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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY STEVEN BACA, Defendant and Appellant.	E032929 (Super.Ct.No. INF35028) OPINION

APPEAL from the Superior Court of Riverside County. Dana S. Henry, Judge. (Retired judge of the L.A. Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Patrick J. Hennessey, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Laura Stilwell Studebaker, and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Johnny Steven Baca, appeals from his convictions for two counts of murder (Pen. Code, § 187)[1] with firearm-use enhancements (§ 12022.5, subd. (a)). We generally affirm, concluding: (1) Although defendant's counsel should have impeached testimony that falsely bolstered a jailhouse informant's credibility, we find no resulting prejudice because the evidence against defendant was strong even without the informant's testimony, the informant had little inherent credibility, and the informant knew details that could only have been provided by an insider; (2) Hearsay testimony that one of the murder victims identified defendant before dying was admissible as a spontaneous declaration because the victim identified defendant shortly after the attack while still under stress; (3) Hearsay regarding the victim's identification of defendant did not violate the confrontation clause as interpreted in *Crawford v. Washington* (2004) 541 U.S. __ [124 S.Ct. 1354] (*Crawford*) because defendant forfeited his right to challenge the absence of the victim by killing him; (4) The prosecutor did not improperly shift the burden of proof by arguing that defendant failed to call a logical witness because the prosecutor never claimed defendant had a duty to call the witness; and (5) The aggravating factors supporting the upper term on the firearm-use enhancements were either inherent in the jury verdict or involved recidivism, and therefore satisfied *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531] (*Blakely*). However, we reduce

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

defendant's sentence on the firearm-use enhancement in count 1 because it was improperly increased following a successful appeal in violation of double jeopardy.

STATEMENT OF FACTS

This case involves the August 1995 murders of same-sex companions John Adair and John Mix. Adair hired defendant as a live-in housekeeper and gardener a few months before the murders. About two weeks before the murders, Valerie Millot, a close friend of Adair's, received a telephone call from Adair, saying that he wanted defendant to leave. At Adair's request, Millot came over to Adair's house and asked defendant to leave, which he did. In order to make sure that defendant did not come back, Adair and Millot packed defendant's belongings and put them in the driveway. While packing defendant's belongings, they found several items that contained information about defendant. Adair recorded the information just in case there were further problems.

Adair had an adopted son named Tom, whom he had taken in as a troubled teenager. A short time after Adair and Millot ejected defendant from the house, Tom called and confronted Millot. Tom was angry and yelled at Millot that this was none of her business, she should not interfere, and defendant was a good guy.

Tom was apparently successful in getting Adair to take defendant back. Millot continued to see defendant at Adair's house and defendant told his other employer, a Chinese restaurant, that he could keep working because his landlord had taken him back.

On the day of the murders, Millot picked up Adair's companion Mix at the airport and brought him to Adair's house. During the drive, Mix mentioned that he was afraid of

defendant. Millot stayed at Adair's house for a few hours, and when she finally left, Adair and Mix were in good spirits and seemed to be getting along well.

Later that day, Adair called 911 to report that he and Mix had been shot. When asked by the 911 operator to identify the assailant, Adair was unable to do so.

The sheriff's deputies who responded to the 911 call found Mix lying on the floor dead, with a single gunshot wound to his face. The deputies also found a .38-caliber revolver lying on the floor just inside the door about six to eight feet away from Mix's body. The police were unable to obtain fingerprints from the gun.

As the deputies proceeded into the house, they found Adair walking around holding a towel to his face, which was bleeding profusely from two gunshot wounds. The deputies asked Adair to identify the assailant and he responded in a garbled voice with something that sounded like "Baca." When the deputies asked for clarification, Adair clearly repeated "Baca" several times and spelled it. Furthermore, after paramedics cleared Adair's mouth, he directed the deputies to a piece of paper that contained information about defendant.

After Adair was taken to the hospital, a deputy was assigned to pick up his adopted son Tom and take him to the hospital. While at the hospital, the deputy overheard Tom speaking on a telephone trying to locate defendant. When the deputy asked Tom to stop looking for defendant, Tom got upset and yelled at the deputy, asking why he was forbidden from looking for the person who shot his father. Tom wanted to

leave, but the deputy would not allow that either. After a second similar confrontation, the deputy arrested Tom for interfering with the investigation.

Adair died after a week in intensive care. A few days later, police officers found defendant loitering in a park in Carson. When the officers confronted defendant, he tried to hide his identification. But the officers retrieved his identification, discovered that he had an outstanding warrant, and arrested him. The police found Adair's car in the area surrounding the park.

Defendant was charged with the murders of Adair and Mix, and was initially convicted in August 1997. However, this court reversed the convictions based on ineffective assistance of counsel. (*People v. Baca* (Sept. 28, 1999, E021093) [nonpub. opn.].)

