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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARTIN MANZO, Defendant and Appellant.	D055671 (Super. Ct. No. SCS212840)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy R. Walsh, Judge. Affirmed in part, reversed in part and remanded.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Kelley Johnson and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

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

Martin Manzo appeals a judgment following his jury conviction of first degree murder (Pen. Code, § 187, subd. (a)),[1] discharging a firearm at an occupied vehicle (§ 246), attempted murder (§§ 664, 187), and unlawfully possessing ammunition (§ 12316, subd. (b)(1)). On appeal, Manzo contends: (1) the trial court erred by admitting statements he made to police after he invoked his Fifth Amendment right to remain silent; (2) the trial court erred by admitting prior consistent statements made by the prosecution's primary percipient witness; (3) cumulative error deprived him of his due process right to a fair trial; and (4) the evidence is insufficient to support his section 246 conviction for discharging a firearm at an occupied vehicle.

FACTUAL AND PROCEDURAL BACKGROUND

On August 3, 2007, Jose Valadez and Jose Estrada had been friends for five or six years. They had been together for two or three days, smoking methamphetamine. That afternoon, they were walking near a convenience store in San Ysidro when they saw Manzo driving his white truck. One or two days before, Manzo had tattooed the name of one of Valadez's sisters on Valadez's wrist.[2] Valadez flagged Manzo down and asked him whether he could tattoo the name of his other sister on his other wrist. When Manzo agreed, they got in his truck.[3] Manzo drove the truck while Estrada sat in the middle and

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1 All statutory references are to the Penal Code unless otherwise specified.

2 "Catalina," apparently the name of that sister, was tattooed on Valadez's right wrist.

3 Estrada had just met Manzo the day before.

Valadez sat on the passenger side of the front seat. Manzo drove to his apartment in Chula Vista and parked the truck. He told Valadez and Estrada he was going to get his tattoo gun and went inside. Manzo returned carrying a small, dark, zip-up bag, which he placed behind the driver's seat. He got in the truck, drove to the back corner of the apartment complex, and parked the truck.

Manzo got out of the truck, stood next to the driver's seat with the door open, and pulled out a gun from his waistband. Smiling, Manzo placed the gun on the seat. Valadez, who was leaning forward replacing a shoelace, asked Manzo whether he could see the gun. Manzo picked up the gun, extended his right arm, and pointed the gun at Valadez and Estrada. Manzo pulled the gun's trigger, but it did not fire. He pulled out the gun's magazine (or clip), pulled out the bullet, and manually loaded the gun. Manzo pointed the gun at Valadez and Estrada and pulled the trigger again. The gun fired and its bullet struck Valadez in his left cheek, causing profuse bleeding. With an "evil trippy face," Manzo then pointed the gun at Estrada and pulled the trigger, but the gun did not fire.

At gunpoint, Manzo ordered Estrada to push Valadez out the truck's passenger side front door. Estrada opened the door and Valadez fell out onto the ground. Manzo then directed Estrada to get Valadez's cell phone. When Estrada refused, Manzo pointed the gun at him and Estrada then took a cell phone from Valadez's pocket.[4]

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4 At about 3:30 p.m., police arrived at the scene and found Valadez lying face down in a pool of blood. Valadez had a gunshot wound to his left cheek. His pockets were pulled out slightly and he had a shoelace across his face. Tire marks appeared in the

Manzo drove away with Estrada and stopped at a construction site, where he told Estrada to take off his blood-soaked shirt. After Estrada took off his shirt, Manzo held the gun to his head and pulled the trigger. However, the gun did not fire. Manzo attempted to load the gun with a different cartridge, but the gun still did not fire. Manzo then laughed and drove away with Estrada. Manzo stopped a few more times, worked on the gun, and tried to shoot Estrada. However, the gun still did not fire. Manzo ultimately drove to a San Ysidro motel and told Estrada to get a room. When Estrada refused to do so, Manzo got out of the truck and sipped some beer. He then got back in the truck and drove toward the exit of the parking lot.

At about 8:00 p.m., a police officer blocked the motel parking lot exit with his patrol car. Manzo jumped out of his truck and ran away. Officers apprehended him as he tried to jump over a fence. After subduing and arresting Manzo, officers found six 9-millimeter cartridges in his pant's pocket. One of the cartridges had a mark on its primer typical of a firing pin impression.

Estrada remained in the passenger seat of Manzo's truck and was arrested without resistance. Estrada was not wearing a shirt. Officers found a knife in his pocket. He had blood spatter on the right leg of his shorts, blood transfer stains on his right lower leg, and blood saturation stains on the right buttocks of his shorts and underwear. He also had blood on the right side of his torso. The blood from Estrada's clothing matched Valadez's DNA profile.

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blood on the ground. Valadez soon died because of the blood loss and brain injury he suffered from the gunshot wound.

David Garber, a Chula Vista Police forensic specialist, found a soft-sided lunch cooler in the bed of Manzo's truck. The lunch cooler contained a disassembled 1940 Russian Tokarev pistol. The cooler also contained a cell phone with a bloodstain that matched Valadez's DNA profile. The cooler also contained a bandana with Manzo's DNA on it.

Garber also found the pistol's slide release near the truck's gas pedal on the driver's side floorboard. The battery compartment of a black Motorola Boost cell phone (apparently found on or near Manzo or elsewhere at the scene) contained 10 bindles of methamphetamine and a plastic baggie with a Rivotrol (a sedative) pill.[5] The methamphetamine's street value at that time was between $700 and $1,000 and was in a quantity greater than would be for personal use.

An information charged Manzo with the murder of Valadez (§ 187, subd. (a)), discharging a firearm at an occupied vehicle (§ 246), the attempted murder of Estrada (§§ 664, 187), and unlawfully possessing ammunition (§ 12316, subd. (b)(1)). The information also alleged that in the commission of the first three offenses Manzo personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)). It also alleged that in committing the murder and section 246 offenses Manzo intentionally and personally discharged a firearm, causing great bodily injury and death (§ 12022.53, subd. (d)). It alleged that in committing the section 246 offense Manzo personally inflicted great

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[5] The record is unclear regarding which particular cell phones were found on or near Manzo, in the lunch cooler, or on Estrada; and the parties' briefs do not clarify exactly where the Motorola Boost cell phone was found. In Manzo's opening brief, he represents that the Motorola Boost cell phone belonged to Valadez.

bodily injury on Valadez (§ 12022.7, subd. (a)). The information alleged that Manzo had suffered three prison prior offenses (§§ 667.5, subd. (b), 668), two prior serious felony convictions (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), and two prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, 668).

At trial, the prosecution presented evidence substantially as described above. Furthermore, the prosecution presented the testimony of Steven Campman, M.D., a forensic pathologist who performed the autopsy on Valadez. Campman testified the gunshot wound to the left side of Valadez's face was atypical because there were multiple holes caused by a deformed or fragmented bullet. He retrieved two larger and about a dozen smaller bullet fragments from Valadez's head. Based on the lack of stippling, powder burns, or powder residue on the left side of Valadez's head, Campman concluded that the gun was probably at least two to three feet away from Valadez when he was shot. Campman testified Valadez's injuries were consistent with the gun being about 27 inches from his skin when fired.

