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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOHN CLARK RUSSELL, Defendant and Appellant.	2d. Crim. No. B262474 (Super. Ct. No. 2012027191) (Ventura County)

In 1979, Alma Zuniga was stabbed, raped and shot to death then buried in a shallow grave. Her assailant remained unknown until 2012, when police received information that caused the "cold case" to be reopened and DNA specimens examined. John Clark Russell was identified as the perpetrator through a DNA match. He appeals after a jury convicted him of first degree murder (Pen. Code,[1] §§ 187, 189). The jury also found true allegations that (1) appellant personally used a firearm and a dangerous and deadly weapon in committing the offense (§§ 12022, subd. (b), 12022.5, subd. (a)(1)); and (2) the

[1] All statutory references are to the Penal Code unless otherwise stated.

murder was willful, deliberate, and premeditated and was committed during the commission of a kidnapping (§ 190.2, former subd. (c)(3)(ii), now subd. (a)(17)(B)) and rape (*id*., former subd. (c)(3)(iii), now. subd. (a)(17)(C)). The trial court sentenced him to life without the possibility of parole plus three years. The court also ordered him to pay, among other things, a $10,000 restitution fine pursuant to section 1202.4 and a $35 court facilities fee pursuant to Government Code section 70373, subdivision (a)(1).

Appellant contends (1) the court erred in denying his motion for a *Kelly*[2] hearing; (2) the court erred in excluding third party culpability evidence; (3) instructional error compels reversal of the kidnapping-murder special circumstance allegation; (4) cumulative error compels reversal of his conviction; (5) the restitution fine is unauthorized; and (6) the judgment should be corrected to reflect the imposition of a $30 court facilities fee, rather than a $35 fee. The last two contentions have merit and we shall accordingly (1) order that the restitution fine be stricken; and (2) order the judgment corrected to reflect the imposition of a $30 court facilities fee. Otherwise, we affirm.

STATEMENT OF FACTS

I.

Prosecution

A. *The Murder*

On the night of March 10, 1979, 23-year-old Alma Zuniga went to a nightclub in Oxnard with her friends Christine Oregon and Sergio Valdez. At about 2:00 a.m., they left the club and went to the Army Navy Café on Fifth Street. At about 3:00 a.m., Oregon and Valdez walked Zuniga to her car and watched her

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[2] *People v. Kelly* (1976) 17 Cal.3d 24.

drive away and turn left on Oxnard Boulevard at its intersection with Fifth Street.

A short time later, Zuniga stopped at a phone booth and called her ex-husband Enrique Zuniga at his home in Oklahoma. During the conversation, Enrique heard the phone booth door open and Zuniga scream and yell that someone was hitting her. Enrique also heard Zuniga say "that guy came back," then heard the phone booth door close. Enrique immediately reported the incident to the Oxnard Police Department.

Bonnie Winters lived by a lemon orchard in the area of Rose Avenue and Simon Way in Oxnard. Sometime between 2:00 and 3:30 a.m. that morning, Winters was awakened by the sound of a car engine idling in the orchard. An hour or so later, she heard two "pops" in quick succession.

At about 10:00 a.m. that morning, a man who lived on the lemon orchard notified the police he had discovered a dead body. The burial site was approximately 83 feet from the road and was partially obscured by an old bed spring and a corrugated metal water tank. The body was buried but a hand was protruding from the ground. Zuniga was subsequently identified as the victim. Her bra, blouse, and jacket were pulled above her chest and she was nude from the waist down except for stockings and shoes. Her pants, a beer bottle, and a coin purse containing $99 were buried next to her. Her underwear was found on top of the water tank and a receipt bearing her name was found nearby.

Two expended .22-caliber casings and one unexpended .22-caliber bullet were found a short distance away and there were drag marks from that location to the burial site. It was subsequently determined that the casings and bullet came from the same gun. The condition of the front outer portion of Zuniga's

underwear was consistent with her having been dragged on the front of her body. Cast impressions were made of shoeprints found near the burial site.

Zuniga had gunshot wounds to her right temple and her jaw and had a stab wound in her lower back that penetrated about nine inches into her liver. The gunshot wounds were consistent with wounds that would be inflicted by a .22-caliber firearm. There were also abrasions on Zuniga's face and the front and back of her body. A rape kit was prepared during the autopsy and was booked into evidence.

Zuniga's car was found parked in front of a business on the 700 block of South Oxnard Boulevard. There was blood on the passenger seat and passenger side of the car. Part of an expended .22-caliber bullet was found on the rear floorboard.

