



People v. Carreles

2003 | Cited 0 times | California Court of Appeal | September 25, 2003

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Paul Carreles (Carreles) and Osvaldo Contreras (Contreras) appeal from the judgments entered upon their convictions by jury of first degree murder, as well as Contreras's conviction of arson of property and unlawful driving or taking of a vehicle. (Pen. Code, §§ 187, subd. (a), 451, subd. (d); Veh. Code, § 10851, subd. (a).) Carreles was sentenced to 25 years to life in prison, and Contreras was sentenced to 25 years to life in prison with a consecutive term of two years eight months.

Carreles contends (1) that the trial court erred in admitting statements of his co-defendant that implicated him, denying him his right of confrontation; (2) that the prosecutor committed misconduct by expressing his personal belief in Carreles's guilt and in suggesting to the jury that they view the evidence from the perspective of guilt; (3) that the trial court erred in admitting a hearsay statement by a nonparty as an admission; (4) that the trial court erred in excluding evidence of the victim's drug-dealing activities; (5) that the trial court erred in refusing to instruct the jury on the prosecution's violation of its discovery obligations; (6) that the trial court erred in admitting a prosecution witness's hearsay statements as adoptive admissions; and (7) that the trial court abused its discretion in denying his motion for new trial on the ground of newly discovered evidence.

Contreras contends (1) that the prosecutor committed misconduct by expressing his personal belief in Contreras's guilt and in suggesting to the jury that they view the evidence from the perspective that he was guilty; and (2) that the trial court abused its discretion in denying his motion for new trial on the ground of newly discovered evidence. He also adopts all arguments raised by Carreles that may accrue to his benefit.

We affirm the judgment as to each appellant.

FACTS

We view the evidence in accordance with the usual rules on appeal. (People v. Snow (2003) 30 Cal.4th 43, 66.) On the evening of Sunday, July 22, 2001, ¹ Wesley Espinoza (Espinoza), the murder victim, was sitting outside with a friend, Gilbert Bayaze (Bayaze). Bayaze had observed that Espinoza was looking



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worried and very upset that day. At approximately 10:30 p.m., Contreras pulled up in a white Dodge Caravan that had no license plates. Bayaze did not know Contreras personally, but knew that he hung around with the Compton Varrio Tres gang. Contreras called out to Espinoza, who looked frightened but went to the passenger side window of Contreras's van. The two appeared to argue. Espinoza jumped into the car of Carlos Bauza (Bauza), a friend of his and Bayaze's, and asked Bauza to take him home immediately. When they left, Contreras followed them in the van.

A surveillance videotape from a 7-Eleven store in the unincorporated area known as East Whittier showed a white minivan entering the parking lot at 12:47 a.m. on July 23. The videotape showed Espinoza and Contreras in the store between 12:47 a.m. and 12:49 a.m., at which time both of them left. The minivan was then seen leaving. The tape then showed that Espinoza and both appellants, as well as a white van, were there again between 3:07 a.m. and 3:10 a.m. At that time, Contreras wore the same clothing, but also had on a cap and had a towel over his shoulder. The three purchased several items, including some "smaller articles . . . that [the detective describing the videotape] could not accurately make out." They then left the store and the white minivan was seen leaving. The store manager testified that in July 2001, the 7-Eleven store carried chewy Sweet Tart candy.

At approximately 3:15 a.m. on July 23, gunshots were heard by two residents living on opposite sides of Rufus Avenue in the unincorporated area of Whittier, which was within a block or block and a half of the 7-Eleven. ² Mark Wicker (Wicker) lived at 9552 Rufus Avenue, next door to a vacant house in a poorly lit and overgrown yard at 9558 Rufus Avenue. Wicker was awakened by what he thought were four gunshots. He looked at his digital clock, which read 3:25 a.m. However, since he set his clock ahead by 10 or 15 minutes so he could get to work on time, the time was actually 3:10 or 3:15. He looked outside and, after a minute or two, he saw two males jogging south past his house, toward the vacant house, on his side of the street. He called police.

Eleuterio Duran (Duran), who lived at 9541 Rufus Avenue, heard two or three gunshots after he was already awake at 3:15 or 3:20 a.m. He looked outside and saw two individuals running north on the opposite side of the street, one on the street and one on the sidewalk. He lost sight of them as they reached a tree across the street. In the darkness, he then saw one of the persons turn, run south, and open the door of a light colored Dodge or Mazda minivan parked at 9558 Rufus Avenue. This individual had something like a jacket on his arm. The minivan drove away with its lights off. Duran reported the time as 3:15 or 3:20 a.m. to the police when he later spoke to them.

Espinoza's body was found a short time later at 9542 Rufus Avenue. Blood was splattered on trash cans in the driveway between Wicker's house at 9552 Rufus Avenue and the vacant property at 9558 Rufus Avenue, and a trail of blood led from there to where the body was found. Three spent nine-millimeter casings and a piece of a broken tooth were found in the yard at 9558 Rufus Avenue, and a spent nine-millimeter bullet was found under Wicker's vehicle, which had sustained bullet damage while parked in the driveway between his house and the vacant house. A plastic Sweet Tarts candy dispenser and some chewy candies, which appeared to have been run over by a car, were found



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in the street near the entrance to the driveway at 9546 Rufus Avenue. The candy was not in the blood trail. Los Angeles County Sheriff's Detective Sergeant Robert Taylor, the investigating officer, opined that Espinoza had been standing near Wicker's vehicle and had been shot as he ran in a northerly direction.

Espinoza died as a result of three gunshot wounds. One wound was to the back and one was to the neck, and each of these would have been fatal. The bullet that entered the back traveled through the neck to the oral cavity and caused two teeth to fracture before exiting near the nose. The third wound entered near the right nipple and exited through the right flank. The medical examiner believed that Espinoza could have been bending over as he ran when he was shot in the back and that he could have run from the location of the shooting for a short period of time before he died. No bullets were recovered from the body and the murder weapon was never found.

Two days later, at approximately 4:00 a.m. on Wednesday, July 25, a La Mirada resident living on Brazo Road near the corner of Mansa Drive heard a crash and saw a male figure leaning inside the driver's door of a white minivan. The man stepped back from the van, made a striking motion with his hand, and threw something into the van. A fireball erupted from the van. It appeared that the entire right back side of the man's body caught on fire. An arson investigator found a milk container which had burnt gasoline, as well as a road flare, in the street near the van. He testified that the van had been intentionally set on fire, that gasoline was the likely fuel source, and that the road flare was the source of ignition. He testified that a person with gasoline vapors on his skin or clothing could be ignited.