On retrial, the prosecution's evidence was largely the same as before, including the testimony of a jailhouse informant, who described a murder-for-hire plot involving Adair's adopted son Tom. The informant claimed that while he and defendant were housed together awaiting trial, defendant mentioned that he was in jail for murdering a rich doctor. Defendant said he had been living and working at the doctor's house, in addition to working at a Chinese restaurant. Defendant said that he began working for the doctor after meeting the doctor's son, Tom, at the Chinese restaurant. Defendant said that he quickly discovered that the doctor was a homosexual and mentioned it to Tom, who said he knew and did not like it. Shortly after that, Tom told defendant that they could get rich by killing the doctor. The plan was for defendant to kill the doctor and his

companion while they were together so that it would look like a love-triangle murder, then they could take the insurance proceeds. Defendant said he shot them both in the head using a .38-caliber gun that was provided to him by Tom. When one of them did not die, defendant panicked and ran away, leaving the gun behind. Defendant fled to his sister's home, called Tom, and told Tom that he had "fucked up." Tom was angry and told defendant to finish off the survivor, but defendant refused.

In support of the murder-for-hire theory, Millot testified that Adair had always provided Tom with a vehicle, a job, and money. Nevertheless, a couple months before the murders, Adair told Millot that he intended to disinherit Tom, leaving him with just enough for an education. Adair even read Millot the codicil changing his will.

Adair's brother testified that Adair was constantly bailing Tom out of financial trouble. But, a couple months before the murders, Adair told his brother that he wanted to remove Tom from his will and insurance policies because their relationship had soured and Adair felt he was being used by Tom.

After Adair died, Tom became the beneficiary of $160,000 in insurance policies and investments. Tom also received most of the probate estate, including $300,000 in real estate and furniture that would have gone to Mix.

Defendant testified on his own behalf, claiming that Tom asked him if he was interested in a job working at Adair's house. At Tom's request, Adair interviewed defendant and recorded some personal information before hiring him. For the first couple of months, defendant was alone in the house most of the time because Adair and

Mix were in the Los Angeles area. During this time, Tom visited regularly, and defendant and Tom frequently talked on the telephone.

Defendant admitted that Adair and Millot ejected him from the house a few weeks before the murders. At that time, defendant called Tom, who said defendant should call the police to see if he could get back in. The police talked to Adair, but ultimately told defendant that it would be best if he left. Defendant did not mind leaving because he was unhappy with the situation, so he went to Tom's house and asked Tom to take him to his grandmother's house in the Los Angeles area. Tom agreed to do so, dropped defendant off at the Chinese restaurant for a last day of work, and went to get defendant's belongings from Adair. After work, Tom said that Adair wanted to talk to defendant. Adair apologized for throwing defendant out and took him back.

The day before the murders, Adair asked defendant to drive him to pick up Mix at the airport the next day and defendant agreed to do so. However, defendant went out that night with a girlfriend, had too much to drink, and did not make it home the next day. When defendant called Adair to say that he was unable to drive him to the airport, Adair was disappointed.

Later that day, Tom called defendant, picked him up, and took him to Adair's house. Upon entering the house, defendant saw that Adair appeared to be showing defendant's room to a couple of women as if he intended to rent it to them. Defendant thought Adair was upset about the airport and was going to eject him from the house

again. Defendant did not want anymore headaches and was not making much money, so he began packing to leave.

While defendant was packing, Tom interrupted and asked defendant to go with him to an auto parts store. Defendant agreed to go. When Tom returned defendant to Adair's house, Adair and Mix were the only ones there. Adair asked defendant if he was planning to leave and he said yes. Because Mix was there to pick up the car and drive it to Los Angeles, defendant asked Mix to drive him to his grandmother's house in the Los Angeles area. Mix agreed to do so, so defendant got the car keys and began loading his belongings into the car. While defendant was loading the car, Adair and Mix went into the bedroom and began arguing. After waiting 20 minutes for them to finish, defendant decided to take the car himself, which he admitted was a bad idea.

Defendant drove to Carson and stayed with some friends in that area. Defendant abandoned the car nearby with the keys in the ignition. Defendant claimed that when he was confronted by the police a few days later, he tried to hide his identification because he thought he would get in trouble for stealing Adair's car.

Defendant claimed that he never met the jailhouse informant and had never seen the gun before. Defendant denied talking with Tom about Adair's money, but admitted that Tom mentioned that Adair was well-off. Defendant denied conspiring with Tom to kill Adair or Mix, denied having any communications with Tom after the murders, and denied getting any financial benefit from their deaths.

Defendant was again found guilty and sentenced to 70 years to life.