B. *DNA Evidence*

In September 2004, an attorney informed the Ventura County Sheriff's Department that his client had information about an unsolved homicide of a prostitute who had been buried in the area of Rose Avenue in Oxnard 25 to 30 years earlier.[3] Based on that information, Zuniga's rape kit was submitted for DNA analysis. The Ventura County Sheriff's Department Forensic Sciences Laboratory (the crime lab) analyzed the rape kit and obtained a single-source male DNA profile from the sperm fraction of a vaginal swab. The profile was entered into the Combined DNA Index System (CODIS), a national database that allows users to match an unknown profile with the profile of individuals in the system. The CODIS search identified a match with appellant's DNA profile. The crime lab subsequently used an "IdentiFiler" DNA testing kit, which uses a polymerase chain

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[3] Zuniga told Oregon she engaged in prostitution.

reaction/short term tandem repeat (PCR-STR) testing methodology, to verify the match.

The crime lab also used the IdentiFiler DNA testing kit to analyze a cutting taken from the crotch of Zuniga's underwear. The lab obtained a partial DNA mixture profile from at least four donors, but the sperm fraction of the mixture was so low that only part of the DNA was observable. Male DNA was also found in the non-sperm fraction, but the mixture was of such a low level that the results were otherwise inconclusive.

The vaginal swab, the cutting from Zuniga's underwear, and the crotch of Zuniga's pants were subsequently tested by Emily Jeskie of Sorenson Forensics (Sorenson), a private laboratory in Utah. Jeskie used the "MiniFiler," a DNA testing kit that is more sensitive than the IndentiFiler kit used by the crime lab. Jeskie determined that the sperm fraction obtained from the vaginal swab contained at least three contributors and that the major DNA profile matched appellant. Of the two donors of the epithelial fraction obtained from the vaginal swab, appellant matched the male donor profile and Zuniga matched the female donor profile.

In analyzing the crotch of Zuniga's pants and the cutting taken from her underwear, Jeskie found that both samples had a mixture of DNA from a minimum of three donors. Appellant's profile was excluded as being one of the donor profiles from both the epithelial and sperm fractions of the samples. Jeskie subsequently analyzed another cutting taken from the crotch of Zuniga's underwear. The epithelial fraction obtained from this sample had a mixture of DNA profiles from at least three donors, at least one of which was genetically typed as a male. Appellant was excluded as a donor. The sperm fraction had a mixture of

DNA profiles from at least two donors, at least one of which was male. The results were otherwise inconclusive.

C. *Appellant's Statements and the Investigation*

On July 26, 2012, two investigators from the Ventura County Sheriff's Department contacted appellant in Bakersfield. Appellant admitted (and records verified) that at the time of the murder he lived in Oxnard on Dallas Drive, just off of Rose Avenue. When shown photographs of Zuniga, appellant denied knowing her and denied that he ever had any sexual contact with her. He refused to provide a DNA sample and was arrested.

Appellant was subsequently interviewed at the Ventura County Jail. A video recording of the interview was played at trial. One of the investigators began by telling appellant Zuniga had been abducted from a phone booth in downtown Oxnard at 3:00 a.m. and taken to Rose Avenue, where she was raped, murdered, and buried. Appellant was also told his DNA had been found in Zuniga's body. Appellant again denied knowing Zuniga and said he had nothing to do with her murder. He stated, "if you're telling me my DNA is, is in this woman and I never seen [*sic*] this woman before, never met this woman before, never buried her in some shallow grave before, never took her from J Street[.]" After one of the investigators pointed out that no one had said Zuniga was taken from J Street, appellant continued, "Wherever you said she was from, taking her—I'd remember that[.] I'd know I did that. Ain't none [*sic*] of that happened and so for you to tell me my DNA is in her, a setup is jumping off here."

Appellant's residence was also searched the day of his arrest. The police seized three pairs of men's shoes and compared them with the casts of the shoeprints found at the crime scene.

Two pairs of the shoes, sized 12 and 13, were very similar in size to the cast impressions.

II.

Defense

Appellant did not testify. His primary defense was that he had consensual sex with Zuniga but that someone else stabbed, kidnapped, raped, and murdered her. In support of that defense, he offered his post-arrest statements along with expert testimony disputing the prosecution's expert testimony that appellant's DNA was not found on the crotch of Zuniga's pants or the first cutting from her underwear.

