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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CASEY ROWLAND et al., Defendants and Appellants.	B246683 (Los Angeles County Super. Ct. No. BA332525)

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis B. Rappe, Judge. Affirmed as modified.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Casey Rowland.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Clifton Brown.

Kamala D. Harris, Attorney General, Dane E. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

Clifton Gregory Brown and Casey Lee Rowland appeal from the judgments following their convictions for gang-related murder and attempted murders on Western Avenue in South Los Angeles. We affirm.

FACTS AND PROCEEDINGS

1. The Los Angeles Shooting – August 25, 2006

Around 9:45 a.m. on August 25, 2006, Demetrix Clemons and Wilfred Atlas, who were members of the Rolling Forties street gang, were standing on the sidewalk in front of a Kragen Auto Parts store on Western Avenue in South Los Angeles. The Rolling Forties claimed the area as its gang territory. Clemons and Atlas were standing next to a car in which two female companions, Ashley Cheval and Davera Wilson, were sitting. Clemons was throwing gang signs at passing cars. A gold-colored Lincoln Continental co-registered to appellant Casey Rowland drove past. The car made a u-turn and headed back toward Clemons, Atlas, and the women. Appellants Brown and Rowland, who belonged to the Eight-Trey Hoovers street gang, got out of the car with a third man; the Eight-Trey Hoovers and Rolling Forties are enemies. Armed with an AK-47, a handgun, and a shotgun, appellants and their accomplice jogged towards Clemons, Atlas, and the women and began shooting. Davera Wilson avoided being shot by ducking under the car's dashboard, but the gunfire killed Ashley Cheval. Clemons tried to run away, but was shot in the leg and fell in the middle of the street. As the wounded Clemons tried to crawl away, one of the shooters pursued him and continued to fire from as close as four or five feet. Clemons was shot about seven times. His fellow gang member, Wilfred Atlas, was shot twice. When appellants and their accomplice finished firing, they returned to Rowland's car and drove away without being apprehended.

2. The Compton Shooting – August 31, 2006

Six days later on August 31, 2006, a funeral procession for an Eight-Trey Hoovers gang member passed an apartment complex on Bullis Road in Compton. The apartments

were in territory claimed by the Mob Piru Bloods street gang. Mob Piru members who were standing in front of the apartment complex taunted Eight-Trey members in the funeral procession by throwing gang signs at the procession.

Several hours later around 5:00 p.m., appellants and at least two other Eight-Trey Hoover's gang members returned to the apartment complex. The complex consisted of two buildings, with a long driveway separating the buildings. Arriving in a yellow Hummer, appellants and their accomplices parked near the driveway's entrance. Four men, including appellant Brown, got out of the Hummer, but appellant Rowland appears to have remained in the driver's seat. Eight-Trey Hoovers gang colors are orange and dark blue, but appellants and their accomplices were wearing dark pants and red t-shirts. Because the Mob Piru gang color is red, the red t-shirts helped appellants and their accomplices blend into the neighborhood.

Standing four abreast at the driveway's entrance, the men who had stepped out of the Hummer began shooting down the driveway. They fired more than 20 times, hitting six victims. One of the victims was shot repeatedly while she lay wounded on the ground as the shooter stood over her and fired at close range. When the men finished shooting, they returned to the Hummer and drove away.

Sheriff's deputies patrolling nearby received a report of shots fired and a description of the Hummer. As the deputies drove toward the apartment building, the Hummer passed the deputies. The deputies pursued the Hummer at high speed until the Hummer crashed. Appellants fled the crash site on foot and forced their way into a nearby home. Deputies entered the home and arrested appellants.

Investigators recovered from the Hummer crash site an automatic rifle, a shotgun, and a revolver. They also recovered a 9 mm semiautomatic Glock. Investigators did not know it at the time, but it was the same Glock that had been used to murder Ashley Cheval six days earlier in front of the Kragen Auto Parts store in Los Angeles. Investigators did not discover that the Glock had been used in both the Los Angeles and Compton shootings until about a year later in 2007.

3. Post-arrest proceedings

Appellants and their accomplices stood trial for the Compton shooting (case No. TA08639). The jury convicted each appellant of six counts of attempted, premeditated murder for the shootings in front of the apartment building. The jury also convicted appellants of false imprisonment for forcing their way into a home after fleeing the Hummer crash site. Additionally, the jury convicted Rowland of evading an officer with willful disregard for safety. The court sentenced Brown to state prison for 215 years to life and Rowland for 92 years and 8 months to life. (*People v. Tempson* (Jan. 26, 2010, B203152, B203209) [nonpub. opn].) In January 2010, our colleagues in Division 3 affirmed the convictions on appeal except our colleagues reversed Rowland's conviction for false imprisonment because of instructional error. (*Id.*)

Based in part on the lead provided by the investigators' belated discovery in 2007 that the same 9 mm semiautomatic Glock had been used in the Los Angeles and Compton shootings, investigators eventually identified appellants as participants in the Los Angeles shooting. In October 2008, the People charged appellants with the special circumstance murder of Ashley Cheval in front of the Kragen Auto Parts store. The People also charged appellants with the attempted, premeditated murders of Davera Wilson, Demetrix Clemons, and Wilfred Atlas. The People specially alleged as to all counts that a principal had personally and intentionally discharged a firearm causing the death of Ashley Cheval; a principal had personally used a firearm; and, the crimes were committed in association with and for the benefit of a street gang. Appellants pleaded not guilty and denied the special allegations.

