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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. IRVING TORRES, Defendant and Appellant.	B256214 (Los Angeles County Super. Ct. No. BA389057)

APPEAL from a judgment of the Superior Court of Los Angeles County, Monica Bachner, Judge. Reversed and remanded for resentencing; otherwise affirmed.

Sara H. Ruddy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Irving Torres guilty of the first degree murder of his ex-girlfriend and found true a personal gun use allegation. The jury found not true a gang allegation. Nonetheless, defendant contends that admission of gang evidence was an abuse of the trial court's discretion and violated his due process rights. He also contends that the judgment must be reversed, because the court gave a "dynamite" instruction that coerced a verdict, and because of juror misconduct. We reject these contentions, but we do find that the matter must be reversed and remanded for reconsideration, under *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] (*Miller*), of defendant's 50-years-to-life sentence.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *December 2, 2007: the murder of Diana T.*

In 2007, Diana T. was 14 years old.[1] She lived with her mother in an area dominated by Temple Street gang. Defendant, who was then 15, lived a block away. Defendant was in Temple Street gang, and his moniker was Lazy or Trigger or Triste (Sad Boy). Diana and defendant dated for two-to-three months, but they broke up in May 2007. Diana started dating Osmon Ruiz.

In approximately November 2007, defendant told Janine Tapang and Jasmin Anguiano, friends of Diana, he would "put a bullet in that bitch's head," referring to Diana.[2] When Janine suggested Diana was pretty, defendant said, "Fuck that hood rat." Diana, who was there, tapped defendant's arm and told him, "Fuck you." At some point in time, defendant said, "I want to fucking kill her," again referring to Diana.

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[1] Because many witnesses were juveniles at the time of these events we sometimes use first names.

[2] He said this twice, although it is unclear whether it was on one or two occasions.

On December 1, 2007, Diana went to the Santa Monica Pier with Jasmin and Osmon. Jasmin and Diana lived across the street from each other, in different apartment buildings. According to Osmon, they returned to Osmon's uncle's home after midnight, and Osmon and his uncle walked Diana home.[3] They saw defendant, who was with one or two people. Defendant walked toward them, and, when he was about 20 feet away, Diana kissed Osmon on his cheek. She had never done that before. Defendant walked by and "stared at us" "like serious."

The next day, December 2, 2007, Diana left her apartment at 1:00 p.m., after telling her mother she was going to McDonald's with friends. Diana went to Jasmin's apartment. While Jasmin showered, Diana and Jasmin's sister, Alexandra, waited on the outside front steps. Defendant came by and asked Diana if she wanted to take a walk. From his window, Osmon saw Diana, defendant, and "the friend" talking at about 1:00 p.m. Diana left with defendant. Jasmin saw Diana walking away with defendant on Coronado toward the 101 Freeway. They turned left, onto London. Thinking that Diana was going to come back, because they had planned to go to McDonald's, Jasmin waited. Diana never returned.

Asuncion Torres lived nearby on North Lafayette Park Place. At about 2:00 p.m., a neighbor told Torres a body was in the alley. Torres went to the "sidewalk alley," which was a walkway separated from the 101 Freeway by a wall. Diana was on the ground, face up. She had been shot in the right side of her forehead, but she was still breathing. There was stippling around the wound, indicating that she was shot at close range, typically within 18 inches to two feet. Diana was taken to the hospital, but she was not identified until days later. She died on December 6, 2007.

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[3] Jasmin, however, testified that when they returned from the Pier, she and Diana went to Jasmin's, and Diana stayed the night. Osmon did not walk Diana home. Jasmin did not see defendant that night.

Five feet from Diana's body on the wall was Temple Street graffiti in colors that included yellow and blue. "Baby Shadow," "Lazy," and "Lucky" were spray painted in yellow on the wall. To the responding officer, the yellow and blue paint appeared to be fresh: "You get a lot of dust in that area, especially coming over the freeway. Cars kick it up. Brake dust. And it adheres to the wall where the blocks come to the concrete block walls. You have the same – you can run your finger across, and it comes away with dust. I didn't find any of that on the newer taggings, the yellow and the blue. Plus it wasn't faded. As you can see on other taggings, were kind of faded. It was brilliant in color."[4] Blue and yellow spray cans were recovered from within 10 feet of Diana's body. The spray cans appeared to be new, because they were not rusted. A fingerprint on a can did not belong to defendant.

That evening of December 2, 2007, Alexandra saw defendant at about 5:00 p.m. in clothes different than the ones he had been wearing earlier in the day. She asked where Diana was, and he said he gave her money to go on the bus and she was never coming back. Jasmin also asked defendant where was Diana. He said he gave Diana a dollar to go on the bus, and he didn't know where she was. Smirking, defendant said she wasn't coming back. Jasmin accused defendant of taking Diana and not bringing her back. Defendant laughed. Jasmin noticed that defendant had a teardrop tattoo and three dots. Jasmin thought that a teardrop means "they have killed somebody."