The minivan, a white Dodge Caravan, had been reported stolen on or about July 18, after its owner last saw it on July 17, where she had parked it at a location in Whittier.

A few days after the murder, Espinoza's friend, Bayaze, saw Contreras with gauze on his arm from his elbow to his wrist and on his fingers. Contreras stated that he had burned himself torching a van and that he got rid of the van because the police were looking for it in connection with Espinoza's murder. He warned Bayaze not to say anything to the police. Bayaze reported this to Detective Taylor, stating that Contreras had quizzed him on what he had earlier told police.

Further evidence established that Espinoza had been arrested on July 5 together with Eddie Molina (Molina) and two females after a gun was found in Molina's grandfather's vehicle, in which they were riding. Molina, the driver, acknowledged to the investigating sheriff's deputy that he was a member of the Compton Varrio Tres gang, and he was charged with being a gang member in possession of a gun. Espinoza gave a statement concerning the incident to a sheriff's deputy. He was not charged. On Friday, July 20, at the preliminary hearing on the charges against Molina, Molina's attorney called out into the audience for Espinoza, who was not present. His calling Espinoza's name surprised the investigating officer in the charged offense; Espinoza was not scheduled to appear as a prosecution witness. The preliminary hearing was put over to the following Monday, July 23, a few



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hours after Espinoza's body was found.

Bayaze testified that he knew Molina was a member of the Compton Varrio Tres gang and that in July 2001, Espinoza had been "hanging out" with Molina. He knew that Contreras also "hung around" with this gang.

Appellants were arrested on August 15, several weeks after the murder, at a gang hangout on the corner of Mansa Drive in La Mirada, not far from the location where the minivan was burned. Contreras had injuries at the time. He first stated that he had scratched himself while running from police, then later stated that he had burned himself after opening the radiator cap on his girlfriend's car. Carreles had an "L.A. Compton V3" tattoo on his arm. Sheriff's Detective Michael Ponce de Leon, a gang expert, indicated that this meant Carreles was a member of the Los Angeles area Compton Varrio Tres gang.

In interviews with Detective Taylor, both appellants denied participating in Espinoza's murder. Detective Taylor showed appellants photographs made from the 7-Eleven surveillance videotape. Contreras identified himself and Espinoza as appearing on the tape at 12:48 a.m. and 12:49 a.m., and Carreles identified himself and Espinoza as appearing on the tape at 3:07 a.m.

Contreras told Detective Taylor that he liked sour candy and acknowledged having purchased several packages of sour candy at the 7-Eleven on July 23. When Detective Taylor indicated that the road flare and other items in the minivan would be checked for fingerprints, Contreras stated that he had been inside the van and might have touched the road flare that was inside.

Detective Taylor also interviewed Dominic Zamora (Zamora), a member of the Compton Vario Tres gang known as "Wino," on the day of appellants' arrests. At the time, Zamora was "more or less" a suspect because of statements given by another person. At trial, Zamora stated that he did not want to testify and that he could not remember what he had told the police about Espinoza's murder. He acknowledged that he was afraid to testify because he feared for his safety and that of his family.

Zamora testified that Carreles and Molina were members of Compton Vario Tres. Contreras and Espinoza were not gang members but "hung out" at the gang meeting place. Zamora further testified that he had told police that Espinoza and Molina had been caught with a gun and that Espinoza was supposed to go to court and take the rap for owning the gun but that he did not. He testified that he told the police that he was at a garage at a house in La Mirada with appellants, although he claimed he could not remember whether he told police that he overheard appellants talking about killing Espinoza.

An edited version of the audiotape of Detective Taylor's interview with Zamora was played before the jury. Zamora stated that he was at the home of one Gabriel, working on Gabriel's mother's truck. The detective questioned Zamora about who was present. Zamora said, "Me. [¶] . . . [¶] . . . Ozzie



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[Contreras], Stymie [Carreles]. Cesar's in the garage, I know that, cause I heard them talking. I heard Cesar just right there listening." He also indicated that Gabriel's sister Angelina was present.

Zamora told Detective Taylor that he was in fear for his life and the lives of his family and that Carreles had beaten him because he did not go gangbanging and he knew too much. Zamora said, "[T]hey already said if I said anything they're going to kill me and my family. And I know they will." Detective Taylor said, "Okay. Back up, slow down. [¶] Are you talking about the day that you were there working on the truck -- [¶] ... [¶] ... Ozzie and Stymie told you a story?" Zamora replied, "No, I heard them. I heard them, okay. They were in the garage. They're planning it out. I heard them in the garage." Zamora told Detective Taylor that this conversation occurred on the day that Espinoza was killed. When Detective Taylor attempted to clarify whether the conversation occurred before or after Espinoza was killed, Zamora said it happened the day of the killing, and that the next day they started "flipping out."

Zamora stated that after Espinoza was dead, he heard appellants say "[t]hat they took him to 7-11 was the last time that they went. ... [¶] ... [¶] ... They apparently on the scene because they go the only way we can get caught is, you know what, they parked at 7-11. [¶] ... [¶] ... And they went in the store, they got a candy. And then the candy supposedly -- I heard them say they drop the candy like a 100 feet down or something. [¶] ... [¶] ... Those are last ones seen Wesley [Espinoza]. And they're on camera. That's what they're -- they're all paranoid about. That's the only way they said they could get caught."

When asked how Espinoza was killed, Zamora told Detective Taylor that he heard that appellants had shot Espinoza and that the gun, a ".9" belonging to Contreras, was supposed to be stashed at Cesar's house. The detective asked, "Now, who was saying this? Both of them?" Zamora replied, "Yeah, they're all talking about. Then they go there, said too many people know. [¶] Then I hear Ozzie and them said, oh, well, the 7-11 guy [--] said that we're going to have take him out."