Appellants were tried by jury in October 2012 for the Los Angeles offenses. Much of the evidence at trial was from the Compton shooting, which the trial court allowed under Evidence Code 1101, subdivision (b) to prove appellants' identity, common plan or design, and motive. We discuss that evidence and the court's ruling, *post*. The jury convicted appellants as charged. The jury also found true the gang and gun allegations and the special circumstance that appellants were active gang members

when they murdered Ashley Cheval. The court sentenced each appellant to life without possibility of parole plus three life sentences plus 100 years, each term to run consecutively to the other terms and to the sentences for the Compton shooting. This appeal followed.

DISCUSSION

1. *Allowing Evidence of Compton Shooting in Trial of Los Angeles Shooting*

When the People prosecuted appellants in this case for the shooting in Los Angeles in front of the Kragen Auto Parts store, the trial court allowed the prosecutor to introduce evidence from the Compton shooting committed six days later to prove appellants participated in the Los Angeles crimes. Appellants contend the court erred. We disagree.

The prosecutor offered the Compton evidence under Evidence Code section 1101, subdivision (b). Ordinarily, the prosecution may not use evidence of uncharged prior or subsequent acts to show a defendant has a bad character or a propensity to commit crimes. (*People v. Balcom* (1994) 7 Cal.4th 414, 425-426 [relevance of uncharged offense not lessened because it occurred after charged offense].) Subdivision (a) of section 1101 states the general prohibition: "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) But the prosecution may use uncharged prior acts to prove certain other things, including identity, a common plan or design, and motive. Evidence Code section 1101, subdivision (b) states the exceptions to the prohibition of character evidence: "Nothing in [subdivision (a)] prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . .)." (Evid. Code, § 1101, subd. (b); *People v. Merriman* (2014) 60 Cal.4th 1, 40.) We review

a trial court's admission of evidence under subdivision (b) for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)

When analyzing admissibility of evidence of an uncharged prior or subsequent act, the analysis measures the evidence along a continuum of degree of similarity between the charged crime and the uncharged prior or subsequent act. Depending on what one is trying to prove with the uncharged act, the law requires different levels of similarity. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403 (Ewoldt).)[1] The law requires the least similarity between the uncharged act and the crime when the prosecution wants to prove a defendant's culpable intent. "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . ." (*Id.* at p. 402.)

When the prosecution wants to prove a common design or plan, a "greater degree of similarity" must exist. (*Ewoldt, supra,* 7 Cal.4th at p. 402.) In "establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.] '[T]he difference between requiring similarity, for acts negativing innocent intent, and requiring common features indicating

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[1] The trial court here expressed concern that intent could not be easily untangled in this case from evidence showing identity or common plan or design because all of them were interwoven into the facts of this case. One implication of *Ewoldt's* different levels of similarity is that issues such as intent and identity must be analyzed separately, because similarity that may satisfy intent will not necessarily satisfy identity. (*Ewoldt, supra,* at pp. 402-403 ["least degree of similarity" to prove intent but "greatest degree of similarity" to prove identity], superseded by statute on other grounds, as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) If what the court meant was the facts of a case must be viewed in their entirety in order to understand any particular fact – what the court called "cross links" in the evidence – its comment seems sound.

common design, for acts showing design, is a difference of degree rather than of kind; for to be similar involves having common features, and to have common features is merely to have a high degree of similarity.' [Citation.] [¶] To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Id.* at pp. 402-403.)

The greatest similarity, almost akin to being a defendant's personal "imprint," must exist when the prosecution seeks to prove identity with the uncharged act. "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (*Ewoldt, supra*, 7 Cal.4th at p. 403.)

Appellants contend the Compton shooting was insufficiently similar to the Los Angeles shooting to admit the Compton evidence in the trial of the Los Angeles crimes. Appellants deny being the Los Angeles shooters, but they concede that whoever the shooters were, they intended to kill their victims; the Los Angeles shooters were not, for example, firing in self-defense or accidentally. Because the shooters' culpable intent was not disputed in the Los Angeles trial, appellants contend the People could not rely on the "intent" exception for admission of evidence of the Compton acts. Thus, according to appellants, the trial court erred in allowing evidence of the Compton shooting to prove their intent.

To illustrate what appellants assert was the court's error, appellants cite *Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 925-926. In *Bowen*, the plaintiff was a dental patient who accused his dentist of physically assaulting him during a dental procedure. To prove the dentist's culpable intent, the patient offered evidence that the dentist had previously attacked other patients. The trial court admitted the evidence.