Chula Vista Police Detective Eric Nava testified regarding a reenactment of the shooting he and two other detectives conducted using Manzo's Ford F150 truck. They determined that a gun pointed by a person standing in the opened driver's side door toward a passenger leaning slightly forward would be about 27 inches away from that passenger's left cheek. Photographs of the reenactment were admitted in evidence.

Anthony Paul, a firearms expert, testified the gun found in Manzo's truck was a 1940 Russian Tokarev military pistol designed to fire 7.625-millimeter bullets, which are

smaller than 9-millimeter bullets. He stated that firing a 9-millimeter bullet through the Tokarev pistol was possible, but it would create a high risk that the pistol would not operate properly (e.g., would not fire or would cause the bullet to fragment). He found that the feed lips of the gun's magazine assembly were irregular and mutilated, which would cause the gun to not operate properly. If the magazine were not working, the gun, however, could be loaded manually. He found a bullet base lodged in the gun's barrel. That base matched the bullet removed from Valadez's head. If a person attempted to fire the gun with the bullet base lodged in its barrel, the gun would misfire. Paul also examined the six 9-millimeter cartridges found in Manzo's pocket. A mark on the primer area of one cartridge showed an attempt had been made to fire it. Three of the cartridges were compressed, which could have been caused by a person attempting to manually load an improperly-sized cartridge into a gun's chamber (e.g., by loading a 9-millimeter cartridge in the Tokarev pistol's barrel with a bullet base lodged in it). If a person attempted to manually load a 9-millimeter cartridge in the pistol with the bullet base lodged in its barrel, the cartridge would not insert completely and the pistol's slide would not shut completely.

Steven Dowell, a criminalist with the Los Angeles County Coroner's Office, testified he analyzed several gunshot residue kits, including samples taken from Manzo's hands, Estrada's hands, Estrada's face, the waistband of Estrada's shorts, the waistband of Estrada's underwear, Valadez's hands, a baseball cap, and parts of the interior of Manzo's truck. Gunshot residue was found on Manzo's hands, Estrada's face, the left waistband of Estrada's shorts, Valadez's right hand, and the baseball cap. No gunshot residue was

found on Estrada's hands or underwear. Gunshot residue was found on the driver's side dashboard and inside roof of the truck and on its passenger's side dashboard and inside roof. No gunshot residue was found on the middle dashboard and middle inside roof.

Carolyn Gannett, a criminalist with the San Diego County Sheriff's Crime Lab, testified as a blood spatter expert. She analyzed photographs of Estrada, which showed bloodstains on his torso, arm, and shorts. The bloodstains on his torso could have been contact stains or transfer stains caused by blood contacting his skin (e.g., through a blood-soaked shirt). Estrada's shorts had both spatter stains and transfer stains. The transfer stains were caused by sitting on the blood-saturated seat. His underwear also had a large bloodstain on its right side. Estrada's right leg had stains consistent with Estrada sitting in the middle seat and Valadez sitting to his right in the front passenger's seat. Gannett also visually examined Manzo's truck and analyzed photographs of its interior. She saw blood on the far right side of the passenger's seat near its back and vertical portion. She did not see any blood on the middle seat or driver's seat. She also saw blood on the inside of the passenger's door and a drip pattern on the seat hinge, suggesting the door was shut or nearly shut when Valadez was shot. Blood found above the passenger's door frame showed the door had been opened at some point.

The prosecution presented the testimony of Estrada regarding the incident, as well as video recordings and transcripts of his police interviews. The prosecution also presented the testimony of other percipient witnesses. Deborah Gallegos testified that on the day of the incident she saw Manzo drive his white truck with two passengers and park near her apartment. She said she heard an argument between Manzo and the passenger

sitting in the "shotgun" position (presumably the far right side). Manzo then got out of his truck and went into his apartment. Manzo returned to his truck and quickly backed it up into an empty parking stall at the end of her building. She heard a gunshot and went outside. Manzo gave her a "frozen look," jumped into his truck as it was inching forward, and then drove away.

Larry Morgan testified that on the day of the incident he saw Manzo drive into the apartment complex with two passengers. He later heard a "popping sound" and saw Manzo drive away with just one passenger.

John Parquet testified that on the day of the incident he saw two passengers sitting in Manzo's truck, which was parked near Manzo's apartment. When Parquet walked by the truck, the passenger on the right side asked him for a cigarette and Parquet gave him one. He saw Manzo standing outside the front door of his (Manzo's) apartment. Parquet then walked to a convenience store and, on his return, thought he saw someone crouching down next to his red truck while Manzo sat in the driver's seat of his white truck parked next to it. A person ran and got into Manzo's truck and then Manzo drove it away with only one passenger.

Demond Dukes heard a popping sound, looked toward the parking lot, and saw a Hispanic male with a shaved head holding a gun in his left hand. The man was standing outside the open driver's door of Manzo's truck. He could not identify either Manzo or Estrada as the shooter.

After Manzo's arrest, police interviewed him. Manzo denied any involvement in, or any knowledge of, the shooting. He stated that on the day of the incident he picked up

"Jose" (i.e., Estrada) at Friend's Market in San Ysidro because he asked for a ride. He denied having any other passengers in his truck that day. After initially denying he drove back to Chula Vista after picking up Estrada in San Ysidro, Manzo later stated he might have gone back to his Chula Vista apartment to check on his girlfriend, but does not remember because he was drunk. He stated he did not know whether there was any blood in his truck because he was drinking. He denied owning or ever shooting a gun. He stated that neither he nor Estrada hurt anyone that day (other than police officers). He denying knowing he had six bullets in his pocket and denied they were his. He stated that when police stopped him, he was taking Estrada back to Friend's Market. He ran because he did not want to get crushed in his truck and the officers were chasing him.

The parties stipulated that Estrada is right-handed and that the white bindles found in the cell phone were methamphetamine. They further stipulated that the murder charge against Estrada was dismissed without prejudice, meaning the charge could be refiled.

In his defense, Manzo presented the testimony of Zoltano E., the son of his girlfriend. On the day of the incident, Zoltano was 11 years old.[6] That afternoon, he saw Manzo driving his truck, which then had two passengers, northbound on Broadway in Chula Vista. Later that afternoon, while Zoltano was standing outside a store on Broadway, Manzo pulled his truck over; at that time he had only one passenger, Estrada. Zoltano saw a gun in Estrada's waistband and blood on his hand and leg. He testified Estrada tried to cover the gun with his T-shirt. When Zoltano asked him what happened,

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6 On August 3, 2007, Zoltano was eight days short of his 12th birthday.

Estrada replied he got a cut. Zoltano testified that although he had been with his friend, Michael V., all day, Michael was inside the store when he (Zoltano) saw Manzo and Estrada. Afterward, Zoltano and Michael walked to Zoltano's apartment and saw police officers there.

In rebuttal, the prosecution presented the testimony of Chula Vista Police Officer Naranjo, who said he spoke with Zoltano on his (Zoltano's) arrival at the apartment and determined he had no valuable information. However, after he was allowed to call his mother, Zoltano told Naranjo he wanted to talk to him alone. Zoltano stated "Jose" was a friend of Manzo's and Manzo had tattooed Jose's wrist about a week before. Jose was a passenger in Manzo's truck when he saw them by the store on Broadway about 15 minutes before he (Zoltano) arrived at the apartment. Zoltano stated he saw blood on Jose's hand and a gun tucked in his waistband. He also stated the passenger had "Catalina" tattooed on his wrist.

