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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. BARBARA J. DAVENPORT, Defendant and Appellant.	B267457 (Los Angeles County Super. Ct. No. BA399858)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Lance E. Winters, Assistant Attorneys General, Stephen D.

Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Barbara Davenport appeals from her judgment of conviction of robbery and felony murder during the commission of robbery, with true findings of personal use of a firearm causing death. (Pen. Code, §§ 187, subd. (a); 190.2, subd. (a)(17); 211; 12022.53, subds. (b)-(d).)[1] She argues the trial court committed reversible errors when it denied her request to represent herself, excluded evidence of third-party culpability, denied her motion for mistrial after her ex-boyfriend volunteered that she had threatened him, and overruled her objection to the DNA expert's testimony. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The victim, 79-year-old Cleo Hughes, was appellant's aunt.[2] Cleo managed Jack's Family Kitchen, a restaurant owned by Jack Davenport, who was Cleo's brother and appellant's father. Appellant's sister, Cecelia Banks, worked at the restaurant. Restaurant employees knew that Cleo kept cash from the restaurant at her home. If Cleo was not at the restaurant at the end of the day, a waitress would drop off the daily revenues and receipts at Cleo's house and pick up cash for the next day.

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[1] Undesignated statutory references are to the Penal Code, unless otherwise indicated.

[2] Because some of appellant's relatives share the same last names, we will refer to all family members by their first names for the sake clarity and consistency.

Cleo lived alone in her house at 1644 West 66th Street in Los Angeles. She stored cash in her bedroom closet, in dresser drawers, and in a kitchen utility closet. The house had an alarm system, and Cleo kept the doors locked. Only she and her son Christopher Hughes, a retired Los Angeles Police Department (LAPD) officer, had keys to the house. Cleo did not like visitors to appear unannounced, always checked who was at her door before opening it, and would not open it to a stranger.

On the afternoon of June 2, 2012, a waitress dropped off a bag containing approximately $2,100 at Cleo's home and picked up a bag containing $581. Christopher then drove Cleo to see Jack and brought her back. The next morning, after being unable to reach his mother by phone, Christopher stopped by her house. The front bar and wooden doors were unlocked, which was unusual, but there was no sign of forced entry. Cleo was lying across the bed, with a gunshot wound to her chest. She had bruises on her left jaw and left elbow and gouge marks on her right arm. She wore different clothes than she had the night before. The estimated time of death was between 3 a.m. and 7 a.m. on June 3.

Cleo's house, normally neat, was in disarray, with dresser drawers open and items from the kitchen utility closet and a linen closet out on the floor. Missing were a wastepaper basket Cleo kept in the utility closet, in which she concealed $20 and $100 bills; a small safe she kept in her bedroom closet; the bag with the June 2 restaurant receipts; Cleo's purse; and a .38 caliber Smith & Wesson revolver Christopher kept in the linen

closet. The bullet that killed Cleo could have been fired from that gun.[3]

Appellant was homeless and unemployed. She received a little over $800 in Social Security benefits at the beginning of every month. Her prepaid debit card statement showed a zero balance on May 31, 2012, followed by a $844 United States Treasury check transfer on June 1.[4] The money was withdrawn during several transactions that morning, beginning at 5:28 a.m. Appellant gambled frequently at the Hustler, Normandie and Hollywood Park casinos, where she played blackjack.[5] Her personalized player club card was scanned at the Hustler Casino at 6:20 a.m. on June 1. Appellant denied having gambled on June 2, and claimed she had spent the day either at a park or at her sister Cecelia's place at West 95th Street, where she frequently stayed.

When Cecelia went to work around 4:30 a.m. on June 3, appellant was still at her place. At 10:16 a.m. on the same day, appellant deposited $500 in cash into her debit card account at

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[3] Jack's gun, which was on a high shelf in the linen closet, had not been used in the murder. Additional cash and jewelry were found undisturbed in Cleo's bedroom.

[4] In her interviews with police, appellant, apparently incorrectly, recalled that she did not receive her benefits until June 3.

[5] The Normandie and Hustler casinos are in Gardena; the Hollywood Park Casino is in Inglewood. The police were unable to obtain records of appellant's activity at the Hollywood Park Casino.

Nix Cash Checking, located at 14107 Crenshaw Boulevard, and she went to her rental storage unit, on 11215 Crenshaw Boulevard, around noon.[6] Her player club cards were scanned at 1 p.m. at the Normandie Casino and around 2:30 and 3:30 p.m. at the Hustler Casino. Appellant was at the Hustler Casino when her sister texted her that Cleo was dead. Appellant texted back, "OMG" (short for "Oh, my God").

