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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RUHANI BUSTAMANTE, Defendant and Appellant.	B252930 (Los Angeles County Super. Ct. No. NA085713)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesse I. Rodriguez, Judge. Affirmed.

Deborah L. Hawkins, under appointment by the Court of Appeal for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Ruhani Bustamante was convicted, following a jury trial, of two counts of murder in violation of Penal Code[1] section 187, two counts of willful, deliberate and premeditated attempted murder in violation of sections 664 and 187, one count of shooting at an occupied motor vehicle in violation of section 246 and one count of being a felon in possession of a handgun in violation of section 12021, subdivision (a)(1). The jury found true the special circumstances allegations that appellant committed multiple murders within the meaning of section 190.2, subdivision (a)(3) and committed the murders for the benefit of a gang within the meaning of section 190.2, subdivision (a)(22). The jury also found true the allegations that appellant personally discharged a firearm causing death or great bodily injury for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C). The court found true the allegations that appellant had suffered a prior serious felony conviction within the meaning of the Three Strikes law and section 667, subdivision (a)(1). The trial court sentenced appellant to four terms of life in prison without the possibility of parole plus 224 years.[2]

Appellant appeals from the judgment of conviction, contending the trial court erred in denying his motion to suppress the wiretap evidence and refusing to admit the testimony of defense witness Jose Maya. We affirm the judgment of conviction.

Facts

From July 20, 2009 through January 30, 2010, the same gun was used to commit two murders, five attempted murders and three shootings in nine separate incidents in Long Beach. Police believed the shootings were committed by members of the Eastside Longos gang ("ESL"). Investigations into the crimes stalled, and so in March 2010, Long Beach Police sought and obtained a wiretap order for cellular phones belonging to appellant and Lisa Sedillo, both ESL members.

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

[2] The four terms of life without the possibility of parole are authorized by *People v. Hardy* (1999) 73 Cal.App.4th 1429.

In January 2011, appellant was charged with the crimes committed in all nine incidents, but some charges were dismissed and he was ultimately tried only for the murders of Esaul Villagrana and Jonathan Cordova, the attempted murders of William Aguirre, Victor Lazcano, and Veasna Vong, shooting at an occupied motor vehicle on two different occasions and being a felon in possession of a firearm.

The attempted murder of Lazcano was the first crime to take place. Lazcano was shot on July 30, 2009, while he was riding his scooter on West 17th Street in Long Beach. Lazcano was able to make it to the home of his sister, Deise Lazcano ("Deise"). She took him to the police. Lazcano was an ESL member and refused to cooperate with police. Deise told police that Lazcano had been having trouble in the neighborhood related to ESL, specifically with Raul Bustamante ("Raul"), appellant's brother.

The Lazcano shooting was observed by two men who lived near the scene of the shooting. Both Luis Mesinas Sr. and Luis Mesinas Jr. were outside about 15 minutes before the shooting and noticed appellant loitering in the area. Mesinas Sr. spoke with appellant, who seemed nervous. Appellant expressed concern that police officers were staying in the area. The Mesinas men went inside their home. They heard shooting a few minutes later. Both men identified appellant at a live line-up and at trial as the person they saw near their house before the shooting.

The Vong shooting took place on August 15, 2009, while Vong was sitting in his car on Dawson Street in Long Beach. Vong was a member of the Asian Boys gang, which was a rival of ESL. Appellant was found not guilty of this shooting.

The murder of Esaul Villagrana took place on October 26, 2009, while Villagrana was standing by his SUV near the intersection of Cedar and 20th Street in Long Beach. Villagrana was a member of the 18th Street gang. No eyewitness to the shooting identified appellant.

In an intercepted phone call made in April 2010, appellant stated that he had killed the last members of the 18th Street gang.

The murder of Jonathan Cordova and the attempted murder of William Aguirre took place on January 30, 2010 near 15th Street and Stanley Avenue in Long Beach.

Cordova was a member of the Barrio Pobre gang. Aguirre was not. A man walked up to Cordova and asked if they could talk. Cordova and the man walked across the street. The man shot Cordova five times in the back, killing him. The man also shot at Aguirre, hitting him in the leg as he crawled away.