DISCUSSION

1. *Informant's Credibility*

On appeal, defendant argues that the prosecution presented false testimony that the jailhouse informant received nothing for testifying against defendant. Although we agree that some of the prosecution's testimony falsely bolstered the informant's credibility, we find no resulting prejudice.

a. *Informant's Plea History*

During defendant's first trial in the summer of 1997, the prosecutor in this case, Deputy District Attorney (DDA) Paul Vinegrad, called the jailhouse informant's prosecutor, DDA Robert Spira, to testify about the informant's plea bargain in an effort to bolster the informant's credibility. Spira testified that the informant pleaded guilty to voluntary manslaughter with a firearm-use enhancement, and was to receive a reduced sentence of 14 years and a housing recommendation for providing additional information about a coparticipant in his own case, but not for providing information about defendant. Although Spira insisted that the informant's plea deal was not contingent on testifying against defendant, he testified that the informant's sentencing hearing had been continued until after defendant's first trial because "you do not give anyone the benefit of a bargain until they have testified and testified truthfully in whatever proceeding they may become involved in," "I certainly want him to believe that he is under an obligation to give truthful testimony," and "in terms of [the informant's] hoped-for perception, that his obligation is to continue to testify truthfully." When pressed on the issue, Spira testified:

"I assume communications have been made to [the informant] as regards this case. I have not made those communications. I do not know what those communications are."

The informant testified at the first trial that other than a housing recommendation, no promises or consideration had been given to him in exchange for his testimony against defendant. However, the informant admitted that an investigator told him that he would get a recommendation letter from the prosecutor in defendant's case, although there was no "guarantee" that the recommendation would result in a plea reduction.

Defendant was convicted and immediately appealed. On February 20, 1998, while defendant's appeal was pending, the informant was finally sentenced. At the sentencing hearing, the informant's attorney asked the trial court to unilaterally reduce the plea bargain "primar[ily]" because of the informant's testimony against defendant. The informant's attorney claimed that although the district attorney's investigator had given the informant a reason to expect a reduction, the district attorney's office refused to agree to a reduction because it wanted to protect the record in defendant's case, which was pending on appeal.

DDA Spira confirmed that they refused to reduce the plea bargain in part because of the pending appeal in defendant's case. When Spira also argued that the informant should not have expected a further reduction, the trial court appeared unconvinced: "Well, I guess [the informant] went up to Indio [on defendant's case] as a favor, testified, and wasn't really expected to get anything because he knew all he was going to get is 14 years, based on the agreement here in Riverside. Just kind of an extra thing he threw in

to go up there and testify in Indio [against defendant]. Is that essentially what happened? [¶] Just, you know, he says, well, heck, I will go up and testify in another murder case and just -- I don't expect anything from them. I will go up and subject myself to this again. [¶] . . . [¶] . . . I guess he went up there with -- I guess he didn't even have to help. There wouldn't be any further recommendation as to a downward departure from the sentencing. I mean, nobody represented to him in any fashion maybe you'd get something for going up here. It's just nice that you're coming up here, I guess, essentially."

Although the trial court recognized that it had no authority to reduce the informant's plea bargain without the prosecution's consent (see § 1192.5), it asked the prosecutors what they would do if it unilaterally reduced the plea. Although the prosecutors reiterated that they would not stipulate to a reduction "because members of this office have made good faith representations to another judge and another jury, accurate representations from the knowledge that they had," they nonetheless indicated that they would not challenge a unilateral reduction by appeal or writ. After additional discussions, the parties submitted the matter and the trial court sentenced the informant to 11 years, thereby unilaterally reducing the plea bargain by three years.

After the informant was sentenced, we reversed defendant's convictions and remanded for a new trial. (*People v. Baca*, *supra*, E021093.) In the months preceding defendant's second trial, there were two more hearings on the informant's sentence prompted by remands from the California Department of Corrections (CDC). In

February 2002, the CDC noted an error in calculating presentence credits, which prompted a modification of presentence credits and nothing more. In June 2002, the CDC noted that the court had used the wrong term for the firearm-use enhancements, which resulted in a resentencing and a further reduction of one year, resulting in a 10-year sentence. DDA Spira represented the People at both hearings.

b. *Misleading Testimony*

Defendant's second trial began in October 2002, shortly after the aforementioned modifications to the informant's sentence. DDA Spira testified again and generally repeated his prior testimony describing the informant's plea bargain. However, Spira added a new wrinkle, claiming that during plea negotiations they were working under the assumption that the informant would earn 50 percent good time credits and therefore only have to serve half of his sentence. Spira claimed that the informant was actually sentenced in December 1997 to the agreed-upon 14 years, but the sentence was reduced to 11 years on February 20, 1998 after the CDC noted that the informant was only entitled to 33 percent credits. Spira claimed that the trial court picked the term of 11 years in an effort to approximate the same seven years of actual incarceration that the original 14-year sentence would have provided with 50 percent credits. Spira was asked: "Bottom line, on February 20th, 1998, when [the trial court] reduced [the informant's] sentence from 14 years to 11 years, did that have anything at all [to] do with [the informant's] subsequent coming in to court and testifying in [defendant's] case?" Spira responded: "No, it did not. It was referred back by the Department of Corrections. It did

not come from court here. It was a referral back from the state Department of Corrections for a clarification and amendment." On cross-examination, Spira further explained: "I think probably the best way of putting it, in . . . the February 20, 1998, sentencing modification . . . [the trial court] was essentially acting with the authority of the court in the sense that he knew what the intention was. And so it was his show, so to speak, in trying to roughly fashion implementation of that intent. [¶] So the bottom line is that while I was present . . . , as was [the informant's attorney], we really didn't have input, per se, as to what the judge did. He simply said, cutting to the chase, this is what I think needs to be done in order to effect what was intended." DDA Spira also testified that the informant did not request any sentence reduction in exchange for cooperating against defendant.