Denying that he had assaulted the patient, the dentist claimed that the events alleged by the patient did not happen. On review, the appellate court held that the alleged previous assaults against other patients were irrelevant because the dentist's intent was not at issue. The appellate court noted that if the dentist had committed the acts against the plaintiff as the plaintiff alleged, his conduct was indisputably an unlawful assault. But the dentist's defense was he did not commit the alleged acts, not that he acted as the patient alleged but with an innocent intent, such as mistake or self-defense. (See also *People v. King* (2010) 183 Cal.App.4th 1281, 1301 ["In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it."].) Thus, the trial court erred in admitting evidence of prior acts to prove his intent.

Appellants contend that the Compton shooting was not sufficiently distinctive to permit the jury to conclude that if appellants committed the Compton shooting – offenses for which appellants stood convicted – that appellants exhibited a common plan or design or that they committed the Los Angeles shooting. Appellants note, for example, that the Los Angeles and Compton shootings involved a different number of perpetrators: three in Los Angeles and four or more in Compton. (See *People v. Crawford* (1969) 273 Cal.App.2d 868, 874 [same confederates can be a distinctive mark, but involvement of others "vitiates" probative value of evidence].) Additionally, Rowland was alleged to be a shooter in Los Angeles, but only the get-away driver in Compton. Finally, appellants note, many of the similarities between the Compton and Los Angeles shootings are common to most gang shootings, making those similarities insufficiently distinctive to prove identity or common design and plan. For example, many gang shootings involve multiple shooters, and gang members often flash gang signs before a confrontation. The use of a vehicle to drive to the shooting is not unusual because gang members are likely to want to make a speedy get away. And finally, using an AK-47 and the same 9 mm Glock semiautomatic in two shootings is not distinctive because AK-47s are popular with gangs, and gang members commonly pass guns around within their gang.

The proper focus in assessing the similarities between a charged offense and uncharged prior acts is not the number of similarities, nor the existence of dissimilarities. "A modus operandi or criminal signature, creating an inference of identity, is demonstrated ' "when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses." ' [Citation.]" (*People v. Felix* (1993) 14 Cal.App.4th 997, 1005.) The focus is in on the quality of the similarities. (See generally *People v. Thompson* (1980) 27 Cal.3d 303, 314-316, overruled on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260.) One similarity can be enough if it is sufficiently distinctive.

For example, in *People v. Robinson* (1995) 31 Cal.App.4th 494, 503, the similarity was no more than the presence of the same accomplice in two arsons. The *Robinson* court explained that "Although there was nothing particularly distinctive about either the subject arson or the earlier car arson, the trial court properly admitted this car arson evidence because it satisfied the stringent 'identity' standards promulgated by [*Ewoldt, supra,* 7 Cal.4th at page 394]. It did so because the two arsons shared 'a mark whose distinctive nature tends to differentiate those offenses from other' arsons. [Citation.] That 'mark' was [accomplice] Ny Brown 'and his conjunction with defendant in [the] earlier [arson] . . . [which] supports the inference that defendant and not some other person was his accomplice in [the] charged offense.' [Citation.]" (Compare *People v. Felix*, *supra,* 14 Cal.App.4th at pp. 1005-1006 [presence of two defendants accused of robbery, where one of the defendants had been a robber in uncharged prior robbery perpetrated by multiple robbers, not distinctive enough to permit inference that the same perpetrators were the robbers in the second robbery].)

Here, the trial court did not abuse its discretion in finding that the similarities between the Los Angeles and Compton shootings were sufficient to show common plan or design and identity. The most noteworthy is the use of the same 9 mm Glock in both

shootings, but that was not the only common mark.[2] Both shootings occurred in territory claimed by rivals to appellants' gang. Both shootings took place in daytime. Both shootings involved multiple perpetrators, who wore clothing that blended in with the neighborhood of the targeted gang: appellants' gang colors are orange and blue, but appellants wore red t-shirts when they attacked Mob Piru, whose gang color is red, and wore blue, white or black t-shirts when they attacked the Rolling Forties, whose color is blue. Each shooting was preceded by the victims flashing gang signs, which is an intentionally provocative act when directed at members of a rival gang. The shooters arrived at the scene in a vehicle and instead of committing a drive-by shooting, got out of the car to shoot their victims. And when victims lay wounded on the ground, the shooters approached them and continued to fire at close range.