Mark Taylor, the president and director of Technical Associates, a private DNA testing laboratory, opined that the results of the subject tests should have been deemed inconclusive given the complexity and degraded quality of the samples. Taylor performed his own tests on the samples and found the results to be inconclusive. He did not, however, disagree with the results that included appellant as a major contributor of the DNA found on the vaginal swab.

DISCUSSION

I.

DNA Evidence

Appellant contends the court erred in violation of state law and his due process rights by denying his motion for a *Kelly* hearing. He claims the court was required to hold a "first-prong" *Kelly* hearing because "there was no generally accepted procedure to interpret the data . . . produced from samples consisting of degraded, low-level, complex mixtures." He claims the court was also required to hold a "third-prong" *Kelly* hearing because he presented substantial evidence that Sorenson did not use the

correct scientific procedures in testing the samples obtained from Zuniga's pants and the first cutting of her underwear. Neither claim has merit.

"In *Kelly*, the California Supreme Court set forth the following 'general principles of admissibility' for opinion testimony based on new scientific techniques: '(1) [T]he *reliability of the method* must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly *qualified as an expert to give an opinion* on the subject. [Citations.] Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. [Citations.]' [Citations.]" (*People v. Smith* (2003) 107 Cal.App.4th 646, 652 (*Smith*).)

"Evidence obtained by use of a new scientific technique is admissible only if the proponent of the evidence establishes at a hearing (sometimes called a first prong *Kelly* hearing) that the relevant scientific community generally accepts the technique as reliable. However, proof of such acceptance is not necessary if a published appellate opinion affirms a trial court ruling admitting evidence obtained through use of that technique, at least until new evidence is admitted showing the scientific community has changed its attitude. [Citations.]" (*People v. Cordova* (2015) 62 Cal.4th 104, 127.)

"On appeal, '"general acceptance"' is considered 'a mixed question of law and fact subject to limited de novo review.' [Citation.] Thus, 'we review the trial court's determination with deference to any and all supportable findings of "historical" fact or credibility, and then decide as a matter of law, based on those assumptions, whether there has been general acceptance.' [Citation.]" (*People v. Reeves* (2001) 91 Cal.App.4th 14, 38.)

The third prong of the *Kelly* test "assumes the methodology and technique in question has already met th[e general acceptance] requirement. Instead, it inquires into the matter of whether *the procedures actually utilized in the case* were in compliance with that methodology and technique, as generally accepted by the scientific community. [Citation.] The third-prong inquiry is thus case specific; 'it cannot be satisfied by relying on a published appellate decision.' [Citation.]" (*People v. Venegas* (1998) 18 Cal.4th 47, 78.) "Unlike the independent appellate review of a determination of general scientific acceptance under *Kelly*'s first prong, review of a third prong determination on the use of correct scientific procedures in the particular case requires deference to the determinations of the trial court. [Citation.]" (*Id.* at p. 91.) We must "accept the trial court's resolutions of credibility, choices of reasonable inferences, and factual determinations from conflicting substantial evidence. [Citation.]" (*Ibid.*)

In his first-prong challenge, appellant acknowledges "there is ample authority" to support the conclusion that the testing methodology used here (PCR-STR) has been generally accepted by the scientific community. (See, e.g., *People v. Cordova*, *supra*, at p. 128; *Smith*, *supra*, 107 Cal.App.4th at p. 665.) He claims, however, that none of this authority is relevant here "because none squarely addresses whether there is a generally accepted procedure for interpreting data produced by the application of PCR-STR technology to degraded, low-level, complex mixtures."

But the referenced authority is both relevant and dispositive of appellant's claim. It is well-settled that the use of PCR-STR technology "on a particular type of DNA sample does not constitute a different scientific technique. Rather, it involves

a technique, which has gained general acceptance, as applied to particular set of circumstances." (*People v. Henderson* (2003) 107 Cal.App.4th 769, 786 (*Henderson*).) The inquiry thus "is not whether the procedure is generally accepted within the scientific community, but whether the approved procedure was followed correctly in this instance." (*Ibid.*)

The defendant in *Henderson* sought a first-prong *Kelly* hearing to challenge the use of the capillary electrophoresis technique of DNA testing on a sample containing a mixture of DNA from two or more individuals. In concluding that no such hearing was required, the court reasoned that "[a]lthough capillary electrophoresis is a new technique for which first prong analysis is appropriate, capillary electrophoresis on a particular type of DNA sample does not constitute a different scientific technique. Rather, it involves a technique, which has gained general acceptance, as applied to a particular set of circumstances. *DNA analysis of a mixed sample is more akin to the testing of a degraded or compromised sample.* [Italics added, fn. omitted.] Under such circumstances, the relevant inquiry is not whether the procedure is generally accepted within the scientific community, but whether the approved procedure was followed correctly in this instance." (*Henderson*, *supra*, 107 Cal.App.4th at p. 786.) Other cases are in accord. (E.g., *People v. Stevey* (2012) 209 Cal.App.4th 1400, 1411; *Smith*, *supra*, 107 Cal.App.4th at p. 665.)

