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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LEONARD EPPS,

Plaintiff and Respondent,

v.

ERIK BARAJAS et al.,

Defendants and Appellants.

D072619

(Super. Ct. No. CIVSS813249)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Michael Smith, Judge. Affirmed.

Arias & Lockwood, Joseph Arias and Christopher D. Lockwood, for Defendants
and Appellants.

Callahan & Blaine, Javier H. VanOordt; Law Offices of Frank P. Peterson and
Frank P. Peterson, for Plaintiff and Respondent.

INTRODUCTION

Erik Barajas (Erik) and his sister, Stacy Barajas (Stacy), appeal from a judgment following jury verdicts awarding Leonard Epps over \$4.5 million in compensatory damages against both of them and \$1 million in punitive damages against each of them on his claims for assault, intentional infliction of emotional distress, and negligence per se. Erik and Stacy contend we must reverse the judgment because of faulty jury instructions on Epps's negligence per se claim, the retention of a juror who had prejudged the case, repeated misconduct by Epps and his counsel, and the admission of impermissible expert testimony on what a "green light" is and how it is effectuated. Stacy separately contends we must reverse the judgment as to her because the court prevented her from attending the trial in person notwithstanding her incarceration.

We conclude the court properly instructed the jury on negligence per se and did not abuse its discretion by declining to dismiss the challenged juror. We further conclude Erik and Stacy have not established any misconduct by Epps and his counsel prejudiced them or that the court erred in admitting the challenged expert testimony. Finally, we conclude Stacy has not established she had a due process right to testify in person, particularly since she was represented by counsel and she participated in the trial by video conference. We, therefore, affirm the judgment.

II

BACKGROUND

A

1

Epps managed a nightclub. One evening, after closing, Erik, who is related to the nightclub's owner, appeared at the nightclub and sought entrance, stating he was being followed. Epps let Erik and three other men inside. While the men sat at the bar and had drinks, Epps returned to his office to work.

On security monitors in his office, Epps saw Erik counting out money and giving it to two of the men. Erik summoned Epps to the nightclub's dining area. When Epps got there, Erik showed Epps some paperwork indicating Erik's brother had testified against some people in a murder case. One of the men with Erik had been sent by the Mexican Mafia to speak with Erik. For unexplained reasons, Erik offered Epps and another nightclub employee \$2,000 each. They did not take the money and Epps asked Erik and the men to leave. Epps escorted Erik to Erik's vehicle. On the way, Erik mumbled under his breath and cried, "You didn't protect me." Epps offered to call law enforcement, but Erik declined the offer.

The following morning, the nightclub's owner contacted Epps. The nightclub's owner told Epps that Erik claimed to have been robbed of \$4,000 and his watch when he was at the nightclub the prior evening.

A month later, a man Epps did not know contacted the nightclub. He asked about Epps's work schedule and left a message indicating he wanted to speak with Epps. A few days later, someone rifled through Epps's car and took his car registration.

A week after someone rifled through Epps's car, Erik and Stacy came to the nightclub. While Stacy waited outside, Erik approached Epps in Epps's office. Holding a cell phone in his hand on speaker mode, Erik accused Epps of setting him up to be robbed. When Epps stated he was going to call law enforcement, Stacy and six or eight men entered the nightclub. Stacy yelled for Epps using racial epithets and stated "La Eme" was going to kill him. Then, she went to Epps's office and beat on the door. Epps pulled the silent alarm in his office and informed Stacy he had called law enforcement.

Stacy told a man who was standing behind her to shoot Epps. Epps kicked his door shut. The man went to the kitchen and pointed his gun at the cook, but the magazine fell out of the gun. After that, everyone began to run away because Stacy told them law enforcement was coming. Around the same time, an undercover officer, who happened to be on the premises, came out of the bathroom. Epps told the officer what was going on and the officer detained Erik.

Law enforcement officers later informed Epps he was the subject of a murder-for-hire contract. The officers had him leave town and they faked his death.

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Law enforcement officers learned of the murder-for-hire contract as part of an unrelated investigation for which they were monitoring the conversations of, among others, Salvador Hernandez, who is a validated member of the Mexican Mafia. In two of

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the monitored conversations Hernandez asked Stacy for a photograph of Epps. In the second conversation, she told Hernandez she had to get the photograph from Erik.