Chula Vista Detective Pene testified that he interviewed Zoltano at the police station on August 3, 2007. Zoltano told him he saw Manzo's truck only one time that afternoon when Manzo was driving it southbound on Broadway with Valadez and another passenger in it. Zoltano followed the truck as it turned the corner to Flower Street and then only Manzo and Estrada were in the truck. Manzo told Zoltano something like: "Whatever happened, I didn't do it." Zoltano told Pene that before the interview he had spoken with his neighbors, who had told him some details regarding the incident. Pene testified that when Zoltano was first contacted by police at the apartment, he gave them a false name and said Manzo would be driving a Honda.

Michael V., Zoltano's friend, testified he was with Zoltano on August 3, 2007, when they were at the Sand Hustler store, and left together riding skateboards. He never saw Zoltano talk to anyone in a truck.

The jury found Manzo guilty of all four charged offenses and found the firearm allegations true. Manzo admitted the prior conviction allegations. The court imposed a total prison term of 150 years to life, plus a consecutive five-year enhancement. Manzo timely filed a notice of appeal.

DISCUSSION

I

Admission of Manzo's Statements to Police

Manzo contends his convictions of murder, discharging a firearm at an occupied vehicle, and attempted murder must be reversed because the trial court erred by admitting statements he made to police after he invoked his Fifth Amendment right to remain silent.

A

The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." This provision applies to the states under the Fourteenth Amendment's due process clause. (*Malloy v. Hogan* (1964) 378 U.S. 1, 8.) The Fifth Amendment right against self-incrimination generally applies to preclude the admission of involuntary pretrial confessions or other incriminating statements made by a defendant during coercive police interrogation. (*Dickerson v. United States* (2000) 530 U.S. 428, 433-435; *Oregon v. Elstad* (1985) 470 U.S. 298, 304 (*Elstad*).) If a defendant's statements were obtained by

" 'techniques and methods offensive to due process,' [citation] or under circumstances in which the [defendant] clearly had no opportunity to exercise 'a free and unconstrained will,' [citation] the statements would not be admitted." (*Elstad*, at p. 304.)

Miranda v. Arizona (1966) 384 U.S. 436 (*Miranda*) sets forth an exclusionary, prophylactic rule that unless certain warnings are given to a defendant, statements made by the defendant during custodial interrogation are presumed involuntary and are generally inadmissible at trial.[7] (*Miranda, supra,* 384 U.S. at pp. 478-479; *Elstad, supra*, 470 U.S. at pp. 306-307; *Tankleff v. Senkowski* (2d Cir. 1998) 135 F.3d 235, 242.) "Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*." (*Elstad*, at p. 307.) *Miranda* stated that a defendant in custody "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Miranda*, at p. 479.) "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." (*Id*. at p. 444.) After an individual is admonished of his or her *Miranda* rights, "[i]f the individual *indicates in any manner*, at any time prior to or during questioning, *that he*

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7 *Elstad* notes: "[T]he *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted. Despite the fact that patently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination." (*Elstad*, *supra*, 470 U.S. at p. 307.)

wishes to remain silent, the interrogation must cease." (*Id.* at pp. 473-474, italics added, fn. omitted.) "[N]o particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent [citation], and the suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely." (*People v. Crittenden* (1994) 9 Cal.4th 83, 129.)

However, the United States Supreme Court recently held that a suspect may invoke the right to remain silent only by an unambiguous statement to that effect. (*Berghuis v. Thompkins* (2010) ___ U.S. ___, ___ [130 S.Ct. 2250, 2260, 2263] (*Berghuis*).) In *Berghuis*, the court stated: "Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his ' "right to cut off questioning." ' [Citation.] Here he did neither, so he did not invoke his right to remain silent." (*Berghuis*, at p. ___ [130 S.Ct. at p. 2260].) It further stated: "If Thompkins wanted to remain silent, he could have said nothing in response to [the police officer's] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation." (*Berghuis*, at p. ___ [130 S.Ct. at p. 2263].) Accordingly, in the circumstances of *Berghuis*, the court concluded the defendant's statement to police made after he remained largely silent for almost three hours after receiving a *Miranda* warning constituted an implied waiver of his right to remain silent.[8] (*Berghuis*, at p. ___ [130

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8 We requested, and have received and considered, supplemental letter briefs by the parties on the effect, if any, of *Berghuis* on this appeal.

S.Ct. at p. 2263].) Therefore, *Berghuis* concluded the state court correctly rejected the defendant's *Miranda* claim that the trial court should have excluded his answer of "yes" to the officer's question whether he prayed to God to forgive him for shooting the victim. (*Id*. at pp. ___ [130 S.Ct. at pp. 2257, 2263-2264].)

In reviewing a trial court's finding whether a defendant knowingly and intelligently waived his or her *Miranda* rights, "[w]e must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained." (*People v. Boyer* (1989) 48 Cal.3d 247, 263, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) "Whether a suspect has invoked his right to silence is a question of fact to be determined in light of all of the circumstances, and the words used must be considered in context." (*People v. Peracchi* (2001) 86 Cal.App.4th 353, 359-360, fn. omitted.) We apply federal standards in reviewing a defendant's claim that extrajudicial statements were elicited from him or her in violation of *Miranda*. (*Peracchi*, at p. 360; *People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) Extrajudicial statements obtained in violation of *Miranda* are inadmissible to establish the defendant's guilt. (*People v. Sims* (1993) 5 Cal.4th 405, 440.) However, the erroneous admission of extrajudicial statements obtained in violation of *Miranda* is *not* per se reversible error. (*Sims*, at p. 447; *People v. Johnson* (1993) 6 Cal.4th 1, 32-33.) Rather, we apply the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18, 24 to determine whether reversal is required. (*Sims*, at p. 447;

Johnson, at pp. 32-33; *Peracchi*, at p. 363.) Under the *Chapman* standard, an error is reversible unless it is harmless beyond a reasonable doubt. (*Chapman*, at p. 24.)

B

Before trial, Manzo filed an in limine motion to exclude statements he made to police obtained in violation of his Fifth Amendment right to remain silent. Quoting excerpts from the transcript of his August 3, 2007, interview with police, Manzo argued he invoked his right to remain silent after police advised him of his *Miranda* rights. Shortly after his interview with police began, the following transpired:

> "[DETECTIVE] PENE: And I don't think you pulled the trigger. So, let me—you've heard this before. Let me read this to you first.
>
> "MANZO: Mm-hm.
>
> "PENE: Um, I'll tell you a little bit about what happened and what we know, and I'll give you an opportunity to tell me what you want—if you want to.
>
> "MANZO: Oh, hell no. Don't even . . .
>
> "PENE: Okay.
>
> "MANZO: Don't even mention it.
>
> "PENE: Let me read this to you.
>
> "MANZO: No—what for? (Unintelligible).
>
> "PENE: That's fine, that's your choice. But let me read this . . .
>
> "MANZO: You know—you know when you say that, and that's like . . .
>
> "PENE: Okay.
>
> "MANZO: . . . it's like—so-so . . .

"PENE: It's—it's your choice, you know.

"MANZO: But you guys do ask me that, but don't.

"PENE: Okay.

"MANZO: Forget about that.

"PENE: Let me read this to you. You can—you can tell me pound sand if you want to, or you can tell me what you want to tell me, okay?

"MANZO: What is that, the rights?

"PENE: Your rights.

"MANZO: Oh, okay.