Zamora told the detective that he heard "that they blew up the van or something." When asked "who," Zamora replied, "Ozzie. Cause Ozzie -- couple days later I seen Ozzie, and Ozzie's face was all burnt, cause he said that he blew up the van." The detective asked, "He told you that?" Zamora answered, "No, I heard him telling some -- the guy at the same house." He stated that he had seen Contreras with a Dodge Caravan a few days before Espinoza was killed, although he did not know where Contreras had gotten it. When the detective asked Zamora to describe Contreras's injuries, Zamora said that his eyebrow and hands were burned and his wounds were not bandaged, but they were "real shiny. He had ... put cream on." Contreras did not say that anyone was with him at the time he got burned. Zamora told the detective that he "just heard him say how he pour gasoline on it, and he lit a match and --" The detective attempted to ascertain when Zamora saw the burns on Contreras, asking if he was burned "when he was talking about what they did to Wesley?" Zamora said, "No, he wasn't burned yet. Couple days later he is burned."



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Detective Taylor asked Zamora, "How do you know about 7-11?" Zamora replied, "Cause I heard them say that that's the only way they could get caught, is they drove back to 7-11. [¶] . . . [¶] . . . Yeah, they on the camera, the video tape. [¶] . . . [¶] . . . That's when they -- that's when I heard them say the only way -- the only thing I heard them say, was the only way that they would get caught is if they got that tape from 7-11, cause all three of them were together, Ozzie, Stymie, and Wesley. [¶] . . . [¶] . . . And that was the day that that happen to them. They were on tape. They went in. I don't know. I heard them say -- that's all I heard them say."

Detective Ponce de Leon testified that Molina was a member of the Compton Varrio Tres gang. Several members of the Molina family who belonged to that gang started a subset of the gang in La Mirada. As original members of that subset, they had a special status as "shot callers," and others in the gang looked up to them. If an "OG," a street gang member who had a lot of respect, asked someone else to testify in order to take the blame for a crime committed by the OG, that individual would be expected to testify. If he did not, he could be murdered. A rat or snitch, who is an individual who cooperates with the police in an investigation, could also be beaten or killed.

Neither appellant testified. In defense, Bauza, who had been with Espinoza and Bayaze on the night of July 22, testified that Espinoza looked normal after speaking with the occupants of the white minivan and that when Bauza drove Espinoza to Espinoza's mother's house at Espinoza's request, Espinoza did not seem scared that the van was following them. When they arrived at Espinoza's mother's house, Espinoza appeared to look for something in the bushes, grabbed something, and then put something in his pocket. Espinoza spoke to the driver of the van, and, sounding "just like himself," told Bauza he was going to go with his friend in the van.

Anthony Ibarra (Ibarra) testified that he received a phone call from Espinoza at approximately midnight on the night of the murder. Espinoza seemed normal during the conversation.

Prior to trial, Bayaze's sister told Detective Taylor that Bayaze was upset and was crying on the afternoon of July 23. She told Detective Taylor that Bayaze said that Espinoza had been killed the night before at a Taco Bell by some gangsters who were driving across the parking lot. Bayaze's mother told Detective Taylor the same story. At trial, the sister denied that Bayaze told her Espinoza had been shot at a Taco Bell or that she had told this to Detective Taylor. At trial, the mother could not remember what Bayaze had told her or what she had said to Detective Taylor, but she testified that she never told Detective Taylor anything about a drive-by shooting. Detective Taylor testified that there are no Taco Bells on Rufus Avenue.

Dennis Thomas (Thomas) testified that he had met Espinoza at a drug recovery program. In the garage of a house on Mansa Drive in La Mirada, while he was working on Gabriel's mother's truck, he heard Zamora bragging that he had just "offed" or murdered someone by putting a bullet in the back of his head and two bullets in his neck. Thomas believed this conversation occurred after Espinoza's murder. Several Compton Varrio Tres gang members were there, but Carreles was not



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present at the time. Thomas, who was "an associate" of Carreles but had never met Contreras before the trial, asked to meet with Detective Taylor about three days after the murder and told him what Zamora had said, but asked that his name be kept secret because he feared for the safety of his children.

Detective Taylor's notes indicated that Thomas told him Zamora claimed to have shot someone once in the head and twice in the back when he was on the ground. Thomas testified that that was "similar along the lines" of what he thought he had said to Detective Taylor, but he could not "be specific" as to what he had said. He acknowledged that Detective Taylor's notes of his statement were accurate.

DISCUSSION

I. The admission of Contreras's statements did not violate Carreles's right of confrontation.

Carreles contends that the admission of Contreras's statements about the sour candy and the road flare, as well as Contreras's conflicting explanations for his injuries, implicated Carreles in the killing, in light of the evidence already introduced showing that the two appellants were together in the company of Espinoza prior to the crime and that sour candy and the road flare figured in the murder. He argues that the admission of these statements violated his right of confrontation under the principles set forth in *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*) and requires reversal of his conviction. This contention lacks merit.

Carreles moved for severance of his trial from that of Contreras on *Aranda/Bruton* grounds (*Bruton*, supra, 391 U.S. 123; *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*)), arguing that Contreras's statements implicated him and their admission in a joint trial would deny him the right of cross-examination. The trial court denied the motion after the prosecutor indicated that he would introduce only a limited number of Contreras's statements, including the statement that he had bought sour candy, that would not inculcate Carreles.

At the time the prosecutor sought to introduce Contreras's statement that he might have touched a road flare in the van, and when the prosecutor indicated that he wished to introduce Contreras's conflicting statements about how he had obtained his injuries, the trial court overruled Carreles's counsel's objections. After Detective Taylor testified that Contreras said he had bought some sour candy, Contreras's counsel sought to cross-examine the detective to elicit testimony that Contreras had stated that three packs of candy were purchased. Carreles objected on the ground that reference to more than one pack would incriminate him, and the trial court suggested that Contreras could elicit testimony that Contreras stated more than one pack was purchased. Carreles's objection was overruled. Carreles later renewed his severance motion and moved for mistrial. These motions were denied, as was Carreles's motion for new trial on *Aranda/Bruton* grounds.

Prior to the introduction of the first statement, the trial court admonished the jury that the evidence



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of statements made by each defendant after his arrest was admitted only against the person who made the statements and were not to be considered as evidence against the other defendant. The trial court further explained, "So if a statement is received, alleged to have been made by Mr. Contreras after his arrest, that statement is being admitted in this trial against Mr. Contreras only. It is not being admitted as evidence against Mr. Carreles, and you're not to receive it for any purpose other than the purpose for which it is admitted." The trial court repeated the admonition before each of appellants' statements was introduced.