Hernandez's brother subsequently met with a confidential informant and asked the confidential informant to take care of something for Hernandez involving an African-American male who worked at the nightclub. Hernandez's brother explained the confidential informant would be provided with a photograph and a weapon. Hernandez's brother later provided the confidential informant with the photograph of Epps and made arrangements for the confidential informant to obtain a weapon.

Once law enforcement officers had possession of the weapon, the confidential informant called Hernandez's brother and told him "he was lying in wait and would contact [Hernandez's brother] later for a shovel." The following morning the confidential informant contacted Hernandez's brother and told him "the job was done, ... he made it look clean," and "no eyes would look towards [Hernandez]." The confidential informant also said he did not believe anyone would find Epps's body.

Sometime later, Hernandez introduced the confidential informant to Erik and told Erik the confidential informant "was the one that took care of that thing." Hernandez instructed the confidential informant to give Erik the confidential informant's phone number and to drop whatever he was doing to help Erik if Erik should call.

3

An excerpt from the deposition of a Doe witness was read to the jury. In his deposition, the Doe witness stated he was Stacy's bodyguard and was present at two meetings where Hernandez and others discussed killing Epps for money. At first, the

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amount discussed was between \$10,000 to \$20,000. The amount later increased to \$250,000. Stacy was at both meetings and Erik was at the first meeting. On a couple of occasions Stacy gave the Doe witness money to give to Hernandez, and on one occasion the witness took Stacy to the bank to withdraw \$40,000.

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Erik pleaded guilty to assaulting Epps with a deadly weapon (firearm) and admitted committing the crime for the benefit of a criminal street gang. In exchange for his guilty plea he received a grant of probation and no custody time.

After his guilty plea, Erik admitted to a probation officer it was his idea to have Epps killed. Erik also admitted he knew people in the Mexican Mafia, knew of Hernandez, and contacted Hernandez, who agreed to take care of the matter.

In addition, in prior interviews with a law enforcement officer, Erik stated Hernandez had returned Erik's money to Erik and offered to kill Epps for Erik. Stacy wanted Epps dead and Hernandez connected Erik with a person who would kill Epps. The person was the confidential informant. Stacy took the confidential informant to the nightclub so the confidential informant would know who Epps was. Stacy also asked Erik for a photograph of Epps and Erik obtained Epps's yearbook photograph, which was ultimately provided to the confidential informant. Hernandez subsequently contacted Erik and told Erik that Epps was dead.

5

Stacy pleaded guilty to attempted murder and admitted the truth of a gang benefit enhancement allegation. Like Erik, in exchange for her guilty plea, Stacy received a

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grant of probation with no custody time. Nonetheless, she is currently serving a 17-year sentence for the crime because her probation was revoked.¹ After her guilty plea, she told a probation officer that Erik had concocted the plan to kill Epps with help from Hernandez because Erik was embarrassed and wanted to show others they "shouldn't mess with him."

B

Erik testified at trial and his version of events differed in most key respects from Epps's version. Erik claimed he went to the nightclub alone. Epps let the three men in and locked the door behind them. Two of the men told Erik a drug dealer was looking for him and one of them pulled out a gun. The men asked for his watch, but he refused to give it to them because it had sentimental value. Instead, he gave them \$4,000 he had in his pocket. Epps witnessed the encounter. After it was over, he let the two men out and relocked the door. The third man confronted Erik, accused Erik's brother of being a "narc," and said he wanted \$60,000 from Erik's brother. Erik said he would pass the message along to his brother and left. Erik was scared and crying because of the threat with the gun. As Epps walked him out, Erik complained about Epps not calling law enforcement and accused Epps of setting him up. Epps responded by advising Erik to give the men the money they wanted.

A few weeks after the robbery, Erik's cousin introduced Erik to Hernandez's wife, who said Hernandez could take care of the problem and get his money back. Several

¹ The revocation of her probation was upheld on appeal. (*People v. Nunez* (Jan. 6, 2011, E049018) [nonpub. opn.])

months later, Erik met with Hernandez at Erik's cousin's house. Hernandez offered to get Erik's money back, but Erik declined the offer.

