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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ARTHUR LOURDES LENIX, Defendant and Appellant.	F048115 (Super. Ct. No. BF100124B) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Arthur E. Wallace, Judge.

A. M. Weisman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Stan Cross and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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Arthur Lourdes Lenix went to trial three times on charges arising from a fatal shooting in an alley near a convenience store. His first trial ended in a mistrial after his attorney declared an irreconcilable conflict of interest. His second trial ended in a

mistrial after his attorney took ill. At his third trial, Curtis Rufus testified that he saw Lenix shoot his cousin Lamar Rufus in the head, killing him, and that he saw Lenix shoot at him (Curtis) moments later, missing him but hitting someone else in the arm.[1]

A jury found Lenix guilty of Lamar's first degree murder (§ 187, subd. (a)[2]; count 1), of Curtis's attempted murder (§§ 187, subd. (a), 664, subd. (a); count 2), of conspiracy to commit murder (§§ 182, subd. (a)(1), 187, subd. (a); count 3), of possession of a firearm by a convicted felon (§ 12021, subd. (a)(1); count 4), and of possession of a loaded firearm in a public place by an active participant in a criminal street gang (§ 12031, subd. (a)(2)(C); count 5). The jury found true the counts 1 and 3 allegations of personal and intentional firearm discharge proximately causing great bodily injury or death (§ 12022.53, subd. (d)) and the count 2 allegations of premeditation and deliberation (§§ 189, 664, subd. (a)), personal and intentional firearm discharge (§ 12022.53, subd. (c)), and personal firearm use (§ 12022.5, subd. (a)). At a bifurcated trial, the court found true the counts 1-5 allegations of prison term priors. (§ 667.5, subd. (b).)

The court imposed a 25-to-life term for first degree murder, a consecutive 25-to-life term for personal and intentional firearm discharge proximately causing great bodily injury or death, and a consecutive 1-year term for a prior prison term (count 1); imposed a consecutive term of life with possibility of parole for attempted murder and a consecutive term of 20 years for personal and intentional firearm discharge (count 2); imposed and stayed a 25-to-life term for conspiracy to murder and a consecutive 25-to-life term for personal and intentional firearm discharge proximately causing great bodily

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[1] For brevity and clarity, later references to the Rufuses will be by first names only. No disrespect is intended. Later references to all other people, none of whom shares a last name with anyone else here, will be by last names only.

[2] All statutory references are to the Penal Code unless otherwise noted.

injury or death (count 3); imposed a concurrent aggravated term of 3 years for possession of a firearm by a convicted felon (count 4); and imposed a concurrent aggravated term of 3 years for possession of a loaded firearm in a public place by an active participant in a criminal street gang (count 5).

Lenix raises nine issues on appeal. First, he argues that an impermissibly suggestive pretrial photographic lineup that tainted Curtis's in-court identification of him as the perpetrator constituted a miscarriage of justice and a denial of his constitutional right to due process. Second, he argues that the prosecutor's reasons for striking the last African-American prospective juror from the venire were pretexts, that denial of his *Batson-Wheeler*[3] motion constituted structural error, and that reversal is imperative without a prejudice inquiry. Third, he argues insufficiency of the evidence of conspiracy to murder.

Fourth, Lenix argues that joint trial of the status offenses with the substantive offenses constituted a miscarriage of justice and a denial of his constitutional right to due process. Fifth, he argues that Lamar's statement that Lenix dropped a .38 moments before the shooting was inadmissible hearsay that denied his constitutional rights to confrontation and due process. Sixth, he argues that improper limitation of cross-examination of a detective about whether he handed the gun to someone else shortly before the shooting constituted a miscarriage of justice and a denial of his constitutional rights to confrontation and due process.

Seventh, Lenix argues that three occurrences of prosecutorial misconduct in argument to the jury constituted a denial of his constitutional right to due process. Eighth, he argues that an error in the abstract of judgment requires a limited remand.

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[3] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), overruled in part by *Johnson v. California* (2005) 545 U.S. 162, ___-___ [162 L.Ed.2d 129, 135-138, 125 S.Ct. 2410, 2413-2416] (*Johnson*).

Ninth, he argues that the trial court's imposition of consecutive terms without jury findings of aggravating factors violated his constitutional right to a jury trial.

We will order a limited remand for correction of an error in the abstract of judgment. Otherwise we will affirm the judgment.

DISCUSSION

1. Identification Procedure

Lenix argues that an impermissibly suggestive pretrial photographic lineup that tainted Curtis's in-court identification of him as the perpetrator constituted a miscarriage of justice and a denial of his constitutional right to due process. The Attorney General argues that the lineup and the in-court identification were proper and that error, if any, was not prejudicial.

Immediately after the shooting, Curtis told the 911 operator that the person who shot his cousin "was a guy, I don't know his name, but I'd know him if I could see him." At the preliminary hearing, Curtis did not testify, but the officer who showed him the lineup – a standard "six-pack" of photographs – testified that Lenix was the person whom Curtis picked out of the lineup. He testified that Curtis "said that there was one person who looked like the subject who did the shooting. He would be more confident if he was able to see the person – the person that he identified actually in person to say, definitely, that was him or not." He testified that Curtis "knew everyone else in the lineup" and that although he "kind of said that [Lenix] looked like the person" he "would have been more sure with himself if he was able to see the person in person" since he "didn't basically want to point a finger at somebody who was innocent." He testified that Curtis told him he had heard about Lenix's gang monikers from other people.

At Lenix's first trial, Curtis testified that he first saw Lenix a week before the shooting, that he knew him not by his name but by his gang monikers, and that otherwise he did not know him at all. He testified that on the day after the shooting, when he

picked Lenix out of the lineup, he said he could not be 100 percent sure because the photograph showed only the head area and that to be 100 percent sure he wanted to see "his size, his build, his height." He testified that the person who shot his cousin had a "deformed," "decayed," or "missing" tooth that "jumped out" at him. He testified that after Lenix stood up in court, opened his mouth, and showed his teeth he was "a hundred, hundred and fifty percent sure that this is the guy that murdered my cousin." He testified that he knew "one of the other guys" in the lineup and that he did not tell the officer he knew "all the other ones."

Lenix's second trial ended before Curtis could testify. Before his third trial, Lenix filed a motion in limine to preclude Curtis from identifying him in court as the perpetrator. At the hearing on the motion, his trial attorney argued that the lineup was impermissibly suggestive since Curtis could have learned about Lenix's tooth problem from anonymous third parties not available for cross-examination and since the officer testified Curtis told him he knew all of the other people in the lineup. The prosecutor acknowledged the officer's testimony but emphasized Curtis's testimony that he knew only one of the other people in the lineup and that "he noticed an abnormality with his teeth" the day before he picked Lenix out of the lineup. The court noted that Lenix would have "every opportunity to cross-examine [Curtis] on the basis of whatever information he has on which he bases that identification, including the potential suggestiveness of the photographic lineup," and denied the motion.

