrial hearing pursuant to Evidence Code section 402 and excluded the testimony of Palacios and Duarte.

When the existence of a preliminary fact is disputed, the court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; "but in a criminal action, *the court shall hear and determine* the question of the

admissibility of a confession or admission of the defendant out of the presence and hearing of the jury *if any party so requests*." (Evid. Code, § 402, subds. (a) & (b).)

> "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] ... [¶] (4) *The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself*." (Evid. Code, § 403, subd. (a)(4), italics added.)

The Comment by the Assembly Committee on the Judiciary following Evidence Code section 403 indicates, as to admissions of a party under Evidence Code section 1220, "[t]he only preliminary fact that is subject to dispute is *the identity of the declarant*. Under [Evidence Code] Section 403(a)(4), an admission is admissible upon the introduction of evidence sufficient to sustain a finding *that the party made the statement*.…" (Assem. Com. on Judiciary com., 29B pt. 1B West's Ann. Evid. Code (2011 ed.) foll. § 403, p. 20 (West's Ann. Evid. Code), italics added.)

Establishing a foundational preliminary fact for the admission of evidence requires proof by a preponderance of the evidence. The trial court has broad discretion in determining whether the foundation has been laid, and we review its ruling for abuse of discretion, upholding it if supported by substantial evidence. (*People v. Riccardi* (2012) 54 Cal.4th 758, 831; *People v. Anthony O.* (1992) 5 Cal.App.4th 428, 433-434.)

As applied to this case, if defense counsel had raised pretrial hearsay objections to Palacios and Duarte, the court would have been required to conduct a hearing pursuant to Evidence Code section 402 to determine if their testimony was admissible under Evidence Code section 1220 and defendant made the statements attributed to him. (Evid. Code, § 402, subds. (a), (b).) As the proponent of the evidence, the prosecution would have had the burden of producing evidence of the preliminary fact by a preponderance of the evidence–that defendant made the statements directly to Palacios and Duarte, and not

that Palacios and Duarte heard the information from Elias Robert. (Evid. Code, § 403, subd. (a)(4); *People v. Riccardi*, *supra*, 54 Cal.4th 758, 831.)

Based on the preliminary hearing transcript, Palacios and Duarte initially testified that defendant made certain inculpatory statements directly to them, that he murdered the decedent and then started the fire to make it look like an accident. On further examination, however, both witnesses hedged about whether they learned about the murder and arson from defendant or his brother, Elias Robert. Duarte ultimately testified that defendant directly told her: " 'I killed somebody.' " Palacios also conceded that defendant directly made several inculpatory statements to her, and clarified that defendant, and not Elias Robert, told her about choking the woman and putting her in the bathtub.

It is important to note that the preliminary fact as to whether the declarant made the statement "is governed by the substantial evidence rule. The trial court is to determine *only whether there is evidence sufficient to sustain a finding that the statement was made*. [Citation.] As with other facts, the direct testimony of a single witness is sufficient to support a finding unless the testimony is physically impossible or its falsity is apparent 'without resorting to inferences or deductions.' [Citations.] Except in these rare instances of demonstrable falsity, *doubts about the credibility of the in-court witness should be left for the jury's resolution; such doubts do not afford a ground for refusing to admit evidence under the hearsay exception* .… [Citations.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 608-609 (*Cudjo*), italics added.)

Thus, even if the court had conducted a pretrial hearing on the admissibility of their testimony, it would have allowed Palacios and Duarte to testify before the jury, consistent with their preliminary hearing testimony. Both Duarte and Palacios clearly did not want to testify against defendant who was, respectfully, their son and brother. By the time of trial, Duarte said that her children were not speaking to her anymore because she

had initially cooperated with the police; Lilliana Alvarez testified that she had been warned by Duarte to stop talking about the incident and not to testify against defendant.

If the court had reviewed the proposed testimony of Duarte and Palacios, presumably consistent with their preliminary hearing appearances, it would have heard them give contradictory accounts of whether defendant was the declarant, or Elias Robert disclosed certain details of the murder and motel fire. As explained in *Cudjo*, the court could have relied on their direct examination testimony at the preliminary hearing, and decided there was sufficient evidence to allow them to testify before the jury, and for the jury to resolve the credibility of their testimony as to the preliminary fact of whether defendant made the inculpatory statements directly to them, so that the evidence would have been admissible as admissions. (*Cudjo, supra*, 6 Cal.4th at pp. 608-609.)