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[4] "Normally," the officer would touch the paint to see if it was wet, but he could not recall whether he did that or whether the paint was wet.

The next day, Jasmin again accused defendant of killing Diana. He laughed and said Jasmin shouldn't bother looking for Diana, that she wasn't going to come back. He gave her a dollar to go on the bus. This didn't make sense to Jasmin, because Diana had money, she didn't need defendant's money. When the investigating detective spoke to Jasmin several weeks after the murder, Jasmin didn't tell him everything "because everything was really recent, and I lived in that neighborhood. I was scared."[5]

Alexandra testified that defendant had a teardrop tattoo the day after Diana went missing. The Tuesday after Diana disappeared, Diana's mother saw defendant. His face was swollen and he had two teardrops. Janine testified that about a month after Diana died, she saw defendant, who now had tattoos on his face.

B. *People's gang evidence.*

Police Officer Hugo Ayon testified about gangs. He first testified about how people join gangs. Usually, younger kids, between the ages of 12 and 15 or 16 start to hang around older gang members, idolizing them. The gang courts kids and then jumps them into the gang. "Putting in work" means to commit crimes on the gang's behalf. For the younger kids, this could mean putting up graffiti or fighting with rival gang members. Then it escalates to "transportation" and then to robberies, burglaries, "all the way up to shootings and then murders."

Young members are "new booties" or "youngsters." "Soldiers" are a "little step above." "Shot callers" are older guys with "more pull." An "OG" is an "original gangster," an older gang member who has been in and out of prison.

A gang's reputation follows the individual. "The more powerful a gang is perceived, the more it's feared, the more it's respected, the more the individual kind of carries that reputation with him." One of the most important things for a gang is to earn respect and to cause fear among enemies. This allows them to commit crimes without

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5 Neither Jasmin nor Alexandra told the investigating officer about defendant's comments when they were interviewed in 2008. They didn't mention these comments until 2011.

fear of people contacting the police. Snitching—cooperating with the police or providing information to the police—is "basically a death sentence."

To get its name "out there," a gang marks its and rival's territory with graffiti. Territory is important to a gang, because it's their "safe area." Also, the bigger the territory, the bigger the gang's clientele for narcotics sales and collecting taxes or rent. Gang members also use monikers to conceal their true identity.

It's common for gangs to have "community guns," guns that belong to the gang and that are passed from member to member on an as needed basis.

Temple Street gang has been around since 1923. In December 2007, it had between 150-to 200-active members. Officer Ayon personally spoke to over 100 members of the gang. He investigated vandalisms, burglaries, robberies, shootings, and murders committed by gang members. Temple Street's primary activities are vandalism, burglary, "leading all the way up to robberies, shootings and murders." The gang does not have a specific color, but it favors blue and black. The most common tattoos are TST, 1923, VTR, and T. They also have a gang sign. Symbols they commonly use when doing graffiti are "Temple Street" followed by "13" or "x3." When more than one moniker is present in graffiti, generally each person to whom the moniker refers was present when the graffiti was painted. There are a variety of reasons someone gets a teardrop tattoo: when somebody is killed, for dead family members, or because they've been in prison.

Officer Ayon first met defendant in early 2007, when defendant was not yet a member of Temple Street and did not have any tattoos. His moniker was Lazy, although at one point he used Baby Trigger.

Based on a hypothetical modeled on the facts of this case, Officer Ayon testified that such a crime benefits the gang. "It's important to note that there were also other members of Temple Street there with him. He was disrespected, and he was obligated to answer to that disrespect. By shooting the ex-girlfriend and killing her, he answered. He answered that disrespect." The act also enhances the gang's reputation "as a violent entity within that community" and "contributes again to the atmosphere of fear and

intimidation within that community[,] which benefits the gang, makes them seem larger or maybe more powerful than they actually are. It dissuades potential witnesses and even victims from cooperating with the police, testifying or even reporting crimes."

C. *The defense case.*

Defendant's gang expert disagreed that killing a child or a young girl is something that would be given the "green light." Committing such an act is "almost as bad as committing rape" and would not give the killer "esteem" in the gang. "[T]hey're more of a coward to the gang, and they would be looked upon in a negative light." But he agreed that a teardrop tattoo has a variety of meanings, including that you've lost someone close or that you've killed.

Defendant's brother, Christian (Baby Shadow), testified that he too was in the Temple Street gang. He was in juvenile camp when Diana was shot. He, not his brother, wrote the graffiti on the walkway in the beginning of 2007. Christian often saw Jasmin with defendant; they seemed to be friends and Jasmin was attracted to defendant. Jasmin also hung out with Temple Street gang members, and, although she was not a member of the gang, she was an affiliate.