Appellant's attempt to distinguish this line of authority is unavailing. As that authority makes clear, the application of a scientific technique to a particular type of sample is not the proper subject of a first-prong *Kelly* hearing. Rather, the inquiry

is whether the proper procedure was followed, an inquiry that arises under the third prong of *Kelly*.

Appellant, however, fares no better in claiming that the court was required to hold a third-prong *Kelly* hearing. He claims he presented substantial evidence that Sorenson did not apply the proper procedure in analyzing the samples derived from Zuniga's pants and the first cutting from her underwear. Specifically, he complains that Sorenson did not establish a "stochastic threshold"[4] and claims that the alternative procedure it employed to validate its results was contrary not only to generally accepted scientific principles, but also to Sorenson's own standard operating procedures.

The court, however, credited the prosecution's expert declaration indicating that the correct scientific procedures were used here. Ryan Buchanan, Sorenson's technical leader, stated that the laboratory's protocol was in full compliance with the relevant guideline established by the Scientific Working Group on DNA Analysis Methods (SWGDAM) regarding stochastic thresholds.[5] Buchanan declared that Sorenson "performed an

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[4] The stochastic threshold has been described as "a laboratory-set number used to assess whether a sample contains sufficient DNA to obtain reliable results." (*People v. Lazarus* (2015) 238 Cal.App.4th 734, 781, fn. 49, citing *U.S. v. McCluskey* (2013) 954 F.Supp.2d 1224, 1276-1277.)

[5] The guideline states: "If a stochastic threshold based on peak height is not used in the evaluation of DNA typing results, the laboratory must establish alternative criteria (e.g., quantitation values or use of a probalistic genotype approach) for addressing potential stochastic amplification. The criteria must be supported by empirical data and internal validation and must be documented in the standard operating procedures."

internal validation study" for Minifiler typing of degraded samples based upon empirical data. As an alternative to establish a stochastic threshold for its 10-second injection procedure, Sorenson performed replicate or multiple amplifications to obtain a confirmatory profile from which it could be determined whether there had been any allelic drop-in or drop-out events.[6] Buchanan stated that this procedure was agreed to be generally reliable by the scientific community. He also stated that the procedure is "viewed as a significant improvement in the ability to separate and interpret individual profiles in mixed sample" and was "developed specifically to account for the stochastic [e]ffects that can occur during the PCR process when testing low template or degraded DNA samples such as those tested in this case."

The court was entitled to credit this evidence and conclude that appellant's criticisms of the procedures employed by Sorenson went to weight rather than admissibility. (*People v. Lucas* (2014) 60 Cal.4th 153, 246, disapproved on other grounds

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(SWGDAM Interpretation Guidelines for Autosomal STR Typing by Forensic DNA Testing Laboratories (2010), ¶ 3.2.2, pp. 6-7.)

[6] "Allelic drop-in" is a common scholastic effect that "refers to the phenomenon that occurs when alleles [genes or segments of DNA material that produce traits] not originating from the principal DNA donors show up in a DNA profile." (*United States v. Morgan* (S.D.N.Y. 2014) 53 F.Supp.3d 732, 736.) Allelic drop-out "occurs when alleles from the principal DNA donors fail to appear in the DNA profile[.]" (*Ibid.*) The stochastic threshold, as defined by Buchanan, is "the value above which it is reasonable to assume that allelic dropout has not occurred within a single-source sample." (SWGDAM Interpretation Guidelines for Autosomal STR Typing by Forensic DNA Testing Laboratories, *supra*, ¶ 3.2, p. 6.)

in *People v. Romero* (2015) 62 Cal.4th 52, 53; *People v. Hill* (2001) 89 Cal.App.4th 48, 58 ["General acceptance in the scientific community may be established by the testimony of a director or supervisor of a DNA forensic lab"]; *People v. Morganti* (1996) 43 Cal.App.4th 643, 661-662 [trial court did not abuse its discretion in finding the prosecution made the necessary foundational showing that correct scientific procedures were followed where expert testified he followed established procedures or protocol]; see also *United States v. Trala* (D. Del. 2001) 162 F.Supp.2d 336, 349 [defense claim that allelic drop-out may have rendered PCR-STR typing unreliable went to weight rather than admissibility of the evidence].) Appellant's claim that the court abused its discretion in failing to hold a third-prong *Kelly* hearing thus fails.