In *Bruton*, the United States Supreme Court held that a defendant is denied his Sixth Amendment right of confrontation when the confession of his non-testifying co-defendant that names and incriminates him is introduced at their joint trial, even where the jury is instructed to consider the confession only against the co-defendant. (*Bruton*, supra, 391 U.S. at pp. 124-126, 135-136.)³ However, in *Richardson v. Marsh* (1987) 481 U.S. 200 (*Richardson*), the Supreme Court held that "the Confrontation Clause is not violated by the admission of a non-testifying co-defendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (*Id.* at p. 211, fn. omitted.) The Supreme Court reasoned that *Bruton* was a "narrow exception" to the general rule that a jury may be expected to obey a limiting instruction and that, in contrast to the "'powerfully incriminating'" confession implicating the defendant in *Bruton*, which a jury might not be able to disregard, a confession that is not incriminating on its face but becomes so "only when linked with evidence introduced later at trial" is more likely to be disregarded when the jury is so instructed. (*Richardson*, supra, at p. 208.)

In *Gray v. Maryland* (1998) 523 U.S. 185 (*Gray*), the Supreme Court found a violation of the right to confrontation where the co-defendant's confession was redacted to replace the defendant's name with blanks and the word "deleted." The Supreme Court found this technique "similar enough to *Bruton*'s unredacted confessions as to warrant the same legal results." (*Gray*, supra, at p. 195.) The court distinguished *Richardson*, observing that in *Richardson* the "inferences involved statements that did not refer directly to the defendant himself and which became incriminating 'only when linked with evidence introduced later at trial,'" while in *Gray* the inferences involved statements that "obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." (*Gray*, supra, at p. 196.)

In *People v. Fletcher* (1996) 13 Cal.4th 451, the California Supreme Court considered a similar issue and held that "editing a non-testifying co-defendant's extra-judicial statement to substitute pronouns or similar neutral terms for the defendant's name will not invariably be sufficient to avoid violation of the defendant's Sixth Amendment confrontation rights. Rather, the sufficiency of this form of editing must be determined on a case-by-case basis in light of the statement as a whole and the other evidence presented at trial." (*Id.* at p. 468.) The court observed that "[t]he editing will be deemed insufficient to avoid a confrontation violation if, despite the editing, reasonable jurors could not avoid drawing the inference that the defendant was the coparticipant designated in the



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confession by symbol or neutral pronoun." (13 Cal.4th at p. 456.)

Carreles, relying on *People v. Archer* (2000) 82 Cal.App.4th 1380 (*Archer*), argues that Richardson is distinguishable and Bruton applies because Contreras's statements became incriminating as a result of evidence already introduced.⁴ In *Archer*, the co-defendant's redacted statement did not refer to the existence of the defendant, but made it clear that another perpetrator was involved. The statement indicated that, in order to set the victim up, the co-defendant brought the victim to an address which the jury already knew was the defendant's; that the victim was murdered at that location; that the co-defendant saw the body in the yard of that address a week later; and that the body was moved in a vehicle which the jury already knew had the defendant's license plate number. (*Archer*, supra, at pp. 1384-1385.) The court observed that the ungrammatical manner in which the statement was redacted "raise[d] as strong a suspicion that names have been omitted as a neutral pronoun or symbol would have done" and that, even though it was redacted, the statement informed the jury that the other person occupied a leading role in the murder. (*Id.* at pp. 1389-1390.) Since the jury would necessarily conclude that this other person was the defendant, the *Archer* court held that the statement, even as redacted, facially implicated the defendant and that Gray and Fletcher, rather than Richardson, controlled.

The People argue that the timing of the introduction of the co-defendant's statement is not the determinative factor, but, rather, the determination as to whether a defendant's right to confrontation has been abridged depends upon "whether the nature of the statements and evidence presented at trial would have been sufficiently 'powerfully incriminating' so that it could not be presumed that a jury followed instructions to only consider a non-testifying co-defendant's statement as to that co-defendant and not against a defendant. (See *Gray v. Maryland*, supra, 523 U.S. at p. 192)"

We agree with the People. The statement in *Archer* was redacted in an attempt to eliminate any reference to another perpetrator. The reviewing court found that it did not succeed in eliminating reference to another perpetrator and thus did not come within Richardson but, rather, violated Gray and Fletcher. *Archer* did not distinguish Richardson because of the fact that the evidence pointing to the unnamed individual as the defendant came in before, rather than after, the statement; *Archer* distinguished Richardson because "the existence of another participant is obvious from the statement itself" and the statement facially incriminated the defendant. (*Archer*, supra, 82 Cal.App.4th at p. 1390.) *Archer* is readily distinguishable from the instant case, since Contreras's statements, pertaining to the sour candy, the road flare and his burns, did not indicate the existence of another person. The admission of the statements here comes within the principle set forth in Richardson, and there was no violation of Carreles's Sixth Amendment rights.

Finally, even were we to find Bruton error here, any error in the admission of Contreras's statements here would be non-prejudicial to Carreles under the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. Such error is deemed harmless where the properly



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admitted evidence is overwhelming and the evidence provided by the co-defendant's statement is cumulative of other evidence. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1128-1129.) Carreles admitted to Detective Taylor that he was depicted in the surveillance videotape, which showed the white van and showed him with Contreras and Espinoza at the 7-Eleven at approximately 3:10 a.m., shortly before the murder. The 7-Eleven sold sour candies, which were found at the scene of the murder. A few minutes later, at the scene of the murder, two witnesses heard shots fired and saw two men running on the street, and one of these individuals was seen running toward a white van. Contreras's conflicting explanations for his burns at the time of his arrest several weeks later were cumulative to the evidence that he was seen with injuries to his arms a few days after the murder and, in view of this evidence, did not themselves implicate Carreles. Carreles made adoptive admissions that were overheard and reported by Zamora to the effect that he was guilty of the murder. Gang evidence suggested that Carreles, a member of the Compton Varrio Tres gang, had a motive to kill Espinoza because he failed to testify favorably to Molina, a respected figure in the gang who had been arrested together with Espinoza. Moreover, the trial court repeatedly instructed the jury that statements made by one defendant were admitted only as to that defendant and were not to be considered against the other defendant. On this record, any error in the admission of Contreras's statements was harmless beyond a reasonable doubt as to Carreles.

