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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MICHAEL CAPERS et al.,<br><br>Defendants and Appellants. | B267823<br><br>(Los Angeles County Super. Ct. No. TA125615) |

APPEAL from a Judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed as modified, remanded with instruction.

Randy S. Kravis for Defendant and Appellant Michael Capers.

Law Office of David Carico and David D. Carico for Defendant and Appellant Daynell Bernard Bell.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael J. Keller and Corey J. Robins, Deputy Attorneys General for Plaintiff and Respondent.

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## FACTUAL AND PROCEDURAL BACKGROUND

*1. Introduction*

Following a jury trial appellant Michael Capers was convicted of the first degree murder of Jamil Lyles (Count I), attempted murder of Brent Exley, Jerry Sims, Estvon Johnson, Deshawn Needham, and Darlene Allen (Counts II–V and VIII), and the second degree murder of Diamond Johnson (Count VII.) Appellant Daynell Bell was convicted of the first degree murders of Marvin Nichelson[1] and Diamond Johnson (Counts VI and VII, respectively) and the attempted murder of Darlene Allen (Count VIII.)

Capers was sentenced to state prison for life without the possibility of parole, plus 140 years to life. Bell was sentenced to state prison for life without the possibility of parole, plus 75 years to life.[2] The court ordered both appellants to pay restitution

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[1] We note that defendants spell Marvin's last name "Nicholson," but the court transcripts, as well as the verdict forms, spell his name as "Nichelson." The court will use "Nichelson."

[2] Both parties agree the record contains a discrepancy regarding Bell's total sentence. The reporter's transcript reflects the trial court sentenced Bell to life without the possibility of

jointly and severally and also a parole revocation fine.

Bell and Capers both appeal from the judgment. Each alleges numerous errors, including challenges to the cell phone tracing evidence that placed appellants near the scene of these three murders, DNA evidence that matched with Bell, challenges to statements by a detective and by percipient witnesses, challenges to evidentiary rulings, the court's refusal to sever the trial, cumulative error, incompetence of counsel, and sentencing errors. We affirm the convictions but modify the judgment by striking the parole revocation fine and striking the restitution order. We also remand the restitution order to the trial court to reassess the award and enter a new payment order.

*2. The Nightclub Shooting (Counts I–V Against Capers)*

On the night of July 19, 2009, Brent Exley went to the "Second II None" motorcycle nightclub at 131st Street and Broadway. Most of the people in the club belonged to the Crips, a gang associated with the color blue. A group of women from

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parole plus 85 years. However, the minute order reflects the sentence was life without the possibility of parole, plus 82 years, and the abstract of judgment reflects a sentence of life without the possibility of parole on Counts VI and VII, plus life with the possibility of parole, with a minimum parole eligibility after seven years with respect to Count VIII. Bell addresses this discrepancy in his statement of the case, but he does not raise it as an issue on appeal. Both parties agree that the court misstated the sentence at the hearing and the court clerk miscalculated the sentence in the minute order, but that the abstract of judgment does not reflect these errors. We agree this discrepancy was merely a clerical error and will remand to correct the record.

Exley's neighborhood were there, wearing and displaying red and pink in their hair and clothes. Presumably because of the association between the color red and a rival gang, the Bloods, a fight broke out between two groups of girls. During the brawl, a woman, Tori McBride, was stabbed in the face. Also during the fight, a man whom Exley identified as appellant Capers brandished a gun in front of Janika Nelson, who had gone to the club with McBride.

While Exley was helping the group of women who were wearing red and pink, including McBride, Capers pointed the gun at him and said "Fuck Slobs," a derogatory slang term for the Bloods. Exley told Capers that he was a Crip, and then Capers helped stop the fight.

Exley retrieved his van in order to take McBride to the hospital. When he couldn't find McBride, he left the club. Exley's friends Jerry Sims, Estevon Johnson, Deshawn Needham, and Jamil Lyles got in his van. As he turned left at the intersection of Broadway and 131st Street, Exley heard a female voice yell, "there go them slobs." Bullets then hit the van from both sides. Exley identified Capers as the shooter who was firing into the driver's side of the van. Moments later, realizing that Jamil Lyles had been shot, Exley drove to a local hospital. By now it was approximately 5 a.m. Lyles died at the hospital from a bullet wound to the head.

At the scene of the shooting, investigators recovered both nine-millimeter and .380 cartridge cases and bullets. Investigators determined that Lyles had been killed by a nine-millimeter bullet.

Before learning of Lyles's death, Exley and the rest of the van's occupants were interviewed at the hospital by Deputy

Sheriff Stefanie Barragan and Sergeant Gray. Initially the group was uncooperative. Exley told the deputies that the shooting took place on El Segundo Blvd. and that the shooter was a light-skinned Mexican. Later, as Exley testified at trial, he decided to tell the truth in part because he had learned that Lyles had died. Exley admitted to lying to the detectives because he just wanted to be let go.

On May 18, 2011, Exley was shown two "six-packs" of photographs and immediately identified Capers as one of the shooters. Exley identified Bell as looking "familiar" and having been at the club on the night in question, but he did not identify Bell as one of the two shooters. Exley also identified Capers at the February 3, 2014, preliminary hearing. After testifying at the preliminary hearing, Exley received relocation funds in the form of first and last month's rent. Then he left his gang.

*3. Marvin Nichelson's Murder (Count VI Against Bell)*

On October 12, 2009, at 12:30 p.m., Marvin Nichelson, a 13-year-old boy, was walking home from an education center located at Alondra and Grandee Avenue. His home was located at 915 South Grandee Avenue. An administrator of the center who was watching Nichelson saw the boy make an apparent gang sign at a car. The car made a u-turn and drove towards Nichelson. Shots were fired, and Marvin Nichelson died. As she looked through the window of her home, Lakeisha Hamm, Marvin Nichelson's mother, saw her son killed.

Two patrolling Los Angeles County Sheriff deputies heard the gunshots, and after heading in their direction, they came face-to-face with the suspects' car. Because of the sun's glare, they could not identify the driver or the passenger. The suspect

vehicle maneuvered past the deputies, and they later lost sight of it between Central Avenue and Aprilia Street.

After losing sight of the suspect vehicle, the deputies were alerted that Phillipa Hudson observed a car parked behind her home. The deputies recognized that vehicle (which was now empty) as that of the suspects. It was a gray Dodge Stratus, registered to appellant Bell's wife Dary Bell. Near the Dodge Stratus police investigators recovered a .45 caliber cartridge case and a .45 caliber firearm. At the site of the shooting, police recovered eight nine-millimeter cartridge cases.

In the immediate aftermath of the suspects' escape, Frank Campbell was preparing to drive in his Toyota Camry away from his home by Alondra and Cypress Streets. Suddenly, a man got into his car. The man was sweating and breathing heavily and told Campbell that "something happened." Campbell told the man to get out, but the man said he needed a ride to visit his sick mother. Campbell agreed to drop the man at the nearest bus stop. Campbell noticed that the man had a cut on his finger, which left a blood smudge in the vehicle. Five days after the incident, according to Campbell, the man appeared at his house and offered to pay him money.

Police investigators recovered DNA profiles from the blood the man had left in Campbell's car. Bell was identified as a "high stringency match" to the full DNA profile recovered from Campbell's car's front passenger seat, equating to a frequency of one out of 430 quintillion (a 1 followed by 18 zeros) people. Forensic scientists were unable to definitely match Bell to any of the DNA recovered from the Dodge Stratus's steering wheel, its gear shift, or from the .45 firearm.

*4. Diamond Johnson's Murder (Counts VI–VIII Against Capers and Bell)*

On December 29, 2009, police officers discovered the body of Bell's cousin Lamont Crayon, killed by gunshot wounds, near 42nd Street. Crayon was a member of a Crips subset, the Four-Deuce gang. Bell and Capers also belonged to this group. The Los Angeles Police Department believed that Crayon's murder gave Bell the motive to commit the Diamond Johnson murder.

On January 3, 2010, at approximately 1:30 p.m., Darlene Allen went to Diamond Johnsons's house at 1196 East 33rd Street, which is on the corner of 33rd Street and Naomi Avenue. Johnson was wearing red basketball shorts and was standing with Allen on the porch. Suddenly, an African-American man of average height and weight shot Allen three times and Johnson twice. Allen recovered, but Johnson died from a gunshot to the head. Juan Funes, who was cleaning the porch of a house also at the corner of 33rd Street and Naomi Avenue, heard the gunshots, then saw the gunman run to a vehicle and say, "I got him. I got him." As the gunman fled, his cap fell off, and when he stooped to pick it up, he dropped his cell phone. He retrieved the phone, but some parts remained on the ground. At the scene of the shooting, police recovered nine-millimeter shell casings, a cell phone clip, and the back of the Blackberry cell phone.

Almost a month later, on January 27, 2010, two detectives interviewed Donald Streeter, another associate of the Four Deuce gang.

Streeter told the detectives that two days after Crayon's murder, Streeter had been with Bell and Capers at Crayon's residence. Bell was armed with a Glock handgun and Capers had a nine-millimeter pistol. Capers said "I'm going to show you

n-----s how we do this, how the Four-Deuces really get down." Then the appellants left for between 20 and 30 minutes. After returning to Crayon's residence, Capers told Streeter that he and Bell had to "get off the street because they had just laid two slobs down in the Bottoms," slang for having killed two members of the Bloods in the area near Jefferson High School.

The detectives later served Streeter with a subpoena to testify at the preliminary hearing, which was scheduled for December 21, 2010, but Streeter became uncooperative and denied everything he had previously said to them.

In June 2011, detectives interviewed Streeter regarding an unrelated murder. Streeter initially pointed to two other men, but when interviewed a second time, confessed to the murder. Streeter pleaded guilty to that crime and received a 25-year sentence.

Streeter refused to testify at the trial of Capers and Bell; he even refused to leave his jail cell to come to court. The court found him unavailable, and Streeter's testimony from the preliminary hearing was read into the record.

## DISCUSSION

### I

### *The Trial Court Correctly Ruled on the Issues With Respect to Cell Phone Evidence*

*A. The Facts*

Los Angeles Sheriff's criminalist Romy Haas analyzed Bell's cell phone records and reached the following conclusions:

1) On July 19, 2009, the night of the Lyles murder, Bell's cell phone registered calls at 3:14 a.m. and 4:56 a.m. on a tower roughly one-half mile from 131st and Broadway, the closest tower

to that location. A different tower registered a call at 4:53 a.m. That tower was roughly one and one-third miles from 131st and Broadway. A fourth call was made at 4:56 and 45 seconds, which connected to the original tower half a mile from the shooting.

2) On October 12, 2009, the day of the Marvin Nichelson murder, an analysis of cell phone records revealed that a call at 12:26 p.m. used a tower about three-quarters of a mile from 915 South Grandee Avenue, Marvin Nichelson's home. Calls at 12:33 and 12:36 p.m. registered on a tower one and a half miles from Grandee, indicating that the cell phone was moving.

3) On January 3, 2010, the day of the Diamond Johnson murder, Bell's cell phone registered a call at 12:42 p.m. using a tower a mile and three quarters from 1246 East 42nd Street, the location of the murder. The phone registered another call at 1:02 p.m. using a different tower 1,000 feet from that address, again indicating that the cell phone was moving.

4) Data from Capers's cell phone, revealed two calls on January 3, 2010 at 12:53 p.m. and 1:38 p.m. registering on a tower that was less than 2,000 feet from 1246 East 42nd Street.

Bell requested a *Kelly-Frye*[3] hearing, that is, foundational evidence disclosing general acceptance of the test within the relevant scientific community and a hearing under Evidence Code section 402 as to whether respondent could lay foundation sufficient to enable Romy Haas to analyze Bell's cell phone records. The court denied the motion, reasoning that the argument went to the weight of the evidence.

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[3] *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*) and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 (*Frye*).

*B. Standard of Review*

We review these rulings for abuse of discretion. "'When expert opinion is offered, much must be left to the trial court's discretion.' [Citation.] The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion. [Citations.]" (*People v. McDowell* (2012) 54 Cal.4th 395, 426.)

*C. No Kelly Hearing was necessary.*

California adheres to the *Kelly* test with respect to "the admission of expert testimony regarding new scientific methodology." (*People v. Leahy* (1994) 8 Cal.4th 587, 591.) The proponent of such evidence must establish (1) the new methodology is reliable by showing it has gained general acceptance in the relevant scientific community; (2) the witness furnishing the testimony is qualified as an expert to state an opinion on the subject; and (3) correct scientific procedures were used in the particular case. (*Kelly*, *supra*, 17 Cal.3d 24, 30.) However, as our Supreme Court has explained, this test applies only to "'new scientific techniques,'" that is, "'"to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is *new* to science and, even more so, the law."' (*People v. Leahy, supra*, 8 Cal.4th at p. 605, quoting *People v. Stoll* (1989) 49 Cal.3d 1136.)" (*People v. Garlinger* (2016) 247 Cal.App.4th 1185, 1194 (*Garlinger*).)