Because appellant had the opportunity to challenge the evidence at trial, his claim that evidence was admitted in violation of his due process rights also fails. (*People v. Lucas*, *supra*, 60 Cal.4th at p. 247.) Moreover, appellant merely challenged the results of the prosecution's DNA testing on Zuniga's pants and the first cutting of her underwear. He did not challenge the results of the tests on the vaginal swab, which identified him as the major contributor. Other evidence indicated that appellant lived in the vicinity of the murder at the time it was committed, and his statements to the police contradicted his defense at trial. In light of the independent evidence of appellant's guilt, any error in admitting the challenged DNA evidence was harmless. (*People v. Venegas*, *supra*, 18 Cal.4th at p. 93 [erroneous admission of DNA evidence is viewed under the harmless error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836].)

II.

Third Party Culpability Evidence

Appellant contends the court erred in precluding him from presenting evidence that a third party, Sebastian Carrillo, had committed the crime.[7] We are not persuaded.

"An accused may defend against criminal charges by showing that a third person, not the defendant, committed the crime charged. He has a right to present evidence of third party culpability where such evidence is capable of raising a reasonable doubt as to his guilt of the charged crime. But evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice; there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. [Citations.]" (*People v. Mackey* (2015) 233 Cal.App.4th 32, 110-111.)

In assessing an offer of proof relating to evidence of a third party's culpability, the court must decide whether the evidence could raise a reasonable doubt as to the defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) A trial court's ruling excluding third party culpability evidence is reviewed for abuse of discretion. (*People v. Brady* (2010) 50 Cal.4th 547, 558.)

Prior to trial, appellant moved in limine to present evidence that Carrillo was Zuniga's killer. His proffered evidence included the transcript of Enrique Zuniga's 911 call, in which Enrique recounted hearing Zuniga state "that guy came back" shortly

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[7] Appellant does not challenge the ruling precluding him from presenting evidence that a man named Artemio Lopez was the killer.

before the phone line went dead. Appellant also offered the conditional examination testimony of Oregon, who recalled that a Hispanic man sat near Zuniga at the Army Navy Café on the night of her murder. Oregon thought the man was Carrillo, who had dated her cousin Nancy Valenzuela, but she was not certain. The man argued with Zuniga after she asked him to put out his cigarette. When the man stood up, a gun fell from his person. Valdez, who was with Oregon and Zuniga that night, told the police that the gun was a .22 or .25 caliber.

Appellant also offered the preliminary hearing testimony of one of the police officers who investigated the murder. That testimony indicated that Zuniga's car was registered to a motel room where Carrillo was staying on the night of the murder. When first questioned by the police, Carrillo denied that he and Zuniga were romantically involved or had lived together. He also claimed that he and a friend were watching television on the night of the murder. The police later discovered that Carrillo was involved in a car accident in Oxnard at about 1:30 a.m. that morning. Carrillo subsequently admitted that he was involved with Zuniga and had previously lived with her for about two weeks in an apartment in Oxnard. He also admitted (but had previously denied) seeing her around the time of his car accident. Carrillo also admitted giving Zuniga the ring she was wearing at the time of her murder.

Appellant also offered the conditional examination testimony of Pauline Smith, who was Carrillo's wife at the time of the murder. A few days after the murder, Smith received an anonymous phone call warning that she was "next." About two months prior to the murder, she found a note threatening to kill the recipient if he or she did not leave the author's family alone.

The note was written in Spanish, but someone translated it for her. She hid the note under her mattress but it vanished. She did not tell the police about the note when she was interviewed shortly after the murder because she was afraid of Carrillo.

Finally, appellant offered two reports from an investigator for the Ventura County Public Defender's Office. The first report summarized an August 2013 telephone interview of Valenzuela. Valenzuela said that she and Zuniga were both romantically involved with Carrillo at the time of Zuniga's death, although Valenzuela only saw Carrillo "a few times." Carrillo "took" a high school ring in her possession and later "showed her the ring and he had engraved something on [it.]" After Zuniga's murder, Oregon told Valenzuela that Carrillo committed the crime and had placed the ring on the hand that was left unburied, which Valenzuela "took . . . as a sign that it could have been her." The second report summarized an April 2014 interview of Carrillo's half-brother Juan. Juan said Carrillo only lived in Oxnard for a few years and had made his living picking lemons. Carrillo had returned to Mexico at least 30 years earlier and died from an intestinal illness within a few weeks of his return.