Appellants cite *People v. Rivera* (1985) 41 Cal.3d 388, overruled on other grounds in *People v. Lessie* (2010) 47 Cal.4th 1152, 1168, fn. 10, to emphasize the caution a trial

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[2] Rowland contends use of the Glock was not distinctive because it was used in four additional shootings – one in July 2005 and the other three during one week in July 2006 – while he was in custody, thereby defeating the inference that the Glock's use necessarily meant its use by him alone. The People moved to exclude evidence that the Glock had been used in the four other shootings because the shootings were unsolved and the identity of the shooters unknown. During the hearing on the People's motion, Rowland told the court that he had been in custody during the time of the four shootings, and therefore someone other than him necessarily must have used the Glock in those shootings. The trial court asked the prosecutor whether the People agreed that Rowland had been in custody as he claimed. The prosecutor answered "I don't know, your honor. I would have to look it up." The court told the prosecutor that Rowland's assertion was "something for the People to check out." The prosecutor promised, "I will." At that point during the hearing, Brown's counsel noted that Brown did not claim to have been in custody during the other four shootings, and thus he feared that a jury might possibly infer that Brown had been involved in the shootings. Brown's counsel told the court that he would therefore object to Rowland's introducing evidence of the shootings, or, if the evidence were admitted, move for severance of Brown's and Rowland's trials. The court stated it needed to review eyewitness descriptions of the shooters in the police reports to see if Brown plausibly matched the description of any of the shooters before it would rule on the People's motion. The court concluded by saying "we can revisit this." Rowland does not point to any later hearing or provide a record citation to a final ruling on the People's motion, leaving us with no ruling to review.

court must employ in admitting evidence of an uncharged act to prove identity. In *Rivera*, the defendant was tried in the stabbing death of a convenience store customer, who chased four youths after they stole beer from the store. (*Id.* at p. 391.) The trial court allowed evidence of a prior armed robbery by defendant to prove the defendant's identity as one of the fourth youths in the current offense. (*Id.* at p. 392.) The trial court found the following similarities justified admission of the prior armed robbery: (1) both crimes occurred on a Friday night; (2) both occurred at approximately 11:30 p.m.; (3) both involved convenience markets; (4) the markets were in the same city; (5) the markets were located on street corners; (6) both crimes involved three perpetrators; (7) both involved getaway vehicles; (8) prior to both crimes, two or three people were observed standing outside the store; and, (9) defendant used an alibi defense in both cases: when accused of the prior offense, he claimed to have been with his brother all night; in the current case he claimed he spent the evening with his sister. (*Id.* at pp. 392-393.)

On review, the *Rivera* Supreme Court noted that "significant" dissimilarities made the prior armed robbery too different from the convenience store burglary to admit evidence of the armed robbery. Prominent among those differences were the prior offense was armed robbery, a crime against the person, whereas the charged offense was burglary, a crime against property; the prior involved money, while the charged crime involved beer; the coperpetrators in each case differed; the prior offense involved a gun. (*Rivera, supra*, 41 Cal.3d at p. 393.) Moreover, some of the similarities were not particularly distinctive. The Supreme Court noted that "convenience stores are often on street corners and are prime targets for crimes; undoubtedly many of these offenses occur late on Friday evenings and involve a getaway car and more than one perpetrator; finally, alibi is a common defense." (*Id.* at p. 393.) *Rivera* is distinguishable because the degree of dissimilarities – different accomplices committing different offenses where a gun was used during only one of the offenses – make *Rivera* unlike the Compton and Los Angeles shootings, which shared a number of similarities.

Appellants also contend that regardless of the similarities between the Compton and Los Angeles shootings, the trial court abused its discretion because the prejudicial value of the Compton evidence outweighed its probative value. A trial court may exclude evidence "whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury." (*People v. Carpenter* (1997) 15 Cal.4th 312, 404, overruled by statute, as discussed in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107; Evid. Code, § 352.) Appellants assert that prejudice occurred here because the prosecutor introduced the Compton evidence virtually in its entirety before introducing the Los Angeles evidence. Appellants argue that "trying" the Compton case before turning to the substantive charges involving the Los Angeles shooting predisposed the jury to find appellants guilty of the Los Angeles offenses. Additionally, according to appellants, introducing evidence from the Compton shooting consumed undue time. (Evid. Code, § 352 [trial court may exclude evidence if its admission will "necessitate undue consumption of time"].)

We review the trial court's rulings under Evidence Code section 352 for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) A trial court has considerable leeway in managing its calendar, and unless appellants can articulate how the number of trial days and the trial's length prejudiced them, we find no undue consumption of time when the trial court implicitly found none. (*People v. The North River Ins. Co.* (2011) 200 Cal.App.4th 712, 723 ["Trial courts must be accorded wide latitude in the exercise of discretion to control and regulate their calendars."]; *Moyal v. Lanphear* (1989) 208 Cal.App.3d 491, 497.) Additionally, we do not find introduction of the Compton shooting before the Los Angeles shootings was unduly inflammatory or prejudicial because no one died in the Compton shooting. In contrast, a non-gang member, Ashley Cheval, was murdered in the Los Angeles shooting while sitting in her car.

2. *Restricting Defense Expert Testimony*

Appellant Rowland offered the testimony of a defense expert, Dr. Mitch Eisen, on the factors that influence the reliability of eyewitness identification. The People moved to exclude or limit Dr. Eisen's testimony. In their motion, the People agreed that Dr. Eisen could testify about "factors that may affect visual memory." But, the People argued, the court should not permit Dr. Eisen to opine about the reliability of any particular trial witness, or give his opinion about other evidentiary matters, such as preparation of photo line-ups, police interview procedures, and interpretation of witness statements.