Later that afternoon, Cecelia and appellant went to Cleo's house. Appellant stood off to the side, away from family members and did not offer condolences to Christopher. The sisters then went to a Target store, where appellant bought a watch for $20. They ate dinner at Red Lobster, for which appellant paid in cash. Later, they went to the Hollywood Park Casino, where appellant gave Cecelia $500 in gambling money. They stayed out until 11:00 p.m.

In the following week, appellant gave Cecelia two more $100 bills when they went gambling. Appellant made another $300 deposit into her debit card account on June 8. She bought more things than usual: two designer pairs of prescription glasses, shoes, a ring, a stereo and alarm system for her car, and a purse for Cecelia. She had her car window repaired and the car interior cleaned. She also paid a total of $110 for hotel rooms for herself and Cecelia for a 4th of July weekend in Las Vegas, where she had not been in years. When, on occasion, Cecelia asked where the money came from, appellant responded that she had "a special friend" or claimed to have won at all three casinos. By the

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[6] In early June 2012, appellant visited her storage unit with some frequency: on June 3, 4, 5 or 6, 9, and 10. In contrast, she had visited the unit only twice in May 2012: on May 3 and 30.

end of June, appellant's spending subsided. In Las Vegas, she lost $250 and had to ask Cecelia for money.

Appellant's Normandie Casino player card had not been scanned at all between January and May 2012, but it was scanned on June 3, 4, 6, 7, and 10. Her Hustler Casino card had been scanned nine times in September 2011, twice in October and November, 14 times in December, 16 times in January 2012, nine times in February, six times in March, not at all in April, twice in May, and 30 times between June 3 and June 20.

Detective Michael Whelan considered appellant's gambling activity in June unusual and submitted her DNA sample, along with three others, for comparison with a sample obtained from Cleo's fingernail clippings, which showed a mixture of two female contributors. Appellant's sample identified her as a possible contributor.[7] Appellant's DNA could have been present in Cleo's sample if Cleo had scratched or touched her; it was possible, but not likely, that it could have been transferred by touching an object.

Appellant was interviewed twice, on June 9 and July 11, 2012. In her first interview, she claimed to have last seen Cleo at Jack's house a month earlier, but could not remember when she had last been to Cleo's house. In the second interview, she claimed to have seen Cleo at Jack's house a week before the murder, and to have been to Cleo's house a month before.

In the latter interview, appellant said she had been on a winning streak when she received the news of her aunt's death, having won large sums at all three casinos. She estimated

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[7] The three other individuals whose DNA samples were submitted for analysis were excluded as contributors. One of them was appellant's sister Cecelia.

having won between $2,000 and $2,500, as well as $400 in bonuses. She explained she gambled in order to double her income from Social Security. If she won, she kept on gambling. She did not see anything unusual in her gambling pattern and insisted that the casinos did not scan the player club cards regularly.

Appellant was arrested after her second interview. During her booking, four partially healed scratches were observed on her right shoulder. Appellant volunteered that Cecelia's dog had scratched her "a few weeks" before, but the scratches were inconsistent with the dog's paw.[8] Appellant was charged with one count of murder (§ 187, subd. (a)), with a special circumstance allegation that the murder was committed during a robbery (§ 190.2, subd. (a)(17)), and one count of robbery (§ 211). As to both counts, it was alleged that appellant personally used and intentionally discharged a firearm, causing death. (§ 12022.53, subds. (b)-(d).) The jury convicted her as charged. The murder and robbery were found to be in the first degree, and the enhancements and special circumstance were found to be true.

On the murder count, appellant was sentenced to life in prison without the possibility of parole, plus 25 years to life for the use of a firearm. The sentence on the robbery count and the additional firearm enhancements were stayed under section 654.

This appeal followed.

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[8] The scratches had not been noticed in the earlier interview because appellant had worn short sleeves.

DISCUSSION

I

Appellant contends the court did not properly consider her request to represent herself.

Criminal defendants have a Sixth Amendment right to self-representation. (*Faretta v. California* (1975) 422 U.S. 806, 807 (*Faretta*).) The assertion of that right must be timely, unequivocal, and unmistakable (*People v. Valdez* (2004) 32 Cal.4th 73, 98–99.) "Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied." (*People v. Marshall* (1997) 15 Cal.4th 1, 23.) We examine the record de novo to determine whether the defendant unequivocally invoked the right to self-representation. (*People v. Dent* (2003) 30 Cal.4th 213, 218.)

On August 20, 2015, the first day of trial, the court held a *Marsden*[9] hearing to consider appellant's handwritten reasons for "firing" her attorney from the Alternate Public Defender's office. Appellant complained that she had been represented by a series of five appointed attorneys, some of whom had been removed from her case without an explanation, and that the Public Defender's office had declared a conflict of interest, also without an explanation.