Appellant insists that in reaching her conclusions and tracing Capers's and Bell's movements, Ms. Haas depended on the granulization theory. Appellant admits, however, that Ms.

Haas did not use any particular nomenclature to describe her methods. Our review of the record leads us to conclude that she did not use the granulization theory.

The granulization theory is explained in *United States v. Evans* (N.D. Ill. 2012) 892 F.Supp2d 949 (*Evans*). *Evans* was discussed at length in *Garlinger*, *supra*, 247 Cal.App.4th 1185. There, the court described granulization as follows: "'To determine the location of a cell phone using the theory of granulization, Special Agent Raschke (the expert who testified in *Evans*) first identifies (1) the physical location of the cell sites used by the phone during the relevant time period; (2) the specific antenna used at each cell site; and (3) the direction of the antenna's coverage. He then estimates the range of each antenna's coverage based on the proximity of the tower to other towers in the area. This is the area in which the cell phone could connect with the tower given the angle of the antenna and the strength of its signal. Finally, using his training and experience, Special Agent Raschke predicts where the coverage area of one tower will overlap with the coverage area of another. [¶] Applying this methodology, Special Agent Raschke testified that he could estimate the general location of Evans's cell phone during an 18-minute period (from 12:54 p.m. to 1:12 p.m.) on April 24, 2010, during which time Evans's phone used two cell towers to place nine calls. According to Special Agent Raschke, based on his estimate of the coverage area for each of the antennas, the calls made from Evans's phone could have come from the location where the victim was held for ransom.' [Citation.]" (*Garlinger, supra,* 247 Cal.App.4th. p. 1197.)

Detective Bearor, the expert who testified at the trial in *Garlinger*, did not use the "granulization" theory because "Unlike

Special Agent Raschke, Detective Bearor did not purport to have estimated the coverage area of specific cell towers based on their proximity to other towers. Nor did he claim to have determined the location of defendant's cell phone based on his ability to predict overlapping coverage areas. Those were the salient aspects of granulization theory found to be lacking in reliability. While Detective Bearor did perform the initial steps taken by the expert in *Evans*, i.e., he identified the locations of the cell sites used by defendant's phone before and after the robbery, the specific sector of those towers receiving the signal from defendant's phone, and the direction of that sector's coverage, nothing in the *Evans* decision casts doubt on the ability of an expert to testify to these matters or to the relatively common sense deduction that the phone must have been in the general area of the cell tower and in the general direction of coverage. Indeed, other federal district court decisions, involving expert testimony far more analogous to that given by the detective in this case, have found such testimony to be reliable . . . . [Citations.] As we have already explained, we conclude such testimony does not describe a 'new scientific methodology' at all, and therefore, *Kelly* does not apply. [Citation.]" (*Garlinger*, *supra*, 247 Cal.App.4th, p. 1198–1199.)

Turning to the instant appeal, the record reflects that Romy Haas never said her cell site mapping was precise, only that she obtained general information from which one could estimate location and movement. Many factors impact which sector on a tower receives a call. According to Haas, cell phones initially pick the closest tower with the strongest signal. She explained that if there is an obstruction, a cell might communicate with a tower offering a stronger signal even if it is

located farther away. Haas said that with her Cellhawk mapping software program and call detail records, the best she could determine was that the handset was somewhere within range of a particular tower. With the aid of Cellhawk, Haas was able to track the movement of the appellants' cell phones. She looked only to "the very first cell tower . . . that was hit during the phone call," and which of three general directions (120 degree "pie slices" around the tower) the call was coming from. Based on this data, Haas was able to conclude that the cell phone's location was likely within a certain area. Haas notes that the tower the cell phone is communicating with is "usually" the closest tower to the phone, but admits that during peak hours, the phone will sometimes "jump" to the next closest tower. Haas also testified that the general areas indicated in the exhibits were only "estimates," though she said they were a "very good estimate of the direction that the handset would have been in relation to the whole enter [*sic*] circle."

Haas fed information into the Cellhawk program, which then plotted cell tower locations on a map in order to 1) determine the location of sites depicted in call detail records, 2) pull out tower locations and create pie slices with respect to which of the three sectors were used to service the call, and 3) set the size of the pie slice depending on the value of the radius Haas input. Hass also assumed that the direction of the antennae or the sector getting the call is the direction from which the cell phone call originated. Combined with her assumption of the cell tower's radius, this would place the phone within a three-quarter mile radius of the tower to which it connected. The program did not calculate coverage area of the cell tower based on the relative signal strength of other towers. Haas picked and inputted a .75

mile radius, "a very conservative estimate . . . based off of literature I've read," because it was easy to visualize on a map and would avoid creating overlapping circles. Based on this evidence, Ms. Haas avoided the second and third steps in granulization analysis, that is, estimating the range of an antenna's coverage based on its proximity to another antenna, and then predicting where the coverage area of one tower will overlap with the coverage area of another. Rather, Haas roughly estimated the caller's position based on the direction of antennas and pie slices which Cellhawk produced.

Haas said mapping implied a very good estimate of the direction of the caller in relation to the tower, and she performed independent testing to see if her mapping of the location of the towers' physical location was correct. Haas's mapping resembled the procedure used in *Garlinger, supra*, 247 Cal.App.4th 1184. Both methods allow one to determine the general direction from which a particular call connects to a particular tower and a very rough estimate of location based on that tower's coverage. Neither Haas nor the *Garlinger* expert looked to the potential coverage areas of other towers to determine a more specific location estimate.

Haas did not "purport to have estimated the coverage area of specific cell towers based on their proximity to other towers," nor did she "claim to have determined the location of defendant's cell phone based on [her] ability to predict overlapping coverage areas." (*Garlinger*, *supra*, 247 Cal.App.4th at p. 1198.) The only variables at issue were the coordinates of the tower the cell phone connected to and the direction. We conclude that Ms. Haas did not employ the "granulization" theory in tracing Bell's cell phone.

Haas relied on techniques that have been generally

accepted in the scientific community. As the court explained in *Garlinger*, *supra*, 247 Cal.App.4th at pages 1195–1196: "Here, while cell phones are relatively new devices, the methodology is not new. Cell phones operate like 'sophisticated radios' by sending and receiving a radio signal to and from a cell tower and base station in their general vicinity. [Citation.] The area of the particular tower's coverage is known as a 'cell.' As the cell phone user moves from cell to cell, the wireless company transfers the call to the new cell's tower and base station. [Citation.] As previously stated, the transmission of radio signals from one place to another is a technology that has been around for more than a century. [Citation.] There is nothing new or experimental about this technology. Nor is there anything dubious about science's understanding of radio waves; as relevant here, they generally travel in a straight line. [Citation.] Thus, determining the general location of a cell phone based on which sector of the particular cell tower to which that phone's signal connected cannot be considered a 'new scientific methodology.' [Citation.] This is all Detective Bearor purported to do in his testimony."

*Garlinger* went on to note, with four examples, that testimony like this "is routinely admitted in the trial courts of this state without any suggestion the *Kelly* test applies." (*supra*, 247 Cal.App.4th at p. 1196.) In one of the cited cases, *People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1544, a "high tech investigator" with the Contra Costa County Sheriff's Office, who qualified as an expert in cell phone records and call origins, analyzed the records. "As time passed, the locations of the two phones, as revealed by the cell sites or towers where the calls originated, grew increasingly close, until the last call was registered at the same cell site on Harbour Way in Richmond,

which indicated that the two phones were then in very close proximity to each other and to the scene of the murder." (*Ibid*.) There was no challenge to the admission of this evidence under *Kelly*. *Garlinger* concluded that "not only is the methodology not new to science, neither is it new to the law." (*Garlinger*, *supra*, 247 Cal.App.4th, at p.1196.)

Since factors giving rise to a *Kelly* hearing were not present here,[4] the trial court correctly denied a *Kelly* hearing with respect to the tracking of the cell phones.

*D. No Evidence Code 402 hearing was necessary*

Appellants claim the court erroneously denied Bell's request for a hearing pursuant to Evidence Code section 402 in order to determine if Romy Haas qualified as an expert in cell identification technique and whether the methods she followed met the foundational requirements under Evidence Code sections 801 and 802, subdivision (b). We review the court's ruling for abuse of discretion (*People v. McDowell*, *supra*, 54 Cal.4th 395, 426) and conclude that the trial court correctly denied this request.

Appellants rely on *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*). *Sargon*, they argue, "is the California equivalent to the U.S Supreme Court decision in *Kumho Tire v. Carmichael* (1999) 526 U.S. 137). *Kumho Tire* applied *Daubert v. Merrell Dow Pharms., Inc.* (1993) 509 U.S. 579 across the board to all types of expert testimony. . ." This is not entirely correct, as explained in one of the articles appellants cite. (Imwinkelried and Faigman, Sargon Enterprises

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[4] Detective Gray also said cell analysis is generally used and commonly factored into sheriff's department investigations.

v. USC—A Different Perspective 27 *California Litigation* 14 (2014).) First, the authors acknowledge that ". . . the (*Kelly*) *Frye* standard still governs the admissibility of 'new scientific techniques' (*Sargon*, 55 Cal.4th at p. 772, fn. 6) . . ." Second, "a close reading of *Sargon* demonstrates that when Justice Chin described the nature of the inquiry under *Sargon*, he did not go as far as Justice Blackmun. Justice Chin stated that trial judges should conduct 'a circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by the experts adequately support the conclusion that the expert's general theory or technique is valid.' (*Sargon*, 55 Cal.4th at p 772 . . . . Thus *Sargon* stops short of authorizing as probing an inquiry as *Daubert*." For example, Justice Chin "repeatedly stressed that the Seventh Amendment counsels that judges must be 'exceedingly careful not to set the threshold to the jury room too high.' (*Id.* at p. 769.)"

The record shows that Ms. Haas qualified as an expert. She was a crime analyst with four years of experience with cell tracking and mapping, 30 hours of training in cell phone analysis, and membership in the Cellular Analytical Survey Team. Ms. Haas described the exact processes she performs for the Sheriff's Department, specifically, obtaining call data records from the cell carrier, analyzing the call data such as time and parties to the call, and cell phone mapping. Haas's background suffices to qualify her as an expert. Appellant's criticisms go to the weight of the evidence.

With respect to the substantive evidence about which Ms. Haas testified, one must remember that *Sargon* did not do away with Evidence Code section 801(b). The question remains whether Ms. Haas's evidence was "of a type that reasonably may

be relied upon by an expert in forming an opinion upon the subject to which his [or her] testimony relates, . . ." (*Garlinger*, *supra*, 247 Cal.App.4th at p. 1199.) Ms. Haas did not use new methodology. She testified that cell phone mapping implied a "very good estimate" of the handset's location in relation to the tower. She employed her own testing to determine the accuracy of her mapping. Detective Gray testified to the regular and general use of cell phone analysis. Ms. Haas never said that her mapping was precise. Instead she gave general information to enable a person to estimate the handset's location and movement in relation to the towers. (cf. *Garlinger*, *supra*, at p. 1192.) Haas acknowledged several factors that could affect which sector on a tower receives a call: signal strength, topography, call volume, the design of the cell site, and the presence of obstructions. She agreed that calls would jump to the next-closest tower in a period of high-call volume. (Since she was tracing activity in the early morning hours, we doubt this was a high-volume period.) Moreover, while Evidence Code section 802 allows the trial court to restrict an expert's "reasons" for an opinion, nothing Ms. Haas said in explaining what she did justified exclusion of her testimony. This evidence contains no new scientific techniques; moreover, it satisfies the requirements of Evidence Code sections 801(b) and 802. Experts in the field could reasonably look to and base their opinions and reasoning on these factors, and based on the cases cited in *Garlinger*, they have. We are not dealing with evidentiary voids of the magnitude that justifies a court in excluding testimony, such as, for example, *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563–564, and *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 CalApp.3d 1113, 1135.

The trial court acted well within its discretion in declining

to conduct a hearing under Evidence Code section 402.

## II

*The Court Properly Excluded the CODIS Letter Along With Testimony About It With Respect to the DNA Evidence*

As he fled from the scene of the Johnson/Allen shooting, Bell lost his cap when a low hanging tree branch knocked it off. When he returned to pick it up, he dropped his Blackberry cell phone. Bell retrieved it, but not the phone clip. That remained on the ground at the scene.

Stacy Vaderschaaf, a criminalist, swabbed the phone's clip and sent the samples to a contract laboratory for DNA analysis. She recovered a minimal amount of DNA, but what she recovered was over the target amount for testing, which is .125 nonograms.

