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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. LEO JEROME JOHNSON, Defendant and Appellant.	B280365 (Los Angeles County Super. Ct. No. MA061235)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed and remanded with directions.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer, Acting Supervising Deputy Attorney General, and John Yang, Deputy Attorney General, for Plaintiff and Respondent.

Jurors convicted defendant Leo Jerome Johnson of two counts of second degree murder, each with a firearm enhancement. The focus of this appeal is whether the trial court should have suppressed cell phone location and text messages obtained on the basis of a search warrant affidavit that not even the prosecutor defended with any gusto. Because most of this cell phone evidence inevitably would have been discovered, and admission of the remaining cell phone evidence was harmless error, we affirm the judgment of conviction. Although we affirm, this case serves as a reminder to law enforcement and the trial courts to scrutinize search warrant affidavits carefully in light of the important role they serve in protecting against unconstitutional searches and seizures.

Defendant also contends that remand is necessary to allow the trial court to exercise discretion to strike the firearm enhancement given under a statute not existing at the time defendant was sentenced. Although respondent argues the trial court's imposition of concurrent sentences on the murder counts demonstrates remand would be futile, we disagree. Accordingly, we remand the case to the trial court so that it may exercise its discretion to strike the firearm enhancement.

FACTUAL BACKGROUND

We have separated our factual discussion into two categories. Immediately below, we discuss the evidence adduced at trial. In our legal discussion, we set forth the historic facts relevant to the search warrant by which defendant's cell phone location and texts were obtained.

1. Nicky Packard and Michael Sewell are Shot and Killed

On June 23, 2013 at approximately 4:40 a.m., Packard and Sewell were shot and killed at a party in Lancaster on Hanstead Avenue. Both died of gunshot wounds. The key issue at trial was whether defendant was the shooter.

Sewell and Packard were members or affiliates of BIG, aka bad influence gangsters. Sewell's autopsy showed that he had ingested methamphetamine and cocaine. There was evidence that the combination of these drugs could lead to aggression. Packard had ingested marijuana and alcohol.

2. Surveillance Video

Although surveillance cameras showed the shooter, the pictures on the surveillance videos were unclear. The videos neither conclusively identified nor conclusively excluded defendant as the shooter. The videos were in black and white. While they showed who the parties assumed was the shooter wearing dark pants and a lighter top, they did not show the facial characteristics of the shooter or the shooter's shoes.[1] Muzzle

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[1] Without citation to any part of the surveillance video, respondent states that the videos showed the following: "(1) the arrival of the three cars at 3:57 a.m.; (2) one of the occupants of the golden Cadillac wore wooden-sole[d] shoes; (3) all the occupants going toward the party; (4) the Caprice leaving the scene at 4:10 a.m. and returning four minutes later; (5) Packard and Sewell entering the Acura at 4:36 a.m.; (6) the man with the wooden-soled shoes approaching the Acura and walking away from the Acura; (7) the Acura pulling in front of the man; (8) four gunshots fired and muzzle flashes appearing at 4:42 a.m.; (9) Sewell thereafter exiting the car running[;] and (10) the man

flashes can be seen just before someone starts running away from the scene. The person fleeing uttered a few unintelligible phrases except for the word "Niggas."

3. Two Witnesses Identify Defendant as the Shooter

Prior to trial, both P.H. and B.J. identified defendant as the person who shot Packard and Sewell. At trial, neither witness could identify defendant as the shooter.

a. *P.H.*

P.H. served in the military and suffered from post traumatic stress disorder (PTSD) and traumatic brain injury. Immediately after the shooting, P.H. denied seeing anything. At the time of trial, he was unable to identify defendant or remember the details of the shootings or whether he saw the shooter. P.H. testified that the shootings triggered a flashback to the time he spent fighting in Mosul. He testified that he had been drinking alcohol prior to the shootings.

P.H. identified his voice on a recording of an interview with Sergeant Brian Schoonmaker that occurred a few days after the shootings. In that interview, P.H. stated he observed the shootings and identified defendant as the shooter. P.H. also identified defendant as the shooter at the preliminary hearing.

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with the wooden-soled shoes giving chase." Our review of the video does not confirm respondent's representation. No specific person including the victims can be identified. Although the evidence is consistent with the shooter wearing wooden-soled shoes, that is not confirmed by the video. Although several vehicles can be seen, their exact color and model are not apparent from the videos.