II. Reversal is not required on the ground of prosecutorial misconduct.

Carreles and Contreras both contend that the prosecutor committed misconduct by expressing his personal belief in their guilt in two instances, and by suggesting to the jury that it view the evidence from the perspective that they were guilty. They claim that this misconduct violated their state and federal constitutional rights and requires reversal. This claim must fail.

The first claimed incident of misconduct occurred when the prosecutor was cross-examining defense witness Ibarra. The prosecutor asked, "You never called her [apparently referring to Espinoza's mother] and told her that these guys -- these murderers were --" Out of the presence of the jury, Carreles's counsel objected on the ground, *inter alia*, that this constituted misconduct, and he requested that the trial court admonish the jury to disregard the beginning of the question. The trial court asked the prosecutor to rephrase the question and the prosecutor apologized, stating that he had gotten excited and that the question was inappropriate. In the presence of the jury, the trial court stated, "I'm going to ask that you rephrase the question that you began to ask when we broke, and, ladies and gentlemen of the jury, I'm going to admonish you that you disregard the last question."

The second claimed incident of misconduct occurred at the conclusion of the prosecutor's opening argument, when he stated, "I would ask you to be fair. And I would ask you to go ahead and use the circumstantial evidence, because it's there. We got a couple of killers in this courtroom, ladies and gentlemen. I want you to hold them responsible, because that's the right thing to happen. [¶] Thank you." Both defense counsel objected, on the grounds that the prosecutor was injecting his personal opinion and that he was suggesting that his opinion was based on other evidence. The trial court



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admonished the jury as follows: "Ladies and gentlemen, I want to make a comment to you. At the conclusion of [the prosecutor's] argument, he made a statement regarding his personal belief regarding the facts of this case. I want to make two observations about that. First of all, when any of the lawyers argue in this case they are doing just that, they are arguing. They are not giving testimony. What the lawyers say is not evidence. Number one. [¶] Number two, it is probably not appropriate for [the prosecutor] to express his personal belief about the case. It is appropriate for the lawyer simply to argue what the evidence shows and what you should find the evidence to show. So to the extent that he expressed a personal belief, I would like you to disregard it."

The third claimed incident of misconduct occurred in the prosecutor's closing argument, when he was discussing Zamora's statements containing the adoptive admissions of appellants. The prosecutor urged the jury to consider the specific details in Zamora's statements because there was "corroborating evidence that shows what he says is right." The prosecutor argued, "Because ladies and gentlemen, I am submitting to you if you listen to the specifics of it, it makes perfect sense. [¶] One thing that a prosecutor once told me is if the defendants commit the crime, if in fact you come from the perspective that they committed the crime, just about everything and every fact and every factor that comes up can be explained with a reasonable explanation." He urged the jury to listen to the tape of Zamora's statements. He further argued that the testimony of Thomas, the defense witness who testified that Zamora had bragged about killing Espinoza, did not correspond with the evidence and that Thomas was either mistaken or lying. He concluded, "You have to understand this. Everything makes sense. Everything makes sense if you come from the perspective that these men are our shooters. There is two men involved, there is two. Mr. Wicker says there is two coming back to the van or coming back to the vehicle. These are the guys."

Carreles's counsel objected on the ground that the prosecutor's statement misstated the law and "turns the presumption of innocence on its head It is the burden of the prosecution to convince them beyond a reasonable doubt, not the burden to show that everything fits if you assume they are guilty from the beginning." The trial court overruled the objection, stating, "That is not exactly what he argued that you assume that they are guilty from the beginning"

Appellants contend that in the first two instances cited above, by referring to them as "murderers" and "killers" the prosecutor improperly expressed his personal belief in their guilt. They argue that in the third instance cited above, the prosecutor misstated the law and mischaracterized the burden of proof, telling the jury to assume that appellants were guilty and to put together the evidence in a way that would support that conclusion. This claim must fail.

"The standards under which we evaluate prosecutorial misconduct may be summarized as follows. A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to



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persuade either the trial court or the jury. Furthermore, and particularly pertinent here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (People v. Morales (2001) 25 Cal.4th 34, 44.)

To the extent Contreras failed to object to the question to Ibarra or to the prosecutor's "perspective" argument, and to the extent no admonitions were sought, the issues are waived. (People v. Osband (1996) 13 Cal.4th 622, 696; People v. Welch (1999) 20 Cal.4th 701, 753; see People v. Mitcham (1992) 1 Cal.4th 1027, 1048.) Moreover, any constitutional issues are waived as to the first two complaints of misconduct, since no objection on constitutional grounds was raised. (People v. Kipp (2001) 26 Cal.4th 1100, 1130.) In any event, even if these omissions were excused because further objection or request for an admonition would be futile, none of the claimed instances of misconduct implicated appellants' constitutional rights and none warrants reversal.

It was apparent from the context of the question containing the prosecutor's reference to "these murderers" that this did not constitute an epithet by the prosecutor but was part of the prosecutor's question as to whether defense witness Ibarra had reported to Espinoza's mother his awareness that her son's murderers had been captured on the 7-Eleven tape. The trial court immediately instructed the jury to disregard the question, without repeating the objectionable term. This admonition was sufficient to cure any possible harm, and no prejudice to appellants resulted. (People v. Millwee (1998) 18 Cal.4th 96, 140.)

On the other hand, the prosecutor's reference to "a couple of killers in this courtroom" at the conclusion of his opening argument clearly did not constitute misconduct at all. "It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] . . ." "A prosecutor may `vigorously argue his case and is not limited to "Chesterfieldian politeness"' [citation], and he may `use appropriate epithets warranted by the evidence.'" [Citations.]' [Citation.]" (People v. Vargas (2001) 91 Cal.App.4th 506, 569.) Here, the prosecutor was not arguing his personal belief or suggesting that there were facts not known to the jury. Rather, he was urging the jury to find, based on the evidence, that appellants were the perpetrators in the murder of Espinoza, and hence were "a couple of killers." This argument was supported by the trial evidence and was proper. (People v. Maury (2003) 30 Cal.4th 342, 418, mod. 30 Cal.4th 1083a; see People v. Thomas (1992) 2 Cal.4th 489, 537; People v. Sully (1991) 53 Cal.3d 1195, 1236.)