The contract laboratory found the DNA of at least three people. The lab analyst, Kristen Hammonds, concluded that with respect to Bell and the plastic clip, ". . . we could kind of see a major person contributing a little more DNA than the other individual present. So at seven different areas,[5] we could definitely pull out a major profile. And so at those seven areas, we compared them to Daynell Bell, and at those seven areas, he was consistent. We said he could not be excluded at those seven areas." Hammonds added that the estimated frequency of this genetic profile at seven loci in five North American populations is one in 339.8 million unrelated individuals in the African-American population, 1 in 30.18 million in the Caucasian population, one in 315.8 million in the Southwest Hispanic population, one in 41.53 million in the Southeast Hispanic population, and one in 35.18 million among general Asians.

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[5] Witnesses referred to these areas as loci.

Steve Renteria, forensic scientist for the Los Angeles County Sheriff's Department, performed a DNA analysis on the blood samples recovered from Campbell's Toyota. He received a full profile (15/15) from the blood stain on the passenger seat. Bell could not be excluded as possible major contributor of the DNA. The DNA sample was submitted to the FBI's Combined DNA Index System (CODIS), and it came back with a hit on Bell.

When Detective Daniel Gersna testified, Bell's counsel asked him about a letter dated May 24, 2010, from the Texas Department of Public Safety. Its contents described a "hit" on a subject inmate who was six feet one inch tall, white with blue eyes. Detective Gersna did not recall ever seeing this letter until August 26, 2015, the day he testified at trial.[6]

Bell's counsel proposed to call the "Assistant CODIS Administrator," Jennifer Francis, the Los Angeles Police criminalist who had received this letter. Respondent objected for lack of confirmatory testing, arguing that the subject of the "hit" was "clearly. . . not involved in our case because he doesn't match the description of any of the suspects." Respondent's counsel represented that the investigator in the case never saw the letter and knew nothing about it. In counsel's words, "The (CODIS) letter that was supposedly sent to Thomas Thompson—first of all my I.O.'s name is Tommy Thompson, and the serial number doesn't match. And they sent it to a Lieutenant Thomas Thompson. So they sent it to the wrong person . . . So they never received the letter, so how could they have followed up on any investigation if they never received it . . . This is just a lead and nothing more than that . . ."

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[6] At that time, the letter was not marked as an exhibit nor does it appear to ever have been marked.

Steve Renteria testified that unless three positive comparisons confirm a CODIS hit, it remains nothing more than an unconfirmed "investigative lead . . . for the detective to do more work and we require them to get another sample from that named individual so we could reanalyze it all over again . . . So we—we call it an investigative lead."

The court sustained an objection to the letter on, among other grounds, lack of a sufficient foundation and, under Evidence Code section 352, that it was more prejudicial than probative.

*A. Standard of Review*

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citations]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

*B. The Trial Court Properly Excluded the CODIS letter Along With Testimony About it.*

No one came forward to testify, or even present an offer of proof, that would have laid an adequate foundation for the CODIS letter and taken it out of the realm of hearsay. The record reflects that counsel showed it to Detective Gersna, but he had never seen it before the trial. Although the letter had apparently been mailed, there was evidence that it was sent to the wrong person, with the result that the investigators in the instant case never saw it. The record contains nothing that

would satisfy Evidence Code section 1400.[7] There was no evidence sufficient to sustain a finding that the CODIS letter was what the proponents claimed it to be. Nobody attempted to authenticate the letter, as required by Evidence Code section 1401.[8]

Worse yet, the letter did not become part of the record. No one marked it, and it is not before us. On that basis alone, we do not have a sufficient basis to decide whether it might have been admissible.

Even assuming a proper foundation had been laid and assuming further the absence of any hearsay issue, the trial court still ruled correctly. Evidence Code section 352 allows a court in its discretion to exclude evidence if, among other things, "its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." In this case, all of these factors justify sustaining the objection.

This hit represents nothing more than an investigative lead. Respondent argues, and rightfully so, that if the court had allowed this investigative lead into evidence, "the jury would

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[7] Evidence Code section 1400 provides as follows: "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law."

[8] Evidence Code section 1401 provides as follows:

"(a) Authentication of a writing is required before it may be received in evidence.

(b) Authentication of a writing is required before secondary evidence of its content may be received in evidence."

have been confused and misled and a mini-trial would have been required to flesh out its meaning, basis, and probative value."

Appellant argues that the only reason he wanted to admit the CODIS letter was to impeach the credibility of respondent expert's statistical probability analysis to the effect that this hit would occur once out of 339 million African-Americans. "That there was a second hit in a database containing only a fraction of the DNA profiles from the United States prison population (1.6 million as of December 2010), casts serious doubt on the reliability of Hammonds's and Steve Renteria's probability data from his analysis of the blood samples recovered from Campbell's Toyota."

Appellant's comparison is misleading, because, as Steve Renteria explained, the Texas hit represents nothing more than an investigative lead. Without any follow-up, the hit fails to impeach the probability data. And even if it were relevant, the section 352 factors substantially outweigh the probative value of the CODIS letter for the same reasons as the court explained above.

The trial court ruled correctly with respect to the CODIS letter.[9]

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[9] Appellant further contends that his constitutional rights were violated, including the right of confrontation and the right to present a defense. These rights do not require a court to admit unauthenticated hearsay in the form of an unconfirmed investigative lead which the investigator never saw and whose author remains unknown. "'Although we recognize that a criminal defendant has a constitutional right to present all relevant evidence of significant probative value in his favor [citations], "[t]his does not mean that an unlimited inquiry may be made into collateral matters; the proffered evidence must have

III

*The Court Properly Admitted Charles Lee's Statement*

Appellants claim a violation of the confrontation clause by allowing Charles Lee's out of court statement to Detective Gersna into evidence without any finding that Lee was unavailable to testify and whether there had been an earlier opportunity to cross-examine him. We find no error.

Stephanie Thompson, a person unrelated to this appeal, was murdered. Detective Gersna initially talked with Streeter about this shooting, and when he did so, Streeter falsely implicated two people who did not exist. About a month later, Streeter confessed that he had shot Ms. Thompson. Appellant Capers claims that Streeter engaged in the same dishonest behavior in the instant case. For that reason, Capers's attorney asked to question Detective Gersna about Thompson. "I'm just going to say, 'Did he tell you somebody else did it?' 'Yes.' 'Who were those two people?' 'And then he confessed to it?' 'Yes.'"

Respondent objected, arguing that in the Stephanie Thompson murder, Streeter was trying to shift the blame from himself while in the instant case, "[h]e's just a percipient witness to Mr. Capers and Mr. Bell, plotting to go out and kill somebody for revenge and he's present when they come back."

After further colloquy, the court asked Mr. Salcido, Bell's counsel, "So you just want to get out that he's lied to the police in the past?

Mr. Salcido: Oh, yes. Absolutely.

The court: So if I just limit it to, 'Did you interview him?

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more than 'slight-relevancy' to the issues presented." [Citation.]' [Citation]'" (*People v. Homick* (2012) 55 Cal.4th 816, 865.)

And did you find out he lied'—'He lied initially to you?' That's all you want?

Mr. Salcido: And just—of course, very quickly, just to line up the similarities: 'He told you he was at a house?' 'Yes' 'With other gangsters?'"

Counsel wanted to show "the similarities between the two instances, where he's doing the same thing we're saying that he's falsely accusing Mr. Bell and he falsely accused these other two people over here." (The two whom Streeter named by their ersatz gang monikers).

The court allowed counsel to talk about "the gang issue . . . where he admits he's a gang member . . . then I'll allow you that, 'You had an interview with him initially, he denied involvement and said . . . and named two people and then, subsequent to that, he confessed?'

Mr. Salcido: Yes

The Court: So those are your parameters.

Mr. Salcido: Yes. Yes.

The Court: Okay."

The court warned Bell's counsel that the people would be able to say, "Well, he gave two names in this situation. 'Were you able to confirm their involvement?' 'Yes.' 'How were you able to confirm it?' 'I was able to confirm it by'—'Boom-boom-boom-boom.'"

Mr. Salcido: 'Sure. I understand that.'"

The court repeated that the detective could "kind of almost give their conclusion why your client is guilty," to which Mr. Salcido answered, "I understand the downside to that."

The court: "Just so you understand the door is open to that."

Mr. Salcido: "Yes, yes."

Co-defense counsel joined.

Detective Gersna took the stand and testified that when Streeter named Capers and gave his gang moniker, "There was no doubt in my mind he wasn't making it up." Respondent's counsel then asked Gersna if he did anything "to follow up and investigate to make sure that he was being accurate or truthful."

Counsel objected on hearsay grounds. At the sidebar, the court reminded him that letting in evidence of the earlier lies with respect to Stephanie Thompson's murder "opens up a door, even if it's hearsay." The people would be able to verify Streeter's information "and look up and corroborate. I said they would be able to do that. Since you brought in the issue about verifying, the people would be able to do it with regard to Mr. Streeter.". . . You said, "'that's okay. I understand the risk,' to, kind of, semi-quote you."

Mr. Salcido: 'Yes. And the court is correct in its semi-quote.'"

Testimony resumed. Detective Gersna said that he verified or corroborated what Mr. Streeter had told him, and that his source of the corroborating information was Charles Lee, another Four-Deuce gang member. Then the court sustained an objection to the question whether what Lee said was consistent with what Streeter said.

Later, the court gave the jury a limiting instruction with respect to Charles Lee to the effect that the evidence "is not offered for its truth. It's just offered to show what efforts he (Gersna) made to corroborate Mr. Streeter's statement." The court also instructed the jury with CALCRIM No. 303.

Appellant now insists the court erred by admitting an out

of court statement by Charles Lee without finding him unavailable. Appellant asserts Constitutional and Evidence Code violations. We disagree.

*A. Standard of Review*

We independently review whether a statement was testimonial so as to implicate the Sixth Amendment. "We evaluate the primary purpose for which the statement was given and taken under an objective standard, 'considering all the circumstances that might reasonably bear on the intent of the participants in the conversation.' [Citation.]" (*People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466.) As we stated earlier, we evaluate evidentiary rulings for abuse of discretion.

*B. Admitting The Lee Statement Violated No Constitutional Rights Because It Was Not Hearsay*

Before the testimony at issue came in, the court made it clear that if Mr. Salcido planned to impeach Streeter with his earlier lies, that would open the door to Detective Gersna's efforts to corroborate the information Streeter gave him with respect to Capers and Bell. After the detective testified, the court instructed the jury not to consider what he had said for its truth, but only to show his efforts to find corroboration.[10] Therefore, the statement is not hearsay (Evid. Code, § 1200 subd. (a).) It follows that appellants' Constitutional right of confrontation was not violated.

In *People v. Sanchez* (2016) 63 Cal.4th 665, 681, our Supreme Court held that "Neither the hearsay doctrine nor the

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[10] We presume the jury understood the limiting instruction and followed it. (*People v. Pearson* (2013) 56 Cal.4th, 393, 414.)

confrontation clause is implicated when an out-of-court statement is not received to prove the truth of a fact it asserts. (See *Crawford v. Washington* [(2004)] 541 U.S. 36, 59, fn. 9; *Tennessee v. Street* (1985) 471 U.S. 409, 413–414.)" To the same effect is *People v. Hopson* (2017) 3 Cal.5th 424, 432. *Hopson* quoted *Crawford* to the effect that the confrontation clause "does not bar the use of testimonial statements . . . for nonhearsay purposes." (*Ibid*.)

*C. Assuming Lee's Statement was Hearsay, Appellants Waived Their Right of Confrontation*

Assuming arguendo that Lee's statement qualified as hearsay, appellant waived his Constitutional argument. In *People v. Hopson*, *supra*, 3 Cal.5th 424, 443, the Supreme Court noted the well-established principle that "the prosecution can impeach a testifying defendant, just like any other witness. (Citation.) The prosecution is always entitled to point out a defendant's motivation to divert blame to an unavailable accomplice and present admissible facts that contradict the defendant's story. And it may be possible, in appropriate cases, for the prosecution to argue that the defendant has opened the door to admission of otherwise inadmissible testimonial statements." While the majority did not adopt "a general opening the door exception to the confrontation right or decide the scope of any such exception," it did not rule out the ability to waive. (*Id*. at p. 443.) In her dissent, Chief Justice Sakauye cited a United States Supreme Court case to the effect that "'[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections.' (Citation.)

Similarly, in *People v. Stevens* (2007) 41 Cal.4th 182, 199 we concluded that the defendant had waived his initial confrontation clause objection concerning the admission of a codefendant's statements to police because his defense counsel eventually expressed satisfaction with a redacted version of the statements. (*Stevens*, at p. 199.)" (*People v. Hopson, supra*, 3 Cal.5th at p. 464.)