2. Preliminary fact instruction

Even if the court had found sufficient evidence for the hearsay issue to be considered by the jury, defendant argues the jury in this case never received the appropriate instruction to make that preliminary fact finding by the requisite burden of proof.

Evidence Code section 403 provides that the court may admit conditionally the proffered evidence, "subject to evidence of the preliminary fact being supplied later in the course of the trial." (Evid. Code, § 403, subd. (b).)

> "If the court admits the proffered evidence under this section, the court: [¶] (1) May, *and on request shall*, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist …." (Evid. Code, § 403, subd. (c), italics added.)

"On its own terms, this provision makes it discretionary for the trial court to give an instruction regarding a preliminary fact unless the party makes a request." (*People v. Lewis* (2001) 26 Cal.4th 334, 362.)

Defendant contends defense counsel was ineffective for failing to request any type of instruction for the jury to make such a preliminary fact finding, and the issue was never presented to the jury. A similar issue was addressed in *People v. Hinton* (2006) 37 Cal.4th 839 (*Hinton*), where the trial court admitted evidence of the defendant's alleged confession and found sufficient foundation for the preliminary foundational fact that he made the statements attributed to him by a witness. (*Id*. at p. 890.) *Hinton* found the pretrial hearing and trial testimony supported the court's finding that an adequate foundation had been established for the preliminary foundational fact that the defendant made the statements. (*Id*. at pp. 890-891.)

Hinton rejected the defendant's argument that the court failed "to instruct the jury to determine whether the preliminary fact had been established and to disregard the evidence unless it did so find." (*Hinton, supra*, 37 Cal.4th at p. 891.) *Hinton* held the court did not have a sua sponte duty to instruct, and did not abuse its discretion in failing to instruct on those points. (*Id*. at p. 892.) However, *Hinton* further held the jury was asked to consider the preliminary fact issue under other, properly given instructions:

> "[T]he jurors were instructed that they 'are the exclusive judges as to whether the defendant made an admission'; that if they find defendant did not make the statement, they 'must reject it'; and that '[e]vidence of an oral admission ... should be viewed with caution.' Moreover, defense counsel expressed doubt in argument that defendant had told [the witness] any such thing or that [the witness] had made such a statement to police, and urged the jury to reject the evidence. We therefore see no possibility the jury could have misunderstood its obligation to determine whether defendant was [the declarant] before considering the significance of [the witness's] statements. [Citation.]" (*Id*. at p. 892.)

It is well settled that the correctness of jury instructions is to be determined from the entire charge of the court; thus, the absence of one instruction may be cured by matters included in another instruction. (*People v. Holt* (1997) 15 Cal.4th 619, 677; *People v. Burgener* (1986) 41 Cal.3d 505, 538-539, overruled on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 753.)

"A trial court has a sua sponte duty to instruct the jury to view a defendant's oral admissions with caution if the evidence warrants it. [Citations.]" (*People v. Wilson* (2008) 43 Cal.4th 1, 19.) " 'The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made.' [Citation.] This purpose would apply to any oral statement of the defendant, whether made before, during, or after the crime." (*People v. Carpenter* (1997) 15 Cal.4th 312, 393.)

As applied to this case, the jury herein received the *identical instructions* which were found sufficient for the determination of the preliminary fact issue in *Hinton*, as to whether the defendant made inculpatory statements attributed to him. As in *Hinton*, the jury in this case was instructed that it had to "decide whether the defendant made any such statements in whole or in part," and to "[c]onsider *with caution* any statement made by the defendant tending to show his guilt …." (CALCRIM No. 358; CT 328, italics added) While the prosecution's burden of proving the preliminary fact would have been through a preponderance of the evidence, the jury was instructed – albeit erroneously – to rely on a higher burden of proof, since it received only one instruction on the topic. CALCRIM No. 220 instructed the jury: "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt."

Thus, even if defense counsel had raised pretrial hearsay objections as to whether defendant made the statements attributed to him by Palacios and Duarte, the trial court could have found sufficient foundation for the preliminary fact that defendant made the statements, and allowed the jury to hear the evidence. Based on the entirety of the instructions, the jury was instructed that it had to consider whether defendant made the statements attributed to him by Palacios and Duarte, and that it had to make that determination beyond a reasonable doubt.