The court ruled that Dr. Eisen could testify about factors that influence reliability of eyewitness identification because those factors are beyond the ordinary experience of lay jurors. But the court additionally ruled that Dr. Eisen could not opine as to the applicability of those factors to particular trial witnesses, nor could he comment in his testimony about any particular witness's credibility. Thus, for example, Dr. Eisen could testify about the factors that might affect the reliability of a witness's selection of a photograph from a six-pack photo line up, but he could not opine about the reliability of that particular selection nor the "fairness" of the six-packs created by investigators. Dr. Eisen could not, in particular, opine whether investigators "manipulated" a witness's selection of a photograph, because the jury had the ability to determine for itself the fairness of the six-packs. The court explained that the jurors did not need expert testimony to understand manipulation of the sort appellant alleged happened here, where supposedly detectives subtly guided witnesses toward one photo or another with expressions of encouragement. The court stated: "I do agree the eyewitness expert should be able to discuss the science but - - I'll just make it clear that I think as long as he is talking about general propositions like suggestibility - - if he wants to define what it is that would lead an eyewitness to a particular person or something like that, that's one thing, but to start commenting on the specific fact of this case or a particular six-pack or something like that goes beyond identifying factors and how they operate and into the

province of the jury and once the jury understands the things that the expert has some expertise on they can then apply it." (RT 1519-1520)~

Appellants contend the court erred in its restriction of Dr. Eisen's testimony. We review the trial court's limitation or exclusion or expert testimony for abuse of discretion. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 663; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; *People v. McDonald* (1984) 37 Cal.3d 351, 377, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) The trial court permitted Dr. Eisen to testify that human memory does not perform like a camera, recording every detail. He explained that gaps inevitably exist in a person's memory, which the person subconsciously fills when recalling the memory whether or not the added information is accurate. A number of factors affect a person's ability to form complete and accurate memories. For example, a limit exists to how much information a person can absorb at one time, particularly when the person is distracted. Trauma or stress affects a person's memory, as does alcohol. Most people are not very good at cross-racial identification, and the passage of time alters memory. Also, a witness's exposure to an individual whom the witness initially does not identify as a suspect can, in later encounters, move the individual to the forefront of the witness's memory based on a "carry over effect." That effect makes a witness in later encounters choose someone as a suspect because the person seems familiar, even though the witness unwittingly acquired the familiarity from an earlier encounter, such as a line-up or photo six-pack, in which the witness did not identify the person. Dr. Eisen also cautioned that an investigator's verbal and non-verbal cues to a witness, such as words of encouragement or asking the witness "are you sure?" about an identification, can, even if unintentionally, "manipulate" a witness to choose one suspect over another.

Appellants cite no authority that the court erred in permitting Dr. Eisen to identify factors that affect memory, while excluding his opinion about how those factors applied to particular witnesses in this case. (Compare *People v. McDonald, supra,* 37 Cal.3d 351, 377 [proper to admit expert testimony on "psychological factors" that affect accuracy of eyewitness identification] with *People v. Valdez* (2012) 58 Cal.App.4th 494,

506 ["expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness"].) In any event, the court gave Dr. Eisen great leeway to render his opinion about the risk of unreliable identifications caused by investigators' manipulation of witnesses. Defense counsel asked the following hypothetical which was largely based on the facts of the case: "Assume there is a witness to a crime who was drinking. And further assuming that this witness described the gunman right after the event while it was freshest in his mind as a dark-skinned Black male. [¶] Now, add to this hypothetical that many months later the police develop a suspect but he is not dark-skinned but, rather, medium complexion and they put his picture in a six-pack to show the witness. [¶] Now, add to this hypothetical that after studying the six-pack for a while the witness stated they did not recognize anyone. [¶] And also assume that although they did not make an identification they learned that the police believed they had the right guy and they are asked to come to court to see if they can identify him in person during trial. [¶] Keep in mind the person they are asked to come to identify in court was already shown to him in a six-pack years earlier and they did not recognize him at that time. [¶] Based on the research is it possible that learning that the police believed their case enough to take it to trial that they could influence the witness' in-court identification?"

Dr. Eisen said manipulation was possible. Dr. Eisen was thus permitted through the hypothetical to offer his expert opinion in support of a central point of appellants' mistaken-identity defense. We therefore find that the court's limitations of Dr. Eisen's testimony were not an abuse of discretion.

3. *Displaying Two Compton Guns*

Deputies seized four guns from the Hummer crash site after the Compton shooting: the 9 mm Glock semiautomatic used in both the Los Angeles and Compton shootings, a shotgun, a revolver, and a SKS rifle similar to an AK-47. The trial court admitted photographs of the guns into evidence without objection by appellants. But when the prosecutor proposed to show the jury the actual shotgun and revolver,

appellants objected because there was no evidence the shotgun and revolver had been used in the Los Angeles shooting for which they were on trial. Thus, according to appellants, the prejudicial value of displaying the two guns outweighed their probative value, and should have been excluded under Evidence Code section 352.