An expert on PTSD testified that someone suffering from PTSD may have impaired functioning. The person with PTSD may have flashbacks to the traumatic event that triggered the PTSD. The expert further testified that consuming alcohol may increase the likelihood of a flashback.

b. *B.J.*

B.J., a member of the Crips gang, recalled or pretended to recall almost nothing when he testified at trial. Indeed, during closing argument, defense counsel acknowledged that B.J. "didn't want to cooperate." Initially, B.J. did not recall attending the party where Packard and Sewell were shot, but eventually acknowledged that he was there.

B.J. remembered a shooting but testified that he did not know if defendant was the shooter. B.J. acknowledged that he had provided information in a prior interview but testified that he sought "financial gain." B.J. testified that he was promised a reward for providing information in this case. According to his trial testimony, B.J. received some money from officers and a "break" on a charge against him in return for his cooperation. B.J. saw a newspaper article about a reward for information concerning Packard and Sewell. B.J., however, previously testified he did not learn of the reward until after he provided the interview.

In contrast, in an interview with Detective Dan Welle before trial, B.J. reported that he observed the shooting. B.J. told Detective Welle that from 2:00 to 3:00 in the morning, he met defendant, Jarmar (also referred to as Jamar) Monk, and someone he referred to as Osiris at a club. B.J. explained that he knew victim Sewell because Sewell was related to his son's mom's sister. B.J. also described his son and Sewell's son as cousins.

B.J. knew defendant because they "hung together." On the night Sewell and Packard were killed, defendant was with Jarmar Monk and Monk drove defendant. At the door to the party where the victims were shot, defendant and Packard "g[o]t into it" because defendant discovered that Packard was from BIG. Defendant identified himself as a member of 21 Young Guns.

B.J. knew defendant and saw him pull the trigger. According to B.J., "I watched the whole shit, literally watched the whole shit. Like I didn't take my eyes off, like not one second, . . . I swear to God." "I seen every single piece of that crime."

4. Gang Evidence

21 Young Guns is a subset of the Crips gang. 21 Young Guns and BIG are rival gangs. A gang enforcement officer testified that the text messages on defendant's cell phone reflected conversations among gang members. For example, the use of a letter "c" to replace the letter "b" was common for members of the Crips gang and was apparent throughout defendant's text messages.

5. Cell Phone Evidence

Based on information gathered from cell phone towers, defendant's cell phone at the time of the murders could have been located either at the scene of the killing of Sewell and Packard or at defendant's residence. Jarmar Monk's phone also could have been at the crime scene. The tower information revealed neither the exact location of defendant's cell phone nor whether defendant possessed his phone at the time of the shootings. Phone records showed that calls were made and received on defendant's cell phone shortly after the shooting.

Defendant's text messages were introduced into evidence. His text messages showed that at 3:57 a.m. (about 40 minutes before the shootings), defendant indicated that he was at Hanstead. Defendant's text states that he is "on lance.blvd and hamstead." Several texts reference Gunz and YDG, which the prosecutor argued were references to defendant's gang.

The day after the murders, defendant texted a fellow gang member to see how many people talked to the police. Specifically, defendant wrote, "C how many ppl stayed 2 talk 2 da police." In another text, defendant told a friend she should keep their conversations confidential. She responded, asking defendant if he was fleeing and cautioning him to be careful. The specific text messages were as follows: "Frum wat I told u earlier.but dont trip. We cool if shit get crae ill find away 2 c u just dont spk on shit 2 nobody." Defendant's friend responded: "Wtf . . . are yu on the run or something . . . plz be carefull."

On June 25, another friend wrote defendant: "I'm finna delete all my texts from u ok and u do the same just in case[.]" Defendant responded: "No shit. and stp worrying bout tht we gon c straigkt . . . u need 2 calm down 2 tho[.]" The prosecutor argued that defendant's response indicated that "it's obvious I should delete our texts. . . . " According to the prosecutor, "She's concerned that law enforcement is going to get ahold of their text messages. She had a right to be concerned. They got them. [¶] And he agreed with her."

6. Defendant's Mother

Defendant's mother testified that defendant did not wear hard-soled shoes. Hard-soled shoes were relevant because the prosecutor theorized that the shooter was wearing hard-soled shoes and argued that the video supported his theory.

7. Defense Expert

Thomas Guzman-Sanchez testified as a defense witness. Guzman-Sanchez had a long career in television and video and studied forensics. He was a member of the "Law Enforcement Video Association," the "International Association for Identification," and the "Acoustic Society America." Guzman-Sanchez prepared a surveillance video analysis report. Guzman-Sanchez testified that the resolution on the cameras was "not great." Only the positioning of the eyes, top of the head and hairline could be assessed; no specific face could be viewed.