3. Impeachment of the witnesses

Based on our analysis of the preliminary fact issue, the record suggests that defense counsel may have had another tactical reason for not moving to exclude the

proposed testimony of Palacios and Duarte. There is no basis to conclude the court would have completely excluded their trial testimony. Palacios and Duarte still would have testified for the prosecution even if defense counsel had raised the preliminary fact and hearsay objections, and they would have testified about some of the inculpatory statements defendant made directly to them, most notably Duarte's testimony that defendant said: " 'I killed somebody.' "

If the court had excluded any part of their testimony, then defense counsel would not have been able to impeach Palacios and Duarte with the inconsistencies between their initial statements to Detective Gray, their preliminary hearing testimony, and their trial testimony, as to exactly what defendant said directly to them, whether they received the information from Elias Robert, or whether Palacios told Duarte the story about the motel fire. Instead, Palacios and Duarte would have presumably offered straightforward testimony that defendant made certain inculpatory statements to them.

As demonstrated by the trial record, however, Palacios and Duarte were extensively impeached by their prior inconsistent statements, and on the question of whether they spoke directly to defendant.[15] Defense counsel seized on these inconsistencies to question the veracity and accuracy of their allegations that defendant made the inculpatory statements which they attributed to him, and argued that both Palacios and Duarte were confused about what they knew.

The record thus suggests that in addition to defense counsel's corpus delicti argument that there was no independent evidence to corroborate defendant's extrajudicial statements, defense counsel also used cross-examination to demonstrate that Palacios and Duarte were confused as to the precise nature of his alleged extrajudicial statements.

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[15] Lilliana Alvarez was also subject to the same type of impeachment during trial, and admitted that she was not present when defendant spoke to either Palacios or Duarte.

D. Prejudice

Even assuming that defense counsel was ineffective for relying on the corpus delicti argument, and/or that the superior court would have granted any pretrial hearsay objections, defendant must still show "prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*People v. Williams, supra*, 16 Cal.4th 153, 214-215.)

Even if we were to find that defense counsel was ineffective for failing to make hearsay objections, and that all or part of the trial testimony of Duarte and Palacios would have been excluded, we do not find a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different for several reasons.

First, Dr. Gopal testified that Bustamonte died from strangulation and cocaine intoxication, and that she did not die from the fire or smoke inhalation. Contrary to defense counsel's efforts on this point, Dr. Gopal testified that he discovered the blunt force trauma to her head, and internal neck injuries and hemorrhages, when he initially conducted the autopsy, and that he made these discoveries before he spoke to Detective Gray about any aspect of the case. It was thus clear that Bustamonte was killed by someone.

Second, Bustamonte's blood was found on the shower curtain. While that fact may not have been critical since she lived in that room, the presence of her blood was relevant and probative given Dr. Gopal's testimony about the blunt force trauma to her head. It was also relevant given defendant's admission that he had been in the room with her in the hours before the fire, and he was seen walking away from that room as smoke emerged from under the door.

Third, the motel's manager testified about defendant's response to her question about whether Bustamonte was still upstairs as the smoke poured out of her room. Defendant said that he thought Bustamonte was still there, and added: "That's what karma will get you." Defendant immediately left the scene, even though he knew that Bustamonte's room was on fire, the firefighters had just arrived, and Bustamonte's fate was unknown.

Fourth, while defendant told the motel manager that he thought Bustamonte was still in the room, there is no evidence that he pounded on the door, tried to rouse her, or attempted to break open the door. Brand testified that defendant was walking away from the room as Brand headed to his nephew's adjoining room to wake him up. While Brand discovered that Bustamonte's door was locked, he joined the manager's husband in breaking open the door and attempting to control the fire with fire extinguishers, while defendant left the scene. Defendant later claimed he went back upstairs to fight the fire with a garden hose, but he never made that statement during his initial interview with Detective Gray, and Brand said defendant never returned upstairs.

Fifth, even if certain aspects of Duarte's testimony would have been subject to exclusion because of hearsay objections, she repeatedly testified, without contradiction, that defendant arrived home early in the morning, he was crying and emotional, and he said: "I killed someone." Duarte testified that defendant smelled, she thought he smelled from using drugs for several days, and he left his shoes outside and threw his sweatshirt in the garbage.