"PENE: Okay? You've heard it before, but let me go through it. You have the right to say nothing. Anything you say can be used against you and will be used against you in a court of law. You have the right to talk with an attorney, and have an attorney present before and during questioning. If you cannot pay for an attorney, one will be appointed free of charge to represent you before or during questioning. Okay? Do you understand each of these rights that I have just explained to you? Yes or no?

"FEMALE [apparently Chula Vista Police Detective Miriam Byron]: Martin? Do you understand . . .

"MANZO: *I'm doing what my right . . .*

"FEMALE: Okay, but do you understand them all?

"PENE: Do you understand your rights?

"MANZO: *I'm doing my right.*

"FEMALE: Okay—do you understand what he just read to you?

"PENE: I'm not asking you to tell me anything. I'm asking you . . .

"FEMALE: Yeah, he's just asking do you understand . . .

"PENE: . . . do you understand what I just told you?

"MANZO: Yes, I understand.

"PENE: Okay.

"MANZO: Yes, I understand English.

"PENE: Okay. What my point was I was trying to make is that I don't think you pulled the trigger, so I don't think you need to go down for life. Okay? You got your act together now, you got a job—you're doing well at your job. Your P.O. says you're staying clean, your girlfriend says you ain't doing dope. You know, you're—you're not hanging out down in the hood. Maybe you say hi to people every once in awhile, but you're staying out of the crap down there, okay." (Italics added.)

After those excerpts, the remaining transcript consists of 103 pages of substantive questioning by police and Manzo's answers.

The trial court denied Manzo's motion to exclude his statements to police, stating: "I think case law is pretty clear on the point that an indication has to be unambiguous and unequivocal. And that's what I need to look for. I need not look at this language and speculate as to what he meant. If I am speculating at all, it means it is equivocal or ambiguous . . . ." The court noted it had viewed the video recording and read the transcript of the police interview. The court concluded Manzo's statement that "I am doing my right," was "clearly not a clear and unambiguous assertion of his rights. It is unclear what he meant by that." The court believed that ambiguity was shown by the officers' follow-up questions whether Manzo understood his rights. The court concluded: "So I do not think there was an indication [sic] of his rights. And clearly, there was no

unambiguous assertion of his rights. I do think that [Manzo's] claim that that took place is not supported by what I have before me in evidence." The court denied Manzo's motion to exclude statements he made to police during the interview.

C

Manzo asserts the trial court erred by concluding he did not unambiguously assert his right to remain silent during his police interview. We, like the trial court, have reviewed both the video recording and the written transcript of Manzo's interview. However, unlike the trial court, we conclude Manzo unambiguously invoked his right to remain silent. As the transcript excerpts quoted above show, Pene read Manzo his *Miranda* rights and then asked him whether he understood each of the rights that he "just explained to [him]? Yes or no?" Based on our viewing of the video recording, Manzo, rather than immediately answering, remained silent for about eight seconds. The female not identified in the written transcript (but presumably Detective Miriam Byron) then repeated the question whether Manzo understood his rights.[9] Manzo answered: "I'm doing what my right . . ." The female officer then asked him whether he understood all of his rights. Pene joined in and asked Manzo whether he understood his rights. Manzo answered: "I'm doing my right." After additional questioning whether he understood his rights, Manzo answered: "Yes, I understand." However, rather than discontinuing further questioning, the officers proceeded to substantively interrogate Manzo, resulting in over 100 transcript pages.

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9 Pene testified at trial that Byron assisted him in interviewing Manzo, and she appears in the video recording of the interview.

Based on our independent review of the video recording and the written transcript of his interview, we conclude Manzo clearly and unambiguously invoked his Fifth Amendment right to remain silent after being apprised of those rights. *Miranda* stated that "[i]f the individual *indicates in any manner*, at any time prior to or during questioning, *that he wishes to remain silent*, the interrogation must cease." (*Miranda*, *supra*, 384 U.S. at pp. 473-474, italics added, fn. omitted.) Furthermore, "no particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent [citation], and the suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 129.) However, under the recent holding in *Berghuis*, a suspect may invoke the right to remain silent only by an *unambiguous* statement to that effect. (*Berghuis*, *supra*, ___ U.S. at pp. ___, ___) [130 S.Ct. 2250, 2260, 2263].)

In the circumstances of this case and the context of the words used by the officers and Manzo, it is clear that when Manzo remained silent for eight seconds (rather than immediately answering as he had before) and then, on inquiry, explained he was "doing what my right," Manzo unambiguously invoked his right to remain silent. Manzo confirmed that invocation when, after further questioning whether he understood his rights, he emphatically stated: "I'm doing my right." Both Manzo's words and conduct were "reasonably inconsistent with a present willingness to discuss the case freely and completely." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 129.) A suspect is not required to use specific words, such as "invoke" or "assert," to unambiguously invoke his or her

Fifth Amendment right to remain silent. A suspect's assertion of the constitutional right to remain silent cannot be conditioned on the use of certain technical words or, in colloquial terms, use of the "Queen's English," or other similar formalities. Rather, if the words used and conduct displayed by a suspect unambiguously show his or her intent to invoke the Fifth Amendment right to remain silent, then all interrogation must cease. (*Miranda*, *supra*, 384 U.S. at pp. 473-474; *Crittenden*, at p. 129.)

In this case, after Pene advised Manzo of his *Miranda* rights, Manzo remained silent for eight seconds and, on further inquiry, stated: "*I'm doing what my right*" and soon thereafter restated: "*I'm doing my right*." (Italics added.) Although the use of the word "doing" could be considered ambiguous in other contexts, in the circumstances and context of *this* case Manzo's use of the word "doing" in connection with the words "my right" cannot reasonably be construed as conveying anything other than his assertion or invocation of the *Miranda* rights of which he had just been apprised, including the "right" to remain silent. Because Manzo's use of the word "doing" in this context had the same meaning as "invoking," his statement to police can only be reasonably construed as "I'm [invoking] my right [to remain silent]." We conclude Manzo invoked his right to remain silent by unambiguously "*indicat*[*ing*] *in any manner"* that he wished to remain silent or was asserting the right to remain silent. (*Miranda, supra*, 384 U.S. at pp. 473-474, italics added, fn. omitted.) The trial court erred by denying his motion to exclude his statements to police during the interview.

D

Given that the trial court erred by admitting Manzo's statements to police during his interview, we must determine whether the People have carried their burden to show beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Chapman v. California, supra,* 386 U.S. at p. 24.) *Sullivan v. Louisiana* (1993) 508 U.S. 275 explained this standard of harmless error:

> "Harmless error review looks, we have said, to the basis on which 'the jury *actually rested* its verdict.' [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Id*. at p. 279.)

In the circumstances of this case in which evidence of Manzo's statements to police was erroneously admitted, that error can "be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 308.) Alternatively stated, in reviewing the erroneous admission of Manzo's statements to police, we "simply review[] the remainder of the evidence against [Manzo] to determine whether the admission of [Manzo's statements] was harmless beyond a reasonable doubt." (*Id.* at p. 310.)

Based on our review of the record in this case, we conclude the erroneous admission of Manzo's statements to police was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The evidence proving Manzo's guilt of the murder and attempted murder offenses was so overwhelming that we conclude

beyond a reasonable doubt the erroneous admission of Manzo's statements did not contribute to the jury's verdict convicting him of those offenses.[10] (*Ibid*.) Quantitatively assessing the evidence of Manzo's statements in the context of the other evidence, we conclude the erroneous admission of his statements was harmless beyond a reasonable doubt. (*Arizona v. Fulminante*, *supra*, 499 U.S. at p. 308.)