Based on his review of the video and a site visit, Guzman-Sanchez opined that the shooter was taller than defendant. Guzman-Sanchez believed that the video may have suggested someone other than defendant was the shooter and emphasized the shooter's hairline and ears. Guzman-Sanchez used software to discern what a male said and concluded that the male said " 'yo weak ass hit' " and " 'kiss as nigga.' " Guzman-Sanchez acknowledged that these words could not be discerned without the software. Guzman-Sanchez asked defendant to say the same phrases and concluded that defendant's exemplar differed from the person on the video. Guzman-Sanchez was not able to "empirically confirm that these [were] the same speakers."

PROCEDURAL BACKGROUND

Defendant was found in New Mexico and extradited to California. Defendant was charged with two counts of premeditated first degree murder. A multiple murder special circumstance was alleged. The People also alleged firearm enhancements, a gang enhancement, and a prior strike

conviction. The court dismissed the gang enhancement prior to trial.

Defendant moved to suppress the cell phone evidence prior to trial. Specifically, he sought to suppress call records, cellular tower location information, and stored text messages. In opposing the motion, the prosecutor described the text messages as "crucial." Following a hearing, the trial court denied defendant's motion to suppress.

Defendant's first trial ended in a mistrial. The evidence summarized above is from the second trial. In his opening statement in the first trial, the prosecutor presented his hard-soled shoe theory, which he also advanced in the second trial.

In the second trial, the prosecutor argued that B.J. was credible in his pretrial interview even though he did not want to testify at trial. The prosecutor argued that the surveillance videos and P.H.'s pretrial interview corroborated B.J. statements in his pretrial interview. The prosecutor further asserted defendant had a motive to kill rival gang members. The prosecutor referred to several text messages and described them as "damning, damning evidence." The prosecutor urged jurors to review the messages, which he described as "a huge part of this case."

Defense counsel emphasized the presumption of innocence. Defense counsel argued that P.H. and B.J. were not credible in their pretrial interviews and emphasized that neither witness identified defendant at trial. Defense counsel argued the shooter acted in self defense. Counsel further argued that defendant did not wear hard-soled shoes.

With respect to the text messages, defense counsel contended none of the text messages expressly stated that

defendant shot Sewell and Packard. Counsel argued that the text messages emphasized by the prosecutor in his argument were just a few of many texts. Counsel also observed there were reasonable interpretations of the text messages that did not implicate defendant as the shooter.

The jury convicted defendant of two counts of second degree murder, each with a firearm discharge enhancement causing death (Pen. Code,[2] § 12022.53, subd. (d)). At the prosecution's request, the trial court dismissed the prior strike allegation. The trial court sentenced defendant to an aggregate term of 80 years to life. This included two consecutive terms of 15 years to life for the substantive offense and 25 years to life for the firearm enhancement (§ 12022.53, subd. (d).) Defendant timely appealed.

DISCUSSION

A. Although The Search Warrant Was Deficient, The Fourth Amendment Did Not Require Exclusion Of The Cell Phone Evidence

1. General Fourth Amendment Principles

Federal constitutional standards apply to evaluate an alleged unconstitutional search. (*People v. Macabeo* (2016) 1 Cal.5th 1206, 1212.) The United States Supreme Court recently explained the limits of a warrantless search imposed by the Fourth Amendment: "The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The 'basic purpose of this Amendment,' our cases have recognized,

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[2] Undesignated statutory citations are to the Penal Code.

'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.' " (*Carpenter v. U.S.* (2018) __ U.S. __ [138 S.Ct. 2206, 2213] (*Carpenter*).)

" '[W]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.' [Citation.] Such a warrant ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' " (*Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2482].)

These general principles inform the specific query in this case: What happens when a magistrate judge approves a search warrant even though the affidavit in support of the search warrant objectively lacked probable cause?

The relevant law is undisputed. The United States Supreme Court held that an officer would not act in "objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " (*United States v. Leon* (1984) 468 U.S. 897, 923 (*Leon*).) Following *Leon*, our Supreme Court held that if "a well-trained officer should reasonably have known that the affidavit at issue here failed to establish probable cause (and hence that the officer should not have sought a warrant), exclusion is required . . . , and a court may not rely on the fact that a warrant was issued in assessing objective reasonableness of the officer's conduct in seeking the warrant."

(*People v. Camarella* (1991) 54 Cal.3d 592, 596, italics omitted (*Camarella*).)

The holdings of *Leon* and *Camarella* are based on the exclusionary rule, a judicially created doctrine to enforce Fourth Amendment principles. (*Davis v. United States* (2011) 564 U.S. 229, 236 (*Davis*).) The purpose of the exclusionary rule "is to deter future Fourth Amendment violations." (*Id.* at pp. 236-237.) "Exclusion exacts a heavy toll on both the judicial system and society at large. [Citation.] It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. [Citation.] And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. . . . For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." (*Davis*, *supra*, 564 U.S. at p. 237.)