Sixth, defendant repeatedly gave a false name when the police arrived at the residence; defendant later claimed he was trying to avoid arrest on traffic citations.

Finally, we find no prejudice even if we presume that some of Palacios's trial testimony should have been excluded as hearsay based on her alleged belief that she learned some of that information from her brother, Elias Robert, and not directly from defendant. Despite her equivocation, Palacios still testified at trial that defendant made

certain inculpatory statements about the murder and arson directly to her. The prosecutor reviewed Palacios's lengthy statement to Detective Gray, and Palacios testified that she told Gray that defendant gave her the following information: that the victim was a snitch, "they told him to take her out," someone was in the room with him, the victim was asleep on the bed, defendant ripped off the shower curtain, he wrapped it around the victim, he started to suffocate her with it, and he told the other guy to get out of the room, the victim fell asleep, and defendant put her in the bathtub.

> "Q And is that – and that's when you were telling Detective Gray that's what your brother, [defendant], had told you?
>
> "A I was telling him the story that I remembered.
>
> "Q *Okay. Was that the story that your brother, [defendant], had told you?*
>
> "A. *Yes, I believe so*." (Italics added.)

The prosecutor reviewed the rest of Palacios's statement to Detective Gray, and Palacios testified that defendant told her the following information: that after the victim was in the bathtub, someone knocked on the motel room door and wanted to get him high. Defendant closed the bathroom door and let the person in because he wanted to take a hit. Defendant told Palacios that he could hear the victim snoring in the bathtub so he told the person to get out of the room. Defendant told Palacios that he went back into the bathroom and finished her off, and she was already dead when he put her in the bed. Defendant said he tried to light the bed on fire so no one would know what happened, but it wouldn't start. Defendant said he made a hole in the mattress, put toilet paper in it, and it went really fast.

Based on the entirety of the record, we conclude that defense counsel's failure to raise hearsay objections to the trial testimony of Palacios and Duarte was not prejudicial because it is not reasonably probable that the result would have been more favorable to defendant, that he would have been acquitted of murder.

II. CALCRIM No. 358

As explained *ante*, the court instructed the jury with CALCRIM No. 358 as follows:

> "You have heard evidence that the defendant made oral statements before the trial. You must decide whether the defendant made any such statements in whole or in part. If you decide that the defendant made such statements consider the statements along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements.
>
> "Consider with caution any statement made by the defendant tending to show his guilt *unless the statement was written or otherwise recorded*." (Italics added.)

Defendant challenges the italicized portion of the final paragraph, and contends the court had a sua sponte duty to modify and clarify that language. Defendant contends the jury could have believed that since Detective Gray tape-recorded his interviews with Palacios and Duarte, and both women attributed inculpatory statements to defendant, the jury could have believed that it did not have to view their testimony about his statements with caution because Gray tape-recorded their accounts of defendant's alleged inculpatory statements. In the alternative, defendant argues defense counsel was prejudicially ineffective for failing to request modification of the instruction to clarify that the cautionary language was inapplicable if defendant's own statement was tape-recorded.

As noted *ante*, the trial court has a sua sponte duty to instruct the jury with the cautionary instruction of CALCRIM No. 358. (*People v. McKinnon* (2011) 52 Cal.4th 610, 679.) "The purpose of the cautionary language ... is to assist the jury in determining whether the defendant ever made the admissions. [Citations.]" (*Ibid*.) As noted by the People, it is frequently argued that the trial court's *failure* to give CALCRIM No. 358 constitutes prejudicial error. (*Id*. at pp. 679-680; *People v. Dickey* (2005) 35 Cal.4th 885, 906.)

Defendant raises a slightly different challenge. Defendant argues that since Detective Gray recorded his interviews with Palacios and Duarte, where they disclosed defendant's inculpatory statements to them, that CALCRIM No. 358 may have misled the jury into believing that it did not have to consider with caution the statements attributed to defendant by Palacios and Duarte. Defendant's instructional challenge is meritless.