As the prosecutor argued in closing, Manzo's guilt of the charged murder and attempted murder offenses was proven beyond a reasonable doubt based on the extensive and detailed physical evidence in the case, the expert testimony explaining much of that physical evidence, and the percipient testimony of Estrada and other eyewitnesses, which was corroborated by the physical evidence. The evidence showing Manzo's guilt included his flight when stopped by police, the six bullets found in his pocket, the disassembled pistol and bloodstained cell phone in the lunch cooler found in the bed of his truck, the gun's slide release found on the driver's side floorboard, Valadez's blood found on Estrada's right side and clothing, gunshot residue found on Manzo's (but not Estrada's) hands, and the cell phone found containing 10 bindles of methamphetamine. Also, Estrada testified extensively regarding the details of the incident, stating that Manzo stood in the open driver's door of his truck, pointed the gun at Valadez and him, and fired the gun, striking Valadez. Campman, the forensic pathologist, testified the gun, when shot, was at least two feet from Valadez and could have been 27 inches from

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10 Because we reverse Manzo's conviction for discharging a firearm at an occupied vehicle on another ground as discussed below, we do not address whether that conviction must be reversed based on the violation of his Fifth Amendment right to remain silent.

Valadez's cheek. He also testified regarding Valadez's atypical gunshot wound caused by a fragmented bullet and the bullet fragments found in Valadez's head.

Testimony regarding, and photographs of, the police reenactment (based on the physical evidence and Estrada's testimony) showed that a gun pointed by a person standing in the open driver's door of the truck was 27 inches away from the cheek of a person sitting in the right passenger's seat and leaning slightly forward. Dowell testified that gunshot residue was found on Manzo's hands, Estrada's face, the left waistband of Estrada's shorts, Valadez's right hand, and the dashboard and roof on the driver's side and passenger's side (but not the middle dashboard and roof). However, no gunshot residue was found on Estrada's hands. The gunshot residue evidence tended to corroborate Estrada's testimony describing how Manzo shot Valadez. Gannett testified regarding the blood spatter and bloodstains found in the truck and on Estrada and his clothing. That testimony tended to corroborate Estrada's testimony that he was sitting in the middle passenger's seat and Valadez was sitting in the right passenger's seat when Manzo shot Valadez.

Paul, the firearm expert, testified regarding the 7.625-millimeter gun found in Manzo's truck and that the use of 9-millimeter cartridges would cause it to misfire or the bullet to fracture. The irregular and mutilated feed lips of the gun's magazine could have been caused by use of 9-millimeter cartridges. He testified that the bullet base found lodged in the gun's barrel matched the bullet found in Valadez's head. The gun would misfire if a person attempted to fire the gun with the bullet base lodged in its barrel. Three of the six 9-millimeter bullets found in Manzo's pocket were compressed, which

could have been caused by attempts to manually load them in the gun while the bullet base was lodged in its barrel. A mark on the primer of one of the bullets showed an attempt had been made to fire it. Paul's testimony corroborated Estrada's testimony regarding Manzo's initial misfiring of the gun, removal of the gun's magazine, manual loading of the gun, firing one bullet at Valadez, and subsequent misfiring at Estrada after attempting to manually load and/or adjust the gun.

The percipient testimony of Gallegos corroborated Estrada's testimony that Manzo drove the truck into the apartment complex, went inside his apartment, returned to his truck, and drove it to the back of the complex. She then heard a gunshot and saw Manzo jump in the truck and drive away after giving her a "frozen look." Morgan testified he saw Manzo drive into the apartment complex with two passengers, heard a popping sound, and then saw Manzo drive away with only one passenger. Parquet testified he saw two passengers in Manzo's truck, but later drove away with only one passenger, and saw a bloody body near the area from which Manzo departed. Dukes testified he heard a popping sound, looked toward the parking lot, and saw a Hispanic male with a shaved head holding a gun, standing outside the open driver's door of Manzo's truck. Therefore, the testimony of the prosecution's percipient witnesses generally corroborated Estrada's testimony regarding the incident.

Based on our review of the record, we conclude the jury actually rested its verdict on the evidence described above and the jury's verdict was surely unattributable to the trial court's erroneous admission of Manzo's statements to police. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) As generally described above, Manzo's statements to police

consisted primarily of denials of any involvement in, or any knowledge of, the shooting. Manzo said he picked up Estrada at a market in San Ysidro because Estrada asked for a ride and denied having any other passengers in his truck that day. After initially denying he drove back to Chula Vista after picking up Estrada in San Ysidro, Manzo later stated he might have gone back to his Chula Vista apartment to check on his girlfriend, but does not remember because he was drunk. He stated he did not know whether there was any blood in his truck because he was drinking. He denied owning or ever shooting a gun. He stated that neither he nor Estrada hurt anyone that day (other than police officers). He denying knowing he had six bullets in his pocket and denied they were his. He stated that when police stopped him, he was taking Estrada back to the market and ran because he did not want to get crushed in his truck and the officers were chasing him.

When Manzo's statements are considered with the overwhelming evidence discussed above proving his guilt of the murder and attempted murder offenses, the jury logically found his statements to police were not credible. However, the prosecution's case against him was *not* that of a credibility contest between Estrada's testimony and Manzo's statements to police. Rather, it was based on the extensive and detailed physical evidence, the testimony of expert witnesses, and the testimony of Estrada and other percipient witnesses (corroborated by the physical evidence and expert testimony). Although the prosecutor argued in closing that Manzo repeatedly lied to police and noted the relative credibility of Estrada in comparison to that of Manzo, the prosecution's case against Manzo (in particular, Estrada's credibility) did *not* rely on Manzo's statements to police and his lack of credibility. Furthermore, contrary to Manzo's assertion on appeal,

Estrada's testimony that Manzo shot Valadez and attempted to shoot him was not inherently incredible based on inconsistencies in Estrada's versions of the incident or on the fact Estrada continued to ride in Manzo's truck for about four and one-half hours after Valadez was shot and after Manzo repeatedly attempted to shoot him. Rather, Estrada's testimony regarding Manzo's commission of the offenses was corroborated by the extensive physical evidence and expert testimony.

Quantitatively assessing the evidence of Manzo's statements in the context of the other evidence, we conclude the erroneous admission of his statements was harmless beyond a reasonable doubt. (*Arizona v. Fulminante*, *supra*, 499 U.S. at p. 308.) The evidence proving Manzo's guilt of the murder and attempted murder offenses was so overwhelming that we conclude beyond a reasonable doubt the erroneous admission of Manzo's statements did not contribute to the jury's verdict convicting him of those offenses. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Therefore, the trial court's error in admitting those statements does not require reversal of his convictions of those offenses. (*Ibid*.)

II

Admission of Estrada's Prior Consistent Statements

Manzo contends the trial court erred by admitting into evidence Estrada's prior consistent statements.

A

Evidence Code section 1236 provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent

with his testimony at the hearing and is offered in compliance with [Evidence Code] Section 791." Evidence Code section 791 provides:

> "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
>
> "(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
>
> "(b) *An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen*." (Italics added.)