Aguirre spoke with police at the hospital on the night of the shooting. On February 4, 2010, Aguirre selected two photographs from a six-pack photographic line-up. One of the photographs was of appellant, and Aguirre said he looked like the shooter from the nose up.[3] Aguirre said the person in the second photograph looked like the shooter from the nose down.

On March 11, 2010, Aguirre happened to see appellant driving, recognized him and wrote down the car's license plate. Aguirre described the car as a white Corolla. He gave this information to police.

On March 11, 2010, police passed out a flyer and press release about the Cordova murder which showed photographic stills taken from a security camera. One showed a white car, another a person who looked like appellant walking near the scene of the Cordova shooting.

In an intercepted phone call made that same day, Robert Padilla told appellant about the press release, and a newspaper article based on the release. Padilla said the article contained a photograph of the car used in the shooting. Appellant asked if the car looked like his. Padilla said it did. Later that same day, appellant telephoned Reyes Rios, the leader of ESL, and asked for help painting his car. Rios agreed to help. Appellant told Reyes that there were only two men present when he "took" one man and "shot the other man, too, but he's the only one that looked at my face. So, he's the one ratting on me." Appellant suggested that Rios tell "Psycho," the leader of the Barrios Pobre gang, that one of his "homeboys" was talking to the cops.

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[3] At the preliminary hearing, Aguirre indentified appellant as the shooter, but was not completely certain. At trial, Aguirre again indentified appellant as the shooter, and said he was certain.

Later in the day of March 11, appellant took his white Corolla to someone who painted it green. He also added hubcaps to the car.

On March 12, 2010, appellant spoke with Juan "Frosty" Herrera, and asked him if he thought police could link the shootings. Frosty advised him to get rid of the gun. On March 12, 14, and 22, 2010, appellant had discussions with Herrera and two others about destroying and disposing of the gun. In a phone call made later on March 22, appellant told Padilla that he destroyed the gun and now only had a rifle.

On March 22, 2010, a tracking device on appellant's car showed him driving to Compton and stopping briefly. Police officers went to the location, searched a dumpster there, and found a nine-millimeter handgun that had been chopped into several pieces. The nine-millimeter casings found at the Lazcano, Vong, Villagrana and Cordova shootings were all fired from the same gun. Those casings could have been fired from the recovered gun, but no matching was possible due to the damage to the gun.

On April 7, 2010, police put out a press release indicating a link between the Cordova and Villagrana shootings. The information was published in a news article.

The next day, April 8, appellant called Sedillo and said, "They linked both of the jobs already." "Both of those jobs, with the fool from 18 and the fool from Pobre . . ." Appellant opined that police had linked the two killings because the same gun was used, but would not be able to prove he was the shooter. The same day, appellant told Rios that he had gotten rid of the gun, so police would not be able to prove he was the shooter without eyewitnesses. Appellant expressed concern, however, because "when I did the fool from 18th" some people in an alley saw and told police they saw someone in a white car. Appellant also said that witnesses said there was another person with him, but he was alone.

On April 10, 2010, appellant spoke with Herrera and another man and said, "I blasted on them fools from Pobre."

Appellant was arrested on May 20, 2010. He testified on his own behalf at trial and denied committing the charged shootings. He blamed Herrera for the shootings. Appellant claimed he was with Herrera, Raul and two other ESL gang members moments

before the Lazcano shooting, knew something was going to happen and left. He stated that on January 30, 2010, he was at a home near the Cordova shooting when Herrera and an ESL gang member named "Yaps" borrowed his car. Twenty-five minutes later, he heard shooting. Herrera and Yaps returned a minute later. Either Herrera or Yaps said that Yaps had done a shooting. Appellant claimed Herrera told him he did the Villagrana shooting. Appellant asserted that he had earlier falsely claimed responsibility for some of the shootings in order to improve his status in the gang. Appellant testified that the gun which he destroyed was given to him by Herrera in February 2010.

Discussion

1. Wiretap order

In March 2010, police obtained a wiretap order for appellant's cell phone and also for the cell phone of Sedillo, with whom appellant frequently spoke. Before trial, appellant moved to suppress the evidence obtained from the wiretap of his cell phone. As part of this motion, appellant moved to traverse the affidavit supporting the wiretap order and quash the order on the grounds that there were material misrepresentations in the affidavit supporting the application, and absent those misrepresentations there was no probable cause for the wiretap order and no showing of necessity for the order. A portion of the affidavit was sealed, and appellant moved to unseal it.