At Lenix's third trial, the prosecutor asked Curtis if he "more or less" identified Lenix on the day after the shooting, from among the six photographs in the lineup, as the person who shot Lamar. Curtis testified, "Yes." He testified that he was "quite sure" about his lineup identification but that since the photograph was just "a head shot" and could have been old, and since the person who shot his cousin had a "decayed," "missing," "chipped," or "defective" front tooth, he "wanted to see him" in person. After Lenix stood up in court, opened his mouth, and showed his teeth, Curtis testified he had

"absolutely no doubts" and was "100 percent positive" that Lenix was the person who shot his cousin. The officer who showed him the lineup testified that Curtis not only identified Lenix as the person who looked like the shooter but also said "he wanted to see the person in person" to be positive about his identification due to the severity of a murder charge. The officer testified that Curtis told him he knew the names of the other five people in the lineup.

Here, as in *People v. Johnson* (1992) 3 Cal.4th 1183, all six photographs were of African-American males who were "generally of the same age, complexion, and build, and generally resembling each other," the accused's "photograph did not stand out, and the identification procedure was sufficiently neutral" to withstand appellate review. (*Id.* at pp. 1208, 1214, 1217; see *People v. Gordon* (1990) 50 Cal.3d 1223, 1243, disapproved on another ground by *People v. Edwards* (1991) 54 Cal.3d 787, 834-835.) Before trial, Curtis picked Lenix out of the lineup even though everyone's mouths were either barely open or completely closed and no details about anyone's teeth were visible. At trial, he positively identified Lenix after he stood up, opened his mouth, and showed his teeth.

An appellate court will set aside "convictions based on eyewitness identification at trial following a pretrial identification by photograph" only if the pretrial procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (*Simmons v. United States* (1968) 390 U.S. 377, 384.) The standard of independent review applies to a trial court's ruling that a pretrial identification procedure was not impermissibly suggestive. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608-609.) Our independent review of the record persuades us that Lenix fails to make the requisite showing for relief on appeal. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

2. Batson-Wheeler

Lenix argues that the prosecutor's reasons for striking the last African-American prospective juror from the venire were pretexts, that denial of his *Batson-Wheeler* motion constituted structural error, and that reversal is imperative without a prejudice inquiry. The Attorney General argues that denial of the motion was proper.

The clerk initially called 21 prospective jurors to the jury box. After questioning by the court and counsel, the prosecutor passed for cause. Of the five challenges for cause by Lenix's attorney, the court sustained two and denied three. Each counsel exercised three peremptory challenges, leaving only 13 prospective jurors on the panel, so the clerk called another 21, whom the court and counsel questioned. The African-American prospective juror at issue ("C. A.") was among the second group of 21 whom the clerk called.

The entire colloquy on voir dire between Lenix's attorney and C. A. follows:

> "Q. Thank you. Good afternoon, [C. A.]. Were you familiar with any of the names the judge read off in this case?
>
> "A. No.
>
> "Q. Is there anything about the nature of this case that gives you any concern?
>
> "A. The murder aspect.
>
> "Q. That's always tough.
>
> "A. Yeah.
>
> "Q. Okay. The fact that Mr. Lenix is charged and brought to trial is not evidence that you can consider of his guilt. Do you understand that?
>
> "A. Yes.
>
> "Q. You'll get an instruction early on from the Court that the fact he's been arrested, brought to trial, and accused is not evidence. [The prosecutor] has to put on evidence on the jury stand in the form of witnesses or documents or whatever to present to you for you to make a determination as to whether or not he's guilty. Will you do that?

"A. Yes.

"Q. Do you think you'd have any problem evaluating the credibility of witnesses?

"A. No.

"Q. You're going to be asked to judge whether or not witnesses are telling the truth or not telling the truth or if they actually saw what they said they saw. Is that something you feel you can do?

"A. Yes.

"Q. Can you treat all the witnesses the same?

"A. Yes.

"Q. Is there any reason that Mr. Lenix would be concerned if you were to sit as a juror in this case?

"A. No."

The prosecutor twice engaged in a dialogue with C. A. on voir dire. First, he asked her about the murder charge:

"Q. … [C. A.], let me ask you, you had indicated to [Lenix's attorney] that you were particularly troubled by some of the charges, especially the murder charges; is that correct?

"A. Yes.

"Q. Could you – if you don't mind, I know anybody, of course, would be troubled by charges like that, but is there something – if I can ask – is there something beyond that?

"A. The fact that someone lost a life.

"Q. Have you yourself had anyone close to you involved in something like that?

"A. Yes.

"Q. Is that something you can discuss in public?

"A. It's something I can discuss in public. It was a family member.

"Q. Who was that?

"A. My sister's husband.

"Q. And was that recently?

"A. No. At least ten or eleven years ago.

"Q. Were you close to him?

"A. Yeah.

"Q. Was he murdered?

"A. Yes.

"Q. And I am sorry about that, and I apologize for getting into things that I'm sure are very sensitive. [¶] [C. A.], do you know, was this somehow gang related or alleged to be gang related?

"A. Yes.

"Q. Do you know which gang committed that offense?

"A. It wasn't here in Bakersfield. It was in Los Angeles County.

"Q. All right. Was the person who committed that murder – was he caught?

"A. No.

"Q. Do you have any trouble with law enforcement for not catching the person who did it?

"A. No.

"Q. Was it one of those situations where basically nobody had an idea who did it?

"A. Yes.

"Q. Are you going to hold any of that experience against myself?

"A. No.

"Q. Are you going to hold any of that experience against … Mr. Lenix?

"A. No.

"Q. Is there anything else involving that or any similar situations that we need to know about?

"A. No."

Later, after the prosecutor asked the entire venire a set of questions about law enforcement, C. A. was the sole prospective juror to reply:

> "Q. … Has anybody here had any contacts with law enforcement that were hostile, confrontational, adverse, however you want to describe it, that might carry over into what we're going to do here in the courtroom? Anybody at all? Traffic ticket you didn't feel you deserved?
>
> "[C. A.]: I had a traffic ticket.
>
> "[PROSECUTOR]:
>
> "Q. Me too. What was the officer – did you feel that he was maybe impolite or anything like that?
>
> "A. No. Well, no one ever feels they deserve a ticket. That was all.
>
> "Q. You feel that maybe he was a little shading the truth a little bit in it?
>
> "A. Yeah.
>
> "Q. Did you feel you deserved it?
>
> "A. I didn't know if I deserved it or not, so I just went along with it."