Aide Villegas, who lived next door to Jasmin, agreed that defendant and Jasmin appeared to be friends. Jasmin's relatives were Temple Street gang members, and she hung out with Temple Street gang members.[6] Villegas never saw defendant mistreat Diana. Another good friend of Diana's, Nataly Cortes, never saw defendant physically abuse Diana. But Nataly noticed that defendant got a teardrop tattoo the day after Diana disappeared.

Defendant testified. He admitted he was a Temple Street gang member and that he saw Diana the afternoon she died; but he denied seeing her the night before she died, as Osmon had testified. The afternoon she died, Diana was in front of her house. Defendant called her over and asked her to return some movies. They spoke for less than

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6 Jasmin denied socializing with Temple Street gang members, although she knew gang members.

five minutes. Defendant did not kill Diana. He also denied writing the graffiti in the walkway. His teardrop tattoo was to commemorate a dead homey and to symbolize his moniker, Sad Boy.

Defendant also said that he and Jasmin were friends, and she socialized with Temple Street gang members. Neither Jasmin nor Alexandra asked him where was Diana.

Defendant denied telling a detective that Diana was a "ho" and a crack addict and was hanging out with "Popeye."[7]

II. Procedural background.

In 2012, an information was filed alleging that defendant killed Diana. (Pen. Code, § 187, subd. (a).)[8] The information also alleged personal gun use (§ 12022.53, subd. (d)) and gang (§ 186.22, subd. (b)(1)(C)) enhancements.

On July 12, 2013, a jury found defendant guilty of first degree murder and found the personal gun use allegation true. The jury found the gang allegation not true.

On April 9, 2014, the trial court sentenced defendant to 25 years to life for Diana's murder, plus a consecutive 25 years to life for the gun use. His total sentence therefore was 50 years to life in prison.

DISCUSSION

I. The admissibility of gang evidence.

Defendant contends that the trial court abused its discretion by denying his motion to bifurcate the gang allegation and that admitting gang evidence violated his federal due process rights. We disagree.

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[7] Defendant's statement to the detective in which he called Diana a "ho" and said she smoked crack and hung out with Popeye, who also smoked crack, was introduced to impeach defendant.

[8] All undesignated statutory references are to the Penal Code.

A. *Additional facts: the bifurcation motion.*

Before trial, the defense moved to bifurcate the gang allegation. As an offer of proof, the prosecutor represented that Diana's body was in a "walkway located four feet away from a fresh Temple Street tag which the defendant was a new member of" at the time the murder occurred. Next to her body were tags that included defendant's moniker, Lazy. The night before the murder, defendant saw Diana kiss another boy. "The defendant had seen this in front of his fellow gang members, and he let them know that that was not acceptable."[9] Defendant told the victim he wouldn't tolerate that and not to do it again, and he went back to his friends. A gang expert would testify that "this is one of the ultimate signs of disrespect" especially for a new gang member. Defendant was trying to make his name in the gang, and therefore could not tolerate being disrespected. The day after the murder, defendant got a teardrop tattoo, indicating someone had been killed. He told Jasmin and Alexandra that they'd better not come forward.

The trial court denied the motion to bifurcate, finding that the evidence was inextricably intertwined with the facts of the case and was relevant to motive, intent, and identity.

B. *By admitting gang evidence, the trial court did not abuse its discretion or deny defendant a fundamentally fair trial*.

A trial court has discretion to order bifurcation of a gang allegation from trial of the substantive offense. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1050 (*Hernandez*).) Bifurcation may be proper where gang evidence is "so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Id.* at p. 1049.) Still, "evidence of gang membership is often relevant to, and admissible regarding, the charged offense"; for example, to identity, motive, and specific intent. (*Ibid.*) Thus, to "the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any

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9 Osmon testified at trial that defendant was with "friends." Osmon did not say whether the friends were gang members.

inference of prejudice would be dispelled, and bifurcation would not be necessary." (*Id.* at pp. 1049-1050.) But even if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself—under Evidence Code section 352, for example—a court may still deny bifurcation. (*Hernandez,* at p. 1050.) Because public policy favors the efficiency of a unitary trial, a court's discretion to deny bifurcation of a gang allegation is broader than its discretion to admit gang evidence in a case with no gang allegation. (*Ibid*.)