Cross-examination of a witness by defense counsel regarding that witness's plea agreement may be deemed to be an implied charge that the witness had an improper motive to fabricate his or her trial testimony. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 491; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1209.) "[A] prior consistent statement is admissible as long as the statement is made before the existence of *any one of the motives* that the opposing party expressly or impliedly suggests may have influenced the witness's testimony." (*People v. Noguera* (1992) 4 Cal.4th 599, 629.) "That there may always have been present a motive to fabricate does not deprive a party of his right to show that another motive, suggested by the evidence, did not also affect his testimony." (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1014.) In *Hillhouse*, the court rejected the defendant's argument that the witness "had a motive to minimize his role in the crime even before he made the prior consistent statements," explaining "[t]his is no doubt true, but defendant

also implied at trial that the plea agreement provided an *additional* improper motive. A prior consistent statement logically bolsters a witness's credibility whenever it predates *any* motive to lie, not just when it predates all possible motives." (*Hillhouse*, at pp. 491-492; see also *People v. Jones* (2003) 30 Cal.4th 1084, 1106-1107 (*Jones*); *People v. Andrews* (1989) 49 Cal.3d 200, 210-211; *People v. Hayes* (1990) 52 Cal.3d 577, 609.) The focus is on the specific agreement or other inducement suggested by cross-examination as showing the witness had an improper motive. (*Noguera*, at p. 629; *Jones*, at p. 1107.) "The abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

B

During his opening statement, Manzo's counsel stated that Estrada was not credible and the evidence would show Estrada, not Manzo, was the shooter in this case. He stated Estrada was charged with murder and arraigned on that charge, and from the time of his initial statement to police on August 4, 2007, through the time of trial had a motive to "turn himself from a suspect into the victim." Manzo's counsel implied Estrada's statements to police were self-serving so that he would not face 25 years to life in prison and could, instead, go home on August 24 after three weeks in jail.

Before Estrada testified, Manzo filed a motion in limine to exclude evidence on Estrada's statements to police as prior consistent statements under Evidence Code section 791, subdivision (b). The trial court deferred ruling on the motion until after Estrada testified.

On direct examination by the prosecutor, Estrada testified regarding the incident substantially as described above. During cross-examination, Manzo's counsel asked Estrada whether he had received immunity "from the drugs in this case [e.g., drug possession offenses]." Estrada replied, "Yes." Estrada confirmed that his attorney explained to him that the immunity agreement provided he could not be prosecuted for offenses involving the methamphetamine in the case. Manzo's counsel also asked Estrada whether on August 3, 2007, he was arrested at the motel parking lot for murder in this case. Estrada confirmed he was arrested on that date. Manzo's counsel further asked whether Estrada had been booked into jail and later arraigned in court for murder in this case. Estrada confirmed that at his arraignment he was appointed an attorney who told him he was facing 25 years to life in prison for the murder charge. Manzo's counsel asked Estrada whether he "sat in the Chula Vista jail for the next three weeks" after his arrest and arraignment. Estrada confirmed that he had and knew he was facing prison. Estrada confirmed he did not like being in jail.

On conclusion of Estrada's cross-examination by Manzo's counsel, the trial court conducted a hearing outside the jury's presence to consider the prosecutor's motion under Evidence Code section 791, subdivision (b), for admission of video recordings of Estrada's prior consistent statements made during police interviews. Manzo's counsel objected to admission of Estrada's prior consistent statements, arguing Estrada had a motive to fabricate since the time of his arrest. After discussing the holding in *Jones*, the trial court stated:

> "Without going into the case as created in *Jones* in great detail, I think here we have a similar situation. [¶] Here there was no express plea bargain or, quote/unquote, deal. But one might argue at the extreme end of any spectrum involving . . . the dismissal of the case, and that is the ultimate bargain or benefit for [a] defendant, and I think that's what constituted at least one major event here subsequent to his contact. In other words, 17 days after he was arrested, the case against him was dismissed, and today he was granted immunity at least as it pertains to part of the case. [¶] . . . [¶] . . . [Partial immunity] gives him another incentive potentially to understand that only part of the situation has been resolved. He still might have incentive.
>
> "So while Estrada arguably had a motive to minimize or detectives know his own involvement and implicate Mr. Manzo from the outset, I find that [*Jones*] holds under similar circumstances such statements are admissible because of the second incentives that he had; namely, the deal. In other words, the fact the case was dismissed against him as well as the immunity he was granted today.
>
> "Estrada's statement implicating Manzo was made prior to the People's decision not to prosecute and prior to . . . granting . . . immunity today as to partly the facts in the case, and I am going to allow it [to] be admitted."

Accordingly, the court granted the prosecutor's motion to admit Estrada's prior consistent statements.

Later during the trial, video recordings of two of Estrada's police interviews (on August 4, 2007, and August 7, 2007) were played for the jury, and at that time each juror was provided a transcript of those interviews.

After conclusion of the evidentiary portion of the trial but before closing arguments, the trial court informed the jury that the parties stipulated as follows: "The charge of murder against Mr. Jose Estrada was dismissed without prejudice. Without prejudice means the charge against Mr. Estrada can be refiled." In closing argument,

Manzo's counsel argued the prosecution's case rose and fell on Estrada's credibility. He argued Estrada wanted to be a victim, rather than a suspect, in the murder and noted Estrada had been granted partial immunity regarding the drugs he possessed. Manzo's counsel further noted the murder charge against Estrada was dismissed without prejudice three weeks after his arrest and argued that if he did not testify the way the prosecutor wanted him to, he could be back in jail charged with murder.

C

Manzo asserts the trial court erred by admitting evidence of Estrada's prior consistent statements because Estrada had the same motive to lie since the time of his (Estrada's) arrest for murder (i.e., to avoid being charged with and convicted of murder). However, as discussed above, during Estrada's cross-examination, Manzo's counsel asked Estrada about two significant matters: (1) the immunity agreement he received from the prosecutor for any drug-related offenses in this case; and (2) his arrest for murder on August 3, 2007, and confinement in jail for the following three weeks. In so cross-examining Estrada, the trial court (and jury) could reasonably infer Manzo's counsel was making an "implied charge" or claim that Estrada's testimony at the trial was influenced by bias or other improper motive. The court could conclude that, by questioning Estrada regarding the partial immunity agreement he obtained from the prosecutor and his arrest and three-week confinement in jail, Manzo's counsel was attempting to show Estrada had an improper motive to lie and testify favorably to the prosecutor's case. Although, in cross-examining Estrada, Manzo's counsel did not expressly refer to Estrada's *release* from jail after that three-week period, the court (and the jury) could infer from the context

of the questioning and Estrada's answers that he was, in fact, released from jail after three weeks. The court could reasonably conclude Manzo's counsel impliedly claimed Estrada had an improper motive to lie and testify favorably to the prosecutor's case based on his release from jail.[11]

We conclude the trial court properly admitted Estrada's prior consistent statements pursuant to Evidence Code section 791, subdivision (b). Although this case, unlike *Jones*, did not involve a plea agreement that purportedly provided the witness with an improper motive to lie, we nevertheless agree with the trial court that the facts in *Jones* are sufficiently similar to this case to apply its reasoning in admitting Estrada's prior consistent statements. Estrada received immunity for any drug-related offenses in this case. Although he did not receive immunity for any murder offense, the record supports a reasonable inference that Manzo's counsel implied, in cross-examining Estrada regarding his partial immunity agreement, he had an improper motive to lie and testify favorably to the prosecution's case. Furthermore, Estrada was arrested and charged with murder on August 3, 2007, and was released from jail three weeks later. Although, as Manzo notes, the murder charge against Estrada was not dismissed *with* prejudice and therefore could be refiled, the record supports a reasonable inference that Manzo's counsel implied, in cross-examining Estrada regarding his initial arrest for murder and subsequent release from jail three weeks later, Estrada obtained a benefit and had an

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11 Because there was no evidence before the jury regarding dismissal without prejudice of the murder charge against Estrada, we do not consider that factor in determining whether Manzo's counsel made an implied claim during cross-examination that Estrada lied during his trial testimony because of that purported improper motive.

improper motive to lie and testify favorably to the prosecution's case. That inference is bolstered by the implication by Manzo's counsel during his opening statement that Estrada's statements to police were self-serving so that he would not face 25 years to life in prison and could, instead, go home on August 24 after three weeks in jail.