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[9] *People v. Marsden* (1970) 2 Cal.3d 118.

Her principal complaint about her latest attorney was that he repeatedly had told her to lie under oath. She also complained he had told her not to testify and that he wanted to go over her testimony. Appellant's other grievances were that the attorney preferred to communicate with her through video conferences, had not read the discovery in her case, had refused to call witnesses in her defense, and had failed to remove her to another jail facility after she had suffered an attack at her placement.

At the end of her written motion, appellant stated: "If I cannot fire my present Alternative Public Defender . . . and have a state appointed attorney and a new jurisdiction venue at this time . . . , I do not feel that I can have a 'fair trial' at this criminal court building also. [¶] I feel that all of my rights have been 'trampled on' due to the nature of my case. I strongly feel used and mistreated by the jails, and courts here and all of the attorneys that I have had. [¶] If I cannot fire my present attorney from the Alternative Public Defender's Office. . . and have a state appointed attorney and change the jurisdiction, then I request to have a psych evaluation A.S.A.P. ordered by the court, but not to be done at CRDF Lynwood Jail Facility, to determine whether or not I am capable to go Pro-Per, and defend myself."

After discussing appellant's complaints with her and her attorney, the court stated: "[A]s far as your ultimate request to have a competency determination to see if you can represent yourself, it's way too late in the game. We're about to start jury selection on this. So we're in the process of jury selection and we're not going to delay this any further for the purpose to get a competency determination. [¶] . . . I'm confident that [appellant's counsel] will competently and vigorously defend you in this

matter. But I'm not going [to] delay these proceedings any further. Okay? So at this point the *Marsden* motion is denied."

On this record, we cannot conclude that appellant clearly and unequivocally requested to represent herself. Her actual request was for a competency evaluation, and that is how the court interpreted it. Appellant argues that because she was competent to stand trial she was presumptively competent to represent herself, and the court should have understood that she mistakenly believed a competency evaluation was required. We disagree.

As *Indiana v. Edwards* (2008) 554 U.S. 164, 177–178 and *People v. Johnson* (2012) 53 Cal.4th 519, 526 have explained, competence to stand trial is not always coextensive with competence to represent oneself at trial, and the trial court may order a psychological examination in case of doubt. (*Id.* at p. 530.) The trial court cannot be faulted for taking appellant at her word when she requested such an evaluation. Nor are we required to infer that appellant made the request in error rather than because she had doubts about her own competence or was ambivalent about self-representation. Rather, we must "draw every reasonable inference against waiver of the right to counsel" (See *People v. Marshall*, *supra*, 15 Cal.4th at p. 23.) Appellant's request for a competency evaluation supports the court's decision as it reflects ambivalence about her ability to represent herself. (*Ibid.*)

We also agree with respondent that appellant's request appears to have been made out of frustration and anger. Appellant did not simply request that counsel be removed and, if not removed, that she be allowed to represent herself—a request that would be considered unequivocal. (*People v. Michaels* (2002)

28 Cal.4th 486, 524.) Rather, she expressed exasperation not only with her current attorney, but also with the court and jail system in Los Angeles County, and made additional requests for a "state-appointed attorney" and venue transfer, without either of which she believed she could not have a fair trial. Considering the range of her complaints and requests, it is difficult to conclude that appellant "truly" desired to represent herself as opposed to airing her general frustration. (*Marshall*, *supra*, 15 Cal.4th at p. 23.)

Appellant's request also was untimely. Where a defendant asserts the right to self-representation on the eve of trial and requests a continuance, the *Faretta* motion is "addressed to the sound discretion of the trial court." (*People v. Valdez*, *supra*, 32 Cal.4th at p. 102, quoting *People v. Windham* (1977) 19 Cal.3d 121, 128, fn. 5.) The court should consider "'the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.'" (*Windham*, at p. 128.) The court rejected appellant's complaints regarding her attorney's performance when it denied her *Marsden* motion, and appellant does not challenge its ruling that defense counsel was competent, which is a relevant factor under *Windham*. The court found that appellant's request, made on the day jury selection began and phrased in such a way as to necessarily require a delay in the proceedings, was untimely. Even were we to construe appellant's request for a competence evaluation as a *Faretta* motion, appellant's untimely request for self-representation was bound to cause delay, and the court's denial of that request was not an

abuse of discretion, especially since the court considered appointed counsel's performance to be adequate.

II

Appellant also challenges the court's exclusion of evidence of third-party culpability. We review the court's evidentiary ruling for abuse of discretion. (*People v. Cudjo* (1993) 6 Cal.4th 585, 607 (*Cudjo*).)