We cannot find that the trial court abused its discretion by denying the bifurcation motion. Gang evidence is "relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167-1168.) " ' "[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." [Citations.]' " (*Id.* at p. 1168.) The gang evidence here was relevant to motive. The night before Diana was shot, she kissed Osmon in front of defendant and defendant's friends. The gang expert's testimony that Diana's act "disrespected" defendant and that maintaining respect is paramount in gang culture, explains why defendant would kill Diana. Although defendant argues that the gang evidence added nothing to what is "simply jealousy by another name," gang evidence explains why a 15-year-old boy who has been broken up with a girl for months would kill her for simply kissing another boy. He may have been jealous, but in the gang culture he was also disrespected.

The gang evidence was also relevant to identity. (See generally *People v. Williams* (1997) 16 Cal.4th 153, 193 [gang evidence is relevant and may be admissible to prove, for example, identity, motive, and specific intent in connection with the charged offense].) Diana's body was next to fresh graffiti of defendant's gang moniker, Lazy. The presence of defendant's freshly written name in the walkway tended to show he was there in or around the time Diana was killed or, at a minimum, was familiar with the walkway. Moreover, it was probative to identifying Diana's killer—Lazy. Defendant, however, argues that even if the graffiti "has substantial probative value on the identity of

Diana's killer, it would be because it identifies the killer by name, not because it identifies the killer as a gang member." This is an overly simplistic view of the evidence. The graffiti identifies defendant *by his gang name*. The connection between "Lazy" and "Irving Torres" had to be explained. Only gang evidence could explain it. Similarly, only gang evidence could explain the significance of defendant's teardrop tattoo, which he got either the day of or day after Diana was shot. Because one reason a gang member gets a teardrop tattoo is to signify a murder, defendant's teardrop tattoo linked him to Diana's murder. Gang evidence was therefore inextricably intertwined with facts underlying the substantive offense, and it would have been admissible even had a gang enhancement not been alleged.

Defendant, however, argues that the "vast majority" of the gang expert's testimony had no probative value on any contested issue relating to defendant's guilt. He thus takes issue with Officer Ayon's testimony about, for example, gang hierarchy, community guns, and how individual gang members benefit from a gang's reputation and vice versa. But this evidence was relevant and admissible to prove the gang enhancement. (*Hernandez, supra,* 33 Cal.4th at p. 1044 ["Accordingly, when the prosecution charges the criminal street gang enhancement, it will often present evidence that would be inadmissible in a trial limited to the charged offense."].) Because gang evidence was admissible to establish motive and identity as to the charged offense, the prosecution was not limited to introducing only gang evidence relevant to the underlying crime; it could introduce evidence relevant to the enhancement.

Nor can we agree that the evidence admitted to prove the enhancement was "so minimally probative on the charged offense, and so inflammatory in comparison, that it threatened to sway the jury to convict regardless of defendant[']s actual guilt." (*Hernandez, supra,* 33 Cal.4th at p. 1051.) On this point, defendant focuses on evidence about Herson Gayton. To establish the "pattern of gang activity" prong of the gang enhancement, the People introduced evidence about Gayton's conviction for a gang-related murder committed on December 27, 2008. The prosecutor later elicited from defendant on cross-examination that defendant and Gayton were cousins and that Gayton

lived next to Jasmin.[10] Because Gayton's crime occurred after Diana's murder, the court ruled it could not be used to establish a pattern of criminal gang activity and struck the exhibits and testimony regarding it, instructing the jury to "disregard it." We presume the jury followed that instruction. (*People v. Sims* (1976) 64 Cal.App.3d 544, 554-555.) We also note that the trial court gave a limiting instruction concerning the gang evidence. (CALCRIM No. 1403.)[11] We presume the jury followed this instruction as well. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.)

In any event, that defendant's cousin committed a gang-related murder a year after Diana's murder was not likely to sway the jury to convict defendant regardless of defendant's actual guilt. There was no suggestion that Diana's murder was connected to the murder Gayton committed a year later. Defendant's concern that his relationship to Gayton "colored [the jury's] impression" of defendant is overstated. Defendant's brother, Christian, testified for the defense. Christian was a Temple Street gang member and, at the time of Diana's death, was in juvenile camp. Defendant also did not dispute his own membership in the gang. Therefore, to the extent defendant argues that having the jury discover that other members of his family were gang members was unduly inflammatory, other evidence introduced by defendant put that fact squarely in front of the jury.

For these same reasons, the trial court's refusal to bifurcate the gang allegation did not violate defendant's due process rights and right to a fundamentally fair trial. An

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10 The record is unclear, but a reasonable inference from the evidence is defendant was staying with Gayton's father during these events.

11 "You may consider evidence of gang activity only for the limited purpose of deciding whether: [¶] The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related enhancement charged; or [¶] the defendant had a motive to commit the crime charged. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crimes."

evidentiary ruling—whether or not correct under state law—denies a defendant due process of law only if it makes the trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Partida* (2005) 37 Cal.4th 428, 439; *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*).) "To prove a deprivation of federal due process rights, [a defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. 'Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.' [Citation.] 'The dispositive issue is . . . whether the trial court committed an error which rendered the trial "so 'arbitrary and fundamentally unfair' that it violated federal due process." [Citation.]' [Citation.]" (*Albarran,* at pp. 229-230.)