Several weeks later Hernandez asked to meet with Erik again. They met at a gas station and Hernandez gave Erik \$4,000.

A few weeks after Hernandez returned Erik's money, Hernandez told Erik he did not like being disrespected and he would take care of the situation at the nightclub. Erik asked Hernandez not to do anything to Epps. He had heard Hernandez was involved in La Eme, which scared him. However, Hernandez repeatedly pressured Erik to provide him with Epps's picture. Erik eventually provided Hernandez with a high school yearbook photograph of Epps, but Erik implored Hernandez to "please don't do this." Hernandez later called Erik and told Erik that Epps was dead.

Despite his guilty plea, Erik denied ever asking or wanting anyone to kill Epps. He also denied assaulting Epps with a firearm. He pleaded guilty to assault with a deadly weapon and admitted the truth of a gang benefit enhancement to avoid a potential prison sentence of 35 years to life. Erik denied telling his probation officer he struck up an acquaintance with Hernandez to have Epps killed.

C

Stacy also testified at trial and her version of events also differed in most key respects from Epps's version. Stacy claimed she went to the nightclub after learning of the robbery to speak with Epps. Although she went alone, Erik was there when she arrived. She did not have a gun, but she did get into a verbal argument with Epps. She

did not mention La Eme, direct anyone to shoot Epps, or threaten to have anyone harm him.

Stacy denied telling a probation officer Erik concocted a plot to kill Epps. Instead, she claimed she merely relayed what she had heard in court, which was that Erik and Hernandez did something because Erik was embarrassed about the incident in the nightclub.

Stacy knew Hernandez wanted to talk to Epps about the robbery, but she did not know Hernandez intended to harm Epps. She denied attempting to obtain Epps's picture from Erik or anyone else.

Stacy further denied the Doe witness was ever her bodyguard. In addition, she, Erik, and Hernandez denied ever attending any meetings where killing Epps was discussed. She and Erik impeached the Doe witness's deposition testimony with evidence of the Doe witness's bias, past felony convictions, and gang affiliation as well as with evidence contradicting aspects of his deposition testimony, including his claim Stacy withdrew \$40,000.

Finally, Stacy denied attempting to murder Epps and testified she did not want to plead guilty. She did so at her parents' behest to help Erik avoid the risk of a long prison sentence because the prosecution conditioned its plea bargain offer on all defendants pleading guilty.

D

Hernandez did not testify at trial, but portions of his deposition were read to the jury. In his deposition, he stated he was friends with Erik and Stacy. When he learned of

the robbery, he caught up with one of the robbers and got Erik's money back. He tried to contact Epps to talk with him about his failure to assist Erik, but Epps ignored him. He never had any agreement with anyone to harm Epps, he did not meet with Stacy and Erik to discuss killing Epps, and Erik never asked him to harm Epps. Rather, he decided on his own to have Epps killed because Epps disrespected him and his friends. He kept pressing a fearful and reluctant Erik for a picture of Epps until Erik eventually provided him with one, but he never told Erik what he intended to do with the picture. Ultimately, no one actually attempted to harm Epps and Hernandez was no longer interested in having him harmed. Nonetheless, Hernandez acknowledged he pleaded guilty to attempting to murder Epps and admitted the truth of a gang benefit enhancement. His brother also pleaded guilty to a related offense.

III

DISCUSSION

A

1

For Epps's negligence per se claim, the court instructed the jury: "In order to prove the claim of negligence per se, [Epps] must prove that Erik and/or Stacy ... violated at least one of those laws [i.e., the Penal Code sections prohibiting assault, attempted murder, conspiracy to commit murder], and that that violation of the law was a substantial factor in bringing about harm to [Epps]. A plea of guilty to a crime creates a rebuttable presumption that the person who pled guilty is, in fact, guilty of the crime that

he or she pled guilty to. [¶] "However, that presumption may be rebutted or eliminated by other evidence.