The informant similarly testified at the second trial that he never provided information about defendant in order to help himself. The informant replied "No" when asked whether he had "contact[ed] any -- the district attorney, the police department, anybody, investigators, people from the district attorney's office, either through yourself or through your attorney to try to get you some kind of leniency in this case if you gave information about [defendant's case]?"

Unfortunately, the testimony from the second trial bears only a superficial resemblance to reality. While it is true that an 11-year sentence was imposed on the informant in February 1998 and the CDC eventually noted an error in calculating credits, those two events were wholly unrelated. As we have previously described, the informant

was actually sentenced for the first time to 11 years in February 1998, while the credit calculation error did not even arise until February 2002, nearly four years later. And we find it difficult to believe that Spira accidentally confused these hearings. Spira was actively involved in both hearings; the February 1998 sentencing hearing was peculiarly memorable; there was a lengthy gap of four years between the two hearings; and the February 2002 modification occurred just eight months before Spira testified at defendant's second trial. By conflating these two entirely separate events, Spira managed to conceal the only facts that were favorable to the defense at the second trial: that the trial court unilaterally reduced the informant's plea bargain as a reward for testifying against defendant, after assurances from the prosecution that it would not seek review to enforce the terms of the plea bargain. Furthermore, the claim that the informant never requested leniency for testifying against defendant is sheer fantasy for the simple reason that he actually got just that, which never would have happened if he had not actively pursued it.

c. *The People's Response*

The People respond that it was unclear why the trial court reduced the informant's plea bargain at the February 20, 1998, sentencing hearing. The People note that the trial court indicated it was reducing the informant's sentence based on the "equities of the whole thing . . . look[ing] at the overall occurrence here," but never specified what it meant by "equities." The People offer some alternative "equitable" reasons why the trial

court may have reduced the sentence, such as the informant's assistance in other cases or the informant's exemplary family life.

The People's attempt to blur the record is not effective. The "equities" comment came at the end of the hearing after both sides had submitted the matter. The trial court said in whole: "The Court after listening to -- at least all of the evidence that was presented to the Court and to some extent trying to look at the equities of the whole thing and with the understanding that the Court is not in any way saying that the People made any particular representations or promises in the Indio case [defendant's case], and I so find. I still think that the Court, since it's being asked to look from the standpoint of a downward departure, does in somewhat look at the overall occurrence here and what had occurred." The trial court specifically mentioned the alleged promises regarding defendant's case, and that was the only issue that the parties attempted to address with "evidence." Furthermore, the trial court had previously mentioned the "equities" during a discussion that related solely to whether the informant was entitled to a unilateral reduction for testifying against defendant: "Well, let's -- let me put it this way. Accepting those representations that [the prosecutors] make, and there was really no promises or other thing -- other statements made to [the informant] that would depart even further from the 14 years that had been mentioned, if the Court, just in looking at maybe the sense of equities and what has gone on, and based on the information provided to the Court, it would elect to, say, make some downward departure, maybe not substantially, but some downward departure, just based on the equities, are the People in

opposition to this?" Thus, the "equities" refers primarily, if not solely, to the informant's testimony in defendant's case. The alternative "equitable" reasons noted by the People, such as defendant's family life, pale in comparison to the informant's testimony against defendant, which was, in the words of the informant's own attorney, the "primary" issue at the hearing.

The People also note that the testimony can be parsed in such a way as to make it true, or at least not clearly false. For instance, the People argue that when the informant was asked whether he contacted anyone to ask about leniency in exchange for information about defendant, it was unclear whether that would apply to contacts *after* he had already supplied the information. Similarly, the People note that DDA Spira was consistently asked whether the informant got anything in "exchange" for or as "consideration" for his testimony against defendant, a choice of words that might arguably refer to reductions as part of a plea bargain, not unilateral reductions by the trial court.

This sort of hypertechnical parsing does not dispel the highly misleading nature of the testimony, which sent a single, unwavering, blatantly false message to the jury: that the informant sought nothing and got nothing for testifying against defendant. The testimony concealed the fact there was "a-wink-and-a-nod" agreement between the prosecution and the court. The prosecution effectively gave the court the green light to deviate from the plea bargain to reward the informant for his testimony by stating that it would do nothing to enforce the district attorney's benefit of the bargain. The only

person who had a right to complain agreed not to. And, regardless, there is no way to parse DDA Spira's mischaracterization of the February 1998 hearing, which was decidedly not a mere sentence modification prompted by the CDC to correct a credit calculation error. That occurred much later.

d. *Judicial Notice*

Perhaps sensing the futility of arguing the accuracy of the testimony, the People put considerable effort into arguing that we should not take judicial notice of the informant's sentencing records that prove the inaccuracies. These arguments are equally futile. We have the discretion to take judicial notice of court records regardless of whether the parties raised the matter. (Evid. Code, §§ 452, subds. (c) & (d), 459.) It would be a grave disservice to the cause of justice if we were to turn a blind eye to evidence of misleading testimony by refusing to exercise that discretion.