In *Albarran*, the defendant was involved in a shooting. Nothing inherent in the facts of the shooting suggested a specific gang motive, and the only evidence to support the gang-related motive was the fact of the defendant's gang membership. (*Albarran, supra,* 149 Cal.App.4th at p. 227.) Given the "nature and amount" of the gang evidence and the role it played in the prosecutor's argument, *Albarran* was one of those "rare and unusual occasions" where the admission of evidence violated federal due process and rendered the defendant's trial fundamentally unfair. (*Id.* at p. 232.)

This is not one those "rare and unusual occasions." We have detailed the ways in which gang evidence was relevant to motive and identity. Nor do we find a reasonable likelihood that the jury's "passions were inflamed" by the gang evidence. (*People v. Williams* (2009) 170 Cal.App.4th 587, 612 [the danger in admitting gang evidence is the jury will improperly infer that the defendant has a criminal disposition].) The jury here found the gang allegation not true. Thus, the jury did not accept the gang evidence uncritically.[12] Moreover, there was strong evidence of defendant's guilt. He was, for

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12 We also note that the jury initially hung.

example, the last person seen with Diana. Alexandra, Jasmin, and Osmon saw Diana walk away with him. Defendant admitted that, on the afternoon Diana died, he saw her in front of her house. "I was currently in front of my aunt's house, and I seen her and I quick called her over," and talked to her about movies he wanted returned. Soon after defendant was last seen with Diana, she was shot.

Defendant's trial was not fundamentally unfair.

II. The supplemental jury instruction.

Defendant next contends that the trial court, after the jury said it was hung, gave a supplemental instruction that coerced the verdict. We disagree.

The jury began deliberations on Wednesday, July 10, 2013, at 1:56 p.m., and court recessed at 4:05 p.m. The jury deliberated on Thursday, July 11, but left early, at 12:05 p.m. On Friday, July 12, the jury sent out a note at 10:25 a.m. stating it was hung and asking for "ideas on how to" proceed.[13] The court proposed this response:

"Given the length of time that this trial has taken and the number of witnesses and exhibits that have been received, *the court is not of the belief that you are hopelessly deadlocked*. I encourage each of you to further discuss this case and try to identify which issues of facts you are in disagreement about. As to those disagreements, consider whether the court can assist you by having certain testimony re-read, instructions further explained or argument reopened. Please continue deliberating and let us know if and how we can assist you." (Italics added.)

Defendant objected "because I think . . . saying that you don't believe that they have deliberated enough is you're – to me, you're telling them that they should go back there and come to an agreement. I think we should inquire why they believe they are hung." The trial court overruled the objection and gave the proposed supplemental instruction. The jury recessed for lunch from noon to 1:30 p.m. The jury gave its verdict at 2:15 p.m.

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[13] The Honorable James R. Brandlin was standing in for Judge Bachner.

Defendant argues that the trial court's statement it didn't believe the jury was "hopelessly deadlocked" coerced a verdict. A coercive instruction, known as an *Allen* charge[14] or a "dynamite" instruction, is one that either "encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them" or "states or implies that if the jury fails to agree the case will necessarily be retried." (*People v. Gainer* (1977) 19 Cal.3d 835, 852, disapproved in part by *People v. Valdez* (2012) 55 Cal.4th 82, 163; see also *Jenkins v. United States* (1965) 380 U.S. 445, 446 [instructing a deadlocked jury it has to reach a decision is coercive]; *People v. Whaley* (2007) 152 Cal.App.4th 968, 980.)

A court, however, may ask jurors to continue deliberating where, in the exercise of its discretion, it finds a reasonable probability of agreement. (*People v. Pride* (1992) 3 Cal.4th 195, 265; *People v. Breaux* (1991) 1 Cal.4th 281, 319; § 1140.)[15] A claim that the trial court pressured a jury into reaching a verdict depends on the particular circumstances of the case. (*Pride*, at p. 265.) When reviewing a coercion claim, we examine "whether or not the court's remarks in sending the jury back for further deliberations indicate[ ] an opinion on his part as to the guilt or innocence of the defendant, and whether the court creates the impression that in his mind the jury ought to convict." (*People v. Diaz* (1962) 208 Cal.App.2d 41, 50.)