"If you decide that a defendant pled guilty to a crime, you may, but are not required to, find that that defendant, in fact, committed the crime to which he or she pled guilty to[,] [o]r that the defendant's commission of that crime was a substantial factor in causing [Epps] harm.

"Erik and Stacy ... contend they did not commit such crime and did not cause [Epps] harm. If, after weighing all of the evidence, you believe that it is more probable than not that Erik or Stacy's actions were a substantial factor in causing [Epps] harm, then you must decide in favor of [Epps]. [¶] "Otherwise, you must decide in favor of Erik and Stacy ... on [Epps'] claims."

2

a

Erik and Stacy contend this instruction was erroneous and requires reversal of the judgment as to the negligence per se claim because (1) the criminal statutes underlying Erik's and Stacy's convictions were not intended to provide a civil cause of action; (2) a negligence per se claim does not apply to intentional torts and the court did not instruct the jury on and the verdict forms did not ask the jury any questions about negligence; (3) a negligence per se claim may not be based on conspiracy to commit a crime or aiding and abetting a crime because there are no civil conspiracy or civil aiding and abetting torts; (4) a negligence per se claim may not be based on an attempt to commit a crime because there is no attempted tort; (5) there was no evidence Erik, Stacy, or anyone else

attempted to kill Epps; and (6) the instruction improperly shifted the burden of proof to Erik and Stacy. We are not persuaded by any of these contentions.

b

" ' "The propriety of jury instructions is a question of law that we review de novo. [Citation.]" [Citation.] If an instruction is found to be erroneous, reversal is required only when "it appears probable that the improper instruction misled the jury and affected [its] verdict." ' ' " (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 263.)

A fair reading of Epps's complaint indicates his negligence per se cause of action was simply a negligence claim that relied on criminal statutes and the presumption in Evidence Code section 669, subdivision (a), to prove the elements of duty and breach of a standard of care. This is consistent with the California Supreme Court's explanation of how the negligence per se doctrine operates: "Examined with care, [negligence per se] consists of two distinct, albeit occasionally overlapping, concepts. Statutes may be borrowed in the negligence context for one of two purposes: (1) to establish a duty of care, or (2) to establish a standard of care." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 927, fn. 8 (*Elsner*).)

Contrary to Erik and Stacy's assertion, the violation of a criminal statute may support a negligence claim relying on the negligence per se doctrine. (See *Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547; *Clinkscales v. Carver* (1943) 22 Cal.2d 72, 75; *Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1526 (*Jacobs Farm*).) The California Supreme Court has long recognized, "A duty of care, and the attendant standard of conduct required of a reasonable man, may of course

be found in a legislative enactment that does not provide for civil liability." (*Vesely v. Sager* (1971) 5 Cal.3d 153, 164, abrogated by statute on another point as recognized in *Strang v. Cabrol* (1984) 37 Cal.3d 720, 722–723.)

The doctrine of negligence per se is codified in Evidence Code section 669. (*Elsner, supra*, 34 Cal.4th 915, 927 & fn. 8.) Under this statute, "The failure of a person to exercise due care is presumed if: [¶] (1) He violated a statute, ordinance, or regulation of a public entity; [¶] (2) The violation proximately caused death or injury to person or property; [¶] (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and [¶] (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." (Evid. Code, § 669, subd. (a).) The statute's first two requirements present factual questions for the jury to decide and the statute's second two requirements present legal questions for the court to decide. (*Jacobs Farm, supra*, 190 Cal.App.4th at p. 1526; *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1284–1285.)

The court's negligence per se instruction did not improperly shift the burden of proof to Erik and Stacey. If established, the presumption of negligence in Evidence Code section 669, subdivision (a), is a presumption affecting the burden of proof. (Evid. code § 660.) "The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (Evid. code § 606.)

Similarly, Erik's and Stacy's guilty pleas effectively operated as a rebuttable presumption they violated the Penal Code sections with which they were charged. A guilty plea is an admission of every element of the offense to which the guilty plea pertains. (*Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601, 605; *Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 190.) A guilty plea is admissible in a civil case arising out of the same offense, but it is not conclusive. Instead, the party who pleaded guilty "may contest the truth of the matters admitted by his plea and explain why he entered the plea." (*Rusheen v. Drews* (2002) 99 Cal.App.4th 279, 284, fn. omitted; *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1052; *Ray v. Jackson* (1963) 219 Cal.App.2d 445, 452.)