We first provide additional factual background and then consider whether the trial court properly admitted evidence from defendant's cell phone.

2. Historic Facts

On June 26, 2013, Deputy Sheriff Timothy O'Quinn (O'Quinn) requested and obtained on an "exigent" basis, defendant's call records and cell tower information from defendant's cell phone carrier without a warrant. O'Quinn testified he based his exigent request "on three sources." He further testified "the person who was not named indicated that they were family members of victim Packard, and they stated that the person who committed the murders, or pulled the trigger, was named Jerome and had a moniker of No Love."

One day later, on June 27, 2013, O'Quinn obtained a warrant for this same information, plus defendant's text

messages. O'Quinn provided the affidavit in support of the search request.

O'Quinn averred that he had been a deputy sheriff for 24 years. He summarized his experience as well as general information concerning cellular communications. The affidavit provided a description of the shooting and stated that no suspect had been "immediately identified."

O'Quinn provided the following terse description of probable cause: "Since the date of the homicides, your Affiant has received information from at least four independent sources, all indicating that the suspect who shot the victims was a male black named Leo Johnson (MB/12-19-84), with a street moniker or nickname of 'No Love'. Your affiant confirmed via LASD databases that Leo Johnson is a local gang member in the area and that he has previously been identified by law enforcement as using the above moniker. Based on informant information, your Affiant believes that Leo Johnson is still in the local area and may be armed and dangerous." Notably, the affidavit did not identify the four sources or provide any information concerning their reliability, credibility, or independence.

A judge at the Lancaster juvenile court approved the search warrant.[3] Pursuant to the search warrant, officers obtained

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[3] " 'In determining whether an affidavit is supported by probable cause, the magistrate must make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." ' " (*People v. Garcia* (2003) 111 Cal.App.4th 715, 720.) "[A]n affidavit based on mere suspicion or belief, or stating a conclusion with no supporting facts, is wholly insufficient." (*Id.* at p. 721.)

defendant's text messages. Officers also obtained the previously retrieved location data and call records.

In his motion to suppress, defendant argued that the affidavit was insufficient, and as a result, the warrant was invalid. The prosecutor argued that the affidavit "likely" was "insufficient" to demonstrate probable cause. According to the prosecutor, however, the officer acted in objective good faith, and the evidence inevitably would have been discovered. The prosecutor represented and defendant did not dispute that in preparing for trial in June 2016, the prosecutor asked defendant's cell phone carrier to "resend" the materials that had been previously garnered pursuant to the search warrant. The prosecutor described the text messages as "crucial to the prosecution of this case."

In a pretrial hearing on defendant's motion to suppress, O'Quinn provided information that he had not included in his affidavit. He first testified about the three informants on whose information he had based his initial "exigent request." One anonymous call purported to be from a victim's family member. Information from a second informant came from an e-mail sent by a female friend of one of the victims. The e-mail included the sender's name, but O'Quinn did not want to reveal the sender's name at the hearing. As to the third informant, O'Quinn testified that Detective Welle from Lancaster told O'Quinn that the detective had received the same information—that someone named Jerome had pulled the trigger and went under the moniker NO Love—from another person, but O'Quinn did not identify that person.

O'Quinn testified that information relayed by a fourth informant came from "[a] detective from Long Beach Police

Department [who] contacted our homicide bureau and said they also had an informant who stated the same information . . . . " O'Quinn identified neither the detective nor the informant, though he testified he could ascertain the detective's name.

O'Quinn acknowledged that he was "unaware" whether the informants were "reliable." He conceded: "[A]t that time, I did not have anything that would determine reliability." O'Quinn further acknowledged: "I was unaware if the same person was calling on several . . . calls. I believe there were more than one, that when you combine the four in total, but that was a belief of mine. I had no substantiation." O'Quinn did not personally speak to any informant. O'Quinn did not know whether any informant was a percipient witness or how any obtained the information that defendant was the shooter. He did not know whether any informant had a criminal history or whether any had percipient knowledge.

The trial court concluded that the affidavit was insufficient to demonstrate probable cause and that O'Quinn acted in good faith. The court reasoned: "I do believe there is good faith that the law enforcement can't be expected to understand the nuances that are presented, legal nuances as what is sufficient. . . . I think taken into totality based on his training, education, and experience and the court's acceptance, . . . that was sufficient to find that the officer acted in good faith and, therefore, not making an exclusion of [the evidence a] proper remedy."