The trial court's statement here that it didn't believe the jury was hopelessly deadlocked did not give the impression the jury should convict defendant. In *People v. Pride*, for example, the trial court similarly said it " 'was not prepared to declare a mistrial at this time. It does not appear to me that the jury has come to a hopeless deadlock, counsel. Based upon the [jurors'] responses, I am going to ask the jury to

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[14] *Allen v. United States* (1896) 164 U.S. 492 (*Allen*).

[15] Section 1140 precludes a court from discharging the jury without a verdict unless both parties consent or, after the expiration of a period of time that the court deems proper, it appears to the satisfaction of the court there is no reasonable probability the jury can agree.

continue their deliberations, and I would appreciate it if you would continue trying.' " (*People v. Pride*, *supra*, 3 Cal.4th at p. 264.) This was not coercive. (*Id.* at p. 266.)

Also, unlike the instructions in *Allen*, which our California Supreme Court in *Gainer* disapproved, the trial court's instructions did not encourage minority jurors to reexamine their views in light of the majority's. (See generally *People v. Gainer*, *supra*, 19 Cal.3d at pp. 847-851 [admonition to minority jurors to rethink their position in light of the majority's position constituted excessive pressure on them to acquiesce in a verdict].) The court here did not refer to either the minority or the majority; instead, the court encouraged "*each of you*" to further discuss the case. We discern nothing coercive in the court's supplemental instruction.

Defendant also makes too much of how long the jury deliberated in comparison to the length of trial. Even assuming defendant's calculations are correct—that the evidentiary portion of the trial for which the jury was present took approximately 12 hours over the course of six days and that the jury had deliberated just a bit more than five hours before sending their note—we reject that this discredits the trial judge's "belief that the jury had not deliberated long enough to have reached an impasse." The court, under section 1140, was well within its discretion to determine—based on, for example, the length of the trial, the number of witnesses, and the grave charges against defendant—that there was a reasonable probability the jury could yet reach a verdict. (*People v. Moore* (2002) 96 Cal.App.4th 1105, 1121-1122.) Indeed, the jury indicated there was such a probability, because it asked for "ideas on how to proceed."

We reject defendant's contention that the court's supplemental instruction coerced a verdict.

III. Juror misconduct.

Defendant moved for a new trial based on alleged juror misconduct. We find that the trial court properly denied the motion.

A. *The motion for a new trial based on juror misconduct.*

Defendant moved for a new trial under section 1181, subdivision (4),[16] on the ground that a juror "decided his verdict by the functional equivalent of a coin toss." The motion was supported by the declaration of Felipe de la Torre, a deputy alternate public defender who stood in for defendant's trial counsel when the verdict was read. After the verdict was given, de la Torre spoke to a male juror for two hours, and the juror said he was the lone hold-out that caused the jury to send the note to the judge that they were deadlocked. "In very emotional terms, he expressed that he had grave doubts as to the guilt of [defendant] initially during deliberations." The night before the verdict, the juror had a "spiritual crisis" and asked God to help him come to the correct conclusion. The next morning, he changed his vote to guilty, but decided that if defendant "looked directly at him, that would be a sign from God that [defendant] was innocent, and the juror would have changed his vote to 'not guilty.' "

The trial court denied the motion for a new trial, because de la Torre's declaration was inadmissible under Evidence Code section 1150; the evidence purported to show the juror's mental process; and, even assuming admissibility, the "allegations don't appear to support a claim that the verdict was decided by means other than a fair expression of opinion."

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16 Section 1181, subdivision (4), provides that a new trial may be granted when the verdict has been decided by lot or by means other than a fair expression of opinion on the part of all the jurors.

B. *The affidavit was inadmissible under Evidence Code section 1150.*

Defendant argues that de la Torre's declaration was sufficient evidence to support a further evidentiary hearing in the trial court. We disagree.

A trial court's ruling on a motion for new trial is reviewed for an abuse of discretion. (*People v. Lightsey* (2012) 54 Cal.4th 668, 729.) Where a motion for new trial is based on juror misconduct, the "threshold question is whether evidence of such misconduct may be received from the jurors themselves." (*In re Stankewitz* (1985) 40 Cal.3d 391, 397; see also *People v. Perez* (1992) 4 Cal.App.4th 893, 906; *People v. Hedgecock* (1990) 51 Cal.3d 395, 415 ["when a criminal defendant moves for a new trial based on allegations of juror misconduct, the trial court has discretion to conduct an evidentiary hearing to determine the truth of the allegations"].) On this threshold question, Evidence Code section 1150, subdivision (a) provides: Any "otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." But no "evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (*Ibid.*; see also *In re Stankewitz* at p. 397.)