Finally, the prosecutor's statement that "if in fact you come from the perspective that they committed the crime, just about everything and every fact and every factor that comes up can be explained with a reasonable explanation" did not, as Carreles's counsel argued, "turn[] the presumption of innocence on its head." In so stating, the prosecutor urged the jury to consider the evidence that proved that appellants were guilty, suggesting that if they concluded that appellants



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committed the murder, the circumstantial evidence rationally supported that conclusion. Particularly in view of the delivery of the instruction on the presumption of innocence and the reasonable doubt standard in CALJIC No. 2.90, and the arguments of both defense counsel regarding the failure of the prosecution to satisfy its burden of proving appellants' guilt beyond a reasonable doubt, it is not reasonably likely that the jury misinterpreted the prosecutor's statement as indicating that appellants bore the burden of establishing their innocence. (People v. Osband, *supra*, 13 Cal.4th at pp. 696-697; People v. Marshall (1996) 13 Cal.4th 799, 831-832.) The cases on which appellants rely, People v. Nguyen (1995) 40 Cal.App.4th 28, 35-37, and People v. Mendoza (1974) 37 Cal.App.3d 717, 726-727, lend no support to their argument.

We conclude that any possible misconduct in the reference to "these murderers" during the questioning of Ibarra was harmless, and the other instances complained of did not constitute misconduct. No violation of due process appears. (People v. Farnam (2002) 28 Cal.4th 107, 168; People v. Kipp, *supra*, 26 Cal.4th at p. 1130.)

III. The erroneous admission of Molina's hearsay statement was non-prejudicial.

Carreles, joined by Contreras, contends that the trial court erred in admitting the hearsay statement by Molina in which Molina admitted to a sheriff's deputy that he was a member of the Compton Varrio Tres gang. During trial, the prosecutor argued that the statement constituted an admission, and the trial court overruled appellants' hearsay objection.

As the People concede, the out-of-court statement was erroneously admitted because Evidence Code section 1220, ⁵ the hearsay exception governing admissions, applies to out-of-court statements made by a party, and Molina was not a party in this case. However, the erroneous admission of Molina's statement acknowledging gang membership was utterly harmless. While the evidence of Molina's gang membership was critical to the prosecution theory as to the motive behind the murder, there was ample other evidence, including the testimony of Bayaze and of Detective Ponce de Leon that Molina belonged to the Compton Varrio Tres gang. The erroneous admission of this hearsay statement was harmless under any standard. (Chapman v. California, *supra*, 386 U.S. at p. 24; People v. Watson (1956) 46 Cal.2d 818, 836.)

IV. The trial court properly excluded evidence of Espinoza's drug-dealing activities.

During trial, Carreles and Contreras sought to introduce evidence that Espinoza used an alias, sold and used methamphetamine, had methamphetamine in his system at the time of his death, and committed burglaries and robberies. They argued that the evidence was relevant to demonstrate that Espinoza was killed because of his drug activities. The trial court ruled that this evidence was irrelevant and constituted inadmissible character evidence under Evidence Code section 1101.

Contreras subsequently sought to elicit testimony from Bayaze that, in selling drugs, Espinoza had



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"burned" many people and that there were "innumerable" people who wanted to kill him. When Contreras's counsel acknowledged that Bayaze had no personal knowledge that Espinoza had "burned" people, the trial court stated that this would be inadmissible hearsay. Contreras's counsel asked to introduce the testimony of Espinoza's mother that she had thrown him out of her house because he was packaging methamphetamine for sale. The trial court ruled that this was inadmissible character evidence under Evidence Code section 1101. ⁶ Contreras's counsel indicated that he wanted to introduce this evidence to show that possibly someone else was the killer. The trial court asked if the defense had admissible evidence that Espinoza had "ripped somebody off for drugs . . . and that that person is a possible suspect in this case or likely to have been the one who pulled the trigger," and stated that "so far you just want to admit evidence about what everybody has heard about him selling drugs." Contreras's counsel replied, "Right," and acknowledged that he could not find anything in the Evidence Code that would provide a ground for admission of the evidence. ⁷

Carreles, joined by Contreras, contends that the trial court erred in excluding this evidence, thereby violating his constitutional rights to present relevant exculpatory evidence and to challenge the People's evidence. He argues that the evidence was admissible under Evidence Code section 1103 ⁸ to show that at the time of the shooting Espinoza was involved in drug dealing during which he had angered some individuals. Alternately, he argues that the evidence was admissible under Evidence Code section 1101, subdivision (b), ⁹ to demonstrate that by virtue of his lifestyle as a drug dealer, Espinoza had exposed himself to violent individuals who might have killed him.

This contention is without merit. Any conduct on the part of Espinoza, the victim in this case, was irrelevant to show the motive, opportunity, or intent of some unnamed person who might have been the perpetrator, and thus the proffered evidence was inadmissible under Evidence Code section 1101, subdivision (b). Similarly, Evidence Code section 1103 permits the introduction of evidence to prove "conduct of the victim in conformity with the character or trait of character." However, nothing pertaining to Espinoza's conduct, such as self-defense, was relevant to any issue or defense raised in this trial. While Evidence Code section 1101, subdivision (b) evidence may apply to a third party (People v. Davis (1995) 10 Cal.4th 463, 500-501), the trial court correctly observed that the defense utterly failed to present an adequate foundation for admitting such testimony on a third-party culpability theory. (Id. at p. 501; People v. Sandoval (1992) 4 Cal.4th 155, 176-177.)

Even had appellants not waived the constitutional issues now asserted by failing to raise appropriate objections, the trial court properly excluded the evidence under the applicable evidentiary rules, and no constitutional violations occurred. (People v. Boyette (2003) 29 Cal.4th 381, 427-428, mod. 29 Cal.4th 1018a; People v. Davis, supra, 10 Cal.4th at pp. 501-502, fn. 1.)

V. The trial court properly refused to instruct the jury to view Wicker's testimony with caution as a sanction for a discovery violation concerning the timing on his alarm clock.

Wicker testified that although his clock indicated the time as 3:25 a.m. when he heard gunshots on



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Rufus Avenue, he had set the clock ahead by 10 or 15 minutes, so it was actually 3:10 a.m. or 3:15 a.m. He testified that he had reported the time as 3:25 a.m. when he spoke to police and that he did not mention that he had set his clock ahead until his interview with the prosecutor a few days before trial, at which time he brought the matter up. Carreles's counsel informed the trial court that the discovery materials indicated the time as 3:25 a.m. and, joined by Contreras's counsel, he requested that a discovery sanction be imposed for the delay in disclosing this fact, the requested sanction being the exclusion of appellants' statements to Detective Taylor. The trial court ruled that there was no intentional discovery violation and determined that the information about Wicker having set his clock ahead was not significant, because Wicker's testimony was consistent with that of the other Rufus Avenue resident, Duran, as to when the shots were fired.