A defendant who contends that an instruction is subject to an erroneous interpretation by the jury must show a "reasonable likelihood that the jury understood the instruction in the way asserted by the defendant" and caused the jury to misapply the law. (*People v. Cross* (2008) 45 Cal.4th 58, 67-68.) Defendant fails to make this showing. CALCRIM No. 358 states that the jury need not consider with caution a recorded statement of the defendant's own voice and words, but does not exempt from the cautionary language a recorded statement by someone else that attributes words to the defendant. The instruction's reference to "any statement made by the defendant," which has been recorded, is clear and unambiguous. "It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions." (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.)

III. Detective Gray's testimony about Mulponce

Defendant contends the court erroneously overruled his hearsay objections to the prosecutor's questions to Detective Gray about his attempt to question Kenneth "Casper" Mulponce about whether defendant was with him immediately before the fire.

A. Background

As set forth *ante*, defendant testified at trial that he spent the evening in Bustamonte's room, using drugs with Sunny Mata. He left her room around 1:00 a.m., when a male client arrived for her. Defendant testified he went downstairs and spent several hours with Kenneth "Casper" Mulponce and his female acquaintance, Marilyn.

In rebuttal, Detective Gray testified that when he interviewed defendant, defendant said that he had been downstairs at the motel with "Casper" and "Marilyn" before the fire

started. Gray testified that he determined there were "two Caspers" who lived at the motel, and he spoke with both of them.

The prosecutor asked Gray about his contact with Kenneth "Casper" Mulponce.

"Q You were able to find him?

"A Yes.

"Q And you talked to him?

"A Yes, I did.

"Q *Any of that information pan out from Mr. Mulponce*?

"A *No, sir, it did not.*'

"[DEFENSE COUNSEL]: Objection, it's vague and hearsay.

"THE COURT: Overruled.

"[THE PROSECUTOR]: Q What did Mr. Mulponce tell you?

"[DEFENSE COUNSEL]: Objection, hearsay.

"THE COURT: It is. Sustained." (Italics added.)

B. <u>Analysis</u>

Defendant cites to the prosecutor's exchange with Detective Gray, as italicized, and argues that Gray's response to the prosecutor's question constituted implied hearsay and the court should have sustained defense counsel's objection to Gray's implied response, that defendant's alibi claim with Mulponce did not pan out. Defendant argues the erroneous admission of Gray's hearsay response violated his Sixth Amendment rights, and was prejudicial because it undermined his alibi defense.

" '[E]vidence of an express statement of a declarant is ... hearsay evidence if such evidence is offered to prove – not the truth of the matter that is stated in such statement expressly – but the truth of a matter that is stated in such statement by implication.' [Citations.] 'While the ultimate fact the statement is offered to prove is not the matter stated, the truth of the implied statement is a necessary part of the inferential reasoning process.' [Citation.] 'An implied statement may be inferred from an express statement

whenever it is reasonable to conclude: (1) that declarant *in fact intended* to make such implied statement, or (2) that a recipient of declarant's express statement would *reasonably believe* that declarant intended by his express statement to make the implied statement.' [Citation.]" (*People v. Garcia* (2008) 168 Cal.App.4th 261, 289, italics in original.)

The erroneous admission of hearsay evidence is assessed under the standard of *People* v. *Watson* (1956) 46 Cal.2d 818, 836, i.e., whether the defendant would likely have obtained a more favorable result if the evidence had been excluded. (*People v. Garcia, supra*, 168 Cal.App.4th 261, 292.) If the defendant's Sixth Amendment confrontation right has been violated, the standard of review of *Chapman* v. *California* (1967) 386 U.S. 18 applies, requiring reversal unless the error was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.)

Under either standard, we find any possible error to be harmless. Even without Detective Gray's testimony, the jury heard defendant's explanation that he was with several individuals in the hours just before the fire, and those individuals constituted potential alibi witnesses: he was using rock cocaine with Bustamonte and Sunny Mata around 1:00 a.m., and he was with motel residents Kenneth "Caspar" Mulponce and "Marilyn" once Bustamonte's male customer arrived. Yet defendant never called any of these witnesses or presented any evidence to further support his alibi defense.

More importantly, defendant's trial testimony was riddled with inconsistencies about his actions as the fire burned in Bustamonte's room. The primary inconsistency was his claim that once he called 911, he rushed back upstairs and helped fight the fire with a garden hose. Defendant admitted that he failed to provide this detail during his pretrial interview with Detective Gray.