The court held an Evidence Code section 402 hearing on what it described as the prosecution's motion *in limine* to exclude the third-party-culpability evidence and the defense response to the motion.[10] The defense's offer of proof was that Donald Nathaniel, a Crips gang member known as Tiny Flux (also spelt in the record as Fluxx or Fluccx), had taken credit for the killing of an LAPD officer's mother in June 2012 at West 66th Street. At the evidentiary hearing, Nathaniel invoked his right against self-incrimination and was declared unavailable as a witness.

In the alternative, the defense sought to introduce Nathaniel's confession as a declaration against penal interest through the testimony of Anthony Player, to whom Nathaniel was claimed to have made the statement, or Randall Bo Jackson, to whom Player was claimed to have relayed Nathaniel's statement.[11] At the evidentiary hearing, Player unsuccessfully

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[10] Although the trial court certified that the written papers referenced at the hearing could not be located in its file, appellant's counsel has augmented the record with the defense motion *in limine* to admit evidence of third-party culpability.

[11] A police report attached to the motion *in limine* stated detectives had contacted Jackson in jail on July 16, 2014. During the interview, Jackson said that while they were in jail together in 2013-2014, Player offered Jackson information about the murder of a police officer's mother, which Jackson could use to

attempted to invoke the right against self-incrimination. Ordered to testify, he denied telling Jackson that Nathaniel had said anything about a murder of an officer's mother on 66th Street in June 2012.

Player also denied making a number of other statements attributed to him by both the prosecution and defense. For example, he denied telling detectives that he had given information about Nathaniel's confession to Jackson to help him with his case. He also denied having seen Nathaniel in jail in December 2012, and claimed to have last seen him in prison in

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get a better deal in his pimping and pandering case. Player reportedly told Jackson that Player and Tiny Fluxx were in Folsom State Prison when Tiny Fluxx took responsibility for the murder of a LAPD officer's mother on 66th Street in June 2012. (The reporting officer, apparently incorrectly, wrote down that Player and Tiny Fluxx were in prison together in 2010-2011.) Jackson told the officers Player had not given him any detail about how the victim had been murdered.

A second police report stated the detectives had contacted Player at his home on July 18, 2014. Player told them he had heard on the news and from friends that an officer's mother had been found murdered in her home. Several of his family members who belonged to the East Coast Crips gang told him they had heard rumors that a gang member by the moniker of "Fluccx" was involved in several shootings in the area around the same time and may have been involved in the murder of the officer's mother as well. Player told the officers he had met Fluccx in Delano State Prison in 2001, and that he had seen him again in jail in December 2012, but had not talked to him. Player admitted giving information about the murder to Jackson to help him with his case, but denied having spoken to Fluccx about the murder. During his interview with the detectives, Player identified Nathaniel as Fluccx from a photograph.

2004 or 2005. He admitted hearing about Cleo's murder on the news but denied telling the detectives that he had heard rumors about Nathaniel's involvement in it. Player also denied that in 2014 he had been contacted by a defense investigator, to whom he had said that, in late 2012 or 2013, he had overheard inmates talking about the murder of a police officer's mother "in the 60's" by someone nicknamed Tiny Flux.

On the first day of the two-day evidentiary hearing, defense counsel represented that Jackson was in local custody but refused to appear in court. On the second day, he advised that Jackson had been "sent up to Chino." The defense sought to continue the case until Jackson was back in local custody. As an offer of proof, defense counsel represented that Jackson would testify Player told him what Nathaniel had told Player: that Nathaniel had shot the mother of a police officer on 66th Street in June 2012.

The court concluded that the evidence was inadmissible under Evidence Code section 352. The court found it was "very difficult to judge the trustworthiness" of a gang member's bragging about "what had become somewhat of a notorious crime in the area." The court noted the lack of evidence about the details of Nathaniel's supposed confession and the circumstances under which it had been made.

Because the confession could not come in through the testimony of Nathaniel or Player, the court was concerned that proving it was made would create "a side show," causing "undue confusion and an undue waste of time based on how little probative value ultimately you're going to have because it's going to be hearsay on hearsay on hearsay, which is going to be impeached by other hearsay." The court assumed Jackson's

testimony about Player's statement implicating Nathaniel in the murder would be admissible as a prior inconsistent statement since Player denied making it. However, fairness would require the interviewing detective and defense investigator to testify to the other inconsistent statements Player denied making, and those statements suggested that what he relayed to Jackson was a rumor rather than an actual confession. The court noted its assumption that Jackson would testify consistently with the offer of proof was "a stretch . . . based on what I've observed," and if Jackson testified inconsistently with what he was believed to have said before, then there would need to be testimony impeaching Jackson.