The People also argue that appellate courts should refrain from taking judicial notice of matters that were not presented below where to do so would unfairly permit one side to raise a new theory on appeal. (*People v. Sakarias* (2000) 22 Cal.4th 596, 636.) But we are dealing with the question of ineffective assistance of counsel for failing to use this evidence to impeach misleading testimony (see *infra*, § 1(f)), an issue that could not have been raised below, fairly or otherwise, precisely because of the alleged ineffective assistance. The People also note that "[t]he underlying theory of judicial notice is that the matter being judicially noticed is a law or fact that is *not reasonably subject to dispute*" (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91

Cal.App.4th 875, 882), and argues that there is a reasonable dispute over why the trial court unilaterally reduced the informant's sentence. We already rejected this argument above and see no reason to rehash that discussion. (See *supra*, § 1(c).) The issue is not why the court reduced the sentence, but why the reduction was hidden from the jury behind a false explanation.

e. *Prosecutorial Misconduct*

Defendant argues that the prosecution committed misconduct by failing to disclose the informant's sentencing records, which could have been used to impeach the aforementioned testimony. (See *Brady v. Maryland* (1963) 373 U.S. 83, 87.) This argument fails for several reasons. First, it was waived because it was not raised below. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1253 [prosecutorial misconduct based on false testimony].) Second, it simply is not supported by the record. Prior to trial, DDA Vinegrad offered to make DDA Spira's entire file on the informant available for review, an offer that was expressly accepted by defendant's attorney. Third, DDA Vinegrad had no obligation to disclose this information because it was a matter of public record. (*U.S. v. Delgado* (6th Cir. 2003) 350 F.3d 520, 527.) In fact, we know that the defendant already had access to the reporter's transcript of the informant's February 1998 sentencing hearing because defendant asked this court to take judicial notice of that very same transcript during his prior appeal.

f. *Ineffective Assistance of Counsel*

Our conclusion regarding prosecutorial misconduct only highlights another obvious area of inquiry: ineffective assistance of trial counsel. In order to demonstrate that counsel's performance was unconstitutionally deficient, a defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.) Counsel's performance appears to have fallen well below any such standard. The informant was a key witness whose credibility was obviously in issue. The evidence necessary to challenge the informant's credibility (the informant's sentencing records and prior testimony) was readily available long before trial. Any reasonably competent attorney would have been familiar with that evidence and used it to challenge the misleading testimony.

g. *Prejudice*

In order to establish that counsel's ineffectiveness violated the state or federal Constitution, a defendant must demonstrate that counsel's inadequate performance resulted in prejudice. (*In re Resendiz* (2001) 25 Cal.4th 230, 239.) In order to prove prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

Prejudice is a close question, but, in the end, we do not see a reasonable probability of a different outcome. The case against defendant was strong even without

the informant's testimony. Adair clearly identified defendant as the shooter and defendant was found near Adair's missing car. Furthermore, a three-year reduction from a 14-year plea bargain was unlikely to have much affect on the informant's credibility in the eyes of the jury. It is unlikely a jury would find a witness with a 14-year plea bargain credible, but not credible with an 11-year agreement. The very nature of a jailhouse informant renders his testimony suspect even without any evidence of an explicit quid pro quo. Lastly, some of the details recited by the informant could only have come from an insider, such as the references to a Chinese restaurant and a .38-caliber gun. Thus, we find no reversible error.

2. *Hearsay Testimony Regarding Adair's Identification of Defendant*

Defendant also argues that Adair's identification of him was inadmissible hearsay. We disagree.

Adair's identification of defendant was admitted under the spontaneous declaration exception to the hearsay rule. A spontaneous declaration is defined as a statement that "[p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant . . . made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) Whether a statement is spontaneous depends on a determination of preliminary facts by the trial court, which will be upheld so long as it is supported by substantial evidence. (*People v. Brown* (2003) 31 Cal.4th 518, 541 (*Brown*).)

Defendant contends that Adair's statements identifying him as the shooter were not spontaneous because they were preceded by a significant lapse of time and were elicited by the deputies. As circumstantial evidence of the declarant's mental state, those factors are clearly important in assessing spontaneity. (*Brown*, *supra*, 31 Cal.4th at p. 541.) But those factors are not determinative if it nevertheless appears that the statements were made under the stress of excitement while the reflective powers remained in abeyance. (*Ibid*.)