In opposing appellant's motion, the prosecution argued that the proffered evidence was unreliable hearsay and insufficient to raise a reasonable doubt whether appellant had committed the crime. After hearing extensive argument from counsel, the court denied the motion. The court reasoned, "[t]he fact that [Carrillo] under the best analysis of the evidence may have been in the Army Navy Café around that time and had a weapon, that doesn't connect him to this crime[.]" The court continued: "So my analysis is that there's not enough to get to the threshold that there's actually some evidence that connects [Carrillo] to this

event as opposed to putting [him] in the galaxy of people who may have a reason to want to inflict violence on her. But that's not enough. [¶] So at this point I don't think that the threshold's been met for the third-party culpability evidence[.]"

The court did not abuse its discretion in excluding the proffered evidence of third party culpability. Much of the evidence was inadmissible hearsay. (See *People v. Hall* (1986) 41 Cal.3d 826, 833 (*Hall*) [third party culpability evidence is subject to state evidentiary rules and cannot be premised upon inadmissible hearsay].) In any event, the court did not err in finding the proffered evidence failed to create a reasonable doubt as to appellant's guilt. There was no evidence to support a finding that Carrillo stabbed, abducted, raped, or murdered Zuniga. Moreover, that Carrillo may have argued with Zuniga over a cigarette does not demonstrate an intent to rape and murder her. (See, e.g., *People v. Adams* (2004) 115 Cal.App.4th 243, 254 [third party's expressions of anger and frustration with the victim were not evidence of intent to murder her].) Whether the evidence might indicate Carrillo had the opportunity to commit the crime is insufficient to compel its admission. (*People v. Geier* (2007) 41 Cal.4th 555, 582 ["[E]vidence of mere opportunity without further evidence linking the third party to the actual perpetration of the offense is inadmissible as third party culpability evidence"], overruled on other grounds in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 345.)

As the People note, evidence of Carrillo's domestic violence toward Smith and/or Valenzuela was inadmissible propensity evidence. (*People v. Whorter* (2009) 47 Cal.4th 318, 372.) We reject appellant's assertion that Evidence Code section 1101, which prohibits such evidence, "should have given way to [his]

federal rights because the evidence had 'significant probative value' (*People v. Babbitt* (1988) 45 Cal.3d 660, 684) and 'persuasive assurances of trustworthiness' (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302)." Even assuming that such an exception can apply in a given case, it plainly does not apply here. Appellant "fails to establish how, apart from suggesting [Carrillo's] 'criminal disposition,' [Carrillo's] prior acts of violence connected him to the present crimes. [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 373.) The claimed connection between Carrillo and Zuniga's murder is "speculative with no evidence, either direct or circumstantial, in support." (*People v. Lucas*, *supra*, 60 Cal.4th at p. 280.) "In short, none of [appellant's proffered] evidence had a tendency in reason and logic to prove or disprove any disputed fact that was of consequence to the determination of the action. [Citation.]" (*People v. Adams*, *supra*, 115 Cal.App.4th at p. 255.)

Moreover, it is not reasonably probable that appellant would have achieved a more favorable result had the court admitted the proffered evidence. (See *Hall*, *supra*, 41 Cal.3d at p. 836 [exclusion of third party culpability evidence reviewed under the harmless error standard set forth in *People v. Watson*].)[8] The court's ruling did not completely preclude appellant from offering evidence that a third party killed Zuniga. (See *People v. Jones* (1998) 17 Cal.4th 279, 305 [exclusion of third party culpability evidence did not compel reversal where defendant had the

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[8] We reject appellant's claim that the alleged error violated his constitutional right to present a defense and his right to compulsory process. (See *People v. Lawley* (2002) 27 Cal.4th 102, 155 [application of the ordinary rules of evidence does not impermissibly infringe upon a defendant's constitutional rights].)

opportunity to prove that a third party was the shooter, yet was merely precluded from doing so with inadmissible evidence].) Oregon was allowed to testify she had seen Zuniga arguing that night with a man who resembled Carrillo. Defense counsel relied on that testimony, coupled with the evidence of the 911 call on the night of the murder, in arguing that the man in the café was the killer. In addition, the evidence of appellant's guilt was substantial. Any error in excluding the proffered evidence was thus harmless. (*Hall*, at p. 836.)

III.