The trial court further concluded that the challenged evidence independently would have been discovered. The court explained: "Assuming arguendo they hadn't requested the warrant at all, they could have gone forward, done the preliminary hearing, and subpoenaed the records at any future

date. They had enough to hold the defendant to answer at [the] prelim[inary hearing] without the text messages, so it didn't impede anything, and he was the subject and the focus before they ever had the text messages. So I do believe it would have come in or it would have come in as an independent investigation. The text messages did not lead them to the defendant. They already had the defendant. And this was supporting and backing up what the prosecution's theory is so I do believe it would have been admissible by way of inevitable discovery."

As previously noted, the evidence was admitted during trial, and the prosecutor relied heavily on the text messages during his closing argument.

3. Standard of Review

In ruling on a motion to suppress, " 'the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] "The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review." [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, viz., the reasonableness of the challenged police conduct, is also subject to independent review. [Citations.]' " (*People v. Superior Court* (*Walker*) (2006) 143 Cal.App.4th 1183, 1195 (*Walker*).)

The trial court made no express finding of historical fact and the parties did not dispute any fact. Therefore, we independently apply the law to the undisputed facts. We first consider the text messages, which we conclude were properly admitted because they would have been discovered by independent, lawful means. We then consider the location data and call records, the admission of which we conclude was harmless beyond a reasonable doubt.

4. O'Quinn Lacked Objective Good Faith to Rely on the Search Warrant to Obtain Defendant's Text Messages

Officers must secure a warrant before searching data on cell phones. (*Riley v. California*, *supra*, __ U.S. __ [134 S.Ct. at p. 2485].) What is disputed is whether O'Quinn acted in objective good faith in obtaining the warrant to search defendant's cell phone text messages. To assess objective good faith, we focus on the affidavit, not O'Quinn's testimony.[4] (*People v. Frank* (1985) 38 Cal.3d 711, 729 (*Frank*); see also *Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, 1465 ["The affiant's testimony at the hearing on the suppression motion cannot provide probable cause"].) As detailed below, the affidavit at issue here provided no basis to assess the reliability of the informants or to determine if the informants "emanated from *independent* sources and are *truly* corroborative of one another" or whether they emanated from the same source.

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[4] O'Quinn's testimony, however, underscored the absence of objective good faith evident from the face of the affidavit itself and well-known legal principles applicable to the search warrant.

(*Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 938 (*Higgason*).)

The applicable rule is well established: An affidavit that fails to provide any information indicating why an informant is "honest" or "reliable" is insufficient to support probable cause.[5] (*Illinois v. Gates*, *supra*, 462 U.S. at p. 227.) " 'An informant's veracity or trustworthiness may be established in a number of ways. If the informant has provided accurate information on past occasions, he may be presumed trustworthy on subsequent occasions. [Citation.] Veracity also may be established through admissions against penal interest. [Citations.] Finally, an informant's reliability may be demonstrated through independent police corroboration of the information provided.' " (*People v. Terrones* (1989) 212 Cal.App.3d 139, 146-147 (*Terrones*).)

In *People v. Kurland* (1980) 28 Cal.3d 376, our Supreme Court explained: "An affidavit which relies on information from a tipster must set forth underlying facts justifying the conclusion that the source is reliable or the information itself credible. [Citations.] An affiant's conclusory opinions of reliability or credibility are not enough, and mere quantity and detail in the tipster's statements do not render them worthy of belief. [Citation.] Reliability must be shown independently, as by corroboration of the information received [citations], the

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[5] The high court has provided the following examples: A statement that the affiant believes that illegal liquor will be found in a specific location was insufficient to show probable cause for a search warrant. (*Illinois v. Gates* (1983) 462 U.S. 213, 239.) A statement that officers received reliable information from a credible source also was insufficient. (*Ibid.*) But, an affidavit containing hearsay may be sufficient if it reveals why the information should be credited. (*Id.* at pp. 241-242.)

informant's previous record of accuracy in similar situations [citation], or indications that the informant has spoken against penal interest. [Citation.] If the affidavit includes insufficient details to permit a reasonable belief in probable accuracy, it fails to demonstrate probable cause as a matter of law." (*Id*. at p. 392.)

Higgason is illustrative. There, an affidavit was based on three anonymous telephone calls. (*Higgason*, *supra*, 170 Cal.App.3d at p. 934.) The first tip came from a caller who "claimed firsthand knowledge" of defendant's activities selling cocaine and marijuana. (*Ibid*.) A second caller identified as "John" described similar drug sales. (*Id*. at p. 935.) A female caller reported that defendant was selling marijuana and that her boyfriend purchased marijuana from defendant. (*Ibid*.)