The trial court overruled appellants' objections, and allowed the prosecutor to show the two guns to the jury. As previously observed, we review the court's ruling under Evidence Code section 352 for abuse of discretion. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917; *People v. Cooper* (2007) 148 Cal.App.4th 731, 740.) In arguing for the probative value of displaying the guns, the prosecutor noted that appellant Brown had been on record as admitting he had been a passenger in the Hummer, but had claimed not to know there was going to be a shooting because he had seen no guns in the Hummer. According to the prosecutor, permitting the jurors to see for themselves the actual size of the guns helped the jury assess the likelihood that Brown could have overlooked them inside the Hummer. Against that probative value, the trial court needed to weigh the risk of inflaming or prejudicing the jury by showing the guns to the jury. We conclude the trial court did not abuse its discretion when photographs of the guns were in evidence, and their display added to, rather than detracted from, the jury's understanding of those guns.

4. *Prosecutor Identifying Appellant Rowland to Witness*

Rowland contends a stand-by prosecutor (not the trial prosecutor) committed misconduct during a pretrial hearing in July 2008. According to Rowland, the prosecutor asked victim Davera Wilson, who had been sitting in the car parked in front of the Kragen Auto Parts store during the Los Angeles shooting, to accompany the prosecutor into the courtroom while Rowland was also in the courtroom. Once in the courtroom, the prosecutor pointed at Rowland in order to identify him for Wilson. When the court learned of Wilson's presence in the courtroom, which violated the court's order excluding witnesses, the stand-by prosecutor, who said he did not know about the exclusion order, asked Wilson to leave the courtroom. According to Rowland, the stand-

by prosecutor then asked Wilson as they stood in the hall whether she had seen Rowland when she walked into the courtroom. She told him she had not.

More than two years later in October 2010, Rowland moved for dismissal on the grounds of prosecutorial misconduct. Rowland argued that the stand-by prosecutor's pointing to Rowland in the courtroom constituted an unlawful and unduly suggestive line-up. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989 [unduly suggestive to point]; *People v. Perkins* (1986) 184 Cal.App.3d 583, 588 ["conduct that singles out certain suspects or otherwise focus a witness's attention on a certain person in a lineup can cause such unfairness so as to deprive a defendant of due process of law"].) Rowland also argued that the prosecutor violated Rowland's right to have defense counsel attend a line-up. (*People v. Bustamante* (1981) 30 Cal.3d 88, 102, superseded by constitutional amendment, as discussed in *People v. Johnson* (1992) 3 Cal.4th 1183-1222-1223.)

The court denied the motion to dismiss. The prosecutor denied having asked Wilson to accompany him into the courtroom, and the court found he had not done so. But, the court found, even if the prosecutor had asked Wilson to enter the courtroom out of ignorance of the exclusion order, the prosecutor's violation of the order was merely "technical." The court credited Wilson's testimony that she could not see Rowland inside the courtroom when the prosecutor pointed in Rowland's direction. In denying Rowland's motion to dismiss, the court explained, "The evidence that I've heard doesn't support any finding of prosecutorial misconduct in this case and even assuming - - even assuming that there were some technical violation of the court order which I question - - I brought that part of the transcript to your attention last time - - I don't see any prejudice based on the testimony I heard from Ms. Wilson today. [¶] She basically said she could not see [appellant Rowland] on that occasion and now she says she can't identify you so that latter is neither here nor there as far as this motion but it's a factual issue that I resolved and I do not find that you made a sufficient showing to dismiss this case under a nonstatutory motion to dismiss."

Rowland's assertion that the prosecutor committed misconduct is unavailing because the court made factual findings supported by substantial evidence concluding

otherwise. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 857-859 [substantial evidence standard of review applies to trial court's factual findings regarding prosecutorial misconduct]; *People v. Parmar* (2001) 86 Cal.App.4th 781, 792 [on appeal from motion to disqualify prosecutor, appellate court reviews trial court's factual findings for substantial evidence].) Accordingly, Rowland's contention that the court erred in denying his motion to dismiss fails.

5. *Prosecutorial Misconduct in Closing Argument*

A prosecutor commits misconduct if she misstates the law to the jury, particularly if those misstatements reduce the People's burden of proof to a threshold easier to prove than beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 829, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Appellants identify three categories of purported prosecutorial misconduct during the closing argument, but appellants did not object to the purported misconduct, nor did appellants ask the trial court for a curative instruction. Accordingly, appellants have not preserved their points for appeal. (*People v. Pearson* (2013) 56 Cal.4th 393, 426; *People v. Pitts* (1990) 223 Cal.App.3d 606, 691-692.)