Part of appellants' trial strategy was to highlight the lies Streeter gave to law enforcement when he named names in connection with an earlier murder and then argue that Streeter lied again with respect to the instant crimes. The court warned counsel what would likely ensue, and more than once counsel acknowledged what could occur. Appellants cannot have it both ways. They cannot use the Confrontation Clause as a sword.[11] As respondent says in its brief, appellants "expressly agreed their questioning would permit the testifying detectives to 'almost give their conclusion why [appellant Bell] is guilty,' that 'things that we might not have even heard about . . . in this trial will come in, as to comparing the two situations . . . ,' and that appellants' chosen strategy 'opens the door very wide.'"

We find no error with respect to how the trial court handled Charles Lee.

## IV

## *The Trial Court Properly Admitted Capers's Out of Court Statements*

### *A. The Facts*

Pursuant to Evidence Code section 402, respondent filed a

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[11] See *United States v. Lopez-Medina* (10th Cir. 2010) 596 F.3d 716, 726, 730–733.

motion to admit a redacted recorded statement which Capers had given to Detective Gersna.

Before playing Capers's statement to the jury, respondent edited it, a task respondent did not find difficult because with one exception, Capers had not referred to Bell. (Early on during the interview, he said he knew Bell, but that portion was redacted.) The basic thrust of the statement was to place Capers at 33rd and Naomi, the scene of the Diamond Johnson shooting. After persistent questioning by Detective Gersna, Capers admitted that he drove to (or at least near) the scene in order to pick somebody up. "I didn't go over there to hurt nobody . . . You want to know. I just can't—I picked somebody up, man." "This is crazy. Basically, I'm—basically what it boils down to I'm caught up in this for picking a motherfucker up, basically." "I just told you. I just picked somebody up I don't know—I don't remember where I picked him up at."

Capers gave different versions of what happened before he drove to the scene: "Look, man. I was at home. Somebody called my girl and, damn. I went and picked somebody up, man." "Like I say, I was—I was home, and I end up going to the 'hood. Was in the 'hood. Mingled around for a little bit trying to, you know, figure out (Inaudible) funeral, when was that going on. Somebody's like, hey, go do this, you know, woo, woo. I'm like, damn. You know, like wow. So (Inaudible) give me his keys, and I go. Like damn. What the fuck?"

During the oral argument, counsel for Bell cited the court to another portion of Capers's statement:

> "So like I say, with Lamont I know the whole entire family . . . You know, when that happened it to him, I can't do nothing but pay my respects to them, 'cause I—I knew him,

you know. I been knowing him since—they be knowing me since I was a kid. So it's not know way I'm not going tell nobody I'm not going pick nobody up or—which I shouldn't have. Damnit."

Appellant contended that this last passage made it clear to the jury that Capers was going to pick up Bell and no one else. We interpret this passage differently. Its context does not limit the individuals to whom Capers made reference nor does it suggest that he was picking up Bell.

When Capers arrived at or near the scene, he said that a person "came out (of) some bushes somewhere. Bushes or alley or something" and then said, "[L]et's go." "Cause it wasn't really like—it wasn't like nothing happened . . . Like nothing he wasn't in like no panic or nothing like that or what you trying to say or nothing like that . . . So I—I wasn't really tripping about nothing."

After Capers's statement was played for the jury, the court instructed the jury that it could be considered only against him, not against Bell. (CALCRIM No. 305.)

Bell claims that "it was obvious" that he was the "someone" at the scene to whom Capers referred, with the result that Bell's Sixth Amendment right of confrontation was violated as to Counts VI and VII. We conclude otherwise.

*B. The Basic Aranda/Bruton Principles*

In *People v. Aranda* (1965) 63 Cal.2d 518, 530–531, our Supreme Court decided that "When the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant, the trial court must adopt one of the following procedures: (1) It can permit a joint

trial if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant. By effective deletions, we mean not only direct and indirect identifications of codefendants but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established. (2) It can grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions cannot be made. (3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a codefendant, the trial court must exclude it if effective deletions are not possible." (Ibid., fn. omitted, abrogated on other grounds as stated in *People v. Capistrano* (2014) 59 Cal.4th 830, 868, fn 10.)

In *Bruton v. United States* (1968) 391 U.S. 123, the United States Supreme Court held that the admission of one codefendant's statement that is "powerfully incriminating" of the codefendant violates the right of confrontation despite a jury instruction to consider the statement only against the declarant. There is too great a risk that the jury will not follow such a cautionary instruction. (*Id*. at pp. 135–137.)

*C. Capers's Statement was Sufficiently Edited*

In *People v. Fletcher* (1996) 13 Cal.4th 451, 456 (*Fletcher*), our Supreme Court addressed the issue whether it was "sufficient, to avoid violation of the Confrontation Clause, that a nontestifying codefendant's extrajudicial confession is edited by replacing all references to the nondeclarant's name with pronouns or similar neutral and nonidentifying terms. Such a confession is 'facially incriminating' in the sense that it is

sufficient by itself, without reference to any other evidence, to incriminate someone other than the confessing codefendant. It is not 'facially incriminating' only in the sense that it does not identify this other person by name."

The *Fletcher* court concluded that whether this kind of editing—which retains references to a co-participant in the crime but removes references to the co-participant's name—sufficiently protects a nondeclarant defendant's constitutional right of confrontation may not be resolved by a "bright line" rule of either universal admission or universal exclusion. "Rather, the efficacy of this form of editing must be determined on a case-by-case basis in light of the other evidence that has been or is likely to be presented at the trial. The editing will be deemed insufficient to avoid a confrontation violation if, despite the editing, reasonable jurors could not avoid drawing the inference that the defendant was the co-participant designated in the confession by symbol or neutral pronoun." (*Fletcher*, *supra*, 13 Cal.4th at p. 456.)

The statement *Fletcher* disapproved placed both of the two defendants in a car moments before the shooting occurred. It put the defendant "and a friend" on a freeway ramp using jumper cables or some kind of ruse to get people to stop so that they could rob them. When one woman drove away, "he shot at her." (*Fletcher*, *supra*, 13 Cal.4th at pp. 458–459, 469.) Substituting a pronoun or other neutral term for the defendant's name could not provide sufficient assurance that the average reasonable juror would obey an instruction to disregard the confession when considering the guilt of the nondeclarant. (*Id.* at p. 465.)

The appeal before us presents a different set of facts. Capers did not facially implicate Bell to the point that the jury could not follow a limiting instruction. Capers's statement did

not place Bell at the scene when the shooting occurred. Indeed Capers did not discuss the shooting at all. Capers did not describe Bell's appearance or his clothing. (See, *Fletcher*, *supra*, 13 Cal. 4th at p. 466.) Capers did not single out Bell with neutral terms. In one of Capers's versions, Capers was mingling with others in his neighborhood when yet another person handed him a set of car keys and asked him to pick somebody up. In other words, several people may have been involved in this entire incident, not just Bell.[12] Unlike *Fletcher*, where both co-defendants were present at the scene when the crime occurred, Capers showed up later, and whoever he picked up did not, according to Capers, appear to be excited or under any stress caused by just having shot two people.

*People v. Archer* (2000) 82 Cal.App.4th 1380 provides another example of a statement that did violate the Sixth Amendment's right of confrontation. Although the statement by defendant Baserga had been redacted to delete any mention of appellant by name, appellant remained "unmistakably implicated in several aspects of the statement. Baserga told the investigator that he picked up the victim, John Pate, and suggested to Pate that they go to 4181 La Madera Avenue. According to Baserga, 'the plan was to attack John Pate by surprise as he walked into

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[12] We know from *People v. Jefferson* (2008) 158 Cal.App.4th 830, 845, that a redacted statement does not pass muster when the group of co-participants mentioned in the confession numbers only three. While we do not have a set number of individuals with whom Capers was mingling in the neighborhood, we can infer from the record that the group exceeded three, which makes the Capers statement more protective of Bell.

the back yard of 4181 La Madera Avenue.' The jury previously had heard testimony that 4181 La Madera was appellant's home address. Baserga stated he knew that bringing Pate to that address 'was gonna set him up.'

"When Baserga and Pate reached that address, Baserga opened the gate and walked into the patio area; 'Pate was behind me, and then Pate was stabbed.' Pate 'tried to escape, but I didn't know what to do, so I held him.' Baserga stated that he stabbed Pate in the arm, 'maybe twice . . . .' Baserga believed John Pate was stabbed more than 10 times, 'mostly in the chest or in the stomach.' These portions of the statement leave no doubt that the serious stab wounds were inflicted by someone other than Baserga, and that this other person was waiting at appellant's house for Baserga to arrive with Pate. [¶]. . .[¶]

"The investigator asked Baserga whether he 'use[d] something to move [the body] from the ground there in the back yard and put it in the back of the hatchback, the little Ford Escort with a plate number 2 MNA 526?' Baserga replied: 'Yeah. Used the wheelbarrow to move the body and put it in the back of the car.' The jury previously had heard testimony that appellant's car was a 1989 blue Ford Escort with that same license number." (*People v. Archer*, *supra*, 82 Cal.App.4th at pp. 1388–1389.)

Moreover, "Baserga's statement was not redacted by using neutral pronouns or symbols to indicate deletions. Instead, pronouns and names were omitted without any indication of an omission. The resulting ungrammatical sentences raise as strong a suspicion that names have been omitted as a neutral pronoun or symbol would have done. For example, Baserga described the disposal of the body: 'Well, first broke open, opened up the lock

with bolt cutters, and then at that time I held the gate and drove in and just parked. And then opened the back of the car and got the body out and left the body near some rocks.'" (*People v. Archer, supra,* 82 Cal.App.4th at pp. 1388–1389.)

Despite the editing, Baserga's statement "informed the jury that Baserga planned the crime with someone else, that the other person was waiting at appellant's house for Baserga to arrive with Pate, and that the other person stabbed Pate at least eight times in the chest or stomach, while Baserga stabbed him only twice in the arm. Someone other than Baserga moved the body from the patio to the back corner of appellant's yard and covered the body with dirt. Someone other than Baserga cut the head off the body and disposed of it. The body was moved from that location by Baserga and someone else, in appellant's car. Baserga and this someone else removed the body from appellant's car, sawed off the hands, left the body near some rocks, and drove away in appellant's car [¶] . . . [T]he existence of another participant is obvious from the statement itself. . . . Moreover, appellant's home address and car license plate number figure prominently in the description of the commission of the crime. A juror who wonders who the other participant is 'need only lift his eyes to [appellant], sitting at counsel table, to find what will seem the obvious answer, . . .' (*Gray v. Maryland* [(1998)] 523 U.S. [185,] 193.) The statement, even with redaction, facially incriminates appellant. 'The average juror, viewing the confession in light of the other evidence introduced at trial, could not avoid drawing the inference that the nondeclarant is the person so designated in the confession and the confession is "powerfully incriminating" on the issue of the nondeclarant's guilt.' (*People v. Fletcher, supra*, 13 Cal.4th at p. 467.)" (*People v.*

*Archer, supra,* 82 Cal.App.4th at pp. 1389–1390.)

The Capers statement did not place Bell at the scene when the shooting occurred. The person Capers described was not excited as one would expect a person to be following a murder. Capers's statement implicates at least one other person besides Bell— whoever gave Capers the car keys. We find that his statement was sufficiently edited so as to comply with the *Aranda/Bruton* rule. Moreover, the prosecution did not misuse the statement during final argument.

V

*The Sixth Amendment Did Not Bar Donald Streeter's Testimony*

On January 27, 2010—roughly three weeks after Diamond Johnson and Darlene Allen were shot—detectives interviewed Donald Streeter. Streeter told them that he had been with several other gang members at Lamont Crayon's residence two days after Crayon's death. Both Bell and Capers carried pistols. According to Streeter, Capers said, "I'm going to show you n-----s how we do this, how the 4 Deuces get down." Capers and Bell drove off together from Crayon's residence and returned 20 to 30 minutes later, saying they needed "to get our little ass off the street and lay low." Streeter indicated that Capers went on to say, "We laid two slobs down in the Bottoms."

On December 21, 2010, Streeter was called to testify at Capers's and Bell's original preliminary hearing. He denied everything he had told the detectives on January 27, 2010. Counsel for Bell and Capers cross-examined Streeter during the preliminary hearing.

On August 6, 2015, appellants filed a written motion seeking the exclusion of Streeter's preliminary hearing

testimony, arguing that they did not have an adequate opportunity to cross-examine Streeter because at the time of the hearing, they had not seen his mental health records and were unaware of his involvement in an unrelated murder of Stephanie Thompson.[13]

The court denied appellants' motion. The court did not issue a final ruling, but noted that because Streeter had "testified at the preliminary hearing, he was subject to the cross-examination on the same areas that we are dealing with in the trial," that "[h]e essentially denied everything and had to be impeached," and that "a sufficient foundation has been laid in order to be able to allow the People to use his prior testimony at the preliminary hearing. We just have to see whether or not he's unavailable."