The court did not abuse its discretion in excluding the third-party-culpability evidence. An out-of-court declaration against penal interest by an unavailable witness is admissible if it is "sufficiently reliable" or trustworthy. (Evid. Code, § 1230; *Cudjo*, *supra*, 6 Cal.4th at p. 607.) A murder confession is undisputably against one's penal interest, but in determining its trustworthiness, the court "'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.]" (*Ibid.*)

Cudjo, *supra*, 6 Cal.4th 585 lays out the proper analysis of trustworthiness. At his murder trial, the defendant in that case sought to introduce evidence that his brother, Gregory, had confessed while in custody for the same crime. (*Id.* at p. 604.) Gregory invoked his right against self-incrimination, but Gregory's cellmate, John Lee Culver, was willing to testify that, while they were in custody together, he had noticed Gregory pacing restlessly. (*Ibid.*) Culver asked Gregory what was wrong

and, in response, Gregory said he was arrested for murder and needed to talk to someone. He then admitted that he went "'to rob, burglarize this lady's house and she seen me.'" (*Ibid.*) "Gregory reportedly said that the woman started screaming as soon as she saw him, that he 'knocked her out,' that she 'came back to,' and that he 'started hitting her and hitting her with a hammer or whatever he hit her with.' Gregory also said, reportedly, that he had found jewelry and guns in the house, and that he knew the lady because they had 'smoked dope together.'" (*Id.* at p. 605.)

The trial court declined to admit the evidence of Gregory's confession because of Culver's lack of credibility. (*Cudjo*, *supra*, 6 Cal.4th at p. 606.) The Supreme Court concluded that was error because the circumstances surrounding Gregory's hearsay statement indicated that it was sufficiently trustworthy. (*Ibid.*) The court concluded that Gregory's alleged hearsay statement was made under reliable circumstances since, "[b]y Culver's account, Gregory made his statement spontaneously, while alone with an acquaintance, within hours after a murder for which Gregory, who had no alibi, was in custody as a prime suspect. Gregory tended to fit [another witness's] description of the assailant, and much of the other evidence . . . was as consistent with Gregory's guilt as with [the] defendant's." (*Id.* at p. 607.)

The factors that rendered the confession in *Cudjo*, trustworthy are markedly absent in this case. As the trial court correctly noted, here, very little is known about the circumstances under which Nathaniel's confession was made, or its details. Player told the detectives that he and Nathaniel had been in jail together in December 2012. But there is no evidence why Nathaniel was in custody or under what circumstances he

confessed to a murder that occurred six months before. There is no indication that Nathaniel had been a suspect in Cleo's murder until at least 2014, when Player's statement to Jackson came to light. No other evidence implicated him in the crimes for which appellant was on trial, and the reported confession provides no details as to how Nathaniel purportedly committed those crimes, making it impossible to compare his account to the evidence collected in this case.

The trial court's error in *Cudjo*, *supra*, 6 Cal.4th 585, 608 was that the court excluded Culver's testimony not because Gregory's confession might be false, but because Culver, a live witness, lacked credibility. No such error occurred here. While the court expressed doubts about Player's credibility, it did not exclude the evidence on that ground. Rather, the court expressly stated that had Player been willing to testify to Nathaniel's confession, its analysis would have been different. But without details about the circumstances under which Nathaniel confessed or what he said beyond the known facts that there was a murder of an officer's mother on 66th Street in June 2012, it is impossible to evaluate the truth of his confession. The court's concern that a gang member like Nathaniel could brag about a notorious crime without having committed it was neither unreasonable nor improper. The court could consider Nathaniel's motivation as part of the analysis, and in doing so it credited Player's testimony that Cleo's murder had been in the news.

The court properly excluded the third-party-culpability evidence under section 352, which requires weighing its "probative value against the dangers of prejudice, confusion, and undue time consumption." (*Cudjo*, *supra*, 6 Cal.4th 609.) Nathaniel's confession to Cleo's murder was certainly material

because it could raise reasonable doubt about appellant's guilt. (See *id.* at p. 610.) But unlike Gregory's confession in *Cudjo*, Nathaniel's confession did not have substantial probative value because, as we have explained, there was no evidence he had confessed "under circumstances providing substantial assurances that the confession was trustworthy." (*Id.* at p. 609.)