The trial court held a hearing on appellant's motions. Long Beach Police Detective Richard Carr, the affiant for the wiretap application, testified about the non-sealed portion of the affidavit. The trial court then held an in camera hearing with the prosecutors and Detectives Carr, Cortes and Sisneros. The transcripts of the hearing were sealed. Following the hearing, the trial court found the sealed potion of the affidavit had been properly sealed. The denied appellant's motion to quash or traverse the wiretap and also denied the motion to suppress evidence. Appellant contends the trial court erred in denying those motions, and the admission of the wiretap evidence violated his Fourth Amendment rights. We do not agree.

a. Wiretap statute

In order to obtain a wiretap order, the applicant for the order must show "[t]here is probable cause to believe that an individual is committing, has committed, or is about to commit" one or more crimes specified in section 629.52, there is probable cause to believe targeted communications by the individual involving the specified crimes will be obtained through the wiretap and "[n]ormal investigative procedures have been tried and have failed or reasonably appear with to be unlikely to succeed if tried or to be too dangerous." (§ 629.52.) Murder is one of the specified crimes. (§ 629.52, subd. (a)(2).)

A person may move to suppress some or all of the contents of any intercepted wire communication or evidence derived therefrom "only on the basis that the contents or evidence were obtained in violation of the Fourth Amendment of the United States Constitution or of this chapter. The motion shall be made, determined, and be subject to review in accordance with the procedures set forth in Section 1538.5." (§ 629.72.)

b. Motion to traverse

Appellant sought to traverse the search on the ground that the warrant was supported by material misrepresentations and speculation designed to be misleading.

A defendant may seek to suppress evidence by traverse on the ground the affidavit supporting the search warrant contained inaccurate statements or omissions if the misstatements or omissions were deliberate or reckless on the affiant's part and were material to the finding of probable cause. (*Franks v. Delaware* (1978) 438 U.S. 154, 156; *People v. Carpenter* (1997) 15 Cal.4th 312, 362-363.) "Innocent or negligent misrepresentations will not support a motion to traverse." (*People v. Scott* (2011) 52 Cal.4th 452, 484.) The affidavit supporting a search warrant is presumed valid. (*Ibid*.)

The trial court found that appellant's "allegations of material misrepresentations, omissions, misstatements, falsities, anything in that regard are not supported by the

unsealed nor the sealed portion."[4] We have reviewed the sealed and unsealed portions of the affidavit, and the testimony at hearings held in open court and in camera hearings. As we explain below, substantial evidence supports the trial court's finding that there are no material misrepresentations in the affidavit. (*People v. Hepner* (1994) 21 Cal.App.4th 761, 776, 26 Cal.Rptr.2d 417 ["to the extent the court heard evidence and resolved factual issues in the [defendant's] efforts to traverse the affidavit in support of the search warrant, the trial court's good faith factual findings, "'whether express or implied, must be upheld if they are supported by substantial evidence"'"].) Assuming we independently reviewed the record, we would find no deliberate misrepresentations and no speculation designed to deceive.

i. "Investigation Linking Ruhani and Sedillo to the Target Offenses" section

Appellant claims there are four material misrepresentations in the investigation section of the affidavit. Three of these statements concern possible motives for the crimes. One involves descriptions of the car driven by appellant.

Appellant contends that in Paragraph 173 Detective Cortes "speculated" that appellant's brother Raul was once a member of the 18th Street gang but had "gone over" to ESL, a rival of the 18th Street gang. Appellant claims Raul's change of gang membership was material because it was given as a possible motive for the Villagrana murder. Appellant overlooks the first part of Paragraph 173, which documents that Long Beach Police officers conducted a field interview of Raul and Villagrana in 2000. Villagrana was a member of the 18th Street gang. It would be reasonable to infer from this companionship that Raul was affiliated with the 18th Street gang at that time.

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[4] The court noted that "in terms of the *Hobbs* [review], the court believes that the moving documents of the defense do not substantiate, and the court believes . . . that the party has not met its burden by the preponderances of the evidence to basically, in essence, allow the court to conduct an in camera hearing. It is not automatic." The court explained that due to the seriousness of the case, the court "decided to proceed with the in camera hearing vis-à-vis the *Hobbs* to err on the side of caution." (See *People v. Hobbs* (1994) 7 Cal.4th 948.)