Afterward, on the court's own motion, two prospective jurors were excused for cause. The prosecutor passed for cause, Lenix's attorney made two challenges for cause, and the court granted both. The prosecutor accepted the panel, Lenix's attorney exercised his fourth peremptory challenge, and the prosecutor again accepted the panel. Lenix's attorney exercised his fifth peremptory challenge, the prosecutor once again accepted the panel, and Lenix's attorney excused an African-American prospective juror other than C. A. with his sixth peremptory challenge. After the prosecutor exercised his fourth peremptory challenge, Lenix's attorney made a *Batson-Wheeler* motion, which the court chose to hear later. Following the exercise by Lenix's attorney of his seventh peremptory challenge, the prosecutor exercised his fifth peremptory challenge – the one

that excused C. A. – and Lenix's attorney exercised his eighth peremptory challenge. At that juncture, both counsel accepted the panel.

At the *Batson-Wheeler* hearing, Lenix's attorney challenged the prosecutor's exclusion from the jury of three Hispanics and one African-American, but on appeal he argues only the exclusion of C. A. from the jury. The prosecutor noted he "would have been fine with" the African-American prospective juror whom Lenix's attorney excused with a peremptory challenge. "Although the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection, it is not a *conclusive* factor." (*People v. Snow* (1987) 44 Cal.3d 216, 225.) So we turn to the prosecutor's reasons for his exercise of a peremptory challenge to C. A.:

> "[PROSECUTOR]: And with respect to [C. A.], again, I'm a little – the earlier ones I'm a little bit – my memory, quite frankly, is not as good as the more later ones, but I know with [C. A.] I was particularly concerned about her statement about the traffic ticket. When I was asking about uncomfortable run-ins with the police, she was actually the only juror who raised her hand. She indicated it was a traffic ticket, but then seemed to indicate that it wasn't adversarial and said that she didn't know the officer was lying, and just kind of didn't fight it because she wanted to take his word for it. Quite honestly, your Honor, I thought there was probably a lot more to it than that, and I felt uncomfortable with her because of that.
>
> "I was also somewhat concerned with the fact that her brother was involved in a gang-related homicide, because it's been my experience more often than not that people who are themselves victims of gangs, not always by any means, but quite often are themselves gang members, and I was concerned with any kind of negative repercussions my case might have in that regard, as well."[4]

Addressing all four of the prosecutor's peremptory challenges together, the court gave the following rationale for denying the motion:

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[4] The prosecutor misspoke when he referred to the victim of gang violence not as C. A.'s brother-in-law but as her brother.

> "THE COURT: … Based on the representations that I have from [the prosecutor] and his reasons for exercising peremptory challenges, I do not find those challenges to be motivated because of the fact that any of the jurors excused were members of a minority group but rather for other reasons not motivated by any kind of ethnicity or membership in any particular minority group, so I'm going to deny the [*Batson*-]*Wheeler* motion."

Lenix challenges that rationale. He characterizes as "pretexts disguising discriminatorily exercised peremptory strikes" the "prosecutor's stated reasons for striking [C. A.] and excluding African-Americans [plural] from the jury." The record belies his intimation that the prosecutor was responsible for excluding more than one African-American from the jury. Lenix's attorney – not the prosecutor – exercised the peremptory challenge that struck another African-American prospective juror from the jury. Without contradiction by the Attorney General, Lenix observes that "[n]o African-Americans served as jurors or alternates" and that there is "no information on whether any African-Americans other than [those two] participated in the pool of potential jurors."

The use of a peremptory challenge to remove a prospective juror on the sole ground of group bias violates the federal constitutional right to equal protection (*Batson, supra,* 476 U.S. at p. 89; U.S. Const., 14th Amend.) and the state constitutional right to trial by a jury drawn from a representative cross-section of the community (*Wheeler, supra,* 22 Cal.3d at pp. 276-277; Cal. Const., art. I, § 16). In *Johnson, supra,* 545 U.S. at pp. ___-___ [162 L.Ed.2d at pp. 135-138, 125 S.Ct. at pp. 2413-2416], the United States Supreme Court overruled the portion of *Wheeler* allowing relief if a party shows a "strong likelihood" that the other party uses a peremptory challenge to implement group bias (*Wheeler, supra,* at p. 280), reversed *People v. Johnson* (2003) 30 Cal.4th 1302 with reference to the California Supreme Court's holding that the terms "'strong likelihood' and 'reasonable inference' state the same standard" (*id*. at pp. 1312-1313), and emphasized the "narrow but important" scope of the three-step procedure that *Batson*

articulates to guide the courts in the "constitutional review of peremptory strikes" (*Johnson, supra*, 545 U.S. at p. ___ [162 L.Ed.2d at pp. 137-138, 125 S.Ct. at p. 2416]):

> "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an *inference* of discriminatory purpose.' [Citations omitted; fn. omitted; italics added.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the [group-bias] exclusion' by offering permissible [group-bias]-neutral justifications for the strikes. [Citations omitted.] Third, '[i]f a [group-bias]-neutral explanation is tendered, the trial court must then decide … whether the opponent of the strike has proved purposeful [group-bias] discrimination.' [Citation omitted.]"

Here, the court made no express finding of a prima facie case before eliciting a defense by the prosecutor of his peremptory challenge to C. A. "Once a prosecutor has offered a [group-bias]-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." (*Hernandez v. New York* (1991) 500 U.S. 352, 359.) So we turn "to the third step of the *Batson* analysis and, specifically, to [Lenix's] claim that the prosecutor's justifications were pretextual." (*People v. Schmeck* (2005) 37 Cal.4th 240, 267.) Since the record shows a sincere and reasoned effort by the court to evaluate the nondiscriminatory justifications the prosecutor offered, our duty is to conduct a review with great deference for substantial evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 200.)

A *Batson-Wheeler* inquiry focuses "on the subjective *genuineness* of the [group-bias]-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons." (*People v. Reynoso* (2003) 31 Cal.4th 903, 924 (*Reynoso*).) C. A. was the lone prospective juror who voiced concern about a "hostile, confrontational, [or] adverse" contact with law enforcement resulting in a traffic ticket. Initially she said no one feels he or she deserves a ticket, then she said she felt the officer who gave her the ticket was "shading the truth a little bit," and finally she said she "just

went along with it." From that colloquy, the prosecutor inferred "there was probably a lot more" to the circumstances than she chose to disclose. Case law recognizes the propriety of a prospective juror's negative experience with law enforcement as a reason for a peremptory challenge. (See *People v. Turner* (1994) 8 Cal.4th 137, 171, disapproved on another ground by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) With police officers among the witnesses at trial, C. A.'s skepticism about the veracity of the officer who gave her the ticket was understandably troubling.