Streeter was unavailable. On August 24, 2015, the court "had a deputy go down and speak with Mr. Streeter. And he is refusing, as he has consistently over the last week, to come out of his jail cell," and that Streeter indicated that "we would have to extract him, if we had to—to have him come up here." The court noted that "I think it's kind of a farce to strategically extract him from the jail cell forcibly, to bring him up here, potentially

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[13] Capers also argues that this court should independently review certain records relating to Streeter's treatment by Dr. Ehab Yacoub. Respondent does not oppose this court's independent review of the mental health records. These records were reviewed *in camera* by the trial court, which found that none of the records was properly discoverable. We have reviewed the records and conclude that there is nothing within them which is properly discoverable. More important, we also conclude that nothing in these records would have changed any of the trial court's rulings or the result in this appeal.

injuring the deputy, himself, or other inmates. And the court is inclined to accept his representation that he is refusing to come up and refusing to take the oath." The court stated that "I think the only thing the court could do at this point would be to hold him in contempt of court; however, the reality is he's already in custody on his own—it is a homicide, it's a manslaughter case. So me holding him in contempt has maybe a lot of bark but no bite. So, at this point, the court is inclined to deem him unavailable, based on the court's own observations, representations from officers of the court as to what we would have to do in order to get him up here."

The court formally ruled on the matter on August 26, 2015. The court said that "[f]rom August 17th through the 19th, [Streeter] refused to come up into court. That was relayed to me by my bailiff. He continually refused to come into court and indicated to everyone around him that he was going to have to be extracted and would use force or resist if he was extracted. . . . Based on the totality of the situation and based on what the court is faced with, and using the balancing with regard to safety of not just Mr. Streeter but the officers and other inmates and people in this court, the court is going to find that he is unavailable as a witness, pursuant to Evidence Code section 240." When counsel of Bell and Capers insisted that the court could not find him unavailable because it had not actually held him in contempt, the court responded that Streeter "is already in state prison for his own voluntary manslaughter charge, so any threats or any action the court would [take] to hold him in contempt would be fruitless."

During the trial, Streeter's preliminary hearing testimony was read into the record. Next, a detective testified that he had

interviewed Streeter on June 29, 2011 about Stephanie Thompson's murder. Streeter identified "G-Eyes" and "S-Mack" as suspects, but denied any direct involvement. Detectives were unable to corroborate the existence of any such-named individuals. However, following another interview on July 5, 2011, Streeter confessed that he had shot Stephanie Thompson. Streeter pleaded guilty to voluntary manslaughter and was sentenced to 25 years. Counsel for Bell and Capers cross-examined the detective about the inconsistencies in Streeter's interviews, including his original lies about his lack of involvement. Capers argues that the trial court erred in finding Donald Streeter "unavailable" at trial and therefore erred by admitting his preliminary hearing testimony. Capers also argues that he did not have an adequate opportunity to cross-examine Streeter at the preliminary hearing, claiming a violation of the Sixth Amendment's confrontation clause.

*A. Standard of Review*

"The constitutional and statutory requirements are 'in harmony.' [Citation.] The proponent of the evidence has the burden of showing by competent evidence that the witness is unavailable. [Citation.]" (*People v. Smith* (2003) 30 Cal.4th 581, 609 (*Smith*).) "[T]he Sixth Amendment to the federal Constitution gives a criminal defendant the right to confront and cross-examine adverse witnesses." (*People v. Lopez* (2012) 55 Cal.4th 569, 576.) Generally, however, "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68.) Similarly, California admits former testimony "[i]f a

witness is unavailable at trial and has testified at a previous judicial proceeding against the same defendant and was subject to cross-examination by that defendant, the previous testimony may be admitted at trial. [Citations.]" (*Smith*, *supra*, 30 Cal.4th at p. 609.)

"The California Supreme Court has held that appellate courts should generally apply the de novo or independent standard of review to claims that implicate a defendant's constitutional right to confrontation. [Citation.]" (*People v. Sweeney* (2009) 175 Cal.App.4th 210, 221.) However, as correctly pointed out by Capers, courts of appeal "deferentially" review a trial court's resolution of factual disputes. (See *People v. Seijas* (2005) 36 Cal.4th 291, 304 [applying deference to factual findings involved in a Sixth Amendment issue].)

*B. Unavailability*

Although not mentioned in the briefs, the record reflects that all counsel stipulated in front of the jury that "Donald Streeter is still alive; however, the court has deemed him unavailable to testify in this case." Because this stipulation does not recite that appellants concede that Streeter was unavailable, we proceed to discuss the issue.

"While we 'defer to the trial court's determination of the historical facts of what the prosecution did to locate an absent witness,' we 'independently review whether those efforts amount to reasonable diligence sufficient to sustain a finding of unavailability.' (*People v. Bunyard* [(2009)] 45 Cal.4th [836,] 851.)" (*People v. Thomas* (2011) 51 Cal.4th 449, 503.)

Capers argues that Streeter was not "unavailable" because he did not fall within any of the six categories set forth in

Evidence Code section 240. We consider only the categories that apply to the facts here.

California courts have long held that "a witness who is physically available yet refuses to testify, after the court has used all available avenues to coerce such testimony, is unavailable. This is true even though such a witness does not fit neatly into one of the subdivisions of Evidence Code section 240." (*People v. Francis* (1988) 200 Cal.App.3d 579, 587.) Our Supreme Court has noted that section 240 "does not 'state the exclusive or exact circumstances under which a witness may be deemed legally unavailable for purposes of Evidence Code section 1291.' [Citation.] Courts have admitted 'former testimony of a witness who is physically available but who refuses to testify (without making a claim of privilege) if the court makes a finding of unavailability only after taking reasonable steps to induce the witness to testify unless it is obvious that such steps would be unavailing.' [Citations.]" (*Smith*, *supra*, 30 Cal.4th at p. 624.)

It is true that the trial court never formally lodged contempt charges against Streeter, and therefore this situation does not "neatly" fit into subsection (a)(6) of section 240. However, the facts set forth above generally fit subsection (a)(4). Streeter was absent from trial and the court was "unable to compel his . . . attendance by its process." As discussed above, both counsel and sheriff's deputies attempted to persuade Streeter to testify at trial. Those attempts failed, and the court noted that Streeter "continually refused to come into court and indicated to everyone around him that he was going to have to be extracted and would use force or resist if he was extracted."

The trial court declined to go through a formal contempt proceeding because it would be "unavailing." Streeter was

"already in state prison for his own voluntary manslaughter charge, so any threats or any action the court would [take] to hold him in contempt would be fruitless." Based on these circumstances, the trial court correctly found Streeter to be unavailable.

*C. Opportunity for Cross-Examination*

Generally, "'preliminary hearing testimony of an unavailable witness may be admitted at trial without violating a defendant's constitutional right. [Citation.]' [Citation.]" (*People v. Thomas* (2011) 51 Cal.4th 449, 499.) In *Thomas*, our Supreme Court upheld the admission of prior testimony from an unavailable witness at a preliminary hearing held as long ago as 15 years before the pertinent criminal proceedings, even if that preliminary hearing occurred in an entirely different criminal matter. (*Id*. at p. 503.) The opinion cited an earlier case, *People v. Wharton* (1991) 53 Cal.3d 522, upholding the introduction of a transcript of a preliminary hearing in a prior criminal conviction conducted 11 years before the trial of the charged offense. "'[A] prior opportunity to cross-examine a witness who has become unavailable is considered an adequate substitute for present cross-examination at trial.' [Citation.] Thus, '"'[a]s long as a defendant was provided the opportunity for cross-examination, the admission of preliminary hearing testimony under Evidence Code section 1291 does not offend the confrontation clause of the federal Constitution simply because the defendant did not conduct a particular form of cross-examination that in hindsight might have been more effective.' [Citations.]'" [Citation.]" (*People v. Andrade* (2015) 238 Cal.App.4th 1274, 1295.)

Here, both Capers and Bell had an opportunity to cross-examine Streeter. After Streeter's direct examination at the preliminary hearing, attorney Salcido asked him about his learning disability. Defense attorney Johnson asked Streeter if the detectives had promised to let him go if he told them "something." Salcido also asked Streeter if the detectives had told him he would stay in jail unless he talked with them.

Capers now argues that his ability to cross-examine Streeter at the preliminary hearing was not an adequate substitute for cross-examination at trial because he did not have the opportunity to ask Streeter about his inconsistent statements regarding the murder of Stephanie Thompson. While this is so, the trial court allowed Streeter to be impeached on that very basis. After Streeter's preliminary hearing testimony was read into the record, a detective testified about the Thompson murder and his interviews with Streeter, and then Salcido had an opportunity to cross-examine the detective on those issues.

Capers's attorneys had an opportunity to effectively cross-examine Streeter to impeach his credibility during the preliminary hearing. Indeed, Streeter's strategy at that hearing was to essentially deny that the recorded voice was his, but that if it was his voice, he had lied to the detectives. Later facts would tend to impeach his credibility even further. "Both the United States Supreme Court and the California Supreme Court 'have concluded that "when a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony. [Citation.]"' [Citations.]"

(*People v. Andrade*, *supra*, 238 Cal.App.4th at p. 1295.) The court correctly overruled the defenses' objections.

VI

*There Was No Need for the Trial Court to Give Accomplice Instructions*

Bell argues that the trial court failed to instruct the jury to determine whether Capers and Streeter were accomplices of Bell with respect to Diamond Johnson's murder, and that if the jury determined the appellants were accomplices, the jury should have been instructed to view their statements with caution. Because the court instructed the jury not to consider Capers's statement whatsoever when considering Bell's guilt, we find that the failure to include accomplice instructions was harmless. We also find no evidence that Streeter was an accomplice to the Diamond Johnson murder. It follows that the trial court did not err in not including accomplice instructions.

*A. The Law in This Area*

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (Pen. Code, § 1111.) This same code section defines "accomplice" as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

"When the evidence at trial would warrant the jury in concluding that a witness was an accomplice of the defendant in

the crime or crimes for which the defendant is on trial, the trial court must instruct the jury to determine if the witness was an accomplice." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1270–1271.)

""Unless there can be no dispute concerning the evidence or the inferences to be drawn from the evidence, whether a witness is an accomplice is a question for the jury. On the other hand, the court should instruct the jury that a witness is an accomplice as a matter of law when the facts establishing the witness's status as an accomplice are ""clear and undisputed."" [Citations.]' [Citation.]" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 472.) However, """. . . if the evidence is insufficient as a matter of law to support a finding that a witness is an accomplice, the trial court may make that determination and, in that situation, need not instruct the jury on accomplice testimony.'" [Citation.]" (*People v. Hinton* (2006) 37 Cal.4th 839, 879.) Speculative inferences alone are insufficient to support a finding that a witness was an accomplice. (*People v. Lewis* (2001) 26 Cal.4th 334, 369 ["Although [the witness] was at the scene of the crime and had intimate knowledge of the robbery and murder, this fact without more merely means that he was an eyewitness and not necessarily an accomplice to the crimes."].)

"Failure to instruct pursuant to section 1111 is harmless if there is sufficient corroborating evidence. Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense." (*People v. Hayes*, *supra*, 21 Cal.4th at p. 1271.)

"[T]he jury should be instructed to the following effect whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies: 'To the extent an

accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.'" (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

*B. Capers's Statement*

It is undisputed that Capers was an accomplice with Bell with respect to the Diamond Johnson murder. It also is undisputed that the trial court did not instruct the jury either that it must determine whether Capers was an accomplice with Bell, or that the jury must view Capers's testimony—in the form of his interview with Detective Gersna—with "caution." Despite conceding that Capers was an accomplice, respondent argues that Capers's statement that he received a phone call, or instructions, to go "pick somebody up" near the scene of the shooting does not implicate Bell at all because Capers did not use Bell's name. Bell contends, however, that similar to the issues discussed in the *Aranda/Bruton* portion of this opinion, the jury would reasonably conclude that in his statement, Capers was referring to Bell. Even assuming that Capers's statement implicates Bell, the failure of the trial court to include either of the accomplice instructions is harmless.

Capers's statement could only have been used against Bell to show that he was in the area of the crime when it occurred. However, there was abundant corroborating evidence placing Bell at the scene, including the DNA on the cell-phone clip, the cell phone tracing evidence, and Streeter's statement that Bell and

Capers were both armed, left a gathering together, and upon their return, one of them admitted that they killed two members of the Bloods in the neighborhood where the murders occurred.