In *Cudjo*, *supra*, 6 Cal.4th 585, 609, there was no issue about undue consumption of time. In contrast, here, because Player denied implicating Nathaniel, there was a concern about the time it would take to get the evidence of Nathaniel's confession before the jury. Player's statement to Jackson about Nathaniel's confession was admissible as a prior inconsistent statement since Player denied making it. (See *People v. Zapien* (1993) 4 Cal.4th 929, 952–954 [prior inconsistent statements admissible despite including multiple levels of hearsay].) But because Player had made many inconsistent statements during the investigation, all of which he denied having made, fairness would have required that the jury hear testimony as to all of them in order to determine their truth. (Evid. Code, §§ 770, 1235; *People v. McKinnon* (2011) 52 Cal.4th 610, 672 [prior inconsistent statements admissible both for impeachment and for their truth].) That would have required allowing Player to explain the inconsistency in his testimony and taking testimony from at least three additional witnesses: Jackson, the interviewing detective, and the defense investigator.

Defense counsel argued that Player's statements to others were very short, and the court agreed they would not require a week of testimony. Nevertheless, there is support for the court's conclusion that presentation of Player's many inconsistent statements would result in an "undue waste of time." The

difficulty in obtaining testimony from Player and Jackson was on display at the evidentiary hearing, where Player's testimony required a second day of hearing because he refused to testify at the first, and Jackson's appearance could not be obtained for either hearing. The court was properly concerned about the undue consumption of time it would take to introduce Player's inconsistent statements, which would necessarily impeach and, as a result, weaken each other by implication, in order to get in Nathaniel's confession, whose probative value would be low because its trustworthiness would be impossible to determine. (See *People v. Zapien*, *supra*, 4 Cal.4th at p. 956 [jury determines credibility of hearsay evidence based on totality of circumstances and probative value of hearsay evidence decreases with each level of hearsay].)

There also was a real danger of confusing the issues. While in *Cudjo*, *supra*, 6 Cal.4th 585, the court noted that "Gregory's culpability constituted the primary defense," which was supported by other evidence (*id.* at p. 609), here, Nathaniel's confession was unrelated to any of the evidence against appellant. The multiplicity of witnesses required to bring the confession in would have introduced an entirely new set of issues into the case, or, as the court phrased it, would have created "a side show."

Because nothing in the defense's offer of proof indicated Nathaniel's confession was trustworthy, its probative value was low. The court correctly weighed that against the risk of undue consumption of time and confusion of the issues that would be caused by the multiplicity of witnesses needed to testify about inconsistent out-of-court statements in order to bring the

confession in. The court did not abuse its discretion in excluding the evidence of third-party culpability under the circumstances.[12]

III

Appellant challenges the denial of her mistrial motion after her ex-boyfriend, Sam McAllister, volunteered that she had threatened him.

"'"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]" [Citation.]' [Citation.] While '[a] witness's volunteered statement can, under some circumstances, provide the basis for a finding of incurable prejudice' [citation], 'a motion for mistrial should be granted only when "'a party's chances of receiving a fair trial have been irreparably damaged."'" [Citation.] Moreover, it is only in the "exceptional case" that any prejudice from an improperly volunteered statement cannot be cured by appropriate admonition to the jury. [Citations.] . . . . (*People v. Franklin* (2016) 248 Cal.App.4th 938, 955.)

Before he testified, McAllister was admonished not to get into specifics about appellant's erratic behavior at the end of the

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[12] In *Cudjo v. Ayers* (9th Cir.2012) 698 F.3d 752, the Ninth Circuit disagreed with the California Supreme Court's holding that the trial court's error in excluding the third-party-culpability evidence in *Cudjo*, *supra*, 6 Cal.4th 585, 612 was subject to harmless error review under *People v. Watson* (1956) 46 Cal.2d 818. The Ninth Circuit concluded the error was constitutional, subject to review under *Chapman v. California* (1967) 386 U.S. 18, and not harmless. (*Ayers*, at pp. 763, 766, 768–770.) Since we find no error, we do not engage in harmless error review.

relationship, such as drug use or mental health issues. The court stated, "As far as any kind of threat that was made at the time in June 2011, let's exclude that." The prosecutor argued that admission of McAllister's voluntary manslaughter conviction would open the door for introducing evidence of appellant's threat. The court disagreed, ruling the threat was not relevant and was subject to exclusion under Evidence Code section 352. The court restated its ruling: "I don't want any mention of that threat at this stage," and added that if appellant's character became an issue, McAllister could be recalled.

McAllister testified that he and appellant broke up in 2011. When the prosecutor asked why, McAllister responded: "We had an altercation and she looked me in the eye and said, 'I'll fuck you up.'" The court immediately ordered the answer stricken. Later, outside the jury's presence, the court denied the defense motion for mistrial. The court was not convinced McAllister had intentionally disobeyed its instruction, noting: "I don't know that he understood what was going on." The prosecutor admitted that when she met McAllister before court that day, she told him to bring up the threat if asked about it; she, therefore, believed McAllister's testimony was a result of "a complete misunderstanding." The court expressly admonished McAllister not to mention the threat again. McAllister then testified that he broke up with appellant because she spent her income on gambling instead of paying her bills, and that she invited him to dinner in June 2012. At the end of trial, the court instructed the jury to disregard testimony stricken from the record and not consider it for any purpose.