Although Erik and Stacy did contest the matters admitted in their guilty pleas, Epps introduced evidence corroborating the guilty pleas. The evidence showed Erik and Stacy worked with Hernandez to arrange for a person, who turned out to be a confidential informant, to kill Epps because Erik felt slighted by Epps. The arrangements included providing the confidential informant with a picture of Epps and a weapon. Collectively, this evidence amply supported the jury's verdict.²

² Given our conclusions, we need not decide whether Erik and Stacy forfeited any of their challenges to the court's negligence per se instruction.

B

1

a

After hearing the gang expert's testimony, Juror No. 12 (Juror 12) informed the court he was a single parent and was nervous about people knowing specifically where he worked (which defense counsel asked him during voir dire). The court reminded him that neither Hernandez nor the Mexican Mafia was a defendant in the case and, consequently, neither would be directly affected by the verdict.

Juror 12 responded, "Here's the issue that I have. A hit was put out with that family that's sitting in the courtroom. And it just makes me uneasy, knowing exactly where I work. I'm not comfortable." Upon further questioning by the court, he clarified he became nervous after hearing the gang expert's testimony that the defendants might retaliate against him if the jury returned a verdict in favor of Epps.

The court assured him such retaliation did not typically occur. Juror 12 stated he believed in the system, but would "feel a lot better" if he was anonymous.

The court asked Juror 12 if his concern was to the point it would influence or affect his verdict in the case. He replied, "No." However, he added, "I don't like it. That's the bottom line. I don't like it. I'm not comfortable with it. It's not going to affect my verdict one way or another. It's not going to do that." He then confirmed he would do "the right thing based on the evidence," stating he was "a fair, rational person." Nonetheless, he stated "I don't like to have drama in my life. And I feel like this is adding a little bit of drama to my life."

The court assured him again retaliation did not typically occur and then excused him so the court could discuss the matter further with counsel.

Defense counsel asked to have Juror 12 excused because counsel believed his fear would interfere with his reasoning ability and affect the other jurors. The court pointed out someone acting out of fear would be more likely to return a verdict in favor of their clients, not against them. Nevertheless, the court acknowledged Juror 12 was uncomfortable, and defense counsel continued to assert the court should excuse him. The court denied the motion without prejudice to revisiting the issue after the case was submitted to the jury.

b

When defense counsel continued to express concern Juror 12's feelings would influence the other jurors, the court questioned Juror 12 once again. Juror 12 admitted he had shared his concerns with the other jurors, who asked him why he was meeting with the court and counsel. When the court asked him if he could follow instructions not to mention his concerns further or to factor them into his deliberations, he responded, "I already answered that question. I think it was a question that you asked me before, if I could be fair and impartial. The answer is yes."

Defense counsel remained uneasy about Juror 12's further participation in the trial. The court again denied their motion to excuse Juror 12 without prejudice to its renewal at the conclusion of the case.

The following day, defense counsel moved again to have Juror 12 excused, this time on the ground Juror 12 had formed an opinion about the Barajas family and made up his mind about the verdict. After reviewing the transcript from the prior day, the court agreed it appeared Juror 12 had made up his mind and the court was inclined to grant the motion to exclude him.

The court and counsel then met with Juror 12, where the following exchange occurred:

"[THE COURT]: We were just talking a little bit more about this. [¶] ... [¶] About some of the things that you were talking to us about yesterday. And, anything changed? Any better any worse?

"[JUROR 12]: I feel bad. I feel bad I even brought it up.

"[THE COURT]: Okay. Well, don't feel bad.

"[JUROR 12]: I mean, I do.

"[THE COURT]: No, you did the right thing by bringing it up. [¶] The other thing that I'm concerned about is it sounds like you've kind of already made up your mind about the case?

"[JUROR 12]: Oh, no.

"[THE COURT]: No?

"[JUROR 12]: I'm still listening. For sure.