The prosecutor's concern about possible "negative repercussions" of the gang-related homicide in C. A.'s family arose from his own experience that victims of gangs tend to be members of gangs. Like his trepidation about her negative experience with law enforcement, his wariness about a possible family gang connection was comprehensible, neither discriminatory nor implausible, and at variance with nothing in the record. Since none of the prosecutor's reasons appears pretextual, Lenix fails to discharge his burden of persuasion of purposeful group-bias discrimination. (See *Rice v. Collins* (2006) __ U.S. __, ___ [163 L.Ed.2d 824, 831, 126 S.Ct. 969, 974; *Reynoso, supra,* 31 Cal.4th at p. 926.)

In an ancillary argument, Lenix claims that *Miller-El v. Cockrell* (2003) 537 U.S. 322 (*Miller-El I*) and *Miller-El v. Dretke* (2005) 545 U.S. 231 (*Miller-El II*) impose on the reviewing court a duty to conduct comparative juror analysis even if, as here, the accused's attorney requested none and the trial court conducted none. In *Miller-El I*, the United States Supreme Court "made clear that the comparative juror analysis *presented to the trial court* was among the evidence reviewing courts should consider." (*People v. Johnson, supra,* 30 Cal.4th at p. 1322, italics added.) *Miller-El II* was silent on "whether an appellate court must conduct a comparative juror analysis *for the first time on appeal,* when the objector failed to do so at trial." (*People v. Gray* (2005) 37 Cal.4th 168, 189, italics added.) The California Supreme Court has noted "that engaging in comparative juror analysis *for the first time on appeal* is unreliable and inconsistent with the deference

reviewing courts necessarily give to trial courts" (*People v. Johnson, supra,* at p. 1318, italics in original): "While we decline to prohibit the practice outright, we are hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate." (*Id.* at p. 1325.) Lenix fails to persuade us of any federal constitutional mandate to the contrary.

3. Conspiracy to Murder

Lenix argues insufficiency of the evidence of conspiracy to murder. The Attorney General argues sufficiency of the evidence.

Our role in a challenge to the sufficiency of the evidence in a criminal case is limited to determining whether, on the entire record, viewing the evidence in the light most favorable to the prosecution and presuming in support of the judgment every fact reasonably inferable from the evidence, a rational trier of fact could find the accused guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The "critical inquiry" is "to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318; U.S. Const., 14th Amend.) Our duty is to '"view the evidence in a light most favorable to [the prosecution] and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576; Cal. Const., art. I, § 15.)

Lenix's insufficiency of the evidence argument has two facets – one as to the evidence that he entered into an agreement with Deshonta Grayson or Glen Maurice Johnson to commit a murder, the other as to the evidence that he, Grayson, or Johnson committed an overt act in furtherance of the conspiracy. We will address each individually.

With reference to Lenix's argument about the evidence that he entered into an agreement with Grayson or Johnson to commit a murder, Curtis testified that after he and

Lamar encountered Lenix and Johnson in the alley shortly before the shooting he heard something hit the ground and saw Lenix pick up something he put into his waistband. Videotape from a convenience store security camera showed Lenix bend over and pick up something he put into his waistband after he and Johnson encountered Curtis and Lamar in the alley. Curtis testified he and Lamar got into and started up their cars when the videotape showed Johnson and Lenix approach a car in the alley, lean over at the passenger window for a few moments, and then walk down the alley.

Later videotape showed Grayson by himself, then Johnson and Lenix together, walk through the alley and out of camera range and, shortly afterward, Lenix walk by himself toward a car Curtis testified Johnson was driving. Curtis testified that Grayson then walked over to Lamar's car, opened the door of the car, and said something to Lamar, that he and Lamar both got out of their cars, and that he told Lamar, "Never mind what this guy is talking about. Let's leave now. Let's go." Curtis testified he drove away after Lamar told him "someone had a gun" but when he looked back he saw Lenix walk up to Lamar "from the right blind side, kind of diagonal," raise a gun, and shoot him in the head. Curtis testified Grayson and Lenix started to walk away together but then Grayson ran toward him, Lenix fired shots at him, striking Grayson, and got into Johnson's car, which Johnson drove away.

A conviction of conspiracy requires proof that the accused and another person had the specific intent to agree or conspire to commit a crime, as well as the specific intent to commit the elements of that crime, together with proof of the commission of an overt act by one or more of the parties to that agreement in furtherance of the conspiracy. (*People v. Morante* (1999) 20 Cal.4th 403, 416.) The intent to agree to commit the crime, which is the essential element of conspiracy, may be, and from the secrecy of the crime usually must be, established by circumstantial evidence. (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1606, disapproved on another ground by *People v. Palmer* (2001) 24 Cal.4th 856, 860-861, 867.) Direct evidence of a meeting among conspirators or of

words conspirators spoke is not necessary, as inferences from circumstantial evidence like the conduct of conspirators in carrying out a crime together are adequate to show the agreement necessary for a conspiracy. (*People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1734; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1232.) A sufficiency of the evidence that Lenix entered into an agreement with Grayson and Johnson to commit a murder is in the record.

With reference to Lenix's argument about the evidence that he, Grayson, or Johnson committed an overt act in furtherance of the conspiracy, the Attorney General acknowledges with commendable candor that of the 12 overt acts the jury found true eight "do not appear to have been committed in furtherance of the conspiracy because they either preceded the agreement, constituted the underlying crimes themselves, or occurred after the underlying crimes were committed." We agree. Since a conspiracy conviction can rest on a single overt act (*People v. Russo* (2001) 25 Cal.4th 1124, 1131-1136; *People v. Alleyne* (2000) 82 Cal.App.4th 1256, 1260), the question before us is whether a sufficiency of the evidence of any one of the other four overt acts is in the record.

The record answers that question in the affirmative. In overt act number six, the jury found that coconspirators Lenix and Johnson conferred briefly and then separated, Lenix walking toward Lamar and Johnson walking toward the car. Moments later, as Curtis testified, Lenix shot Lamar. Immediately afterward, as Curtis testified, Johnson drove up in the getaway car. The jury could – and, as the true finding on overt act number six shows, did – make the inference from circumstantial evidence that Lenix and Johnson talked for a short time to fine-tune the last-minute details of the conspiracy to murder, after which Lenix walked in one direction toward Lamar to shoot him while Johnson walked in another direction to drive the getaway car. Since overt act six was "'an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime'" (*People v. Zamora* (1976)

18 Cal.3d 538, 549, fn. 8, quoting *Chavez v. United States* (9th Cir. 1960) 275 F.2d 813, 817), a sufficiency of the evidence that Lenix and Johnson committed an overt act in furtherance of the conspiracy is in the record.[5]

4. Severance

Lenix argues that joint trial of the status offenses (the count 4 possession of a firearm by a convicted felon and the count 5 possession of a loaded firearm in a public place by an active participant in a criminal street gang) with the substantive offenses (the count 1 first degree murder, the count 2 attempted murder, and the count 3 conspiracy to commit murder) constituted a miscarriage of justice and a denial of his constitutional right to due process. The Attorney General argues that Lenix forfeited his right to appellate review, that a joint trial was proper, and that error, if any, was not prejudicial.