In the interest of completeness, we set out the prosecutor's statements that appellants alleged constitute misconduct.

a. Appellants cite the following passage as unlawfully trying to reduce the People's burden of proof from "beyond a reasonable doubt" to mere "preponderance of the evidence" by telling the jury it need only determine the most "reasonable" interpretation of the evidence. Appellants quote the following passage from the prosecutor's closing argument: "Yes, anything is possible. [¶] That's not really the question that you as jurors need to evaluate. [¶] What you need to evaluate is whether it's a reasonable explanation of the evidence. [¶] Anything is possible. It's possible that [the assistant prosecutor] was the one that actually committed these murders. [¶] Anything is possible. [¶] None of us were there. [¶] We don't know. [¶] What we

need to do is look at all the evidence that we have before us and say what's the most reasonable interpretation?"

We note, however, that the foregoing quotation is taken out of context because the more complete recitation of the prosecutor's point is the following: "Another argument I anticipate Mr. Rowland making is that it was VNG or 52 Hoovers who committed this crime. [¶] He told you at the start of this case in opening statements that his gang, Eight-Trey, didn't do it. [¶] Well, one of the questions that he asked the gang expert in order to help him establish this point was the idea that maybe VNG had the gun, the nine-millimeter, and then passed it off to Eight-Trey. [¶] So you need to ask yourselves -- or Mr. Rowland is going to ask you to consider is it possible that the gun was passed to Eight-Trey after the murder? [¶] And the answer to that is just like any other question that you would ask is it possible? [¶] The answer is, yes, anything is possible. [¶] That's not really the question that you as jurors need to evaluate. [¶] What you need to evaluate is whether it's a reasonable explanation of the evidence. [¶] Anything is possible. It's possible that [the assistant prosecutor] was the one that actually committed these murders. [¶] Anything is possible. [¶] None of us were there. [¶] We don't know. [¶] What we need to do is look at all the evidence that we have before us and say what's the most reasonable interpretation. [¶] Is it reasonable that VNG would have passed off this gun after the murder to Eight-Trey? [¶] And the answer to that question is no. [¶] And you know that that's the answer because of the gang expert, Officer Hartman. [¶] He specifically talked about how this is a jump out boy style shooting. [¶] It is unreasonable to believe that a jump out VNG would do a jump out boys shooting and six days later Eight-Trey j.o.b.'s would end up with the gun. [¶] That's not reasonable. [¶] It's also not a reasonable conclusion because witnesses look at VNG gang books and 52 Hoover and made no I.D. [¶] Miss Wilson, Mr. Clemons, Mr. Estrada. [¶] None of those people were identified. [¶] Four different people identify one or the other defendant. [¶] And, of course, six days later that gun is in Eight-Trey's possession. [¶] So ask yourself not whether it's possible that some other gang did this but is it reasonable in light of the fact that particular shooting matches the M.O. of the defendant's gang,

people are identifying the defendants and just six days later they're in possession of that firearm."

This argument was nothing more than a comment about the unreasonableness of the jury adopting an inference suggested by the defense. The jury was instructed on reasonable and unreasonable inferences along the line suggested by the prosecutor's argument. And, as noted, appellants did not object to the foregoing and thus have failed to preserve the point for appeal

b. Appellants also contend the prosecutor committed misconduct by analogizing the thought processes jurors must employ as they deliberate as equivalent to putting a puzzle together. Appellants cite authorities that frown upon visual presentations, such as Power Point displays, that liken deliberations to filling in the pieces of a puzzle. (*People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1268 [misconduct to argue "beyond a reasonable doubt" satisfied in visual display of six pieces of eight-piece puzzle, where despite two missing pieces, jury could recognize puzzle depicted Statute of Liberty]; *People v. Otero* (2012) 210 Cal.App.4th 865, 867-874 [misconduct to argue "beyond a reasonable doubt" satisfied in jury's ability to recognize California and Nevada from visual display of their outlines despite incorrect placement of some cities and other landmarks within the outlines].) Although the record does not show the prosecutor using visual aids such as a Power Point presentation, she did employ a puzzle analogy several times in her closing. She opened her closing argument by stating: "I want to start off by telling all of you that a trial such as this one is unique in that it's not something that you do every day. Jury duty is something, hopefully, you only do once a year but it's not unique in that you have the skill sets. You have to be jurors in everyday life. And it's often like putting together a jigsaw puzzle, only not a jigsaw puzzle that you buy new from the store and you unwrap it for the first time but a jigsaw puzzle that you buy, say, in a garage sale where you get it home and you open it up and you take out the pieces and maybe there is a couple pieces missing. Maybe one piece looks like a dog chewed on it. Another piece has like marinara sauce on it. But at the end of the day -- when you sit down and you look at all the pieces and you put them

together at the end of the day the question is can you see the picture on the front of the box? [¶] Is it a hot air balloon with kittens even though maybe a couple pieces are missing or the dog chews on one so it no longer fits or there is marinara sauce on another one? [¶] The question is can you tell what happened in this case? [¶] Do you have a clear picture of what happened and who is responsible? [¶] And the court will specifically tell you that in order to put together this jigsaw puzzle, in order to reach a verdict, you need to impartially compare all of the evidence, not just the People's evidence, not just the defendant's evidence, all of the evidence that was received by you throughout the entire trial. [¶] You need [sic] look at all of it because all of the evidence is all of your pieces."