Instructional Error

Appellant contends that the kidnapping-murder special circumstance finding (§ 190.2, subd. (a)(17)(B)) must be reversed due to instructional error. The People concede the court erred in instructing the jury with an expansive definition of kidnapping that did not exist when the crimes were committed, yet claim the error is harmless. We accept the People's concession of error and agree that the error does not affect the verdict.

To find the kidnapping-murder special circumstance allegation true, the jury had to find appellant committed the murder during the commission of a kidnapping. A person is guilty of simple kidnapping if he or she "forcibly . . . steals or takes, or holds, detains, or arrests any person in this state, and carries the person into . . . another part of the same county[.]" (§ 207, subd. (a).) The movement or asportation of the victim must be "substantial in character" rather than slight or trivial. (*People v. Stanworth* (1974) 11 Cal.3d 588, 601; see also *People v. Brooks* (2017) 2 Cal.5th 674, ___, 393 P.3d 1, 51 [quoting same].)

In 1978, our Supreme Court held that the determination whether an alleged kidnapping victim's asportation was

substantial in character depended solely upon the actual distance involved. (*People v. Caudillo* (1978) 21 Cal.3d 562, 572-573 (*Caudillo*).) The pattern jury instruction on simple kidnapping (CALJIC No. 9.50) thus provided that the crime of simple kidnapping was committed if, among other things, the defendant's movement of the victim was "for a substantial distance, that is, more than slight or trivial." (*Id.* at p. 650.)

In 1999, the court overruled *Caudillo* to the extent it prohibited consideration of factors other than actual distance. (*People v. Martinez* (1999) 20 Cal.4th 225, 237, fn. 6, 239 (*Martinez*).) The court concluded that in determining whether an alleged victim's movement was substantial, "the jury should consider the totality of the circumstances. Thus, in a case where the evidence permitted, the jury might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes. [Fn. omitted.]" (*Id.* at p. 237.) The court made clear, however, that "[w]hile the jury may consider a victim's increased risk of harm, it may convict of simple kidnapping without finding an increase in harm, or any other contextual factors. Instead, as before, the jury need only find that the victim was moved a distance that was 'substantial in character.' [Citations.] To permit consideration of 'the totality of the circumstances' is intended simply to direct attention to the evidence presented in the case, rather than to abstract concepts of distance. At the same time, we emphasize that contextual factors, whether singly or in combination, will not suffice to

establish asportation if the movement is only a very short distance." (*Ibid.*)

In light of *Martinez*, jurors are now instructed to "consider all the circumstances relating to the movement" in deciding whether a person was moved a substantial distance such that the defendant is guilty of simple kidnapping. (CALCRIM No. 1215.) Appellant's jury was so instructed.[9] In *Martinez*, however, the court made clear that its decision did not apply retroactively because it enlarged the definition of kidnapping. (*Martinez*, *supra*, 20 Cal.4th at pp. 238-241; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1319.) The trial court in this case thus erred in instructing the jury pursuant to CALCRIM No. 1215 rather than the 1979 version of CALJIC No. 9.50.

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[9] The jury was instructed pursuant to CALCRIM No. 1215 as follows: "To prove kidnapping, the People must prove that: [¶] 1. The defendant took, held, or detained another person by using force or by instilling reasonable fear; [¶] 2. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance; [¶] AND 3. The other person did not consent to the movement. [¶] Substantial distance means more than a slight or trivial distance. In deciding whether the distance was substantial, you must consider all the circumstances relating to the movement. Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the distance the other person was moved was beyond that merely incidental to the commission of rape or murder, whether the movement increased the risk of physical or psychological harm, increased the danger of a foreseeable escape attempt, or gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection."

The error, however, is harmless.[10] Under pre-*Martinez* law, a movement of an actual distance of 200 feet was found to be sufficient to establish the asportation element of simple kidnapping (*People v. Stender* (1975) 47 Cal.App.3d 413, 421-423), while distances of 75 feet and 95 feet were deemed insufficient (*People v. Brown* (1974) 11 Cal.3d 784, 788-789 [75 feet]; *People v. Green* (1980) 27 Cal.3d 1, 67 [90 feet]). Here, there was evidence that (1) Zuniga was abducted from a phone booth somewhere in Oxnard; (2) her body was found in an agricultural area of town in which no phone booths were nearby; (3) the distance from the road to the burial site was about 83 feet; and (4) Zuniga was shot to death with a .22-caliber gun, and expended .22-caliber casings were found a short distance from the burial site. The only reasonable inferences to be drawn from this evidence are that Zuniga was abducted somewhere in the city, driven to a remote location, and taken into an orchard, where she was raped and murdered. Moreover, it was essentially undisputed that Zuniga was moved at least two hundred feet.[11]

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[10] The People ask us to take judicial notice of documents purporting to demonstrate that the burial site is three miles from the location where Zuniga's car was found. Appellant opposes the request. Because the documents were not before the trial court, the request for judicial notice is denied. (*People v. Sanders* (2003) 31 Cal.4th 318, 323, fn. 1.)