Higgason held that "anonymous information may ultimately prove reliable, but three anonymous telephone calls, without more, cannot serve to corroborate one another. . . . In the final analysis, it is impossible to show different pieces of anonymous information emanated from *independent* sources and are *truly* corroborative of one another." (*Higgason*, *supra*, 170 Cal.App.3d at p. 938.) While the defendant's address was corroborated from other sources, no information regarding the defendant's recounted criminal activity had been corroborated prior to obtaining the search warrant. (*Id*. at p. 940.) Thus, probable cause was lacking. (*Id*. at p. 941.)

Bailey v. Superior Court (1992) 11 Cal.App.4th 1107 (*Bailey*) similarly concluded reports from an anonymous informer and an unidentified citizen were insufficient to establish probable cause for a search warrant. (*Id*. at p. 1109.) The first told an officer that the defendant was dealing cocaine and was involved

in prostitution. (*Id.* at p. 1110.) The second informant reported observing heavy foot traffic at defendant's apartment. The second informant believed defendant was selling drugs. (*Ibid.*)

The appellate court explained: "There are no facts showing that either informant witnessed any criminal activity. . . . The only activity witnessed by either informant was 'heavy foot traffic.' " (*Bailey*, *supra*, 11 Cal.App.4th at p. 1113.) "Independent police work . . . did not corroborate any suspicious activity or confirm future actions not easily predicted." (*Ibid.*) There was no basis to support probable cause. (*Ibid.*) *Bailey* further held that a reasonably well-trained officer would have known the search was illegal despite the fact that the magistrate judge issued a warrant. (*Id.* at p. 1114.)

Federal courts also have stressed the importance of demonstrating the reliability of an anonymous tip in the context of an affidavit for a search warrant. For example, in *United States v. Laws* (D.C. Cir. 1986) 808 F.2d 92 (*Laws*), the federal appellate court explained: "An affidavit predicated upon an informant's tip has been regarded as vulnerable because the tip is hearsay, which like all hearsay, is susceptible to special concerns of perception and veracity. If the tip is to serve as a basis for a finding of probable cause, the 'neutral and detached magistrate' issuing the warrant must have substantial reason to believe that nonetheless the hearsay is reliable. Without that determination, the magistrate would cede his duty to gauge probable cause to the informant and the possibly overzealous law-enforcement officer." (*Id.* at pp. 94-95.) Probable cause may be based on "mutually-reinforcing" tips at least one of which was

based on first-hand knowledge, and consistent behavior observed by police could support probable cause. (*Id.* at p. 103.)[6]

The four, anonymous tips in this case were less reliable than those found insufficient in *Higgason* and *Bailey* and were insufficient to support probable cause or to show objective good faith. No tipster was identified in the affidavit.[7] No tip was based on "first-hand knowledge" as described in *Laws*. The affidavit provided no information regarding the reliability of the tipster, provided no information that any tipster had personal knowledge, and provided no information supporting the conclusion that the information from the four tipsters did not emanate from the same person. O'Quinn even admitted he was not sure there were four tipsters. Moreover, O'Quinn did not personally speak to any tipster and could not ascertain whether the four tips emanated from the same person. Although "credible information from four different sources" may support probable cause (*Terrones*, *supra*, 212 Cal.App.3d at p. 150, fn. 4), here the affidavit provided no basis to determine that the anonymous informants—none of whom was identified in the affidavit in support of the search warrant—were credible.

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[6] *Terrones*, *supra*, 212 Cal.App.3d at p. 147 cited *Laws* to support the conclusion that based on multiple known tipsters, officers had probable cause to obtain a warrant. In *Terrones*, however, the affidavit did "not involve anonymous tipsters." (*Terrones*, *supra*, 212 Cal.App.3d at p. 150, fn. 4.)

[7] O'Quinn testified that an e-mail revealed the name of one of the tipsters, but that information was not included in the affidavit, which formed the basis of the magistrate's determination of probable cause. As previously noted, the good faith assessment is based on the affidavit. (*Frank*, *supra*, 38 Cal.3d at p. 729.)

The conclusion that the affidavit was insufficient to show probable cause is both inevitable and undisputed.

Relying on *People v. French* (2011) 201 Cal.App.4th 1307 (*French*), respondent argues that notwithstanding the well-established case law demonstrating the affidavit was insufficient, O'Quinn acted in objective good faith in relying on the warrant. The People have the burden to show objective reasonable reliance on the warrant. (*People v. Willis* (2002) 28 Cal.4th 22, 32, 36-37.) " '[O]ur good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.' " (*People v. Macabeo*, *supra*, 1 Cal.5th at p. 1222.) The objective standard " 'requires officers to have a reasonable knowledge of what the law prohibits.' " (*People v. Gotfried* (2003) 107 Cal.App.4th 254, 265.)