Appellant also overlooks the fact that the affidavit explains in Paragraph 18, subdivisions (e) and (f), that Raul was interviewed by named Long Beach Police officers once in 2006 and three times in 2009, and that that "Raul has been documented having 'HA' (Harbor Area) tattooed on his arms, indicating an affiliation with ESL. Harbor Area includes all the gangs, with the exception of the 18th Street gang in the Long Beach, Carson, and Wilmington area." Thus, Detective Cortes was not simply speculating about Raul's gang membership, and the discussion of Raul's gang membership was not misleading.[5]

Appellant contends Paragraph 175 includes both a materially false statement and speculation. This paragraph discusses an arson incident at the Brite Spot restaurant which Detective Cortes concluded was a possible motive for the attempted murders of Lazcano (and another man, Christian Cruz). Appellant contends Detective Cortes's statement that "Raul's cousin" was the manager of the Brite Spot restaurant is false. Even assuming counsel's unsworn statement in a brief is sufficient to show that no relative of the Bustamantes worked at the restaurant, there is nothing to show that the statement was knowingly false or made with recklessly disregard for the truth. Detective Cortes might have received inaccurate information in the course of his investigation, or may simply have made a mistake. In any event the precise nature of Raul's relationship with a manager at the restaurant is not a material fact.[6]

Appellant contends Detective Cortes was speculating when he stated that the restaurant manager may have reviewed restaurant surveillance video of an arson incident

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[5] Even if Raul's companionship with Villagrana in 2000 did not show that Raul was a member of Villagrana's gang, it certainly shows that the two men had a friendly relationship at that time. Raul's subsequent membership in a gang which was a rival of Villagrana's gang would certainly have ruptured the friendly relationship between the two men and provided a motive for the murder. Further, the 18th Street gang and ESL were rivals, and such rivalry is often the motive for gang murders.

[6] As set forth in the affidavit, it was well documented that over the course of many criminal investigations, the Long Beach Police Department had concluded that the restaurant either had ties with ESL or allowed members of ESL to conduct criminal activities there, and that the management would not cooperate with police in criminal investigations. Thus, a blood relationship between Raul and the manager would not have made it more likely that the manager would have assisted Raul.

involving Raul's girlfriend's car and told Raul that the arsonists were Lazcano and Cruz, and that Raul shot the men in retaliation. The paragraph as a whole makes it clear that Detective Cortes was offering an opinion based on a variety of sources, ranging from investigators to unidentified sources, and the tentative nature of the opinion is apparent from its wording. Thus, there is nothing to suggest that Detective Cortes's opinion was intended or designed to be misleading, or that Detective Carr included the opinion in the affidavit to mislead the reader.

Appellant contends that Paragraph 176 is also speculative. That paragraph states that "investigators" learned that Villagrana had an altercation with Sedillo, during which Villagrana "may" have struck Sedillo and this incident is a "possible motive" for Villagrana's murder. The tentative nature of the investigators' conclusions is apparent from the language of the paragraph. Thus, there is nothing to suggest that Detective Carr's inclusion of this information in the affidavit was intended or designed to be misleading.

Appellant contends that Paragraph 126 falsely states that appellant's four-door white Corolla matched a witness's description of a two-door white Tercel at the Limon shooting (a shooting which ultimately was not included in the trial of this case). Appellant contends his car was a four-door white Corolla. The affidavit did not say that appellant drove a Tercel, only that appellant's car matched the description of the Tercel. Both cars were small, white and made by Toyota. These descriptions do match. Further, a different witness to the Limon shooting described the car as a small white car, possibly Toyota or a Nissan. Elsewhere in the affidavit it is noted that a witness stated that appellant has a white Toyota Corolla. It was also stated that police surveillance observed appellant in a white Toyota Tercel. There was clearly confusion about the model name of the small white Toyota appellant drove. There is nothing to suggest that this statement was knowing false or intended to mislead.

ii. "Statement of Probable Cause" section

Appellant contends that Paragraph 23, subparagraph (a), falsely states that witness Mesinas saw appellant speaking with Lazcano five minutes before Lazcano was shot. Appellant is correct that this statement appears to be inaccurate. This statement is part of the "overview" section of the affidavit, however, and elsewhere in the affidavit there is a more detailed and accurate account of Mesinas's statement. Paragraph 45 of the affidavit makes it clear that it was Mesinas who spoke with appellant before the shooting, not Lazcano. Thus, there is nothing to suggest that the overview statement was intentionally false or designed to mislead.

iii. Sealed portion of the affidavit

In his reply brief, appellant contends that respondent has improperly argued that this court should uphold the wiretap order solely on the basis of the sealed portion of the affidavit. We do not understand this to be respondent's argument. As is discussed in more detail below, we have not relied on the sealed portion of the affidavit at all in our finding of probable cause.