Appellant argues the threat about which McAllister testified incurably prejudiced the jury because it suggested her

propensity for violence. While evidence reflecting a propensity to commit crimes ordinarily is inadmissible because it is prejudicial (Evid.Code, § 1101, subd. (a)), fleeting references to a defendant's past criminality may be curable by prompt appropriate instruction and admonition, which the jury is presumed to have followed, especially where there is no evidence of bad faith. (*People v. Franklin, supra,* 248 Cal.App.4th 938, 955; *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.) The trial court is "obviously the best judge of whether any error was *so prejudicial to one of the parties* as to warrant scrapping proceedings up to that point." (*Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672, 678.)

The court did not consider McAllister's brief mention of the threat to be intentional, and the record supports that conclusion. Although in the initial discussion the court repeatedly stated that evidence of the threat should be excluded, it did not directly admonish McAllister not to testify about it. It is plausible that a lay witness may have been confused by the discussion of this issue in his presence. After the court specifically admonished him not to mention the threat, he complied. While McAllister's initial confusion may have been caused by the prosecutor's position on the issue, there is no indication the prosecutor intentionally elicited the prohibited testimony.

The court's conclusion that McAllister's fleeting testimony about the threat did not merit a mistrial was reasonable. Since his testimony on this point was immediately interrupted, McAllister provided no detail suggesting appellant's threat was criminal, in the sense that there was an immediate prospect of its execution, or that it caused him to be in reasonable fear for his safety. (See *People v. Toledo* (2001) 26 Cal.4th 221, 227.) We are

not convinced that a proper cure required an additional specific admonition to disregard fleeting testimony that the jury may or may not have heard and that already had been ordered stricken.

IV

Appellant complains that Supria Rosner, the DNA technical leader of the LAPD's crime laboratory, was allowed to testify to DNA testing done by other analysts in the laboratory even though she was not present during the testing. Defense counsel objected to the testimony under *Crawford v. Washington* (2004) 541 U.S. 36.

Appellant recognizes that the California Supreme Court has allowed the use of expert testimony "based upon the unsworn recordation of scientific data obtained from laboratory analyses done by people other than the testifying expert," citing *People v. Banks* (2014) 59 Cal.4th 1113, overruled on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; *People v. Lopez* (2012) 55 Cal.4th 569; *People v. Dungo* (2012) 55 Cal.4th 608; *People v. Geier* (2007) 41 Cal.4th 555, overruled on another ground in *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305, 345.)

Appellant's argument on this issue is difficult to follow. She argues these California Supreme Court cases were incorrectly decided, but acknowledges that we are required to follow them under *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 458. Although she attempts to preserve the issue for further review, appellant does not explain why the California cases were incorrectly decided. She relies exclusively on *Williams v. Illinois* (2012) 132 S.Ct. 2221, but the plurality opinion in that case also found that a

DNA expert's testimony based on a report prepared by an outside laboratory did not violate the Sixth Amendment.

Under *Crawford v. Washington*, *supra*, 541 U.S. 36, the Sixth Amendment prevents the prosecution from relying on testimonial hearsay unless the witness is unavailable to testify at trial, and the defendant has had a prior opportunity for cross-examination. (*Id*. at p. 59.) In *People v. Geier*, *supra*, 41 Cal.4th 555, which appellant cites, the California Supreme Court reasoned that a laboratory report is non-testimonial because it is "a contemporaneous recordation of observable events rather than the documentation of past events." (*Id*. at p. 605.) That reasoning was rejected in *Melendez–Diaz v. Massachusetts*, *supra*, 557 U.S. 305, 317, and is no longer followed in California. (See *People v. Lopez*, *supra*, 55 Cal.4th at p. 581.)

Williams v. Illinois, *supra*, 132 S.Ct. 2221 on which appellant primarily relies, offers no binding authority on when a laboratory report is testimonial. (See *Texas v. Brown* (1983) 460 U.S. 730, 737 [plurality opinion not binding precedent]; *People v. Lopez*, *supra*, 55 Cal.4th at p. 582.) In that case, the plurality reasoned that the expert's testimony about the laboratory report was admitted not for its truth but for the limited purpose of explaining the basis of the expert's independent conclusion that the defendant's DNA matched the perpetrator's. (*Williams,* at p. 2228 (plur. opn. of Alito, J.).) The plurality reasoned in the alternative that the laboratory report was not prepared "for the pimary purpose of accusing a targeted individual," as defendant was not a suspect in the case. (*Id*. at p. 2243 (plur. opn. of Alito, J.).)