At the close of trial, Carreles's counsel submitted a proposed special instruction on the subject of the delayed disclosure, which read as follows: "The prosecution in this case violated California's Reciprocal Discovery Law by failing to disclose, before Mr. Wicker's testimony, that Mr. Wicker had revised his previous statement to authorities regarding the accuracy of his bedroom clock. Because of this violation, the court instructs you that you should receive[] Mr. Wicker's testimony about the accuracy of his clock with caution and distrust, unless you find other evidence in the case which corroborates it."

The trial court refused this instruction, stating that "in all other respects Mr. Wicker's testimony is credible. . . . He presented no bias or motive for fabricating or withholding this particular fact from [the prosecutor], who presented it to [defense counsel] prior to Mr. Wicker's testimony. It is a key fact in the case, but I don't find that -- that there was significant prejudice to either of the two defendants by its discovery. In the balance, all things considered, I think the instruction goes too far, and I'm not inclined to give it."

Carreles, joined by Contreras, contends that the trial court's refusal to instruct the jury as to the prosecutor's discovery violation was prejudicial error. Assuming Contreras joined in the request for the instruction, this contention lacks merit as to both appellants.

In *People v. Zamora* (1980) 28 Cal.3d 88, a case involving the destruction of discoverable evidence, the Supreme Court stated, "We first observe that the courts enjoy a large measure of discretion in determining the appropriate sanction that should be imposed" (Id. at p. 99; accord, *People v. Jenkins* (2000) 22 Cal.4th 900, 951.) In *People v. Zamora*, supra, 28 Cal.3d 88, the Supreme Court rejected both the defense claim that the trial court should have dismissed the charges and the People's assertion that minimal or no sanctions were required, and held, instead, that a jury instruction was the appropriate sanction.

Here, this type of sanction was not required. No evidence was destroyed, and the defense was able to cross-examine Wicker, both as to his setting his clock ahead and as to whom, and when, he had disclosed this fact. The testimony of Duran, the other resident of Rufus Avenue, was consistent with



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Wicker's time estimate based on the clock having been set ahead. Thus, the People's belated disclosure constituted harmless error. (*People v. Moore* (1987) 189 Cal.App.3d 1537, 1541.) There was nothing exculpatory about the undisclosed evidence; if anything, it was inculpatory. Moreover, nothing in Wicker's testimony indicated that he "revised" his earlier statement with respect to the accuracy of his clock, as the proposed instruction indicated. Therefore, an instruction of the type suggested by Carreles's counsel was not necessary or appropriate to remedy the claimed error. (See *People v. Jenkins*, supra, 22 Cal.4th at pp. 951-952; *People v. Zamora*, supra, 28 Cal.3d at p. 103.) In any event, given the testimony of Duran, who heard the gunshots at approximately the same time as Wicker indicated he heard them, after allowing for the moving ahead of his clock, and given Wicker's testimony that he brought the matter up with the prosecutor without any prompting, any error in refusing this sanction was utterly harmless. (Cf. *People v. Zamora*, supra, at pp. 103-104.)

VI. The adoptive admissions in Zamora's statements were properly introduced.

Carreles objected to the admission of Zamora's statements to the police on the ground that they constituted hearsay and that the statements did not establish which appellant said what. He also objected that the admission of the statements would deny him his right of cross-examination. The trial court ruled that Zamora's statements were admissible as a prior inconsistent statement to impeach his trial testimony, and, relying upon *People v. Fauber* (1992) 2 Cal.4th 792, ruled that appellants' statements that were reported by Zamora were admissible as adoptive admissions.

Carreles, joined by Contreras, contends that the statements relating the substance of appellants' conversations were not admissible as adoptive admissions because an adequate foundation was not established. He further asserts that, even if they were admissible under state law, their introduction denied him his constitutional right to confrontation. It does not appear that Contreras lodged an objection to this evidence, and therefore the issue is waived as to him. (*People v. Mitcham*, supra, 1 Cal.4th at p. 1048.) Even if it were not waived, this contention lacks merit.

"`Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.' (Evid. Code, § 1221.) Under this provision, `If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.' [Citations.] `For the adoptive admission exception to apply, . . . a direct accusation in so many words is not essential.' [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1189 (Riel).)

Carreles complains that Zamora's statements about the planning of the murder do not clearly establish whether the overheard conversations occurred before or after the murder, and that there



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was insufficient detail to ascertain that the nondeclarant was able to hear what was said by the declarant such that the nondeclarant was in a position to object or otherwise respond. He further asserts that with respect to the rest of the statements, there is little to establish whether Zamora was himself inside the garage and that Zamora was vague as to who said what to whom, making general statements such as "I heard them say they drop the candy like a 100 feet down . . ." and "I heard them say that that's the only way they could get caught" Thus, he claims, it is not possible to conclude that he heard or said the statements.

However, "[t]here are only two requirements for the introduction of adoptive admissions: '(1) the party must have knowledge of the content of another's hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his adoption of, or his belief in, the truth of such hearsay statement.' [Citation.]" (People v. Silva (1988) 45 Cal.3d 604, 623.) "'To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide.' [Citation.]" (Riel, supra, 22 Cal.4th at pp. 1189-1190.)

Under the standard reiterated in Riel, the statements were admissible. Zamora told the interviewing detective that he overheard appellants while he was at Gabriel's house working on a truck. He explained where he was and who was there, stated that he heard both appellants discussing the murder, and stated that the conversation about planning the murder took place "the day they -- that they did it," while the other statements occurred after the murder. He stated that appellants were not whispering or being secretive. This evidence supports a reasonable inference that the statements were made under circumstances which fairly afforded each appellant an opportunity to hear, understand, and reply, and supports a reasonable inference that if the statements were untrue, either appellant would have refuted them. Although Carreles argues that it could not be ascertained what was said by him and what was said by Contreras, the statements were properly introduced and the question of whether either or both appellants made adoptive admissions was for the jury to decide. (People v. Fauber, supra, 2 Cal.4th at pp. 851-853 [witness could not identify which of three people, including defendant, made which statement; distinguishing People v. Lebell (1979) 89 Cal.App.3d 772, on which Carreles relies]; see Riel, supra, 22 Cal.4th at p. 1189 ["[t]he circumstances warranted presenting the evidence to the jury and letting the jury decide what weight to give it"].)