Appellant contends that by showing "numerous false statements and misrepresentations in the unsealed material," he has "cast substantial doubt on the veracity of the sealed portion of the record." He argues that where "law enforcement has been untruthful and misleading in public, there is no basis to infer they were scrupulously honest in private." Appellant cites no authority for these contentions. However, the lack of authority is not significant, since we have determined that appellant has not shown any deliberate material misrepresentations in the unsealed material. Thus, there is no basis to infer dishonesty in the sealed material.

In addition, we have reviewed the sealed portion of the affidavit and the transcript of the in camera hearing in connection with the motion to traverse, and have found no material misstatements or omissions. We have also determined that the material was properly sealed. (See *People v. Hobbs, supra*, 7 Cal.4th 948.)

b. Motion to quash

Appellant also brought a motion to quash the wiretap order. He contended that without the false and misleading statements identified in the motion to traverse, there was no showing of probable cause.

"The question facing a reviewing court asked to determine whether probable cause supported the issuance of the warrant is whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing. (*Illinois v. Gates* (1983) 462 U.S. 213, 238-239 [103 S.Ct. 2317, 2332, 76 L.Ed.2d 527]; *People v. Camarella* (1991) 54 Cal.3d 592, 600-601 [286 Cal.Rptr. 780, 818 P.2d 63].) 'The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.' (*Illinois v. Gates, supra,* at p. 238 [103 S.Ct. at p. 2332].)" (*People v. Kraft* (2000) 23 Cal.4th 978, 1040-1041.)

As we discuss above, the statement about appellant speaking with Lazcano is incorrect, some opinions in the affidavit are based on sources whose reliability has not been shown, and there are minor inconsistencies in the description of appellant's car. These flaws are apparent from reading the affidavit as a whole. Setting aside these flawed statements, there remains a substantial basis for a magistrate to conclude that a fair probability existed that the wiretap would uncover evidence of wrongdoing. Probable cause existed to issue the wiretap order.

The same gun was used to commit at least nine shootings in Long Beach over a six-month period. The shootings with identified victims took place primarily in ESL gang territory. Most victims were members of gangs other than ESL. These circumstances suggest the shooter was a member of or affiliated with ESL. Appellant was an ESL gang member. The Mesinas father and son, both independent witnesses, put appellant at the scene of one of the shootings a few minutes before the shooting. They reported that appellant was concerned with police presence in the area before the

shooting, and left the area immediately after the shooting. Aguirre, the victim in another shooting selected appellant as looking like the shooter, at least from the nose up. A small white Japanese car was observed near two of the shootings. Appellant drove a small white Toyota. These facts provide a substantial basis for concluding that a fair probability existed that a search would uncover evidence of wrongdoing. (See *Illinois v. Gates, supra*, 462 U.S. at pp. 238-239.)

c. Necessity

Appellant also sought to quash the warrant on the ground there was no showing of necessity for a wiretap.

"[T]he government may establish the need for a wiretap by showing either (i) that normal investigative procedures have been tried and failed, or (ii) that normal investigative procedures, though not yet tried, 'reasonably appear' to be either 'unlikely to succeed if tried' or 'too dangerous.' In reality, this gives the government three alternative ways to establish the need for a wiretap." (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1204.) "[I]t is not necessary that law enforcement officials exhaust every conceivable alternative before seeking a wiretap." (*People v. Leon* (2007) 40 Cal.4th 376, 385.) "Instead, the adequacy of the showing of necessity is to be tested in a practical and commonsense fashion . . . that does not hamper unduly the investigative powers of law enforcement agents." (*Ibid*.) "The finding of necessity by the judge approving the wiretap application is entitled to substantial deference." (*Ibid*.) The majority of federal circuits and courts in other states hold the trial court's ruling on necessity should be reviewed for abuse of discretion. (*Id*. at p. 385, fn. 3 [noting split of authority on standard of review].) A minority reviews for clear error. (*Ibid*.)