It is true that in *French*, the court concluded three independent unreliable sources may support a conclusion that an officer acted with objective good cause even though warrant was not supported by probable cause. (*French*, *supra*, 201 Cal.App.4th at p. 1307.) The facts of *French* are readily distinguishable. In *French*, the officer personally spoke to the three informants and knew they were not the same person. O'Quinn acknowledged at the hearing that he did not know whether the information emanated from the same person or even were the same person. The affidavit reflected no information sufficient to conclude the tipsters were independent, i.e., their information did not emanate from the same source. In contrast, here O'Quinn conceded that he had no basis to conclude the informants were independent and the affidavit itself reveals no basis for concluding the informants were independent.

In the words of our Supreme Court: "Although there may be circumstances where corroborative information from separate, unrelated sources will thereby establish its credibility, nevertheless in the instant case the record fails to show what information each informer furnished the officers, or whether the information was furnished independently by each informer. Accordingly, there is no basis for holding that their statements were truly corroborative." (*People v. Fein* (1971) 4 Cal.3d 747, 753, overruled on another ground in *People v. Palaschak* (1995) 9 Cal.4th 1236, 1241-1242.) Here the law was not debatable; neither the prosecutor nor respondent advanced a theory suggesting that the affidavit was supported by probable cause. There was no authority arguably supporting a probable cause finding; an officer acting in objective good faith could not have concluded otherwise. (Cf. *People v. Garcia*, *supra*, 111 Cal.App.4th at p. 724 [finding objective good faith where there was "arguably supportive" authority].)

5. The Text Messages Inevitably Would Have Been Discovered

" 'The inevitable discovery doctrine acts as an exception to the exclusionary rule, and permits the admission of otherwise excluded evidence "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police." ' [Citation.] 'The purpose of the inevitable discovery rule is to prevent the setting aside of convictions that would have been obtained without police misconduct.' " (*People v. Cervantes* (2017) 11 Cal.App.5th 860, 872 (*Cervantes*).) The inevitableness refers to the fact that the evidence would have been discovered through

independent sources and lawful means. (*People v. Robles* (2000) 23 Cal.4th 789, 800.)

" 'The prosecution bears the burden of proving by a preponderance of the evidence that evidence otherwise unlawfully obtained would have been inevitably discovered.' [Citation.] 'The showing must be based not on speculation but on "demonstrated historical facts capable of ready verification or impeachment." ' " (*Cervantes*, *supra*, 11 Cal.App.5th at p. 872, fn. omitted.) "[I]n assessing whether evidence would inevitably have been discovered, 'this "court does not leave its common sense at the door." ' " (*Ibid.*) "There will be instances where, based on the historical facts, inevitability is demonstrated in such a compelling way that operation of the exclusionary rule is a mechanical and entirely unrealistic bar, preventing the trier of fact from learning what would have come to light in any case. In such cases, the inevitable discovery doctrine will permit introduction of the evidence, whether or not two independent investigations were in progress. The existence of two independent investigations at the time of discovery is not, therefore, a necessary predicate to the inevitable discovery exception." (*U.S. v. Boatwright* (9th Cir. 1987) 822 F.2d 862, 864.)

Here, it is undisputed that the eyewitnesses, B.J. and P.H., were located independently of the information learned from defendant's text messages and independently of the information provided in O'Quinn's affidavit. P.H. was interviewed at the scene of the murders and later in his home. B.J. provided information after being arrested on an unrelated charge. B.J. knew defendant and observed him shoot Packard and Sewell. P.H. did not know defendant but identified him as the shooter.

This independent evidence would have supported probable cause to obtain a warrant to search the data on defendant's cell phone, and defendant does not argue otherwise.

To the extent that defendant is arguing the interview of B.J. and P.H. would not have triggered a search of defendant's cell phone or the prosecution would not have been able to retrieve the cell phone records, the argument is not persuasive. The court does not "leave its common sense at the door" and it is reasonable that officers would have pursued such critical evidence. Indeed, the prosecutor did just that in preparing for trial. (*Cervantes*, *supra*, 11 Cal.App.5th at p. 872; see also *Walker*, *supra*, 143 Cal.App.4th at p. 1216 [finding evidence of contraband inevitably would have been discovered through legal means].) Absent evidence that the phone records would not have been available, defendant's argument that the prosecution could not have procured them is based on an unsupported assumption about the cell phone service provider's document retention policies.