We conclude that the deputies' testimony provides substantial evidence that Adair was still under the stress of excitement when he finally identified defendant. The deputies found Adair pacing back and forth with a blood-soaked towel pressed against his face. Adair repeatedly said "Oh my God" and "help him," referring to his companion, Mix. Whenever Adair tried to speak, he would remove the bloody towel from his face and begin bleeding again. The deputies described Adair as being in "bad condition," "bleeding quite a bit," "very agitated," and "pretty upset."

Our conclusion is not altered by the fact that Adair was unable to identify his assailant during the initial 911 call. Although that may indicate that Adair actually engaged in some reflection, the deputies' observations show that Adair was under the stress of excitement when he made the identification. Thus, there was substantial evidence to support the trial court's finding of spontaneity.

3. *Confrontation Clause*

We requested supplement briefing to address the question of whether hearsay regarding Adair's identification of defendant violated the confrontation clause as recently intepreted in *Crawford*, *supra*, 124 S.Ct. 1354. Prior to *Crawford*, the admission of spontaneous declarations such as these did not violate the confrontation clause because they were considered to be a firmly rooted hearsay exception that carried sufficient "indicia of reliability." (*Brown*, *supra*, 31 Cal.4th at p. 542.) However, while this appeal was pending, the *Crawford* majority rejected the "indicia of reliability" analysis in regard to "testimonial" hearsay, concluding instead that the confrontation clause strictly prohibits the use of "testimonial" hearsay absent an opportunity for cross-examination. (*Crawford*, *supra*, 124 S.Ct. at p. 1365.)

Thankfully, we need not decide whether the identification of defendant was "testimonial" and therefore inadmissible under *Crawford.*[2] As the People note, *Crawford* expressed its continued support for the longstanding rule of forfeiture by wrongdoing.

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[2] This court recently published a case on this issue that involved similar factual circumstances. (*People v. Cage* (2004) 120 Cal.App.4th 770, review granted Oct. 13, 2004, S127344 (*Cage*).) In *Cage*, a victim who was at the hospital awaiting treatment was asked what happened by a police officer and responded by describing how the defendant assaulted him. (*Id*. at p. 774.) This court found no confrontation clause violation because, unlike the justice of the peace pretrial examinations that provided the motivation for the confrontation clause, the *Cage* interview was informal, occurred in a neutral location, no suspects had yet been arrested and no trial was yet contemplated, and the interview was not structured or recorded. (*Id*. at pp. 784-785.) If we were to apply *Cage* to the similarly informal circumstances of this case, we would find no "testimonial" hearsay that would violate *Crawford*. However, the Supreme Court has accepted *Cage* for review.

(*Crawford*, *supra*, 124 S.Ct. at p. 1370.) The forfeiture rule was described in the seminal case of *Reynolds v. U.S.* (1878) 98 U.S. 145, where the defendant concealed one of his wives in order to defend against a bigamy prosecution: "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated. . . . The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong[.]" (*Id.* at pp. 158, 159.) This court recently recognized the forfeiture rule (*People v. Jiles* (2004) 122 Cal.App.4th 504, 511), along with our colleagues in Division Six of the Second Appellate District (*People v. Giles* (2004) 123 Cal.App.4th 475, __ [19 Cal.Rptr.3d 843, 849] (*Giles*)). This rule has also been applied by every federal circuit that has addressed the issue (see *U.S. v. Dhinsa* (2d Cir. 2001) 243 F.3d 635, 651 [collecting cases] (*Dhinsa*)) and many of our sister states (*e.g.*, *State v. Meeks* (Kan. 2004) 88 P.3d 789, 794-795 (*Meeks*)).[3]

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[3] The rule of forfeiture by wrongdoing has also been codified in rule 804(b)(6) of the Federal Rules of Evidence. California codified a similar, but much more limited

[footnote continued on next page]

In applying the rule of forfeiture by wrongdoing, the federal courts require the prosecution to prove, by a preponderance of the evidence, that the defendant (1) was involved in procuring the unavailability of a hearsay declarant, and (2) did so, at least in part, with the intention of making the declarant unavailable as a potential witness. (*Dhinsa*, *supra*, 243 F.3d at pp. 653-654; *U.S. v. Emery* (8th Cir. 1999) 186 F.3d 921, 926-927 (*Emery*); *U.S. v. White* (D.C. Cir. 1997) 116 F.3d 903, 912 (*White*); *U.S. v. Houlihan* (1st Cir. 1996) 92 F.3d 1271, 1279-1280 (*Houlihan*).)[4] Furthermore, federal courts generally permit the prosecution to rely on the challenged hearsay when proving those elements. (*White*, at p. 914 [leaving "for another day the issue of whether a forfeiture finding could rest *solely* on hearsay"]; *U.S. v. Mastrangelo* (2d Cir. 1982) 693 F.2d 269, 273; see *Emery*, at p. 927 ["inclined to doubt" that wrongful procurement must be proven independently of the challenged hearsay].)