Moreover, the failure to instruct the jury to view Capers's statement with "caution" with respect to determining Bell's guilt or innocence is harmless in light of the limiting instructions the court *did* give with respect to Capers' statement. The court instructed the jury that it could not use Capers's statement *at all* in determining the guilt of Bell. Assuming, as we do, that the jury followed the trial court's instructions, the jury did not consider Capers's statement in making its determination of Bell's guilt. Therefore, the failure to instruct the jury to view Capers's statement "with caution" because the two were accomplices would not only have been superfluous, but likely confusing to the jury.

*C. Streeter's Statement*

Although the trial court did not instruct the jury to determine if Streeter was an accomplice of Bell in the murder of Diamond Johnson, we conclude that such an instruction was unnecessary because there was no evidence that Streeter was involved in that murder. Bell argues that because Streeter was a fellow gang member who was present "at the home of their fallen gang member" and that Bell and Capers left "to purportedly exact revenge," it is "arguable" that "Streeter and his compatriots had all met at Lamont Crayon's house to discuss retaliation, which resulted in Bell and Capers leaving the meeting with weapons."

The record does not support Bell's argument. The only evidence regarding Streeter's involvement in the crime comes from his statement itself. That Streeter was at Crayon's home with Bell and Capers when they left for twenty minutes and later

bragged about what they had done does not equate to involvement in the murder. Nor is there any evidence that Streeter knew what Bell and Capers were planning to do and encouraged the murder.

In comparison, "[a]n accomplice is subject to prosecution for the identical offense charged against the defendant by reason of being a direct perpetrator, aider and abettor, or coconspirator. [Citations.]" (*People v. Mohamed* (2016) 247 Cal.App.4th 152, 161.) "[A]n aider and abettor must act 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] In other words, an aider and abettor of a specific intent crime shares the perpetrator's specific intent when he or she knows of the perpetrator's criminal purpose and aids, promotes, encourages, or instigates the perpetrator with the intent of encouraging or facilitating the commission of the crime." (*People v. Houston* (2012) 54 Cal.4th 1186, 1224.) There was no evidence that Streeter shared Bell's and Capers's intentions, nor that he instigated them or encouraged them to commit the crime. Accordingly, the trial court correctly determined that no accomplice instructions were necessary with respect to Bell.

*D. CALCRIM No. 707*

In a related argument, Bell states that the trial court erred by not instructing the jury with CALCRIM No. 707, which "is essentially the same" as CALCRIM No. 334, but is "used to prove a special circumstance based on a crime other than the murder charge to which it applies." For the same reasons as we have discussed above, we find that any failure to instruct the jury on accomplice issues with respect to Capers's statement was

harmless, and that there was no evidence that Streeter was an accomplice of either Bell or Capers in the murder of Diamond Johnson.

VII

*Substantial Evidence Supports Capers' s Convictions for Attempted Murder, and Any Kill Zone Instructions Would Have Been Superfluous*

Capers was convicted of the attempted murders of Estvon Johnson, Deshawn Needham, Jerry Sims, and Brent Exley, all of whom were inside Exley's van when the fifth passenger, Jamil Lyles, was shot and killed. This incident occurred on the evening of July 19, 2009. Capers argues that the evidence was insufficient to support these verdicts because 1) there was no evidence of his intent to kill the four other passengers in the van and 2) the trial court failed to instruct the jury on the "kill zone" theory of attempted murder.

Respondent concedes that the court did not give the jury a "kill zone" instruction.[14] Nevertheless, there was substantial evidence to support the jury's finding that Capers intended to kill Johnson, Needham, Sims, and Exley. Respondent also contends, and rightfully so, that "kill zone" liability is not a legal doctrine requiring a special jury instruction. It is merely an inference that the jury may draw in a given conclusion under the ordinary instruction on attempted murder.

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[14] The court gave CALCRIM No. 600 but without the "kill zone" theory of liability contained in the model version of the instruction.

*A. Standard of Review*

When reviewing challenges to the sufficiency of the evidence supporting a conviction, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Mere speculation cannot support a conviction. (*People v. Marshall* (1997) 15 Cal.4th 1, 35.) Reversal occurs if "it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

*B. No "Kill Zone" Instruction is Required to Convict Capers of Attempted Murder*

Unlike murder, where the doctrine of transferred intent supports a conviction even if the person killed was not the one whom defendant intended to kill (*People v. Cardona* (2016) 246 Cal.App.4th 608, 613), "[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]" (*People v. Superior Court* (2007) 41 Cal.4th 1, 7, citing Pen. Code, § 21a.) Although specific intent must exist, "[I]t is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant's acts and the circumstances of the crime. [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 741.)

In *People v. Stone* (2009) 46 Cal.4th 131, 136 (*Stone*) the

main issue before our Supreme Court concerned "the nature of the intent-to-kill requirement. Specifically, the question is whether the intent must be to kill a particular person, or whether a generalized intent to kill someone, but not necessarily a specific target, is sufficient." The Supreme Court reviewed a previous case, *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*), which the *Stone* court summarized as holding: "if a person targets one particular person, under some facts a jury could find the person *also*, concurrently, intended to kill—and thus was guilty of the attempted murder of—other, nontargeted, persons." (*Stone*, *supra*, at p. 137.)

*Bland* also held that "although the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what it termed the 'kill zone.'" (*Bland*, *supra*, 28 Cal.4th at p. 329.) Importantly, the court noted that "California cases that have affirmed convictions requiring the intent to kill persons other than the primary target can be considered 'kill zone' cases even though they do not employ that term." (*Id*. at p. 330)

*Bland* involved a gang-related shooting in which the defendant and his companions fired multiple shots at a car, killing the driver and wounding two passengers. (*Bland*, *supra*, 28 Cal.4th p. 318.) The evidence suggested that the defendant may only have wanted to kill the driver but not the passengers. (*Id*. at pp. 318–319.) While the doctrine of "transferred intent" did not apply, the circumstances warranted a finding by the jury that the defendant had a concurrent intent to kill everybody in the "kill zone" created by firing a gun at vehicle occupied by multiple persons. (*Id*. at p. 319.) *Bland* mentioned out of state

cases that distinguished "'between transferred intent and what is essentially concurrent intent.' [Citation.]" (*Bland*, *supra*, at p.329.) The facts in *Bland*, which are close to ours, not only permitted, but "virtually compel[led]—a similar inference. Even if the jury found that defendant primarily wanted to kill Wilson rather than Wilson's passengers, it could reasonably also have found a *concurrent* intent to kill those passengers when defendant and his cohort fired a flurry of bullets at the fleeing car and thereby created a kill zone. Such a finding fully supports attempted murder convictions as to the passengers." (*Id*. at pp. 330–331.)

A footnote in *Bland* goes on to say that "[t]his concurrent intent theory is not a legal doctrine requiring special jury instructions, as is the doctrine of transferred intent. Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6; see also *Stone*, *supra*, 46 Cal.4th at p. 137.) A passage in *Stone* provides that while "current pattern jury instructions discuss the kill zone theory . . . . The Bench Notes to CALCRIM No. 600 explain that *Bland* stated that a special instruction on the point is not required, and that the kill zone 'language is provided for the court to use at its discretion.'" (*Stone, supra,* at pp. 137–138.)

Accordingly, while there is a general rule "confining the parties upon appeal to the theory advanced below," which is "based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the consequences of which are open to controversy and were not put in issue or

presented at the trial.' [Citation.]" (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) The *Bland* and *Stone* opinions made it clear that for purposes of attempted murder, the "kill zone" theory of liability need not have been included in the jury instructions at all. It follows that the absence of kill zone instructions does not prejudice the appellants.

Capers argues that despite *Stone* and *Bland*'s holdings, the jury "logically did not consider" the kill zone theory because it was not instructed on that theory. Capers relies on *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1244 (*Falaniko*), in which the court held that "[a] conviction for attempted murder under a kill zone theory requires evidence that the defendant created a kill zone; that is, while targeting a specific person he attempted to kill everyone in the victim's vicinity, or he indiscriminately sought to kill everyone in a particular area without having any primary target. [Citation.] In addition, before a defendant may be convicted of attempted murder under a kill zone theory, the evidence must establish that all the victims were actually in the kill zone." Capers argues that *Falaniko* supports his position that the jury needed special instructions on the kill zone theory because the Court of Appeal held that "if the jury rejected the inference supplied by the kill zone theory, it would then have to find appellant specifically intended to kill each person individually in order to convict on all charges of attempted murder." (*Id.* at p. 1244.)

In *Falaniko*, the Court of Appeal found that "substantial evidence did not support conviction under the kill zone theory" because "there was no evidence that appellant created a 'kill zone,' much less that he intended to kill everyone who might have been in it." (*Falaniko*, *supra*, 1 Cal.App.5th at p. 1244.) While

"the surveillance video showed the shooter firing into the building, there was no evidence from which the jury could reasonably infer that appellant specifically intended to kill every single person in the area, or any evidence that [the victims] were both in the 'kill zone' when they were shot. As to count 4, the charge of attempted murder of Kese in the Cherry Park shooting, while there was evidence that appellant and his cohort created a kill zone in the park, the evidence also established that Kese—who was sitting in her car some distance away—was clearly not in it. A court errs when it instructs on a theory which has no application to the facts of the case." (*Ibid.*)

*Falaniko* did not hold that special jury instructions were required, it only held that the evidence did not support a kill zone theory. Capers has cited no case rejecting the clear Supreme Court precedent that a kill zone theory need not be included in a special jury instruction in order for a jury to convict a person of attempted murder, so long as the evidence introduced at trial supports such a theory. The kill zone theory simply describes a "reasonable inference" that a jury makes in the presence of certain facts. No special instruction is required for the jury to reasonably infer that under a given set of facts, a defendant has a concurrent intent to kill everybody within a "kill zone" by, for example, firing a hail of bullets at an enclosed van full of people.

*C. Substantial Evidence Supports the Attempted Murder Convictions.*

Appellants argue that no substantial evidence exists because there was no evidence that Capers interacted with any of the five people in the car other than Exley, nor any evidence that he saw the five get into Exley's van, or that Capers looked inside

the van before shooting, or if he did, that he could see all five passengers inside. This judgment overlooks credible, solid evidence to the contrary. Exley saw Capers pull out a gun in the motorcycle club, point it at Exley, and say, "fuck slobs." After Exley convinced Capers that they both were connected to the Crips, Capers put the gun away. Following this confrontation, Exley left the club and got into a van with Estvon Johnson, Deshawn Needham, Jerry Sims, and Jamil Lyles. Needham had been in a fight with someone outside the club as he waited for Exley, who was driving, to pick him up. The jury could have concluded that Capers saw all of this. Moreover, the fight inside had not ended after Exley left the club. Exley testified that when he stopped the van at a stop sign at 131st Street and Broadway, he heard somebody yell, "There go them slobs." Moments later, shots were fired at the van. Exley testified that he saw Capers standing on the corner shooting at the van. Exley also testified that he saw a gun in Capers's hand as he ran towards the van. Exley then testified that when the shooting started, he and the other passengers ducked. As respondent points out, that the group "got on the floor" implies that they were sitting in upright positions, which Capers would have seen before he and his fellow gunman opened fire. Capers thought Exley belonged to the Bloods along with, the jury could have inferred, the people around him who, the jury could have inferred, shared the same gang affiliation. Capers wanted to kill Exley along with, the jury could have inferred, his alleged fellow gang members, who were the other victims. Capers had a concurrent intent to kill. This constituted sufficient evidence for a jury to have reasonably concluded that Estvon Johnson, Deshawn Needham, Jerry Sims, and Exley—the survivors of the attack who were within the tight

confines of the van—fell within the "kill zone" of Capers's attack. These facts almost duplicate those in *People v. Bland, supra*, and they support the jury's findings on counts II through V. Substantial evidence supports the jury's verdict. There was no error.

VIII

*The Trial Court Was Not Obligated to Sever These Proceedings*

Capers moved and Bell now joins the motion to sever the trial between him and Bell. Capers argues that the trial court abused its discretion by denying the motion and that Capers was prejudiced as a result.

We review the court's denial of severance for abuse of discretion based on facts known to the court at the time of the ruling. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1079 (*Thompson*); *People v. Winbush* (2017) 2 Cal.5th 402, 456.)

As an initial matter, separate trials are the "exception." (*People v. Cleveland* (2004) 32 Cal.4th 704, 726.) The law requires defendants to be tried together when they are jointly charged with crimes.[15] It is "settled" that the Legislature has "expressed a preference for joint trials," and that "[j]oint trials

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[15] Penal Code section 1098 authorizes joint trials. The statute provides in part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant . . . ."

promote efficiency and help avoid inconsistent verdicts. [Citations.]" (*People v. Sanchez* (2016) 63 Cal.4th 411, 464 (*Sanchez*).) Still, there are limits. In exercising its discretion to hold joint trials, a trial court should "'" . . . separate the trial of codefendants 'in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.'" Citations.]" (*Thompson*, *supra*, 1 Cal.5th at p. 1079.)