When considered together, Estrada's partial immunity agreement and his release from jail three weeks after he was arrested for murder, matters revealed during his cross-examination, support a conclusion Manzo's counsel impliedly claimed Estrada had an improper motive to lie during his testimony at trial. Pursuant to Evidence Code section 791, subdivision (b), the court properly allowed the prosecutor to present evidence of Estrada's consistent statements made prior to the time those improper motives arose (i.e., before he was released from jail and before he received immunity for any drug-related offenses in this case). The fact Estrada may have had another motive to lie since the time of his arrest and through the time of his trial testimony (i.e., to avoid being charged with and convicted of murder) does not show his counsel did not impliedly claim Estrada had a separate intervening improper motive to lie and testify favorably to the prosecution's case. (*People v. Ainsworth*, *supra*, 45 Cal.3d at p. 1014; *People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 491-492; *Jones*, *supra*, 30 Cal.4th at pp. 1106-1107; *People v. Andrews*, *supra*, 49 Cal.3d at pp. 210-211; *People v. Hayes*, *supra*, 52 Cal.3d at p. 609.) *People v. Coleman* (1969) 71 Cal.2d 1159, cited by Manzo, is factually inapposite and does not persuade us to conclude otherwise. We conclude the trial court did not err by admitting evidence of Estrada's prior consistent statements.

D

Assuming arguendo the trial court erred by admitting evidence of Estrada's prior consistent statements, we nevertheless would conclude that error was harmless because there is no reasonable probability Manzo would have obtained a more favorable verdict had that evidence been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Andrews*, *supra*, 49 Cal.3d at p. 211.) As we discussed in part I.D. above, the evidence of Manzo's guilt of the murder and attempted murder offenses was overwhelming. We incorporate, without repeating here, our discussion of the extensive and detailed physical evidence, testimony of expert witnesses, and testimony of Estrada and other percipient witnesses, all of which overwhelmingly proved beyond a reasonable doubt that Manzo was guilty of those offenses. Although evidence of Estrada's prior consistent statements tended to corroborate and support the credibility of his trial testimony, that evidence was insignificant compared to the compelling corroboration of his trial testimony provided by the extensive and detailed physical evidence and expert and percipient testimony. We conclude it is not reasonably probable Manzo would have obtained a more favorable verdict had the trial court excluded the evidence of Estrada's prior consistent statements.

III

Cumulative Error

Manzo contends the trial court's cumulative errors of admitting his statements to police and admitting Estrada's prior consistent statements were prejudicial and deprived him of his due process right to a fair trial. However, because we concluded the trial court did not err by admitting evidence of Estrada's prior consistent statements, there is no

cumulative error. Rather, the only error committed by the trial court was admission of Manzo's statements to police, which we addressed in part I above and concluded was harmless beyond a reasonable doubt.

IV

Discharging a Firearm at an Occupied Vehicle

Manzo contends the evidence is insufficient to support his section 246 conviction for discharging a firearm at an occupied vehicle. He argues that because there is no evidence showing the gun was outside the truck when it was discharged, he could not be convicted of discharging a firearm "at" an occupied vehicle.

A

Section 246 provides: "Any person who shall maliciously and willfully discharge a firearm *at* an inhabited dwelling house, occupied building [or] *occupied motor vehicle* . . . is guilty of a felony . . . ." (Italics added.) In *People v. Stepney* (1981) 120 Cal.App.3d 1016 (*Stepney*), the court addressed the question of whether a defendant could be found guilty of a section 246 offense if the discharge of the firearm occurred *within* an inhabited dwelling house. (*Stepney*, at pp. 1018-1021.) In that case, the defendant entered the home through a window and then fired a bullet at a television set in the living room. (*Id*. at p. 1018.) *Stepney* addressed the argument that a person could shoot "at" a building from within as well as from without the building. (*Id*. at p. 1019.) The court concluded that, to the extent section 246 was ambiguous on that issue, it must be interpreted favorably to the defendant, stating:

> "[I]t is well settled that the court must construe that ambiguity in favor of the defendant. When language reasonably susceptible of two constructions is used in penal law, ordinarily that construction more favorable to the defendant will be adopted. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute." (*Stepney*, at p. 1019.)

In the circumstances in *Stepney*, the court reversed the defendant's section 246 conviction, holding that "the firing of a pistol within a dwelling house does not constitute a violation of . . . section 246." (*Stepney, supra,* 120 Cal.App.3d at p. 1021; cf. *People v. Morales* (2008) 168 Cal.App.4th 1075, 1078-1082 [defendant could not be convicted of a section 246 offense for shooting "at" an inhabited dwelling if he, while inside the attached garage, shot the gun into the kitchen of the house].) In contrast, in *People v. Jischke* (1996) 51 Cal.App.4th 552, the court affirmed the section 246 conviction of a defendant who shot a gun into the floor of his apartment and through the ceiling of the apartment below, striking its occupant. (*Jischke,* at pp. 555-556.) In *Jischke*, the court concluded the defendant had shot "at" the adjacent dwelling below his apartment. (*Id*. at p. 556.)

When a defendant argues on appeal that the evidence is insufficient to support his or her conviction, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] If the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and

not substitute our evaluation of [the evidence] for that of the fact finder." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.)

B

Estrada testified Manzo was standing in the open driver's door of Manzo's truck when Manzo pointed the gun at Valadez and him (Estrada) and discharged it, striking Valadez. Campman testified the gun was at least two to three feet from Valadez's face when fired. Photographs of the police reenactment, based on Estrada's testimony and physical evidence, showed the gun was 27 inches from the face of the person sitting in the right passenger's seat and leaning slightly forward. Those photographs show the gun, along with the shooter's right hand and forearm, are clearly within the periphery of Manzo's truck. There was no evidence presented showing the gun was outside the truck's periphery at the time it was discharged.

C

In construing statutory language, it is our objective to ascertain legislative intent and to effectuate the statute's purpose. (*People v. Overstreet* (1986) 42 Cal.3d 891, 895; *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007.) "In determining [legislative] intent, we look first to the words themselves." (*Woodhead*, at p. 1007.) We cannot create an offense by giving the words of a statute false or unusual meanings. (*People v. Baker* (1968) 69 Cal.2d 44, 50.) Rather, we "must give effect to statutes according to the usual, ordinary import of the language employed in framing them." (*Stepney, supra*, 120 Cal.App.3d at p. 1019.) "When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." (*Overstreet*, at p. 895.)