Even if the statements were erroneously admitted, however, their admission would be non-prejudicial. As the trial court observed in denying the new trial motion on a different ground, "[t]he court respectfully disagrees with [Carreles's counsel's] assessment that the star witness in this case was Wino [Zamora]. The star witness in this case was the camera at the 7-Eleven which put these two defendants in the company of the victim moments before he was murdered. That is the star witness in this case. [¶] As far as I'm concerned, the rest of it was evidence that tended to corroborate and provide motive, et cetera, but the real evidence in this case that is uncontradicted and overwhelming is that moments before Mr. Espinoza was put to death was in the company of these



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two defendants and I mean moments." Zamora was thoroughly discredited by both defense counsel in argument. Even if erroneous, the admission of his statements was harmless. (People v. Watson, supra, 46 Cal.2d at p. 836.)

Carreles further claims that the admission of Zamora's statements constituted a violation of his Sixth Amendment rights of confrontation and cross-examination because the adoptive admissions did not constitute a firmly rooted exception to the rule against hearsay and did not bear particularized guarantees of trustworthiness. (See Lilly v. Virginia (1999) 527 U.S. 116, 124-125 [declarations against penal interest in which accomplice shifted blame to defendant did not come within firmly rooted exception and were not sufficiently reliable].) However, in People v. Castille (2003) 108 Cal.App.4th 469, 484-485, the court rejected Carreles's assertion and concluded that adoptive admissions constitute a firmly rooted exception to the hearsay rule, in part because when the statements of another are impliedly adopted by a defendant, they thus become party admissions. As such, the admission of these statements as exceptions to the rule against hearsay do not violate a defendant's rights of confrontation and cross-examination.

VII. The motion for new trial was properly denied.

Carreles and Contreras brought motions for a new trial on the ground of newly discovered evidence. They submitted a declaration executed under penalty of perjury by Amanda Ortega (Ortega), who stated that a man named Wino was staying at her mother's house shortly before Espinoza's murder. About four days before the murder, she observed that Wino was very angry at Espinoza because Espinoza had taken a former girlfriend from Wino, and she heard Wino say, "I'm going to kick his fucking ass! I'll kill him!" Ortega stated that she had not mentioned this when she was interviewed earlier because she was pregnant and was dealing with her medical condition and with keeping her job. She gave birth on April 24, 2002, a few weeks before the commencement of the trial.

A hearing was conducted at which Ortega acknowledged that her boyfriend, Cesar Salcedo, was a friend of Carreles and that her brother Gabriel and her boyfriend were friends of Contreras. She further acknowledged that Carreles had stayed at her home for a period of time during July 2001, the month in which the murder occurred. She was aware that Carreles and Contreras had been arrested for Espinoza's murder. She conceded that she had spoken with a defense investigator who had visited her house to interview her boyfriend. At the time, she was busy getting ready for work and had forgotten about Wino's statement because she was concentrating on other matters relating to her pregnancy and her finances. She claimed that she was testifying truthfully about Wino's statements and that no one was compelling her to say that Wino had threatened to kill the victim.

The trial court denied the motion for new trial, finding that Ortega's evidence "should have been easily discovered if it were believable, which the court finds that it is not. [¶] The court finds that Miss Ortega's credibility is in serious question when someone that she is as close to as she is to this defendant is standing trial for murder for over a year and she has a submission by the real killer. She



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doesn't tell anyone, not before the trial, not during the trial, not till the time of sentencing. I find her explanation for that to be entirely incredible and her rendition of the statement to be unbelievable which leads me to my finding that not only is this evidence that [is] easily discovered, it is evidence that would not likely result in a different finding by the jury in this case."

Carreles, joined by Contreras, contends that the trial court abused its discretion and denied him due process by denying the motion for new trial. We disagree, finding no abuse of discretion in the denial of the motion.

"In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: ``1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.'" [Citations.]" (People v. Turner (1994) 8 Cal.4th 137, 212.) "Because a ruling on a motion for new trial rests so completely within the trial court's discretion, we will not disturb it on appeal absent ``a manifest and unmistakable abuse of discretion.'" [Citation.]" (People v. Earp (1999) 20 Cal.4th 826, 890.)

The trial court here was well within the sound exercise of discretion in finding Ortega's credibility lacking. Moreover, the proffered evidence did not contradict the strongest evidence introduced against appellants, which, as the trial court aptly noted, was the 7-Eleven videotape placing them with the victim shortly before the murder. As the trial court found, it is unlikely that Ortega's testimony would have rendered a different result probable. Based on these factors, the trial court properly exercised its discretion in denying the motion for new trial based on Ortega's proposed testimony. (People v. Earp, *supra*, 20 Cal.4th at p. 890; People v. Turner, *supra*, 8 Cal.4th at pp. 212-213; People v. Delgado (1993) 5 Cal.4th 312, 328.)

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

We concur:

NOTT

DOI TODD

1. Unless otherwise specified, all events to which we hereafter refer occurred in 2001.



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2. Testimony also established that Rufus Avenue and the 7- Eleven were within walking distance of each other and a one- or two- minute drive apart.
3. Aranda, supra, 63 Cal.2d 518, earlier reached the same conclusion on non-constitutional grounds.
4. He points to earlier- introduced evidence of the surveillance tape placing appellants at the 7- Eleven with the victim and his own admission of his presence with Contreras and the van at the 7- Eleven, the discovery of the candy dispenser at the scene of the shooting, the use of the road flare to set the van on fire, and the evidence that the arsonist was burned.
5. Evidence Code section 1220 provides, "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."
6. Evidence Code section 1101, subdivision (a) precludes the admission of evidence of a person's character or character trait, including evidence of specific instances of conduct, when offered to prove conduct on a specified occasion, "[e]xcept as provided in this section and in Sections 1102, 1103, 1108, and 1109" Subdivision (b) of Evidence Code section 1101 provides that "[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."
7. Appellants were able to introduce evidence that, shortly before Contreras drove up on the night of the murder, Espinoza dropped off a vehicle and threw away the keys under circumstances that suggested that the vehicle was stolen.
8. Evidence Code section 1103, subdivision (a)(1) provides, "In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."
9. See footnote 6, ante.