Moreover, Andrew Brand testified that he saw defendant walking away from the area of Bustamonte's room and heading toward the stairwell. After their conversation about the cell phone, Brand saw defendant downstairs at the payphone. Brand saw

defendant holding the payphone receiver, and then he never saw defendant again. Brand further testified that Bobby Garcia, the motel manager's husband, helped Brand kick down Bustamonte's door, and they tried to use fire extinguishers to fight the fire. Brand saw the body on the bed, but had to withdraw from the room because of the flames. Brand testified that he stayed at Bustamonte's door until the firefighters ordered him to leave. Brand never testified that he or anyone else used a garden hose to fight the fire, or that defendant returned upstairs and offered any assistance to determine if Bustamonte was still in the room.

Johnson, the motel manager, testified that defendant was standing next to her as the firefighters arrived. Defendant responded to her inquiry about Bustamonte by saying that she had been in the room "a few minutes ago," and added: " 'That's what karma gets you.' " Johnson testified that she never again saw defendant at the motel.

Thus, even to the extent that Detective Gray's initial rebuttal response about Mulponce should have been excluded, any error is necessarily harmless because defendant's alibi was conclusively undermined by his own trial testimony and inconsistent prior statements.[16]

IV. The trial court properly imposed consecutive terms of imprisonment for second degree murder and arson

Defendant contends resentencing is necessary because the trial court was unaware of its discretion to impose defendant's determinate and indeterminate terms concurrently. Defendant summarily contends in the alternative that his counsel was ineffective by not arguing for concurrent terms.

[16] Given our determinations as to issue I, II, and III, we also reject defendant's argument that cumulative error occurred at his trial.

A. Sentencing

The report of the probation officer filed December 6, 2010, set forth criteria affecting concurrent or consecutive sentences (Cal. Rules of Court, rule 4.425). The report stated in relevant part:

> "Criteria relating to the crime: Criteria affecting the decision to impose consecutive rather than concurrent sentence[s] include:
>
> "(b) Other criteria and limitations: Pursuant to PC 667(c)(7), consecutive sentencing will be imposed."

On that same date, the court indicated that it had read and considered the probation report, the arguments of counsel, and the statements of individuals who spoke at the sentencing proceedings. The court denied defendant probation and imposed terms of imprisonment, stating:

> "With respect to Count One; namely, Penal Code Section 187, murder, as fixed by a jury, and murder of the second degree, defendant will be ordered to [serve] the statutory term of 15 years to life, which will be doubled by virtue of the strike and pursuant to Penal Code Section 667(e)(1). And, therefore, will serve a term of 30 years to life with respect to Count One.
>
> "With respect to Count Two; namely, Penal Code Section 451, subdivision (b), arson of an inhabited structure, that calls for determinate sentencing. And in this case the factors in aggravation outweigh those in mitigation. In fact, the Court doesn't include any mitigating factors in this case. There is a total lack of remorse. The facts of the case demonstrate great violence. And as noted, the prior convictions are of increasing seriousness and numerous, just to mention a few factors in aggravation. Accordingly, for Count Two, the Court will fix the upper term of eight years, which will be doubled by virtue of the strike and, again, pursuant to Penal Code Section 667(e)(1), which will therefore be a determinate term of 16 years with respect to Count Two. [¶] And the total term for both counts equates to 16 years determinate, followed by a term of 30 years to life."

B. Defendant's specific contention

Penal Code section 667, subdivision (c)(6) and section 1170.12, subdivision (a)(6) provide: "If there is a current conviction for more than one felony count not committed on the same occasion, and *not* arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count …."[17] (Italics added.) Section 667, subdivision (c)(7) and section 1170.12, subdivision (a)(7) provide: "If there is a current conviction for more than one serious or violent felony as described in paragraph (6) … the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." Defendant points out the murder and arson charged in the instant case *were* committed on the same occasion and contends the trial court was seemingly unaware of its discretion to impose concurrent terms of imprisonment rather than consecutive terms of imprisonment.