Also, when crimes arising out of separate episodes are alleged, some courts have held that "[t]he analysis is somewhat different." (*Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 938–939 (*Calderon*).) In these cases, the issues are closer to those encountered under Penal Code section 954 (joinder of counts). (*Ibid.*) The Supreme Court has "set out four criteria to guide trial court discretion: (1) whether evidence of the crimes would be cross-admissible; (2) whether some charges are likely to inflame the jury against the defendant; (3) whether a weak case has been joined with a strong one or with another weak case; and (4) whether any of the charges is a potentially capital offense." (*Id.* at p. 939.)

We turn to the factors that apply to this appeal.

*A. Incriminating Admission*

Capers cannot base his severance motion on his incriminating admission (which was not a confession) to Detective Gersna, for the statement only incriminated himself. To the extent Bell joins in the motion to sever, as we have discussed in the section of this opinion dealing with the alleged

*Aranda/Bruton* error, Capers's statement was sufficiently redacted to avoid incriminating Bell. Capers never described Bell's role in the Johnson/Allen shooting. Capers said nothing more than that either via a phone call or while mingling with others in the "hood," someone passed him a set of car keys and told him to "pick someone up." No incriminating confession supports a severance motion.

*B. Prejudicial Association With Codefendant Bell/Charges Likely to Inflame the Jury*

"Prejudicial association might exist if 'the characteristics or culpability of one or more defendants [is] such that the jury will find the remaining defendants guilty simply because of their association with a reprehensible person, rather than assessing each defendant's individual guilt of the crimes at issue.' [Citation.]" (*People* v. *Sanchez, supra,* 63 Cal.4th at p. 464.) Capers argues that his connection with Bell prejudiced him, because the jury could not help but associate him with Bell's "cold-blooded" murder of a 13-year old boy, Marvin Nichelson, even though Capers was not involved or charged with that murder. While "[h]omicide . . . is never looked upon with favor," Capers argues that the jury could not have viewed Bell as "anything less than a heartless sociopath," and that because there was evidence that Capers and Bell were friends and fellow gang members, "whatever prejudicial feelings the jurors had towards Bell for shooting a young boy nine times were imputed onto Capers as well."

While the Marvin Nichelson murder potentially could prejudice Capers, we do not agree that the Nichelson murder differed so much in magnitude from the killings of Lyles and

Johnson as to warrant separate trials. The murders of Lyles and Johnson were no less cold-blooded than Nichelson's. Following a brief confrontation at a nightclub involving a misidentification of gang affiliation, Capers followed a group out of the club and then indiscriminately fired a pistol into the side of a van, killing Lyles. Johnson was shot down on a friend's porch for wearing basketball shorts of the wrong color. Darlene Allen, who was apparently uninvolved in any gang activity of any kind, was nearly killed by the same shooter. When faced with these facts, the potential for any undue prejudice against Capers resulting from Bell's murder of Nichelson becomes so diluted that the trial court did not abuse its discretion in ordering a joint trial.

While courts have recognized that there may be some "potential for prejudice when the murder victims are police officers killed in the line of duty," Capers points to no case in which a court found that killing a minor had more potential for prejudice than killing an adult. (*People v. Myles* (2012) 53 Cal.4th 1181, 1202 (*Myles*).) In *Myles*, the court found that killing a retired police officer in an attempt to protect his wife was "no less inflammatory" than the "callous, cold-blooded killing" of another man "who was shot down in front of his friends." (*Ibid.*)

The trial court instructed the jury to "separately consider the evidence as it applies to each defendant," and to "decide each charge for each defendant separately." We presume the jury followed the court's instructions. (See *People v. Doolin* (2009) 45 Cal.4th 390, 444.)

*C. Likely Confusion From Evidence on Multiple Counts / Cross-Admissibility*

While there was evidence that the same Glock pistol was used in all three murders, that by itself does not justify severance. Both appellants employed the same weapon, and the respondent had a right to bring that fact before the jury. We see no basis for jury confusion nor any prejudice or error.

*D. Joining Weak Case With Strong One*

Capers argues that the case against Bell was considerably stronger than the relatively weak cases against Capers, and trying the cases together risked a prejudicial "spillover effect." We are not persuaded.

It is true that DNA evidence linked Bell to the Johnson and Nichelson murders, and that no such evidence linked Capers. However, the evidence against Capers was substantial. Exley positively identified Capers as the man who brandished a gun in the nightclub and then fired at the van, killing Lyles. While Capers argues that several factors impeach Exley's identification, including his earlier lies to the police and inconsistent descriptions, this does not change the ultimate strength of the case against Capers. Donald Streeter implicated both Capers and Bell in the Johnson murder, as arming themselves and later bragging about having "just laid two slobs down in the Bottoms." This is powerful evidence against both appellants equally. While Bell was also tied to the Johnson murder by the DNA samples obtained from the cell phone parts found at the scene, this link was not as strong as the others. Analyst Kristen Hammonds testified that while Bell "could not be excluded," she ultimately could not reach any conclusions. Therefore, the relative strength

of the case against Bell was not appreciably greater than the case against Capers, certainly not sufficient to compel a court to sever the trials.

*E. Resulting Actual Prejudice*

Finally, Capers argues that even if the decision to deny the severance motion was not an abuse of discretion at the time the ruling was made, the joint trial nevertheless actually resulted in a denial of due process and a fair trial.

It is true that courts have held that "even when a trial court's denial of severance was not an abuse of discretion at the time it was made, we must reverse the judgment on a showing that joinder actually resulted in ""gross unfairness"" amounting to a denial of fair trial or due process." (*Myles*, *supra*, 53 Cal.4th at p. 1202.) Courts "look to the evidence actually introduced at trial . . . ." (*People v. Bean* (1988) 46 Cal.3d 919, 940.) Here, however, Capers's due process argument matches his argument about abuse of discretion. He points to the evidence introduced at trial to support both contentions, but the evidence does not differ from what he relied on to make his motion. Nothing else occurred to cause gross unfairness. Accordingly, we find no due process concerns for the same reason that we find that the trial court did not abuse its discretion by denying the motion for separate trials.

Capers invokes *People v. Chambers* (1964) 231 Cal.App.2d 23 (*Chambers*) as a case where the actual evidence introduced during a joint trial resulted in a denial of due process. In *Chambers*, the owners of a rest home and the home's supervising nurse were jointly indicted on assault charges and were jointly tried by stipulation of their shared defense attorney. (*Chambers,*

at pp. 24–25.) During the trial, a single witness described seeing the owner assault the patient, but this testimony was effectively impeached on cross-examination by the introduction of receipts showing that the owner was running errands at the time of the alleged assault. (*Id*. at p. 26.) The remaining evidence involved only the nurse's assaults on the victim. The court held that because "[t]he consolidated trial was heavily weighted with evidence of [the nurse's] brutality," the owner of the rest home "was probably convicted by association with [the nurse], in trial and otherwise, rather than by evidence of his personal guilt, that an unfairness so gross has occurred as to deprive him of due process of law." (*Id*. at p. 28.)

No such gross unfairness existed here. There was ample evidence to implicate both Capers and Bell, and while additional DNA evidence supported Bell's involvement in the murders, that was not enough to skew the evidence against Bell so heavily that a due process violation occurred.

We find no abuse of discretion in denying the motion to sever.

IX

*The Court Properly Exercised Its Discretion in Excluding Evidence of Relocation Funds Which Exley Received in an Earlier Case*

Capers argues that the trial court abused its discretion in refusing to admit evidence that in 2008 in a prior unrelated matter (the "Venable Case"), Exley had received relocation funds.

During the trial, on August 21, 2015, the court noted that Exley has previously testified in the "Venable Case." Capers's attorney wished to ask Exley about his receipt of some relocation

funds in connection with giving testimony in that matter, reasoning that Capers's attorney argued that such evidence showed "a pattern" because in the Venable case, Exley had been "the only eyewitness," and that "here he is, all of a sudden, a very significant witness . . . ."

The court noted that "I don't think so far that that's relevant. He testified in this case in 2011, not 2008," and that "I'm not following your bias or motive based on the other case, of getting relocation funds, et cetera. In this case certainly you can bring that up, but I'm not getting the connection with the prior case. . . . It's two totally different things. In that other case, he was a person that came forward. He said he was a witness at the scene and he witnessed this Mr. Venable do something, shoot the victim. They were all part of the same gang, apparently, Front Hood. Then in this case he's at a motorcycle club and he's leaving with friends, and the car in which he is in gets shot at and somebody dies. . . . So it wasn't like he came forward to the police by way of independent—he's a victim in this case."

Capers's attorney said that he "would ask to just ask [Exley] 'didn't you receive compensation in a previous case for testifying, witness relocation money?' and then I'll move on." The trial court judge ruled that "I don't think that's relevant, so I'm not going to allow you to ask that. You can certainly ask it in connection with this case, that it would go with motive with regard to this case. So I'll sustain the objection as to that."

*A. Standard of Review*

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative

probativeness and prejudice of the evidence in question [citations]. Evidence is substantially more prejudicial than probative . . . if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [Citation.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

*B. The Trial Judge Did Not Abuse Her Discretion in Sustaining an Objection to the 2008 Relocation Funds.*

"[A] trial court has 'broad power to control the presentation of proposed impeachment evidence '"'to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." [Citation.]"' [Citation.]' [Citation.] "'[W]e have repeatedly held that 'not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance.' [Citation.]" [Citations.]' [Citation.]" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1089–1090 (*Mendoza*).)

We deal here with a classic exercise of discretion pursuant to Evidence Code section 352.[16] The sole purpose of the disputed evidence was to impeach Exley's credibility on a collateral issue, and the trial court did not abuse its discretion in sustaining an objection to it. Exley was a witness in 2008. In 2011 he was a victim. Appellant's argument that Exley's testimony was

[16] "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

unreliable because he had a "pattern" of acquiring relocation fees falls within the categories Evidence Code section 352 mentions, especially the confusion of issues. While the court did not expressly articulate its weighing process, that is not what is required. "A trial court is not required to '"expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing function under Evidence Code section 352."' [Citation.]" (*People v. Nunez & Satele* (2013) 57 Cal.4th 1, 31.) The court did not abuse its discretion in excluding evidence of the 2008 relocation funds.

Capers also argues that the trial court's evidentiary rulings violate his constitutional rights. However, as noted in *Mendoza*, *supra*, 52 Cal.4th at page 1090 "'not every restriction on a defendant's desired method of cross-examination is a constitutional violation.'" We find no constitutional violation.

X

*Assuming Error, Exley's Identification of Capers in the "Six-Pack" Was Not Harmful*

During a recorded interview with a detective on May 18, 2011, Exley picked Capers from a six-pack of photographs. Capers argues that the trial court erred in admitting a recording of a "snippet" of Exley's identification.

*A. Appellants Did Not Forfeit This Argument*

As an initial matter, respondent argues that Capers failed to properly object to the introduction of this evidence. Capers's attorney objected "per *Crawford*,[17]" arguing that "[u]nless it's

[17] *Crawford v. Washington*, *supra*, 541 U.S. 36.

inconsistent, it shouldn't come in." The court ruled that "prior identifications come in, but I'll let you object for the record." A *Crawford* objection implicates hearsay issues (see *Crawford v. Washington, supra,* 541 U.S. at p. 60, fn 9; see also *People v. Ervine* (2009) 47 Cal.4 745, 775–776), which appellant is raising now. We take this exchange as a proper objection to the introduction of Exley's prior identification.

*B. Standard of Review*

Courts review the "ultimate decision whether to admit" hearsay evidence for abuse of discretion and will uphold factual findings relating to that decision if they are supported by substantial evidence. (See *People v. Phillips* (2000) 22 Cal.4th 226, 236.) Whether a trial court has correctly construed a statutory hearsay exception, however, is "a question of law that we review de novo." (*People v. Grimes* (2016) 1 Cal.5th 698, 712.)

*C. Even if the Court Erred in Admitting the Recording, Appellant was not Prejudiced.*

The court admitted Exley's "snippet" pursuant to the hearsay exception set forth in Evidence Code section 1238. Capers's argument focuses on subdivision (b) of the statute, to the effect that the May 18, 2011, recording should not have been admitted because the statement was not made "at a time when the crime or other occurrence was fresh in the witness' memory." Since the interview occurred nearly two years after the July 19, 2009, shooting, Capers argues that the prosecution failed to show that the incident was still "fresh" in Exley's mind.

Capers fails to cite any cases in which a court found that too much time had passed between the event and the

identification for the Evidence Code section 1238 hearsay exception to apply, and respondent candidly admits that courts "have provided little guidance for evaluating a trial court's assessment of freshness under section 1238."[18] Nor has our research located a case setting forth the outer temporal limits of "a time when the crime . . . was fresh in the witness' memory." Although the facts in this appeal present an interesting evidentiary question, we need not decide it, because even if the trial court erred in admitting the recording, the evidence did not prejudice Capers.