She concluded her closing argument as follows: "The gang evidence, ladies and gentlemen, it sort of like when you're putting together a puzzle and you know how they tell you to start with the edges first? [¶] It's always the easiest place to start. [¶] That's what the gang evidence is, folks. [¶] It's -- it sort of gives you an overview of the type of case we're talking about, the issues that we're dealing with and how important it is for you to look at the totality of every piece of evidence to come to the conclusion that these defendants are guilty as charged. [¶] Thank you."

And in her rebuttal argument she stated: "When you look at each and every piece of evidence, ladies and gentlemen, and you add all of them up in the totality it only comes to one conclusion and the question at the end of the day is can you see the picture on the front of the box? Do you know what happened? Do you know who did it? And when you put all the pieces out on the table, all the pieces of evidence, are there pieces that are missing? Are there questions that you have? Perhaps. Trials aren't scientific. Not every question gets answered but that's okay. Your job is to decide do you have enough evidence. Are there enough pieces of the puzzle that you know using your common sense and your life experience what's going on here."

We do not find that these arguments lessened the burden of proof or misled the jury. And, again, appellants objected to none of the foregoing and thus have not preserved their points for appeal.

c. Appellants also contend the prosecutor misstated the law by equating the jury's deliberations to the daily decision one makes in everyday life. The prosecutor said to the jury: "I want to start off by telling all of you that a trial such as this one is unique in that it's not something you do every day. Jury duty is something, hopefully, you only do once a year but it's not unique in that you have the skill sets. You have to be jurors in everyday life." We find no error and, as before, appellants failed to preserve the point for appeal when they did not object or ask for a curative instruction.

6. *Rowland's Pitchess Motion*

Appellants' convictions for the Compton shooting were affirmed on appeal in 2010. In September 2011 before trial of the Los Angeles shooting began in this case, Rowland requested a *Pitchess* hearing on the personnel files of the eight deputies (Marez, Raffaelli, Camarillo, Torres, Heckt, Pohl, Tobin, Smelser) involved in pursuing and apprehending appellants after the Compton shooting. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 537-538 [defendant may seek from police personnel files information relevant to his defense]; Evid Code, § 1043.) The gist of Rowland's motion was his claim that he had no involvement in the Compton shooting even though deputies had filed reports stating he drove the Humvee used in the shooting. Rowland sought from the deputies' personnel files evidence showing a pattern of fabrication by them, such as submitting false probable cause declarations and arrest reports.

Good cause exists under *Pitchess* for discovery of material from a peace officer's personnel file when the defendant can articulate how the information sought is material to the charges against the defendant. (*Chambers v. Superior Court* (2007) 42 Cal.4th 673, 679; *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.) Materiality includes evidence that supports a defense or impeaches the peace officer. (*Warwick* at p. 1021.)

Rowland's *Pitchess* motion sought discovery not from peace officers connected to the Los Angeles shooting for which appellants were on trial here, but from deputies who responded to the Compton shooting. When Rowland filed his motion before trial, the People had already announced their intention to offer evidence from the Compton

shooting to prove appellants' identity in the Los Angeles shooting. But at the time of the *Pitchess* motion, the court had not yet ruled on the admissibility of the People's evidence from the Compton shooting. Describing Rowland's *Pitchess* motion as "putting the cart before the horse," the court explained that without first knowing the scope of the Compton evidence, the court could not assess the relevance of information from the personnel files of the Compton deputies. The court therefore denied Rowland's *Pitchess* motion for an insufficient showing, but it did so without prejudice to Rowland renewing his motion in the future (presumably after the court had ruled on the People's Evidence Code section 1101 motion.)

We review the court's denial of a *Pitchess* motion for abuse of discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039 [reviewed for abuse of discretion].) We find the court's denial without prejudice was not abuse of discretion for the reasons stated by the court. And given that Rowland did not renew his *Pitchess* motion, we find any error has been waived.

7. *Appellants' Parole Revocation Fines*

The court sentenced appellants to life without possibility of parole. The court also imposed a parole revocation fine on each appellant, which it stayed. (Pen. Code, § 1202.56) When a court sentences a defendant to prison for life without the possibility of parole, the court should not impose a parole revocation fine. (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.) Appellants ask that we strike their parole revocation fines, and the People join in that request. We shall do so.

DISPOSITION

The trial court is directed to amend the abstracts of judgment for Casey Lee Rowland and Clifton Gregory Brown by striking the parole revocation fines and to

forward amended abstracts to the Department of Rehabilitation and Correction. As amended, the judgments are affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.