C. Governing law

Section 669 grants the trial court broad discretion to impose consecutive sentences when a person is convicted of two or more crimes. (*People v. Shaw* (2004) 122 Cal.App.4th 453, 458.) California Rules of Court, rule 4.425 sets forth criteria affecting

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[17] In *People v. Deloza* (1998) 18 Cal.4th 585 (*Deloza*), the California Supreme Court held that the "same occasion" and "same set of operative facts" analysis under the "Three Strikes" law is not the same as the indivisible transaction analysis under section 654. (*Deloza*, at pp. 594-595.) Consequently, even if section 654 does not preclude imposition of multiple sentences, the "Three Strikes" law does not necessarily mandate imposition of consecutive sentences. In construing section 667, subdivision (c)(6) and section 1170.12, subdivision (a)(6), courts give the terms "same occasion" and "same set of operative facts" their ordinary English meanings. (*People v. Lawrence* (2000) 24 Cal.4th 219, 226, 230-234 (*Lawrence*).) "Same occasion" refers "at least to a close temporal and spatial proximity between the acts underlying the current convictions." (*Deloza, supra*, at p. 595.) "Operative facts" refers "to the facts of a case which prove the underlying act upon which a defendant had been found guilty." (*Lawrence*, *supra*, at p. 231.)

concurrent or consecutive sentences.[18] Those criteria are guidelines, not rigid rules that trial courts are bound to apply in every case. (*People v. Calderon* (1993) 20 Cal.App.4th 82, 86-87.) The enumeration in the rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. (Cal. Rules of Court, rule 4.408(a).) Any circumstances in aggravation or mitigation may be considered in determining whether to impose consecutive rather than concurrent sentences, except a fact used to impose the upper term; a fact used to otherwise enhance the defendant's prison sentence; and a fact that is an element of the crime. (Cal. Rules of Court, rule 4.425.)

D. Analysis

Here, the two offenses were committed simultaneously, and therefore on a single occasion, and arose out of the same set of operative facts. Defendant contends the trial court believed it was required to impose consecutive sentences. However, relevant sentencing criteria enumerated in the rules of court will be deemed to have been considered unless the record affirmatively reflects otherwise. (Cal. Rules of Court, rule 4.409.) The trial court never expressed or implied that it somehow lacked the discretion to impose concurrent terms of imprisonment. Moreover, the court expressly noted: "[T]he factors in aggravation outweigh those in mitigation." Among the aggravating

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[18] California Rules of Court, rule 4.425 provides: "Criteria affecting the decision to impose consecutive rather than concurrent sentences include: [¶] (a) **Criteria relating to crimes** Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. [¶] (b) **Other criteria and limitations** Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except: [¶] (1) A fact used to impose the upper term; [¶] (2) A fact used to otherwise enhance the defendant's prison sentence; and [¶] (3) A fact that is an element of the crime may not be used to impose consecutive sentences." (Emphasis in original.)

factors, the court cited "a total lack of remorse," a factual setting that "demonstrate[d] great violence," and the fact "the prior convictions are of increasing seriousness and numerous."

A trial court has discretion to determine whether several sentences are to run concurrently or consecutively. Absent a clear showing of abuse, the trial court's discretion in this respect is not to be disturbed on appeal. Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered. (*People v. Benavides* (2005) 35 Cal.4th 69, 88.) Only a single aggravating circumstance is required to impose consecutive sentences. (*People v. Leon* (2010) 181 Cal.App.4th 452, 469.) Here, the trial court cited multiple aggravating factors, including defendant's total lack of remorse, his demonstration of great violence, and the increasing seriousness and numbers of his prior convictions. Any one of these factors would have been sufficient for the imposition of consecutive terms and a remand for resentencing is not required.

V. The trial court properly used defendant's prior serious juvenile adjudication for assault with a deadly weapon as a strike

Defendant initially contends the trial court's use of a prior juvenile adjudication as a "strike" violated his rights to due process, notice, and jury trial under the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution.

Defendant goes on to acknowledge: "[T]he California Supreme Court rejected this contention in *People v. Nguyen* (2009) 46 Cal.4th 1007 (cert. den., Apr. 19, 2010) [(*Nguyen*)] and that it binds this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)"

Defendant nevertheless asserts that *Nguyen* was incorrectly decided and "anticipates the issue to be addressed by the United States Supreme Court. He therefore makes this argument to preserve the issue for federal review."

As the People observe, this court is bound by *Nguyen* under the doctrine of stare decisis and no further discussion is required. (*Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at p. 455.)

DISPOSITION

The judgment is affirmed.

_____
Poochigian, J.

WE CONCUR:

_____
Cornell, Acting P.J.

_____
Franson, J.