"[THE COURT]: Okay. And any of those fears that you feel you have, do you think you can set that aside and say, 'If I'm convinced that they're liable, that's how I'm

going to vote, regardless of any of these fears. And if I'm convinced they're not liable, then that's how I'm going to vote, regardless of any concerns'?

"[JUROR 12]: Absolutely. [¶] ... [¶] 100 percent." The court ultimately declined to excuse him "[b]ased on his statements today, [and] the overall tenor of the transcript."

2

Erik and Stacy contend the court prejudicially erred by failing to excuse Juror 12. We review the court's decision for abuse of discretion and must uphold it if it is supported by substantial evidence. (*People v. Bennett* (2009) 45 Cal.4th 577, 621 (*Bennett*); *Shanks v. Department of Transportation* (2017) 9 Cal.App.5th 543, 550 (*Shanks*)).

A trial court may discharge a juror if upon a good cause showing the juror is unable to perform his duty. (Code Civ. Proc., § 233; Pen. Code, § 1089.) The juror's inability to perform his duty must appear in the record as a demonstrable reality. (*Bennett, supra*, 45 Cal.4th at p. 621; *Shanks, supra*, 9 Cal.App.5th at p. 550.) A juror's prejudgment of the case without hearing the evidence constitutes good cause to doubt the juror's ability to perform his duty and justifies discharging the juror. (*People v. Clark* (2011) 52 Cal.4th 856, 971.)

Here, the court met with Juror 12 multiple times and specifically asked him whether he had made up his mind about the case. He repeatedly indicated he could be fair and impartial. He also unequivocally indicated he had not made up his mind, he was still listening to the evidence, and he was able to set aside any fears he may have had about the Mexican Mafia in deciding the case. "The court was in the position to observe

the juror's demeanor [citation] and the court was persuaded that the juror could perform [his] duties." (*Bennett, supra*, 45 Cal.4th at p. 621.) Consequently, we conclude there is sufficient evidence to support the court's decision to retain Juror 12 and the court did not abuse its discretion in doing so.³

C

1

Erik and Stacy next contend we must reverse the judgment because Epps's counsel engaged in repeated acts of misconduct during trial. More particularly, they contend Epps's counsel repeatedly asked questions implying facts when there was no evidence to support the facts or the evidence to support them was inadmissible, including questions implying Stacy was a gang member and both Erik and Stacy were wealthy. In addition, more than once, Epps's counsel melodramatically directed the videographer not to point the camera at the jurors because he did not think Stacy, who was participating in the trial via video conference, should be able to see the jurors. Finally, more than once during his closing arguments, Epps's counsel made factual statements without evidentiary support and implied defense counsel suppressed relevant testimony. Although acknowledging the court repeatedly sustained their objections to Epps's counsel's questions and statements, and often instructed the jury to ignore the questions and statements, Erik and Stacy contend Epps's counsel's conduct prejudiced them because the jury could not

³ Given our conclusion, we need not decide whether Erik and Stacy's challenge to the court's retention of Juror 12 is barred by the invited error doctrine.

reasonably be expected to ignore the conduct and it created the false impression Erik and Stacy were suppressing evidence helpful to Epps's case.

2

Erik and Stacy have forfeited their challenges to most of the claimed misconduct because they have not established they objected on this specific ground below. "[T]o preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial and the party must also have moved for a mistrial or sought a curative admonition unless the misconduct was so persistent that an admonition would have been inadequate to cure the resulting prejudice. [Citation.] This is so because '[o]ne of the primary purposes of admonition at the beginning of an improper course of argument is to avoid repetition of the remarks and thus obviate the necessity of a new trial.'" (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 148 (*Garcia*); accord, *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 295.)

To the extent Erik and Stacy have preserved any of their challenges for appeal, they have failed to demonstrate prejudice. The factors bearing on whether attorney misconduct is prejudicial are: "(1) the nature and seriousness of the misconduct; (2) the general atmosphere, including the judge's control of the trial; (3) the likelihood of actual prejudice on the jury; and (4) the efficacy of objections or admonitions under all the circumstances. In ascertaining prejudice, the reviewing court makes an independent determination [citation] in light of the overall record." (*Martinez v. Department of Transportation* (2015) 238 Cal.App.4th 559, 568; *Garcia, supra*, 204 Cal.App.4th at p. 149.)