Nevertheless, there is some conflicting authority regarding whether the rule of forfeiture by wrongdoing applies to cases such as this, where the defendant is being prosecuted for the same conduct that rendered the hearsay declarant unavailable. Most

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forfeiture rule. (Evid. Code, § 1350.) California's rule did not apply in this case because, among other things, it requires that the hearsay be memorialized in a tape recording or a notarized written statement signed by the declarant. (*Id*., subd. (a)(3).)

[4] The Fifth Circuit applied a clear and convincing evidence standard. (*U.S. v. Thevis* (5th Cir. 1982) 665 F.2d 616, 631.) But that view remained isolated to the Fifth Circuit and was rejected by the drafters of rule 804(b)(6) of the Federal Rules of Evidence.

courts have had little difficulty applying the forfeiture rule under these circumstances. (*Dhinsa, supra*, 243 F.3d at p. 653; *Emery, supra*, 186 F.3d at p. 926; *Meeks*, *supra*, 88 P.3d at p. 794 [finding no "bootstrapping" problem].) However, in *U.S. v. Lentz* (E.D.Va. 2002) 282 F.Supp.2d 399 (*Lentz*), the district court refused to apply the forfeiture rule under similar circumstances, holding that the forfeiture rule would violate the presumption of innocence and the right to a jury trial because the court would be required to make a preliminary determination of guilt before trial. (*Id.* at p. 426.)

We are not persuaded by *Lentz*. Most federal courts do not even require a preliminary determination; instead, they allow the hearsay to be admitted at trial contingent on proof that defendant wrongfully procured the unavailability of the declarant. (*Emery, supra*, 186 F.3d at p. 926; *White*, *supra*, 116 F.3d at pp. 914-915; *Houlihan*, *supra*, 92 F.3d at p. 1281, fn. 5.)[5] Even if a preliminary determination were required, it would not amount to a finding of guilt because the prosecution need only prove wrongful procurement by a preponderance of the evidence, not beyond a reasonable doubt. And even if a preliminary determination did amount to a finding of guilt, nothing prevents the trial court from maintaining the presumption of innocence by submitting the issue of guilt to a jury that is wholly unaware of the court's prior decision in that regard. Lastly, the procedures for addressing forfeiture by wrongdoing were

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[5] Even the circuits that require a preliminary determination have found the failure to do so to be harmless so long as substantial evidence of forfeiture is produced at trial. (*E.g., Dhinsa*, *supra*, 243 F.3d at p. 656.)

drawn from the coconspirator hearsay exception, which has never posed a constitutional problem despite the fact that it requires a pretrial determination of whether there was a conspiracy. (*Emery*, at p. 926; *White*, at p. 915; *Houlihan*, at p. 1280; *Giles*, *supra*, 19 Cal.Rptr.3d at p. 849.)

Applying the foregoing standards, it appears defendant has forfeited his confrontation clause claim. The facts produced at trial, including Adair's identification of defendant and the jailhouse informant's testimony, easily prove by a preponderance of the evidence that defendant killed Adair.

However, the unique circumstances of our case make it difficult to prove that defendant acted with the requisite intent to silence the witness. Cases applying the rule of forfeiture by wrongdoing usually involve situations where the hearsay declarant was aware of criminal conduct other than that causing unavailability and was obviously killed in order to prevent him from testifying about that other criminal conduct. For instance, in *Dhinsa*, *supra*, 243 F.3d 635, a gas station owner was alleged to have killed two employees who discovered a pump-rigging scheme for overcharging customers. (*Id*. at pp. 643-645.)

On its face, our case does not fit that pattern. By all appearances, this was a typical murder for hire, where defendant killed Adair for financial gain, not to silence him. (See *Wyatt v. State* (Alaska 1999) 981 P.2d 109, 115, fn. 11 [refusing to apply the forfeiture rule to a defendant who murdered a spouse who threatened a divorce because "[t]he cases espousing this rule all involve a defendant who has intentionally acted to

silence an individual *in order to* prevent the witness from testifying against the defendant on another criminal matter"].)

Regardless, two circumstances allow for an inference that defendant killed Adair in order to silence him. First, because there were two murders, it can be inferred that defendant killed Adair in part to prevent him from testifying about the murder of Mix. Second, it could be inferred that defendant killed Adair in part to prevent him from testifying about future crimes that defendant intended to commit, such as the theft of Adair's car. Either inference would be sufficient to support an intent-to-silence finding.[6] As such, we conclude that defendant has forfeited his confrontation clause claims.

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[6] We are not convinced that the rule of forfeiture by wrongdoing properly includes an intent-to-silence element. The intent-to-silence element arises from the erroneous use of a "waiver-by-misconduct" label. Because a "waiver" is an intelligent relinquishment of a known right, the intent-to-silence element was added in order to establish that the defendant was on notice that the declarant was a potential witness and therefore knowingly relinquished his right to cross-examine that witness. (*Houlihan*, *supra*, 92 F.3d at pp. 1279-1280.)