Appellant seeks to distinguish the plurality's first stated reason in *Williams v. Illinois*, *supra*, 132 S.Ct. 2221, but that

reason has not been adopted by the California Supreme Court in cases decided since *Williams*. Most recently, in *People v. Sanchez* (2016) 63 Cal.4th 665, 679, the court rejected the not-admitted-for-its-truth rationale with respect to case-specific hearsay in the context of gang expert testimony. Appellant also distinguishes the second rationale of the *Williams* plurality on the ground that her DNA sample was sent for testing because she was a suspect in the case. That may or may not be an important distinction since appellant's was one of four samples compared to the DNA profile developed from the fingernail clippings, and the samples from the three other individuals were excluded.

An additional rationale was offered in a concurring opinion by Justice Thomas, who agreed with the plurality's conclusion that the DNA expert's testimony did not violate the Sixth Amendment because the laboratory report on which the expert relied "lack[ed] the solemnity of an affidavit or deposition" and was therefore not "testimonial." (*Williams v. Illinois*, *supra*, 132 S.Ct. at p. 2260 (conc. opn. of Thomas, J.).) Appellant does not challenge this rationale, which the California Supreme Court has adopted in cases decided after *Williams*.

In *People v. Lopez*, *supra*, 55 Cal.4th 569, the court held that a signature, certification, or other form of swearing to the truth was required to convert a report into a testimonial statement. (*Id.* at pp. 584–585.) *Lopez* cited a long line of United States Supreme Court cases requiring that testimonial statements exhibit a certain degree of formality. (See *id.* at p. 582, citing *Davis v. Washington* (2006) 547 U.S. 813, 830, fn. 5 ["formality is indeed essential to testimonial utterances"]; *Melendez–Diaz v. Massachusetts*, *supra*, 557 U.S. at p. 310 [laboratory certificate determined to be testimonial was "a

"'solemn declaration or affirmation'"']; *Bullcoming v. New Mexico* (2011) 564 U.S. 647, 665 [laboratory certificate found to be testimonial was "'formalized' in a signed document"].) More recently, in *People v. Banks*, *supra*, 59 Cal.4th 1113, the court upheld the testimony of a DNA expert who had reviewed X-ray films of DNA results generated by a laboratory and had concluded that the defendant's DNA matched the perpetrator's. The court noted, "Nothing suggests that the X-ray films . . . were signed or attested to under oath." (*Id*. at p. 1167.)[13]

We find no authority for appellant's argument that a DNA expert may not testify based on DNA typing performed by another analyst unless the expert was present during the actual analysis. We are, of course, bound by our high court's requirement, which appellant does not challenge, that recorded DNA results must be at least signed or attested to under oath to be considered testimonial, and that recordation of objective data by a person or a machine is not testimonial. (See *People v. Banks*, *supra*, 59 Cal.4th at p. 1167; *People v. Lopez*, *supra*, 55

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[13] In *People v. Banks*, *supra*, 59 Cal.4th 1113, 1168, the court listed two more rules it had developed in *People v. Lopez*, *supra*, 55 Cal.4th 569 and its companion case, *People v. Dungo*, *supra*, 55 Cal.4th 608: that "introduction of machine-generated data does not implicate the confrontation clause because 'unlike a person, a machine cannot be cross-examined'" (*Lopez*, at p. 583) and that "[a]n expert witness's reliance on statements or reports by other individuals that 'merely record objective facts' do not implicate the confrontation clause because '[s]uch observations are not testimonial in nature.'" (*Dungo*, at p. 619; see also *id*. at p. 632 (conc. opn. of Chin, J.) [such statements are not "inherently inculpatory" and do not depend on "whether or not a specific suspect exists"].)

Cal.4th at pp. 583–585; *People v. Dungo*, *supra*, 55 Cal.4th at p. 619.)

Here, the expert testified that her review of the DNA case file included comparing "the DNA profiles from the evidence samples . . . to the reference samples in this case." It is not clear from the record how the DNA profiles were documented. The expert agreed with the prosecutor's representation that all "records, reports, photos, whatever is documented," were placed in the file. Later on, its contents were referred to as "notes." Since nothing indicates that the file consisted exclusively of DNA reports signed or attested to under oath, the record does not support a conclusion that the expert testified based on testimonial hearsay. (See *People v. Banks*, *supra*, 59 Cal.4th at p. 1167.)

Appellant has not shown a Confrontation Clause violation.

V

Appellant contends the cumulative prejudice of the claimed errors mandates reversal of her conviction. Since we reject her other claims of error, the claim of cumulative error also fails. (See *People v. Sapp* (2003) 31 Cal.4th 240, 316.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.