Here, while we do not condone the challenged conduct, the record shows the general atmosphere of the trial was professional, the trial judge maintained control of the proceedings throughout, and the likelihood of actual prejudice to the jury was small, in part because of defense counsel's vigilance in bringing objectionable questions and statements to the court's attention. The number of objectionable questions and statements were not disproportionate to the length and complexity of the trial and, as Erik and Stacy acknowledge, the court generally sustained their objections and instructed the jury to disregard the objectionable questions or statements. "Absent some indication in the record, we presume the jury followed the court's instructions and that its verdict reflects the limitations the instructions imposed." (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1250, citing *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803–804; *People v. Bradford* (1997) 15 Cal.4th 1229, 1337.)

D

1

a

Epps's gang expert testified a "green light" is a euphemism for a hit list or a list of enemies of the Mexican Mafia, which is circulated among the local Hispanic gang community. A green light on a person is authorized by a high-ranking gang member. Once a green light on a person is authorized, any local gang member loyal to the Mexican Mafia is encouraged to assault or murder the person. If a local gang member is unable to carry out the green light, "then an open green light comes out" and is spread worldwide. Once a green light is authorized, the authorization does not go away and it may take years

for it to be accomplished. Anyone who testified in this case was in danger of having a green light authorized against them because "any cooperation with law enforcement, even in a civil trial or as a witness or a victim, is a violation of the code of conduct of the Mexican Mafia."

b

Although Epps testified a green light had been placed on him, the court sustained a hearsay objection to the testimony. He also testified to multiple instances years after Erik's and Stacy's convictions, in which he felt the need to contact law enforcement officers. However, the court sustained hearsay objections to his attempts to testify about the reasons for the contacts and the statements he made to the officers. Epps's mother also testified to threats and surveillance she experienced years after Erik's and Stacy's convictions.

2

Erik and Stacy contend the court erred by admitting the gang expert's testimony about the meaning and effectuation of a green light because the gang expert's opinions were based on inadmissible hearsay and otherwise lacked credibility. They further contend the court erred by admitting the testimony of Epps and Epps's mother because their testimony was derived from the expert's green light testimony and it was highly prejudicial.

We generally review a trial court's ruling relating to the admission of expert testimony for abuse of discretion. A ruling constitutes an abuse of discretion if it is so irrational and arbitrary no reasonable person could agree with it or if it is outside the

confines of applicable legal principles. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773; *Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1085.)

Expert testimony must relate to a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact. (Evid. Code, § 801, subd. (a).) In addition, the testimony must be based on matter reasonably relied upon by an expert in forming an opinion on the subject to which the expert's testimony relates, unless the law precludes the expert from basing his opinion on such matter. (*Id.*, subd. (b).) Similarly, on direct examination, the expert may state the reasons for the expert's opinion and the matter it is based upon, including the expert's special knowledge, skill, experience, training, and education, unless the law precludes the expert from basing his opinion on such reasons or matter. (Evid. Code, § 802, subd. (b).)

A key restraint on an expert's testimony is the hearsay rule (Evid. Code, § 1200). The hearsay rule does not preclude an expert from testifying about the expert's general knowledge in the expert's field of expertise, even if the expert's general knowledge is based on conversations with others, lectures, study of learned treatises, or other hearsay. (*People v. Sanchez* (2016) 63 Cal.4th 665, 675–676, 685.) However, the hearsay rule does preclude an expert from testifying to case-specific facts about which the expert has no personal knowledge. (*Id.* at pp. 676, 686.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried. Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An

expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean." (*Id.* at p. 676.)

Here, the challenged testimony about what a green light is and how a green light is effectuated was from the expert's general knowledge and personal experience in the expert's field of expertise. Consequently, even though it was at least partially based on hearsay, it was not barred by the hearsay rule. An expert may "*rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests." (*Sanchez, supra*, 63 Cal.4th at pp. 685–686.)