Preliminarily, we address the Attorney General's forfeiture argument. With reference to count 4, appellant's opening brief is strangely mute about whether Lenix requested severance. Respondent's brief argues he forfeited his right to appellate review because he never requested severance. Incomprehensibly, appellant's reply brief characterizes the Attorney General's forfeiture argument as, "to say the least, surprising," fails to state whether he requested severance of count 4, and tacitly concedes the negative by arguing "only for the sake of discussion" that the forfeiture doctrine is discretionary rather than mandatory. Briefing like that – inscrutable at best, devious at worst – needlessly saps limited judicial resources and fails to promote the client's legitimate interests. Our independent review of the record shows that Lenix never requested severance of count 4. On that record, he forfeited his right to appellate review. (*People v. Pinholster* (1992) 1 Cal.4th 865, 931.)

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[5] Our holding moots the issue whether any other overt act contains a sufficiency of the evidence.

With reference to count 5, on April 28, 2004, the court ruled on four motions with reference to the interwoven issues of gang evidence and severance. Lenix filed a motion to sever count 5 from the other four counts on the ground that the danger of undue prejudice outweighed the probative value of the gang evidence element, and the prosecutor filed a motion in opposition. Additionally, the parties filed motions in limine to, respectively, admit and exclude gang evidence. In anticipation of receipt of a gang evidence stipulation, the court granted the prosecutor's motion in limine and denied both of Lenix's motions without prejudice.

On May 3, 2004, Lenix's attorney filed a motion requesting that the court relieve him as counsel of record on the ground of an irreconcilable conflict of interest. The court granted the motion, declared a mistrial, and appointed new counsel.

On December 6, 2004, the court ruled on four motions with reference to the issues of gang evidence and severance. Lenix filed a motion to sever count 5 from the other four counts on the ground that the danger of undue prejudice outweighed the probative value of the gang evidence element, and the prosecutor filed a motion in opposition. Additionally, the parties filed motions in limine to, respectively, admit and exclude gang evidence. Noting gang involvement in the case and finding some cross-admissibility of evidence and no substantial likelihood of prejudice, the court denied both of Lenix's motions.

On December 7, 2004, Lenix's new counsel took ill. On December 13, 2004, the court again declared a mistrial and again appointed new counsel.

On January 21, 2005, Lenix filed a motion for discovery of gang evidence. On January 27, 2005, the prosecutor filed a response. On February 2, 2005, the court granted the motion as modified.

On April 5, 2005, the prosecutor filed a motion in limine to admit gang evidence. At a hearing that day, Lenix offered to stipulate to the gang evidence element of count 5, and the prosecutor, acknowledging tactical reasons for not planning to introduce evidence

of Lenix's admission of gang membership, tentatively agreed, but the court, on the ground that the jury had to hear evidence on whether Lenix was an "active street gang member," declined to accept a stipulation. Ruling on the prosecutor's motion, the court stated that gang evidence was admissible solely for proof of the gang evidence element of count 5 and admissible – contingent on a showing of credible evidence – for proof of Lenix's membership in the same criminal street gang as the other coconspirators but that gang evidence was otherwise inadmissible.

Appellant's opening brief argues, "Before *each* of his three trials in this case, appellant moved for a separate trial of count 5." (Italics added.) Although the brief cites to the record of the motions Lenix filed before the *first* and *second* trials (each of which ended in a mistrial) and to the record of the opposition the *prosecutor* filed before the *second* trial, nowhere does the brief cite to the record of any motion *Lenix* filed before the *third* trial (from which the judgment now on appeal arises). Appellant's opening brief states, "The parties *never* argued, and the Court *never* ruled upon, severance." (Italics added.) Respondent's brief, however, cites to the record of argument by the parties *and* rulings by the court on motions to sever Lenix filed before his *first* and *second* trials. Additionally, respondent's brief states that apart from those two motions Lenix filed no motion to sever before the *third* trial and that his failure to do so forfeited his right of appellate review.

Astoundingly, appellant's reply brief persists not only in arguing that "[b]efore *each* of the three trials, defense counsel moved for a separate trial of count 5," but also in repeating the mistaken citations to the record in appellant's opening brief. (Italics added.) Appellant's reply brief simply ignores the citations in respondent's brief to the record of argument by the parties, and rulings by the court, on the motions to sever Lenix filed before his *first* and *second* trials and inexplicably claims the court never ruled on those motions before his third trial. Lenix's appellate attorney's misstatement of the record induces us to remind her of her duty to "employ, for the purpose of maintaining

the causes confided to … her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Bus. & Prof. Code, § 6068, subd. (d).) She is advised to read with care *In re S. C.* (2006) 138 Cal.App.4th 396.

Our independent review of the record confirms that the Attorney General cites to the record correctly and that Lenix's appellate attorney cites to the record incorrectly. Rule 14's mandate is straightforward: "Each brief must … [¶] … [s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 14(a)(1)(C).) The Attorney General's correction of the misstatement of the record in appellant's opening brief gave Lenix's appellate attorney the opportunity to amend her argument in appellant's reply brief. Instead, she parroted the same inapt argument and the same misstatement of the record as she did in appellant's opening brief. Her intransigent violation of rule 14 is inexcusable. A reviewing court has no duty to address a claim a party presents in flagrant violation of a rule of court. (*In re David L.* (1991) 234 Cal.App.3d 1655, 1661.) We decline to do so.

Even if we were to consider Lenix's arguments, he could not establish a right to relief. Neither of his status offenses for possession of firearms was even remotely as inflammatory as his substantive offenses of committing, attempting to commit, and conspiring to commit murder. His briefing fails to show how joinder possibly could have so prejudiced him as to have constituted either a miscarriage of justice or a denial of his constitutional right to due process. "One asserting prejudice has the burden of proving it; a bald assertion of prejudice is not sufficient." (*People v. Johnson* (1988) 47 Cal.3d 576, 591.) After denials – not once but twice – of motions to sever count 5, the defense chose to litigate the admissibility of gang evidence by filing a motion in limine that, by and large, the court granted.

Stonewalling the Attorney General's correction of the misstatements of the record in appellant's opening brief, appellant's reply brief fails to acknowledge any of those three rulings but instead raises a new argument (absent from appellant's opening brief) that Lenix's trial attorney rendered ineffective assistance of counsel by not having "fully litigated" the severance issue. A reviewing court will not consider a point raised for the first time in appellant's reply brief. (*People v. Jackson* (1981) 121 Cal.App.3d 862, 873.) Even if we were to consider that argument, Lenix could not establish a right to relief on appeal since the record fails to show that his trial attorney's action or inaction was not a reasonable tactical choice. (*People v. Jones* (2003) 30 Cal.4th 1084, 1105.)