"Thus, jurors may testify to 'overt acts'—that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration'—but may not testify to 'the subjective reasoning processes of the individual juror . . . .' [Citation.]" (*In re Stankewitz*, *supra*, 40 Cal.3d at p. 398.) Where the "very making of the statement" would constitute misconduct, statements are among the overt acts admissible to show a verdict was improperly influenced. (*Ibid.* [juror's incorrect legal advice to fellow jurors during deliberations was admissible to show misconduct]; *People v. Perez*, *supra*, 4 Cal.App.4th at p. 908 [evidence of a jury's agreement to violate court's instruction not to consider the defendant's failure to testify does not touch on jurors' subjective reasoning processes].)

Defendant concedes that "the unsworn statement Juror X made to de la Torre was hearsay and therefore incompetent on its own to justify" granting the new trial motion. Defendant suggests that the declaration nonetheless provided sufficient ground to hold an evidentiary hearing. We disagree. The declaration also violated Evidence Code section 1150 because the juror's statement that he hoped God would give him a sign was a verbal reflection of his mental process. "[W]hen a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150." (*People v. Hedgecock, supra*, 51 Cal.3d at p. 419.) That the juror put his thoughts into words by verbalizing them to de la Torre and in prayer does not convert his subjective thought process into an overt act or event.

For these same reasons, we reject defendant's additional argument that, regardless of the admissibility of the evidence under Evidence Code section 1150, the juror's misconduct was so serious as to constitute a violation of defendant's due process rights. A state court's application of ordinary rules of evidence generally does not infringe on this right. (*People v. Cornwell* (2005) 37 Cal.4th 50, 82, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The trial court's application of Evidence Code section 1150 to de la Torre's affidavit did not violate defendant's due process rights.

IV. Cumulative error.

Defendant contends that the cumulative effect of the purported errors deprived him of a fair trial. As we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial,' " we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236; *People v. Butler* (2009) 46 Cal.4th 847, 885.)

V. Cruel and unusual punishment.

Defendant was 15 when he killed Diana in 2007. By the time he was tried and sentenced to 50 years to life in prison in 2014, he was 20. (See generally §§ 190, subd. (a), 12022.53, subd. (d).) The Attorney General agrees that defendant will not be eligible for parole until defendant is 69 years old. Defendant contends his sentence is cruel and unusual under the Eighth Amendment.

In recent years, the United States Supreme Court and our California Supreme Court have limited the punishment available for juvenile offenders: the death penalty may not be imposed on juvenile offenders (*Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*)); life without possibility of parole (LWOP) may not be imposed on juveniles who commit nonhomicide offenses (*Graham v. Florida* (2010) 560 U.S. 48); mandatory LWOP may not be imposed on juvenile offenders (*Miller, supra,* 132 S.Ct. 2455); and a de facto LWOP sentence may not be imposed on a juvenile nonhomicide offender (*People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*)).

The People argue that defendant falls outside *Roper* and its progeny, because he committed a homicide and his 50-years-to-life sentence was not technically LWOP.[17] *Miller*, however, forbids a mandatory LWOP sentence for any juvenile offender, not just nonhomicide offenders, in the absence of the sentencing court's consideration of certain factors: "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way

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17 The California Supreme Court has granted review to determine whether a sentence of 50 years to life for a defendant convicted of a murder committed as a juvenile is the functional equivalent of LWOP. (*In re Alatriste* (2013) 220 Cal.App.4th 1232, review granted Feb. 19, 2014, S214652, and *In re Bonilla*, review granted Feb. 19, 2014, S214960.)

familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for [the] incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Miller, supra*, 132 S.Ct. at pp. 2468-2469.)

Caballero extended *Miller*'s reasoning and found that a juvenile nonhomicide offender's 110-years-to-life sentence, although not technically LWOP, was its functional equivalent, and therefore unconstitutional. "Although the state is by no means required to guarantee eventual freedom to a juvenile convicted of a nonhomicide offense, *Graham* holds that the Eighth Amendment requires the state to afford the juvenile offender a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,' and that '[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity.' [Citation.]" (*Caballero, supra*, 55 Cal.4th at p. 266.) *Miller* and *Caballero* thus may be read to prohibit imposition of a mandatory LWOP sentence or its functional equivalent on any juvenile homicide or nonhomicide offender, without first considering the factors *Miller* found relevant to punishment.

Defendant's 50-years-to-life sentence is certainly less than the 110 years to life the juvenile was sentenced to in *Caballero*. Still, that defendant might be eligible for parole some years before his life expectancy does not give him a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation (*Graham v. Florida, supra*, 560 U.S. at pp. 73-75), and his 50-years-to-life sentence "disregards the possibility of rehabilitation even when the circumstances most suggest it" (*Miller, supra*, 132 S.Ct. at p. 2468). Under *Miller* and *Caballero*, defendant's sentence may therefore be the functional equivalent of LWOP.