As for the sufficiency and credibility of the information underlying the gang expert's testimony, this was a jury question and the jury impliedly found against Erik and Stacy on this point. (*Sanchez, supra*, 63 Cal.4th at p. 675 ["The jury is not required to accept an expert's opinion. The final resolution of the facts at issue resides with the jury alone. The jury may conclude a fact necessary to support the opinion has not been adequately proven, even though there may be some evidence in the record tending to establish it. If an essential fact is not found proven, the jury may reject the opinion as lacking foundation. Even if all the necessary facts are found proven, the jury is free to reject the expert's opinion about them as unsound, based on faulty reasoning or analysis, or based on information the jury finds unreliable. The jury may also reject an opinion because it finds the expert lacks credibility as a witness"].) Moreover, because Erik and

Stacy have not established the court erred by admitting the gang expert's testimony, they necessarily have not established the court erred by admitting any derivative testimony by Epps and Epps's mother.⁴

E

Finally, Stacy separately contends she was denied a fair trial because she was not allowed to attend the trial in person. "[P]risoners have a constitutional right of access to the courts." (*Bounds v. Smith* (1976) 430 U.S. 817, 821.) In civil actions, "[r]emedies to secure access may include: (1) deferral of the action until the prisoner is released [citation]; (2) appointment of counsel for the prisoner [citations]; (3) transfer of the prisoner to court [citations]; (4) utilization of depositions in lieu of personal appearances [citations]; (5) holding of trial in prison [citation]; (6) conduct of status and settlement conferences, hearings on motions and other pretrial proceedings by telephone [citation]; (7) propounding of written discovery; (8) use of closed circuit television or other modern electronic media; and (9) implementation of other innovative, imaginative procedures." (*Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792–793 (*Wantuch*), fns. omitted; accord, *Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1483; *Hoversten v. Superior Court of San Luis Obispo County* (1999) 74 Cal.App.4th 636, 643.)

"A prisoner does not have the right to any particular remedy." (*Wantuch, supra*, 32 Cal.App.4th at p. 793; accord, *People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1,

⁴ Given our conclusions regarding the propriety of admitting the gang expert's testimony, we need not decide whether Erik and Stacy adequately preserved their objections to the testimony for appeal.

64.) Rather, the determination of the appropriate remedy is within the trial court's sound discretion, and we will not overturn the court's determination on appeal " 'unless it appears that there has been a miscarriage of justice.' " (*Wantuch, supra*, at p. 794; accord, *People ex rel. Reisig v. Acuna, supra*, at p. 64.)

Stacy has not established that either an abuse of discretion or a miscarriage of justice has occurred in this case. Ordinarily, a prisoner defending a civil action has no right to personally appear in court, particularly if she is represented by counsel. (*Payne v. Superior Court of Los Angeles County* (1976) 17 Cal.3d 908, 913 (*Payne*); *Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App.4th 332, 339; *Wantuch, supra*, 32 Cal.App.4th at p. 794; *People v. Lawrence* (1956) 140 Cal.App.2d 133, 135; *In re Application of Bagwell* (1938) 26 Cal.App.2d 418, 420–421.) If a trial court determines the in-court testimony of a prisoner defendant is necessary to protect the parties' due process rights, the court may attempt, through the California Department of Corrections and Rehabilitation (Department), to arrange for the prisoner's presence. (*Payne, supra*, at p. 924.) The court attempted to arrange for Stacy's presence in this case; however, the Department objected for policy and security reasons.

Except for a few specified circumstances not applicable here, the court had no statutory authority to command the Department to transport a prisoner to a civil courtroom. (*Payne, supra*, 17 Cal.3d at p. 924; *Swarthout v. Superior Court* (2012) 208 Cal.App.4th 701, 706–707.) If the Department "refuses accommodation, the court may order a continuance or employ other alternatives to transporting the prisoner." (*Payne*, at pp. 924–925.) Here, the court opted to employ other alternatives to transporting Stacy.

Specifically, the court arranged for her to participate in the trial through video conferencing. The use of video conferencing coupled with Stacy's representation by retained counsel sufficiently secured Stacy's access to the court for purposes of this civil case.

IV

DISPOSITION

The judgment is affirmed. Epps is awarded his appeal costs.

McCONNELL, P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.