Here, the affidavit showing necessity was prepared by Detective Richard Carr, who had been assigned to the Long Beach Police Department's gang division for 23 years. Detective Carr described the investigative techniques which police had already attempted, and showed that they had not been successful. He also identified investigative

techniques which police had not yet tried and explained why these techniques appeared unlikely to succeed if tried. [7]

Appellant contends the application fails to establish that physical surveillance had been tried and failed or that a parole search of appellant's residence would not be successful or would be dangerous.

Appellant points out that the affidavit showed that physical surveillance of appellant had been established on several occasions and of Sedillo on one occasion. Appellant is correct that the affidavit showed that physical surveillance of appellant was possible, but ignores Detective Carr's statement that experience showed that undercover officers conducting surveillance were quickly spotted in the area and surveillance cameras would be difficult to obtain and install. Thus, surveillance would have been unlikely to succeed and possibly also dangerous.

Appellant contends that since only one gun was used in all the shootings by a lone shooter, a parole search of appellant's resident might have found the gun. He contends there was no need for police to worry about other members of the gang. While appellant is correct that only one gun was used, it was not clear when the wiretap order was sought

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[7] Detective Carr explained: (1) they had reviewed criminal histories, field interrogation cards, arrest reports, and other documents, which has provided useful background information, but no information regarding the instant shootings; (2) they had conducted surveillance at various locations on various dates, but feared that further surveillance would have alerted appellant and the other suspects, particularly because in prior investigations in the area, even undercover officers had been swiftly spotted; they also believed that such surveillance was unlikely to provide helpful information; (3) they feared that conducting a parole search on appellant would have alerted the various participants, leading to the destruction of evidence; (4) they believed members of appellant's gang would have swiftly identified any information or undercover officer; (5) they believed any stationary surveillance camera would have been unlikely to record any useful evidence, and in any event, there were no cameras already installed and prior experience indicated it would be difficult to obtain and install such cameras; (6) they doubted that calling the suspects as grand jury witnesses would lead to useful evidence; further it would alert the suspects and other involved individuals, and would require the undesirable issuing of use immunity; and (7) they intended to try to search the suspects' trash, but viewed the possibility of executing such a search without detection as unlikely, and further doubted they would find anything useful.

that appellant was the only one to use the gun. It was even less clear that no other gang members assisted appellant in the shootings. Thus, Detective Carr's statement that a parole search would have alerted other participants and led to the destruction of evidence was a valid explanation for why a parole search had not been tried.

The affidavit made an adequate showing of necessity. (See *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1173 [necessity shown where informants made defendant more suspicious, physical surveillance had been fruitless and use of search warrant would have altered other participants in crime and led to destruction of evidence]; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1207 [necessity shown where witnesses were reluctant to help the police and police feared defendant would learn of investigation and alert others and cause destruction of evidence].)

Since the affidavit showed both probable cause and necessity, the wiretap order was properly issued. The admission of wiretap evidence did not violated appellant's Fourth Amendment rights.

2. Proposed witness Maya

Appellant contends the trial court abused its discretion in excluding testimony by fellow ESL gang member Juan Maya that "Yaps" had admitted shooting a Barrio Pobre gang member on January 30, 2010, the date of the Cordova and Aguirre shootings. He contends the ruling violated his federal constitutional right to present a defense. We do not agree.

a. Applicable law

"[E]vidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" is hearsay evidence. (Evid. Code, § 1200, subd. (a).) Except as provided by law, hearsay evidence is inadmissible. (Evid. Code, § 1200, subd. (b).)

"Under [Evidence Code section 1230,] one of the statutory exceptions to the hearsay rule, a party may introduce in evidence, for the truth of the matter stated, an out-

of-court statement by a declarant who is unavailable as a witness at trial if the statement, when made, was against the declarant's penal, pecuniary, proprietary, or social interest. A party who maintains that an out-of-court statement is admissible under this exception as a declaration against penal interest must show that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. [Citation.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 606-607 [fn. omitted].)[8]

"There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception. The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry. [Citations.]" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334.)