[11] Appellant notes the prosecutor argued in closing that the remote location of the burial site increased the risk of danger to Zuniga. The prosecutor made this point, however, in attempting to establish the remote location evinced an intent to commit rape. He did not assert that the remoteness of the location supported a finding that appellant had moved Zuniga a substantial distance, such that he was guilty of kidnapping.

Appellant did not assert otherwise, but rather claimed he was not the perpetrator. (See *People v. Miller* (1999) 69 Cal.App.4th 190, 209 ["'Although a defendant's tactical decision not to 'contest' an essential element of the offense does not dispense with the requirement that the jury consider whether the prosecution has proved every element of the crime,' . . . [a] defendant's failure to contest [is] tantamount to a concession of the element at issue"].) Because the evidence supported an inference that Zuniga was moved at least 200 feet after she was apprehended and no reasonable juror would have found otherwise, the error in instructing pursuant to CALCRIM No. 1215 was harmless beyond a reasonable doubt.

IV.

Alleged Cumulative Error

Appellant contends that the cumulative effect of the alleged errors compels reversal of the judgment. Although we have concluded that the court committed instructional error, we deemed that error to be harmless. Moreover, there is no other error to cumulate. Appellant's claim of cumulative error thus fails. (*People v. Panah* (2005) 35 Cal.4th 395, 479-480.)

V.

Restitution Fine (§ 1202.4)

The trial court imposed a $10,000 restitution fine at sentencing pursuant to section 1202.4. As appellant correctly notes, section 1202.4 was enacted in 1983, over three years after he committed his crime in 1979. In 1979, restitution fines of up to $10,000 were statutorily authorized by former Government Code section 13967, but could be imposed only if the court found (1) the defendant had the present ability to pay the fine; and (2) the economic impact of the fine would not cause the

defendant's dependents to be on public welfare.[12] (See *People v. Downing* (1985) 174 Cal.App.3d 667, 672.) Neither finding was made here.

Appellant contends the fine was imposed against him in violation of ex post facto principles. Assuming that the issue is forfeited, he further claims that counsel's failure to object to the fine amounts to ineffective assistance.

We conclude that the ex post facto claim is not forfeited. Although the rule of forfeiture can apply to ex post facto claims (see, e.g., *People v. Martinez* (2014) 226 Cal.App.4th 1169, 1189), the fine imposed here under section 1202.4 amounts to an unauthorized sentence because it could not have been lawfully imposed under any circumstances. (*People v. Zito* (1992) 8 Cal.App.4th 736, 741-742.) Accordingly, the order was a void judgment subject to correction at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

Because section 1202.4 was not in effect when appellant committed his crime, the restitution fine imposed under that

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[12] The statute provided in pertinent part: "Upon a person being convicted of a crime of violence committed in the State of California resulting in the injury or death of another person, if the court finds that the defendant has the present ability to pay a fine and finds that the economic impact of the fine upon the defendant's dependents will not cause such dependents to be dependent on public welfare the court shall, in addition to any other penalty, order the defendant to pay a fine commensurate with the offense committed, and with the probable economic impact upon the victim, of at least ten dollars ($10), but not to exceed ten thousand dollars ($10,000)[.]" (Former Gov. Code, § 13967, added by Stats. 1973, ch. 1144, § 2, p. 2351, and repealed by Stats. 2003, ch. 230 (A.B. 1762), § 2, eff. August 11, 2003.)

section must be stricken unless there was another statute in effect at the time that would support it. As we have noted, the relevant statute in effect at the time of the offense required the court to make findings that were not made here. We shall accordingly order that the fine be stricken.

VI.

Abstract of Judgment

Appellant asserts that the abstract of judgment should be corrected to reflect the imposition of a $30 court facilities fee (Gov. Code, § 70373), rather than a $35 fee. The People agree, and we shall order the judgment corrected accordingly.

DISPOSITION

The $10,000 restitution fine imposed under section 1202.4 is stricken. The judgment is also modified to reflect the imposition of a $30 court facilities fee under Government Code section 70373, rather than a $35 fee. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Charles W. Campbell, Judge
Superior Court County of Ventura

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