However, "[w]hen the language is susceptible of more than one reasonable interpretation, . . . we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, [and] public policy . . . ." (*Woodhead*, at p. 1008.) Finally, and importantly in this case, the rule of lenity provides that "[w]hen language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute." (*Overstreet*, at p. 896; see also *Woodhead*, at p. 1011; *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631 ["[i]t is the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit"]; *Stepney*, at p. 1019.)

D

We agree with Manzo's assertion that, in the circumstances of this case, the evidence is insufficient to support his section 246 conviction. Applying the rule of lenity, we conclude the language of section 246 must be construed as excluding discharge of a firearm located within the occupied motor vehicle. We note section 246's express language focuses on the *firearm*, not the person holding the firearm, in prohibiting the "discharge [of] a *firearm* at an . . . occupied motor vehicle . . . ." (Italics added.) Furthermore, section 246 bars discharging a firearm "at" an occupied motor vehicle. *Stepney* concluded "the firing of a pistol *within* a dwelling house does not constitute a

violation of" section 246. (*Stepney*, *supra*, 120 Cal.App.3d at p. 1021, italics added.) *Stepney* focused on the location of the *pistol*, not the location of the person holding it.

Application of the rule of lenity also requires us to conclude that section 246's phrase "discharge a firearm *at* an . . . occupied motor vehicle" means the firearm must be outside the periphery of the motor vehicle to be discharged "at" the vehicle. In the context of section 246, the word "at" is reasonably susceptible of a meaning involving both the *direction* the firearm is pointed *and* its *location* at the time of discharge. First, the firearm must be directed or pointed "at" or "toward" the motor vehicle at the time of discharge. Second, the firearm must be located outside the periphery of the motor vehicle at the time of discharge. Therefore, the word "at" in this context is reasonably susceptible of a meaning that a firearm located within the periphery of a motor vehicle cannot be discharged "at" or "toward" that vehicle. As *Stepney* noted, the legislative history of section 246 does not reveal any intent to include the discharge of a firearm within an occupied dwelling (or vehicle).[12] (*Stepney*, *supra*, 120 Cal.App.3d at p. 1020.) To paraphrase *Stepney*, the discharge of a firearm *within* an occupied motor vehicle does *not* constitute a violation of section 246. (*Stepney*, at p. 1021.)

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12 Rather, *Stepney* noted that section 246, as originally proposed, would have prohibited the discharge of a firearm "into" an occupied dwelling, but, as enacted, prohibited the discharge of a firearm "at" an occupied dwelling. (*Stepney*, *supra*, 120 Cal.App.3d at p. 1020.) *Stepney* viewed the change from "into" to "at" as merely reflecting the legislative intent to allow prosecution of persons who discharge a firearm at an occupied dwelling but miss their target. (*Ibid*.) The People do not cite, and we are not aware of, anything in section 246's legislative history showing the Legislature intended to address a pervasive problem of persons extending firearms into occupied dwellings or motor vehicles and discharging them.

Furthermore, section 246's language is reasonably susceptible of a meaning that does *not* make the location of the *person* an element of the crime (i.e., that a § 246 offense does *not* depend on where the shooter is standing or otherwise located at the time the firearm is discharged). Under this reasonable construction of section 246, if a firearm is within a vehicle when it is discharged, there can be no section 246 offense of firing at that vehicle, regardless of whether all or part of the person holding that firearm is located within or without the periphery of the vehicle.[13]

Accordingly, assuming arguendo section 246's language is reasonably susceptible to an interpretation prohibiting discharge of a firearm within an occupied motor vehicle (whether or not the person shooting the gun is within the vehicle or standing just outside its periphery) in addition to the reasonable interpretation of section 246, discussed above, not prohibiting discharge of a firearm within an occupied motor vehicle, then the rule of lenity applies and requires us to adopt the construction most favorable to the defendant. (*People v. Overstreet*, *supra*, 42 Cal.3d at p. 896; *People v. Woodhead*, *supra*, 43 Cal.3d at p. 1011; *Keeler v. Superior Court*, *supra*, 2 Cal.3d at p. 631; *Stepney*, *supra*, 120 Cal.App.3d at p. 1019.) Therefore, even if the People are correct that section 246's language can be reasonably construed as prohibiting the discharge of a firearm within an

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13 *People v. Jischke*, *supra*, 51 Cal.App.4th 552, cited by the People, is factually inapposite. As noted above, in *Jischke* the defendant fired a gun into the floor of his apartment and through the ceiling of the apartment below, striking its occupant. (*Id*. at pp. 555-556.) Under our interpretation of section 246, the defendant in *Jischke* committed a section 246 offense because the gun was pointed at or toward the occupied apartment dwelling below and the gun was outside of the periphery of that dwelling at the time it was discharged. Neither *Jischke*'s reasoning nor its holding support the People's position or otherwise persuade us to reach a contrary conclusion.

occupied motor vehicle by a person standing outside the periphery of the vehicle, we nevertheless must adopt the alternative reasonable construction that section 246 does *not* prohibit such conduct.[14] The People do not cite anything in section 246's language or the circumstances in this case precluding the application of the rule of lenity. (*Overstreet*, at p. 896; *Keeler*, at p. 631.) If the Legislature wants to expand section 246's provisions to prohibit the discharge of a firearm located within an occupied dwelling or motor vehicle when the shooter is standing or located outside the periphery of that dwelling or vehicle, it can amend section 246's language to so provide. However, until section 246 is so amended, we apply the rule of lenity and construe section 246 as excluding such conduct.

In so interpreting section 246, we are aware of, and have considered the reasoning in, *People v. Jones* (2010) 187 Cal.App.4th 266, which reached a contrary conclusion in similar circumstances based on the location of the *person*, rather than the firearm, at the time of discharge. However, *People v. Jones* did not address whether section 246's language could be reasonably construed in the manner in which we have construed it. Therefore, that case did not address whether the rule of lenity would, or should, apply to require construction of section 246 as discussed above. In any event, to the extent *People v. Jones* concluded, expressly or implicitly, section 246's language clearly and unambiguously prohibits the discharge of a firearm within an occupied motor vehicle by

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14 Although a strong argument can be made that the plain language of section 246 requires the firearm to be outside the periphery of an occupied motor vehicle at the time of discharge for a section 246 offense, we need not decide the substantive merit of that argument because we interpret section 246 favorably to Manzo based on the rule of lenity.

a person standing outside the periphery of the vehicle, we disagree with its reasoning and decline to follow its holding.

Because the evidence is insufficient to support a finding that the firearm was outside the periphery of his truck when Manzo discharged it at Valadez and Estrada (passengers in his truck), applying our interpretation of section 246's provisions, we conclude there is insufficient evidence to support Manzo's section 246 conviction of discharging a firearm at an occupied motor vehicle.[15] Accordingly, his section 246 conviction must be reversed.

DISPOSITION

Manzo's section 246 conviction (on count 2), along with the true findings on the allegations related to that conviction, are reversed. In all other respects, the judgment is affirmed. The matter is remanded for resentencing.

CERTIFIED FOR PUBLICATION

McDONALD, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.

15 The evidence overwhelmingly supports a finding that the gun (along with Manzo's right hand and forearm) was within the periphery of the truck when it was discharged. The People do not cite any evidence that arguably would support a contrary finding.