But this rule is characterized by the Supreme Court as a "forfeiture" that "extinguishes confrontation claims on essentially equitable grounds," not a waiver. (*Crawford*, *supra*, 124 S.Ct. at p. 1370.) As a forfeiture, there is no need to prove an intelligent relinquishment of a known right (see *U.S. v. Olano* (1993) 507 U.S. 725, 1777; *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371), and no corresponding need to establish that the defendant was on notice that the declarant was a potential witness.

Ultimately, if the forfeiture rule is to further the maxim that "no one shall be permitted to take advantage of his own wrong" (*Reynolds v. U.S.*, *supra*, 98 U.S. at p. 159), then the motivation for the wrongdoing must be deemed irrelevant. Whether a murder is motivated by a desire to silence a witness, financial gain, or mere sadism, the murderer should not be permitted to gain an advantage.

On this issue we generally agree with *Giles*, *supra*, 19 Cal.Rptr.3d 843 once again. However, we feel compelled to note that the intent-to-silence element is firmly ensconced in the forfeiture-by-wrongdoing case law. Although we are respectful of this contrary authority, we believe it to be misguided on this point.

4. *Failure to Call Logical Witness*

Defendant argues that the prosecution impermissibly shifted the burden of proof by arguing during closing arguments that defendant should have called Adair's adopted son Tom as a witness to deny the murder-for-hire plot. We disagree. "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.) The prosecutor merely commented on the failure to produce Tom as a witness; he did not claim that defendant had a duty or a burden to do so.

Defendant also claims that the argument was improper because the prosecutor knew that Tom would not testify. But we fail to see how anyone could have known that, given that Tom testified during the first trial.

5. *Judicial Determination of Aggravating Factors*

We requested supplemental briefing to address the impact of *Blakely*, *supra*, 124 S.Ct. 2531 on the use of aggravating factors necessary to impose the upper term on the firearm-use enhancements. We find no *Blakely* error. The trial court imposed upper terms because the crime involved great violence, was particularly cruel or vicious, and involved a certain degree of planning, plus defendant was armed, took advantage of a position of trust, and had a prior criminal record. For the most part, these factors do not require further jury findings under *Blakely* because they involve recidivism or are

inherent in the jury verdict of guilt on two counts of murder with a firearm. (*People v. Butler* (2004) 122 Cal.App.4th 910, 917-918, 920; *People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1369-1370.) Even if we ignore factors that were not clearly included in the jury verdict--such as the degree of planning--the remaining aggravating factors are more than sufficient to justify the upper term, particularly since the trial court found no mitigating factors. (*Butler*, *supra*, at pp. 919-921.)

6. *Greater Sentence Following Retrial*

Defendant was originally sentenced to a total of 55 years four months, consisting of two 25-to-life terms, plus a four-year midterm for the firearm-use enhancement on count 1 and one-third the midterm (one year four months) for the firearm-use enhancement on count 2. The Supreme Court subsequently clarified that the "one-third" limitation on subordinate, consecutive terms (§ 1170.1, subd. (a)) does not apply to enhancements attached to indeterminate terms. (*People v. Felix* (2000) 22 Cal.4th 651, 656 (*Felix*).) As a result, following retrial, defendant was sentenced to the full 10-year upper term on both firearm-use enhancements, for an aggregate sentence of 70 years to life. Defendant argues that the increased sentence following retrial constitutes double jeopardy. We agree, in part.

The double jeopardy clause of the California Constitution prohibits the imposition of a greater sentence following retrial, except when the original sentence was unauthorized. (*People v. Serrato* (1973) 9 Cal.3d 753, 765, rejected on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572.) An unauthorized sentence "is subject to

being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement." (*People v. Serrato*, *supra*, at p. 764.)

Defendant concedes that his original sentence improperly included a one-third term on the firearm-use enhancement in count 2 in violation of *Felix*, *supra*, 22 Cal.4th at page 656, but argues that it was not "unauthorized" because it predated *Felix*. We disagree. *Felix* applied only to sentencing and was therefore fully retroactive. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 530, fn. 13; cf. *People v. Statum* (2002) 28 Cal.4th 682, 694-695 [prospective-only application of new sentencing rule only warranted by unique considerations of fundamental fairness].)

Defendant also argues that the trial court was prohibited from increasing the firearm-use enhancement in count 1 to the 10-year upper term because the original four-year midterm was a full term that did not violate *Felix*. This argument is well taken. Insofar as the aggregate sentence is increased following retrial, each individual component of the sentence must separately comply with the double jeopardy rule. (*People v. Price* (1986) 184 Cal.App.3d 1405, 1413.) Thus, in our case, the court could only increase the unauthorized firearm-use enhancement in count 2. As a result, the sentence on the firearm-use enhancement in count 1 is reduced to the original four years.

DISPOSITION

The sentence for the firearm-use enhancement in count 1 is reduced to four years and the judgment is affirmed as modified.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ Richli
J.