The test which is generally applicable may be stated as follows: "That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Further guidance appears in *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1118. There, the appellant argued that the court erroneously admitted a witness's testimony at the preliminary hearing under the section 1238 "prior identification" hearsay exception. In *Rodrigues*, our Supreme Court concluded that:

> Vargas's recognition and identifications of defendant were not, as defendant suggests, uncertain. At trial, Vargas explained that although she recognized defendant as one of the fleeing men when initially shown his photo in 1987, she chose not to identify

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[18] One guidepost is *People v. Garceau* (1993) 6 Cal.4th 140, but that case involved a prior photo identification made one day after the alleged crime.

> him at that time because she was afraid. However, Vargas overcame her fear and stepped forward to identify defendant both at his preliminary hearing and at a subsequent photographic lineup. She also identified him at trial. Since Vargas's testimony was both consistent and unwavering in this regard, it is not reasonably probable that the admission of Vargas's identification of Garcia at his preliminary hearing affected the verdict.

Here, although Exley initially lied about what happened, Exley's identification of Capers was consistent and unwavering once he learned that Lyles had died. Exley identified Capers as the shooter several times, including at the preliminary hearing and during his trial testimony. For example, the record reflects the following:

Inside the club, "somebody approached me with a gun, whipped out" and said, "Fuck slobs."

> "Q: The person that approached you with the gun, do you see that person here today?
> A: Yeah, this man right here." (Exley then identified Capers.)
> Q: Mr. Exley, do you remember what gun he was holding, what hand he was holding the gun in?
> A I believe it was the right.
> Q: Okay. And, sir, were you able to see what kind of gun it was?
> A: Maybe a .40 Glock. I don't know.
> Q: You're not sure?
> A: No.

Q: And when he approached you with the gun, did he actually point it at you?

A: Yeah.

Q: What part of your body was he pointing it at?

A: Probably the chest, the face.

Q: So you said chest, face?

A: Yeah.

Q: From your chest all the way up to your head?

A: Right.

Q: Is that—that area?

A: Yeah."

Later, outside the club, Exley described his friends getting into the van. He recalled where one of them was seated, "right behind me." At the intersection of 131st and Broadway, he heard somebody yell out, "'There go them slobs,' and then we started getting shot at." He remembered where the shooter on his side was standing. Then he testified as follows:

"Q: Okay. And, sir, who was it that you saw standing at that corner, shooting at you?

A: The man right here.

Q: Uhm—

A: The same man I was speaking of before.

The Court: Indicating Mr. Capers for the record.

A: Right."

We find no indication in the record that as Mr. Exley testified, he hesitated or had trouble remembering the incident. The record suggests that his memory was, despite the passage of time, firm and fresh. It follows that after hearing these multiple identifications, the jury did not need to see the May 18, 2011 interview. Had the recording not been admitted, there is scant if

any probability that the jury would have returned a result more favorable to Capers. It follows that any error in the trial court's admittance of the recording did not prejudice Capers.

XI

*A Habeas Corpus Petition Is the Appropriate Procedure to Determine Whether Bell's Counsel was Ineffective In Not Moving to Suppress Evidence Obtained From Bell's Cell Phone*

Following Bell's arrest, the police seized his cell phone, searched its contents, and found incriminating material in his texts and in his contact list. Defense counsel did not make a pretrial motion to suppress under Penal Code section 1538.5. Appellant claims this search and seizure occurred without a warrant and that his counsel was incompetent for failing to raise the issue.

We find no verification of this contention in the reporter's transcript until appellant's motion for a new trial, which the trial court denied.

Respondent does not quarrel with the argument that a search warrant was required. (*Riley v. California* (2014) 134 S.Ct. 2473, 2485.) Instead, Respondent says that Bell "overlooks testimony by Detective Thompson that Detectives Thompson and Gersna obtained 'court order[s]' connected to appellant Bell's number and the phone number for Capers in Bell's phone." Appellants claim that the order Detective Thompson testified about was in fact not a warrant, but a court order for phone records.

Unfortunately, the reference to the record leaves the matter unclear. We quote the relevant testimony of Detective Thompson:

"Q: Now, Sir, in the course of your investigation with your partner, Detective Gersna, did you and your partner submit a court order connected to specific phone numbers in this case?

A: Yes

Q: And was one of those numbers from the phone that you obtained from Mr. Bell?

A: Yes.

Q: And was another phone number from Mr. Capers, or the contact from Raggz that you found in the phone.

A: Yes."

Based on this passage, we do not know if there was or was not a search warrant.

During the closing argument, the prosecution made use of the texts recovered from Bell's cell phone in order to establish a motive for the murders and shootings. We acknowledge that this might have been prejudicial, but to make that determination, we need more information than what we find in the record. In this respect, the instructive law appears in *People v. Pope* (1979) 23 Cal.3d 412, 426 (overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048.

"In some cases, however, the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal. [Citation.] Otherwise, appellate courts would become engaged 'in the perilous process of second-guessing.' [Citation.] Reversals would be ordered unnecessarily in cases where there were, in fact, good reasons for the aspect of counsel's

representation under attack. Indeed, such reasons might lead a new defense counsel on retrial to do exactly what the original counsel did, making manifest the waste of judicial resources caused by reversal on an incomplete record.

"Where the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for habeas corpus. In habeas corpus proceedings, there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner complained of. [Citations.] For example, counsel may explain why certain defenses were or were not presented. Having afforded the trial attorney an opportunity to explain, courts are in a position to intelligently evaluate whether counsel's acts or omissions were within the range of reasonable competence." (*People v. Pope, supra,* 23 Cal.3d. at p. 426, fn. omitted.)

Based on this truncated record, we decline to rule with respect to incompetence of trial counsel. If Bell elects to file a habeas corpus petition below, the trial court will have the opportunity to determine whether there was a search warrant and whether counsel acted incompetently or pursuant to a trial strategy.

XII

*The Parole Revocation Fine Must be Modified*

The trial court imposed parole revocation fines on each appellant in the amount of $10,000 per Penal Code section 1202.45 and ordered payment stayed unless either appellant violated parole.

Appellants correctly claim, and respondent concedes, that

these fines must be stricken. A parole revocation fine cannot be imposed for a sentence of life without parole. (*People v. Battle* (2011) 198 Cal.App.4th 50, 63; *People v. McWhorter* (2009) 47 Cal.4th 318, 380), although it may be imposed if a defendant also received a determinate sentence under Penal Code section 1170 which includes a period of parole. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075.) Here the court sentenced both appellants to life without the possibility of parole, clearly not a determinate term under section 1170. The court modifies the judgment by striking the parole revocation fine. (*People v. Carr* (2010) 190 Cal.App.4th 475, 482, fn. 6.)

XIII

*The Victim Restitution Award Must Be Recalculated*

Before sentencing, the people asked the court to order the defendants to reimburse the state for money paid for funeral and burial expenses incurred by the families of Jamil Lyles, Marvin Nichelson, and Diamond Johnson. The court did so, ordering the appellants to pay jointly and severally to the Victims' Restitution Board the sum of $15,453.97. There were no objections at the time.

It appears that the documents supporting the restitution figure were not included with the appellate record. However, the trial transcripts establish that the judge was in possession of the restitution documents. After the victim impact statements, the prosecutor said, "I just have an issue of restitution, and I have submitted documents to the court." The Court replied, "Do I have them? Oh, here they are. Okay. All right." The Court went on to state, "Just for the record, the Court did read and consider the probation reports for Mr. Capers and Mr. Bell."

On appeal, Capers contends that the trial court erred by ordering that he and co-defendant Bell jointly and severally pay the restitution amount. He says that this amount was unsupported by the evidence and that the statute authorizing such an award does not impose liability against Capers for restitution to a victim he did not harm. Specifically, Capers argues that because he was not found liable in the death of Marvin Nichelson, he cannot be held jointly and severally liable for restitution to Nichelson's family.

"'Generally speaking,'" the standard of review provides that "'restitution awards are vested in the trial court's discretion and will be disturbed on appeal only where an abuse of discretion appears.' [Citation.] 'If there is no substantial evidence to support the award, and assuming no other rational explanation, the trial court will have obviously abused its discretion.' [Citation.]" (*In re Anthony S.* (2014) 227 Cal.App.4th 1352, 1356.)

We need not discuss the question whether substantial evidence supports the restitution amount, because the court was not authorized to enter the joint and several payment order. Capers and Bell were not convicted of all the same crimes. They were jointly convicted of only one of the three murders, that of Johnson. Capers alone was convicted of killing Lyles, and Bell alone was convicted of killing Nichelson.

Section 1202.4, subdivision (f) of the Penal Code[19] "requires courts to order restitution in cases 'in which a victim has suffered

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[19] Penal Code section 1202.4, subdivision (f) provides that "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court."

economic loss as a result of the defendant's conduct.' This provision contains a causality requirement: a defendant sentenced to state prison may be obligated to pay restitution only for losses stemming from the criminal conduct of which he or she was convicted. [Citation]. A defendant may be held jointly and severally liable for losses for which a codefendant bears more culpability [citation], but the criminal conduct of which the defendant was convicted must be at least a substantial factor in causing victim's loss, [citation.]" (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 786.)

Based on the statute's wording, it is improper to order Capers to pay the Nichelson family's expenses, and it improper to order Bell to pay the expenses the Lyles family incurred. The full amount cannot be attributed to each appellant's conduct as they were found guilty of committing separate murders. As emphasized in *People v. Leon* (2004) 124 Cal.App.4th 620, 622, Penal Code section 1202.4(f)(3) requires restitution "[i]n every case in which a victim has suffered economic loss *as a result of the defendant's conduct.* (Italics added.) Under this statutory language, the courts have found that if two defendants convicted of the same crime caused a victim to suffer economic loss, a court may impose liability on each defendant to pay the full amount of the economic loss, as long as the victim does not obtain a double recovery. [Citation.] However, because $11,000 of Farber's loss resulted from the crimes of Garza, not Leon, and nothing in the record suggests that Leon aided and abetted commission of Garza's crimes, the trial court was not authorized by section 1202.4 to order Leon to pay restitution for a crime he did not commit."

Respondent relies on *People v. Blackburn* (1999) 72

Cal.App.4th 1520 for the proposition that appellant forfeited this argument. The appellant did not do so. The court said, at pages 1534–1535, "The objection and waiver rule applies to 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices.' [Citation.] It does not apply to claims that the sentence was 'unauthorized.' [Citation.] '[A] sentence is generally "unauthorized" where it could not lawfully be imposed under any circumstance in the particular case.' [Citation.] Here, if defendants' contentions are correct, the trial court did not merely abuse its discretion in setting the restitution amounts; it imposed restitution in amounts that could not lawfully be imposed in this case under any circumstances. Such contentions are not waived by failure to object. [Citations.]"

This rule constitutes "a narrow exception to the waiver rule for "'unauthorized sentences" or sentences entered in "excess of jurisdiction."' [Citations.]" (*People v. Smith* (2001) 24 Cal.4th 849, 852.) and it has been applied to arguments that a restitution award was unauthorized by statute. (*Id*. at pp. 853–854.) It follows that while a court has the power to order restitution jointly and severally, that power is limited to an appropriate case, which this was not, a fact respondent tacitly admits. Respondent has not made any arguments as to how Capers or Bell, who joins in this argument, could be held responsible to compensate the family of a victim for whose death he was not held liable.

The court reverses the joint and several restitution orders and remands to the trial court to recalculate the victim restitution awards and enter new payment orders consistent with this opinion.

XIV

*The Cumulative Error Doctrine Does Not Require Reversal*

Finally, appellants claim the cumulative effect of the identified errors at trial was to deprive them of their right to due process under the federal Constitution. "Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) Under the cumulative error doctrine, we must "'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' [Citation.] When the cumulative effect of errors deprives the defendant of a fair trial and due process, reversal is required. [Citations.]" (*People v. Williams* (2009) 170 Cal.App.4th 587, 646.) We conducted such a review and as we have discussed at length above, we have found no harmful error. We acknowledge that the trial was not perfect. "Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Nevertheless, the requisite showing of injustice was not made. (See *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795. ["The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial'"].) Accordingly, the cumulative error doctrine provides no basis for reversal.

## DISPOSITION

The court affirms the convictions of appellant Michael Capers and Daynell Bell. We modify the judgment by striking the parole revocation fine. We remand the matter to the trial court to (1) recalculate the restitution award and enter a new payment order consistent with this opinion, and (2) correct any clerical error related to Bell's sentence as discussed in footnote 2, *ante*.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MOHR, J.*

We concur:

EPSTEIN, P. J.

WILLHITE, J.

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