Defendant argues that this case is one in which officers could have obtained a warrant but simply failed to follow Fourth Amendment requirements. If defendant's description of the historic facts were accurate, it would have triggered the rule that inevitable discovery does not apply to excuse the failure to obtain a warrant in the first place even if a warrant would have been supported by probable cause. (*U.S. v. Mejia* (9th Cir. 1995) 69 F.3d 309, 320 (*Mejia*); see also *U.S. v. Reilly* (9th Cir. 2000) 224 F.3d 986, 995.) Otherwise, "there would never be *any* reason for officers to seek a warrant." (*Mejia*, *supra*, 69 F.3d at p. 320.)

Defendant ignores the undisputed evidence that the officers did obtain a search warrant to search defendant's text messages.

In addition, here inevitable discovery is not based on the existence of probable cause at the time of the warrant. Instead it is based on the fact that the officers pursued a separate inquiry that inevitably would have led to the discovery of defendant's text messages independent from the search garnered by the warrant. As set forth above, the officers identified defendant as the shooter from its interviews of B.J. and P.H., and common sense would have led them to seek defendant's cell phone given the ubiquity of cell phones and text messaging. Under these historic facts, the inevitable discovery doctrine applies. (*People v. Superior Court* (*Chapman*) (2012) 204 Cal.App.4th 1004, 1022-1023.) For all the above reasons, we conclude the trial court properly denied defendant's motion to suppress the text messages.

6. Admission of the Remaining Cell Phone Evidence Was Harmless Beyond a Reasonable Doubt

Here O'Quinn initially retrieved location information and call records without a warrant and later obtained a warrant for the same information. Recent law makes clear that a warrant is required to obtain a person's cell site location from a cellular telephone company. (*Carpenter*, *supra*, ___ U.S. ___ [138 S.Ct. at p. 2219].)

Carpenter was decided long after O'Quinn submitted the affidavit and no party has addressed the law regarding this kind of search at the time O'Quinn submitted his affidavit. We need not decide whether then existing case law would have validated the search based on objective good faith because even if the search were prohibited by then existing precedent, the admission of the evidence did not prejudice defendant. We evaluate the admission of evidence seized in violation of the

Fourth Amendment to determine whether it was harmless beyond a reasonable doubt. (*People v. Mathews* (2018) 21 Cal.App.5th 130, 141 [admission of evidence obtained in violation of Fourth Amendment does not require reversal if error was harmless beyond a reasonable doubt].)

The location evidence at most showed that defendant's cell phone could have been at the scene of the shootings. It was undisputed that his cell phone also could have been at defendant's residence. The two locations were nearby and used the same cell tower. Admission of the cell tower location evidence therefore was of limited probative value in placing defendant at the scene of the killings. Although defendant emphasizes that neither B.J. nor P.H. identified him as the shooter at trial and the videos did not confirm he was the shooter, defendant identifies no prejudice flowing from the admission of his call records. Defendant identifies no link between the call records and the call records do not assist in evaluating B.J. or P.H.'s testimony or the surveillance video. Given the slight probative value of the call records, their admission even if erroneous, was harmless beyond a reasonable doubt.

B. Because The Law Recently Changed, The Case Must Be Remanded For Resentencing

As noted, defendant's 80-year indeterminate sentence included two 25-to-life terms pursuant to section 12022.53. At the time the trial court imposed the sentence, it had no discretion to strike the firearm enhancements. (Former § 12022.53, subd. (h).) An amendment to that statute became effective after defendant was sentenced and applies retroactively to him. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) It affords

trial courts the opportunity to strike the firearm enhancement if that action is in the interests of justice.[8]

Remand is thus necessary to allow the trial court the opportunity to exercise its discretion whether to strike one or both section 12022.53 enhancements. The trial court was not informed of that discretion at the time of sentencing because at that time, it had no authority to do so. The record does not indicate whether the trial court would have stricken an enhancement. Therefore, remanding the case to the trial court would not be an idle act. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 426-427.)

Respondent argues that the fact the court imposed consecutive sentences demonstrates it would not have stricken either or both enhancements. After noting defendant's lengthy criminal history, the trial court found defendant had committed separate acts of violence against independent victims. The trial court stated, "There are two independent victims, and I do find they are separate acts of violence." Although the trial court's conclusion may support imposing rather than striking the firearm enhancement, the trial court's conclusion does not compel that result particularly when at that time, the trial court was statutorily required to impose the enhancements. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111 [even though the court imposed consecutive rather than concurrent sentences,

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[8] Section 12022.53, subdivision (h) provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

remand was necessary for trial court to exercise its discretion under the newly enacted section 12022.53].)

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded to the trial court to determine whether to strike the enhancement under section 12022.53, subdivision (h) and if the enhancement is stricken, to resentence defendant.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.