5. Statement Before Shooting

Lenix argues that Lamar's statement that Lenix dropped a .38 moments before the shooting was inadmissible hearsay that denied his constitutional rights to confrontation and due process. The Attorney General argues the contrary.

Preliminarily, we will address a misstatement of the record by Lenix's appellate attorney. Appellant's opening brief states, "During the first trial, Lamar's hearsay statement was excluded as inadmissible hearsay," for which the *sole* citation to the record is to a brief dialogue between the prosecutor and Curtis on direct examination:

> "Q [BY PROSECUTOR]. When you heard that sound, did you turn around and look?
>
> "A. No, I didn't [¶] I didn't look until Lamar, Lamar had turned around before I turned around.
>
> "Q. All right. [¶] Now, I can't get into what Lamar said, because, that's hearsay?
>
> "A. Um-hum.
>
> "Q. All right."

Respondent's brief is silent about that dialogue. Appellant's reply brief states, "Preliminarily, appellant notes that respondent at no point acknowledges that Lamar's

hearsay statement was *excluded* from the first trial *as inadmissible hearsay*." (Italics added.) The sole citation to the record in both of appellant's briefs, however, is to the brief dialogue quoted above. That shows only that the *prosecutor* characterized Lamar's statement as hearsay and that *Curtis* agreed with him – not that the *court* excluded the evidence as hearsay. In short, the record to which Lenix's appellate attorney cites contradicts her own misstatement of the record.

Our independent review of the record discloses an excerpt from the prosecutor's further direct examination of Curtis that shows the altogether different ground on which the *court* excluded Lamar's statement:

> "Q. What was your plan, at this point?
>
> "A. My plan was to get out of there as fast as I possibly could.
>
> "Q. Why?
>
> "A. Because Lamar had stated –
>
> "THE COURT: Hold on.
>
> "THE WITNESS: Okay.
>
> "THE COURT: I apologize for interrupting, that was a fair question, fair response. [¶] But, again, as counsel has indicated and the ladies and gentlemen of the jury, understand, what is said by someone else, as a general rule, is what we call hearsay. [¶] Someone else said it. [¶] And usually hearsay is not allowed to be presented. [¶] There are a lot of exceptions to the hearsay rule, but, I'm not thinking of one right now. [¶] Are you, counsel?
>
> "[PROSECUTOR]: Well, off the top of my head, *I would offer it for the limited purpose of showing why they were trying to get out of there.*
>
> "THE COURT: I thought we had – [¶] Well, actually, we did not talk about this, but, suffice it to say, *something was said and, as a result of whatever it was that was said and what this witness heard up to this point, he was getting out of there as quickly as possible*. [¶] *And I think we've got that established, without going into what may have been said*. [¶] So, counsel, let's proceed." (Italics added.)

In short, the record shows that the court excluded Lamar's statement not as *inadmissible hearsay* but as *cumulative evidence* of why he and Curtis were "trying to get out of there." We turn now to the arguments of the parties.

Hearsay was the sole basis of the motion Lenix filed at his third trial to request relief on constitutional grounds. At the hearing on the motion, the prosecutor argued that he was offering the statement not for the truth of the matter asserted but only for the purpose of showing "why all of a sudden these two guys, who were out having a nice, casual time, are suddenly getting to their car in an expedited manner and why Curtis is concerned when [Deshonta] runs up and tries to stall the departure of his cousin." Lenix's trial attorney retorted that "these people were, as counsel is saying, in the process of leaving already," which, of course, is to state the cumulative evidence rationale on which the court actually excluded Lamar's statement at his first trial. The court denied the motion and offered to give a limiting instruction, were the defense to request one.

"'Hearsay evidence' is evidence of a[n] [extrajudicial] statement … *offered to prove the truth of the matter stated*." (Evid. Code, § 1200, subd. (a), italics added.) Evidence offered to explain conduct or state of mind, on the other hand, is not hearsay. (*People v. Hill* (1992) 3 Cal.4th 959, 987, overruled on another ground by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Bolden* (1996) 44 Cal.App.4th 707, 714-715.) Since Lamar's non-hearsay statement explained why Curtis urged Lamar to leave, why Curtis kept an eye on him as the cousins both tried to leave, and why Curtis saw Lenix shoot him, the court did not err in ruling the evidence admissible. (*People v. Turner, supra,* 8 Cal.4th at pp. 189-190.) Since the sole premise of his written motion at trial and of his argument on appeal is that his statement was inadmissible hearsay, his confrontation and due process arguments fail for want of a valid premise.

Nonetheless, since both parties argued Evidence Code section 352 at the hearing on the motion, we will consider that ground as well to determine whether the court's

admission of Lamar's statement – not as hearsay but as nonhearsay – was error.[6] The record shows that Curtis testified on direct examination to events that occurred after he heard "something that hit the ground and didn't break":

> "Q. … And did your cousin Lamar – did he turn around when that sound came out?
>
> "A. Yes.
>
> "Q. And after your cousin turned around, did you turn around?
>
> "A. Yes.
>
> "Q. When you turned around, what did you see?
>
> "A. I saw the defendant reaching down receiving – retrieve something from the ground and tuck it inside of his waistband and walk down the alley southbound. [¶] … [¶]
>
> "Q. Were you able to see at that point what it was that the defendant had picked up and put into his waistband?
>
> "A. No, I didn't see exactly what it was.
>
> "Q. Did your cousin say something about what it was that caused you some concern?
>
> "A. Yes.
>
> "Q. What did your cousin say?
>
> "A. He said, 'Curt, this guy dropped a .38.'
>
> "Q. And did that cause you – it's going to sound like a stupid question, but did that cause you some concern?
>
> "A. Yes.

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[6] Evidence Code section 352: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"Q. Why?

"A. Because there was a guy within, you know, a few feet of me and he has a gun in his hand.

"Q. What did you do at that point?

"[LENIX'S ATTORNEY]: Objection, your Honor. I would ask for a limiting instruction at this point. It's hearsay.

"[THE COURT]: You're talking about the statement made.

"[LENIX'S ATTORNEY]: The statement made by Lamar Rufus.

"THE COURT: Okay. And I will give that limiting instruction. Ladies and gentlemen, the statement made by Lamar Rufus to the extent that 'That guy has a .38,' that is not received for purposes of establishing the truth of the statement, but rather simply it's an operative fact, the fact that the statement was made and not for the truth of what was said. Proceed, Mr. [Prosecutor].