The People respond that section 3051 corrects any Eighth Amendment problem. With certain exceptions inapplicable here, the law, guarantees juvenile offenders the right to a "youth offender parole hearing." (§ 3051, subd. (a)(1).) Juveniles, like defendant,

sentenced to an indeterminate base term of 25 years to life are entitled to a parole hearing during the 25th year of their incarceration. (§ 3051, subd. (b)(3).)

Courts of Appeal disagree whether section 3051 addresses *Miller*'s concerns.[18] Some guidance may be found in *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1379 (*Gutierrez*). In *Gutierrez*, LWOP sentences were imposed on juvenile defendants under section 190.5, subdivision (b), which had been construed to create a presumption in favor of LWOP sentences for special circumstance murders committed by 16- and 17-year-old offenders. (*Gutierrez*, at p. 1379.) Interpreting section 190.5, subdivision (b), to harmonize with the Eighth Amendment, *Gutierrez* found that trial courts have discretion to sentence juvenile offenders to serve 25 years to life or LWOP with no presumption in favor of LWOP. (*Gutierrez*, at pp. 1371-1379.)

In so holding, *Gutierrez* considered the recent enactment of section 1170, subdivision (d)(2), on LWOP sentences for juvenile offenders. Section 1170 allows youthful offenders to petition the court to recall their LWOP sentences after serving 15 years, and, if then unsuccessful, at subsequent designated times. (§ 1170, subd. (d)(2).) *Gutierrez* rejected the notion that section 1170, subdivision (d)(2), "removes life without parole sentences for juvenile offenders from the ambit of *Miller*'s concerns because the statute provides a meaningful opportunity for such offenders to obtain release." (*Gutierrez, supra*, 58 Cal.4th at p. 1386.)

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18 The issues raised in these cases and this appeal are currently on review. (*People v. Solis* (2014) 224 Cal.App.4th 727, review granted June 11, 2014, S218757 [modifying the juvenile defendant's 50-years-to-life sentence to include a minimum parole eligibility date of 25 years]; *In re Heard* (2014) 223 Cal.App.4th 115, review granted Apr. 30, 2014, S216772 [section 3051 does not alleviate the constitutional concerns about a juvenile offender's sentence]; *People v. Garrett* (2014) 227 Cal.App.4th 675, review granted Sept. 24, 2014, S220271 [same]; *People v. Hernandez* (2014) 232 Cal.App.4th 278, review granted Apr. 1, 2015, S224383 [same]; *In re Wilson* (2015) 233 Cal.App.4th 544, review granted Apr. 15, 2015, S224745 [same]; but see *People v. Gonzalez* (2014) 225 Cal.App.4th 1296, 1307, review granted July 23, 2014, S219167 [section 3051 cures the Eighth Amendment problem]; accord, *People v. Saetern* (2014) 227 Cal.App.4th 1456, review granted Oct. 1, 2014, S220790.)

Although section 3051 gives juvenile offenders a mechanism to obtain release without serving their entire sentence, it suffers from the same problem *Gutierrez* saw in section 1170, subdivision (d)(2): the "meaningful opportunity" must be provided at the outset, not 15 or 25 years in the future. Thus, a sentencing court must, at the time of sentencing, exercise its discretion in accordance with *Miller*. (See *Gutierrez, supra*, 58 Cal.4th at p. 1379.) Section 3051 is not a substitute for the requisite "individualized sentencing" the Eighth Amendment requires. (See *Miller, supra*, 132 S.Ct. at p. 2467.)

Here, at defendant's sentencing hearing, his counsel asked the trial court to "run the life sentences concurrent, rather than consecutive." The court said: "[C]ertainly the court recognizes that there are in the United States Supreme Court law regarding factors that would be considered by a court in imposing an LWOP sentence. I think that is what [defense counsel] is referring to. There is a whole series of cases. There are new statutes in the State of California relating to that. Nothing has been presented to the court in existence that a 50-year to life sentence would be the functional equivalent of an LWOP sentence. [¶] Accordingly, there is no legal basis for me to diverge from the law. If there is such a case . . . it was a general proposition . . . . The court is required to follow the statutory requirements. If there was such a case – and there's a whole process of [ ] factors that the court would have to consider. But this is not an LWOP sentence."

The trial court therefore declined to consider the *Miller* factors, namely, defendant's age and "its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences," family and home environment, the circumstances of the homicide, the extent of each defendant's participation in it, and familial and peer pressures. (*Miller, supra*, 132 S.Ct. at pp. 2468-2469.) We remand this matter with the direction to the trial court to reconsider defendant's sentence in light of *Miller* and *Caballero*. We do not dictate what the outcome should be on remand.

DISPOSITION

The judgment is reversed and remanded only for reconsideration of defendant's sentence under the Eighth Amendment to the United States Constitution; the judgment of conviction is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

JONES, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.