"BY MR. [PROSECUTOR]:

"Q. After Lamar said, 'That guy's got a .38,' 'That guy dropped a .38,' whichever it was, you became concerned, what did you tell your cousin?

"A. I told him, 'Hey, let's get out of here. Let's go now."

Curtis later testified that on the basis of Lamar's statement to him he told the 911 operator that the gun with which Lamar had been shot was a .38. Immediately afterward, the court gave a limiting instruction to the jury:

"THE COURT: I'll remind you, ladies and gentlemen, that testimony earlier about the statement made to the witness by Lamar Rufus was not offered to prove the truth of the matter stated. That same limiting instruction applies to Mr. Curtis Rufus' repetition of that, but simply the fact that it was said, not that it necessarily was or was not a .38 or anything else."

In argument to the jury, the prosecutor himself reminded the jurors that Lamar's statement was "not offered to prove that Mr. Lenix had a .38 or any other gun" but rather "to show why all of a sudden right now, right when they hear that and see that, right

when Lamar says that, this stops being just a casual evening with these guys out having a good time, and suddenly it becomes a precarious, concerning situation." His argument buttressed the court's limiting instructions.

On appellate review of an Evidence Code section 352 ruling, the deferential abuse of discretion standard governs. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) The rule is settled that, in the absence of a contrary showing, the appellate court presumes that the jurors followed the court's instructions. (*People v. Smithey* (1999) 20 Cal.4th 936, 961; *People v. Stanley* (1995) 10 Cal.4th 764, 837.) The record shows no abuse of discretion. Since neither of the statutory grounds – hearsay and Evidence Code section 352 – reasonably implicit in Lenix's constitutional arguments has merit, and since the record answers in the negative the question whether the court committed an error rendering his trial so fundamentally lacking in fairness as to violate due process, we reject his constitutional arguments as well. (See *People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919-920.)

6. Cross-Examination of Detective

Lenix argues that improper limitation of cross-examination of a detective about whether he handed the gun to someone else shortly before the shooting constituted a miscarriage of justice and a denial of his constitutional rights to confrontation and due process. The Attorney General argues the contrary.

The issue before us originated in direct examination of the detective by the prosecutor:

> "Q. … After Curtis described to you what happened in that alley where his cousin Lamar was murdered, after he gave you that description, did you then look at a videotape?
>
> "A. Yes. [¶] … [¶]
>
> "Q. Did the things you saw on the videotape – did they correspond to what he had told you before you ever looked at the videotape?

"[LENIX'S ATTORNEY]: Objection. Vague.

"THE COURT: Overruled.

"THE WITNESS: Yes. The videotape account was very similar to his original statement.

"BY MR. [PROSECUTOR]:

"Q. Were there any significant differences between what's on the video and what he told you?

"A. No."

A portion of the defense cross-examination of the detective likewise is germane to the issue before us:

"Q. At any time when these two men come together and before they separate and one goes over towards Curtis' car and one comes down into the side alley to get the red car, did he ever describe to you any movement by either of the individuals where the person pulled up his shirt and reached into his waistband?

"A. No.

"Q. Did he ever describe to you that the person appeared to pull an object out of his waistband and hand it to the other man?

"A. No."

Lenix's attorney argued to the jury that the videotape showed one person passing the gun to another person and that since Curtis never saw "the passing of the object back and forth" the jury should infer that he was never in the alley and that everything he "told us was fabricated."

During the jury's deliberations, counsel memorialized on the record a sidebar conference not reported at the time. Lenix's attorney stated that the detective had written in his report that on the videotape he had seen the weapon going from the hand of the suspect whom Curtis identified as the shooter to the hand of the other suspect, argued that if Curtis had been in the alley he would have seen the gun changing hands, and objected

to the court's refusal to allow cross-examination of the detective as a denial of his constitutional rights to confrontation and due process. He characterized Curtis's identification of the shooter and the detective's observation about the videotape as inconsistent.

The prosecutor, on the other hand, characterized the detective as "no more qualified than any of the 12 people on the jury to render some sort of expert opinion as to what appears or does not appear on that videotape" and argued that his "opinions as to what is transpiring on that videotape" were irrelevant since the videotape "speaks for itself." Lenix's attorney denied that he was "looking for opinions or expert opinions" and argued instead that he was trying to impeach the detective on the issue of handing off the gun just before the shooting. The court stated that even if the detective and Curtis had seen something on the videotape that Curtis had not seen on the night of the shooting there was no evidence that Curtis had monitored Grayson, Johnson, and Lenix continuously from the time when someone dropped something to the time when someone shot Lenix. On that rationale, the court found "there wasn't anything there that was inconsistent" and declined to permit the detective to testify "that, in his opinion, one of the subjects on the tape handed a gun to another subject on the tape."

In his motion for a new trial, Lenix renewed the same argument. As before, the prosecutor opposed the motion on the ground that the detective's opinion was "irrelevant" and that "the tape speaks for itself." The court denied the motion.

Nothing in the record shows that the detective had any expertise superior to the common experience of the jurors in perceiving the contents of the videotape that the jurors watched at trial. (See *People v. Torres* (1995) 33 Cal.App.4th 37, 45; cf. Evid. Code, § 801.) In his report, the detective wrote that he saw someone handing off a gun to someone else in the videotape. Since his report was *consistent* with the testimony Lenix's attorney sought from him, the request that he so testify was entirely at odds with Evidence Code section 1235's fundamental requirement of an *inconsistency* between the

witness's prior statement and testimony. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1219.) The constitutional right to cross-examine witnesses is not absolute, and judges retain wide latitude to impose reasonable limits on cross-examination so as to minimize confusion of issues, harassment of witnesses, and consumption of time. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295; *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1386.) Since the court's order barring the inquiry at issue was well within that wide latitude, no denial of Lenix's constitutional rights to confrontation and due process ensued.

On the authority of Evidence Code section 352, Lenix argues that the court's order constituted an abuse of discretion. At sidebar and in his motion for a new trial, however, he argued solely constitutional grounds. On that record, he forfeited his right to appellate review of the statutory ground. (*People v. Ghent* (1987) 43 Cal.3d 739, 766; Evid. Code, § 353, subd. (a).)

Even if we were to consider Lenix's argument, he could not establish a right to relief. An appellate court will disturb an Evidence Code section 352 ruling only if the record shows an exercise of discretion in an arbitrary, capricious, or patently absurd manner that caused a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) Here, the court's ruling euthanized a fatally defective theory of admissibility on which Lenix's appellate attorney wastes a dozen pages of briefing in a doomed attempt at resuscitation. She is advised to take to heart an observation that this court made nearly 30 years ago: "The use of a well-aimed and finely-honed blade, rather than the scattergun with its dangerous spray effect, is often the most effective method of assuring a successful and final victory." (*People v. Houts* (1978) 86 Cal.App.3d 1012, 1022.)[7]

[7] In violation of the rule requiring appellate counsel to brief "each point under a separate heading or subheading summarizing the point," Lenix's appellate attorney

7. Argument to the Jury

Lenix argues that three occurrences of prosecutorial misconduct in argument to the jury constituted a denial of his constitutional right to due process. The Attorney General argues that Lenix forfeited his right to appellate review of two of those three claims and that no prosecutorial misconduct occurred.

First, Lenix argues that the prosecutor improperly vouched for Curtis's credibility by arguing, inter alia, that he was "not making this up," that on the night of the shooting he had "no ax to grind" against Grayson, Johnson, or Lenix, and that he had "no reason in the world why he would come in here and tell you these people did what they did unless it, in fact, were true." Second, he argues that the prosecutor improperly characterized Curtis, inter alia, as a victim of Lenix's "attacking him by attempting to kill him" and of defense counsel's "attacking him by calling him a liar."

The Attorney General's forfeiture argument applies to those two claims. The accused generally forfeits the right of appellate review of a prosecutorial misconduct issue in the absence of a timely objection and a timely request to admonish the jury. (*People v. Fierro* (1991) 1 Cal.4th 173, 207.) Although the rule "does not apply when the harm could not have been cured," Lenix's briefing inexplicably characterizes the prosecutor's comments with a single word – "incurable" – and never even attempts to explain why. (*People v. Benson* (1990) 52 Cal.3d 754, 794.) The record shows that the prosecutor's remarks about Curtis's credibility were permissible inferences from the

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scatters passing references to cumulative prejudice among 170 pages of briefing. (Cal. Rules of Court, rule 14(a)(1)(B).) We interpret her casual treatment as a lack of reliance on those arguments. (*In re Keisha T.* (1995) 38 Cal.App.4th 220, 237, fn. 7; *In re David L., supra*, 234 Cal.App.3d at p. 1661.) The needless length and numbing repetitiveness of her briefing calls to mind Blaise Pascal's sage observation long before computers put the potential abuse of word processing at every appellate attorney's fingertips: "I have made this letter longer than usual, because I lack the time to make it short." (Bartlett, Familiar Quotations (17th Ed. 2002) p. 279.) She should ponder Robert Browning's concise advice: "Less is more." (*Id.* at p. 493.)

evidence and that his comments about defense counsel's attack on Curtis, even if arguably improper, were not prejudicial, so he forfeited his right to appellate review. (*Id.* at pp. 794-795.) He fails to persuade us that any of his alternative arguments – that his trial attorney's failure to make a timely objection and a timely request to admonish the jury constituted ineffective assistance of counsel, that the trial court's failure to discharge its statutory duties to control the proceedings constituted a denial of his constitutional right to due process, and that the appellate court's invocation of the forfeiture doctrine is discretionary – qualifies as "a talisman in whose presence the [forfeiture] fades away and disappears." (*Coolidge v. New Hampshire* (1971) 403 U.S. 443, 461.)

Third, Lenix argues that the prosecutor improperly implied in argument to the jury that he removed his glasses to disguise his appearance in his booking photograph. Neither party put on any evidence about whether he removed his glasses during booking or whether he ever wore glasses. His argument to the jury noted that no one identified anyone in the alley wearing glasses, that a defense exhibit shows him wearing glasses, that he wore glasses during trial, that jurors probably saw him using eye drops during trial, and that he has a medical problem requiring corrective lenses. The prosecutor objected on the ground of facts not in evidence. "As to vision problems other than wearing glasses," the court sustained the objection and struck the argument from the record.

In rebuttal, the prosecutor agreed that Curtis never identified anyone in the alley wearing glasses and that Lenix wore glasses at trial. After an off-the-record sidebar, the court overruled a prosecutorial misconduct objection. Afterward, without objection, the prosecutor concurred that the defense exhibit to which Lenix's attorney referred earlier shows him wearing glasses but added a caveat: "He's wearing *sunglasses*, ladies and gentlemen." (Italics added.)

Once jury deliberations commenced, counsel memorialized on the record the sidebar just before the prosecutorial misconduct objection. Lenix's attorney argued that

jail policy requires arrestees to remove their glasses to make their eyes and faces visible and that the prosecutor "knew or should have known that." The prosecutor disclaimed knowledge of, and doubted the existence of, that policy. The court accepted the prosecutor's representation and found no prosecutorial misconduct.

Later, at the bifurcated court trial on the prison term priors, a sheriff's department identification technician testified that jail policy requires arrestees to remove their glasses before photographs are taken. Afterward, the prosecutor stated that when he argued to the jury he did not know of that policy and, commendably, that after he argued to the jury he reviewed nine photographs from a camera found at Lenix's residence at the time of his arrest of which seven showed him without glasses and two showed him with glasses. The court let the prior ruling stand.

On a record showing, first, a defense argument objectionable for inadequate evidentiary support; second, a good faith, though mistaken, reply by the prosecutor; and, third, a quick correction of the prosecutor's own errors once new evidence came to his attention, we agree with the trial court's characterization of the issue as "rather innocuous in any event." In the absence of anything deceptive, egregious, or reprehensible about the prosecutor's behavior, there was no prosecutorial misconduct. (Cf. *People v. Hill* (1998) 17 Cal.4th 800, 819.)

8. Firearm Enhancement

Lenix argues, the Attorney General agrees, and we concur that although the reporter's transcript of the probation and sentencing hearing shows imposition of an indeterminate 25-to-life term on the count 1 firearm enhancement the abstract of judgment incorrectly shows imposition of a determinate 25-year term on that enhancement. (§ 12022.53, subd. (d).) We will remand the matter to the superior court with directions to amend the abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 187-188.)

9. Consecutive Sentencing

Lenix argues that the court's imposition of consecutive terms on counts 1 and 2 without jury findings beyond a reasonable doubt of aggravating factors violated his constitutional right to a jury trial. In light of the Supreme Court's rejection of a like argument (*People v. Black* (2005) 35 Cal.4th 1238, 1244, distinguishing *Blakely v. Washington* (2004) 542 U.S. 296), the doctrine of stare decisis obliges us to reject Lenix's argument (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

DISPOSITION

The matter is remanded with directions to the trial court to amend the abstract of judgment by striking the imposition of a determinate 25-year term on the count 1 firearm enhancement and substituting the imposition of an indeterminate 25-to-life term on that enhancement and to send to all appropriate persons certified copies of the abstract of judgment as so amended. (§ 12022.53, subd. (d).) Lenix has no right to be present at those proceedings. (See *People v. Price* (1991) 1 Cal.4th 324, 407-408.) Otherwise the judgment is affirmed.

_____
Gomes, J.

WE CONCUR:

_____
Levy, Acting P.J.

_____
Kane, J.