"[T]he fact that certain evidence meets the requirements of an exception to the hearsay rule does not necessarily make such evidence admissible. The exception merely provides that such evidence is not inadmissible under the hearsay rule. If there is some other rule of law . . . that makes the evidence inadmissible the court is not authorized to admit the evidence merely because it falls within an exception to the hearsay rule." (Comments to section 1200.) The most fundamental rule of evidence is that only relevant evidence is admissible. (Evid. Code, § 350.)

We review a trial court's ruling on whether a statement is a declaration against interest for an abuse of discretion. (*People v. Valdez* (2013) 55 Cal.4th 82, 143.) The same standard applies to rulings on the relevance of evidence.

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[8] Evidence Code section 1230 provides: "Declarations against interest [¶] Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

b. Yaps's statement

Maya spoke to police about Yaps's statements about a shooting in February 2010. Yaps died in August 2010, in a car crash.

Maya told police that Yaps had made statements to him about a shooting. According to Maya, he encountered Yaps in the morning of January 31, 2010 and Yaps started talking about events from the night before. Maya asked, "[S]o how do you know you did the guy?" Yaps replied, that "after he let him have it, he turned around – when he started running, he turned around and made sure that the guy wasn't getting up. When he saw the guy like stirring around that's when he jumped in the car and took off." Maya also said that Yaps told him "he ran for the guy and started shooting. He didn't tell . . . me how many times." Although Maya at times indicated that Yaps knew the victim was a Barrio Pobre gang member, Maya's statements as a whole indicated that Yaps did not have personal knowledge that the victim was a Barrio Pobre gang member. Yaps initially said he shot "some fool from Pobre. And like how do you know he was from Pobre? Like because Frosty knew who he was. . . ." Yaps said, that "Frosty had took him and showed him the guy who it was. I asked him if he knew him and he said no and he thought he knew he was from Pobre."

Yaps's statement would have been supplemented by Maya's observations that Yaps was at a party near the scene of the Cordova/Aguirre shooting on the night of the shooting, was given a gun by Frosty (Herrera) and left the party with Frosty in Frosty's blue Yukon.

c. Trial court's ruling

The trial court stated, "When we're looking at the totality of the circumstances and what the court has to consider, it is inconceivable that Yaps's declarations allegedly to [Maya] were against his penal interests in this case as to Mr. Cordova because there's a complete backing [*sic*] because everything else that is questionable in terms of the location, the time; that he didn't know or knew about where he was or didn't know where he was or didn't know that the person was a Barrio Pobre or who the person was . . . . [¶]

So, furthermore, again, as I said before, it could be slightly against Mr. Yaps's penal interests when we consider not only the totality of the circumstances but the evidence in this case, the evidence that has been admitted, the recordings that have been introduced – excuse me, that may have been played. The testimony of Mr. Aguirre. Not only a reasonable court . . . but a most reasonable person under any circumstances could not conclude that the alleged statements had to do anything with this case because Mr. Aguirre was shot at least once on his left leg, and he was shot at least three to five other times as he was crawling. All of the is completely absent from this alleged declaration."

d. Analysis

There is no doubt that Yaps's statement that he shot someone was against his penal interest. However, in order to be admissible, the statement must be, as the trial court phrased it, "against his penal interest *in this case*." (Italics added.) The trial court did not abuse its discretion in finding Yaps's statement did not have "anything" to do with this case.

The January 30, 2010 shooting in this case had two victims: Cordova, who was killed, and Aguirre, who was shot but not killed. Nothing in Yaps's statement suggests there was a second victim involved in his shooting. Further, Yaps provided no admissible details of his shooting which would link it to the Cordova/Aguirre shootings. Yaps stated that the victim was a Barrio Pobre gang member, but his statements as a whole showed that he had no personal knowledge of this affiliation. He was simply repeating statements by Frosty. Further, Yaps gave no clear location for the shooting. According to Maya, Yaps at first said "it was on - off Spaulding" then later Maya "found out it wasn't even on Spaulding." In addition, it is not clear from Yaps's statement that he in fact killed the person he shot. Yaps did not say what parts of the victim his shots hit or how many shots he fired, and at one point said that the person was "stirring around." The fact that Maya appeared to believe that Yaps was talking about the Cordova/Aguirre shootings does not make up for Yaps's lack of specificity about his shooting.

Appellant contends the "trustworthiness standard does not require an evidentiary correlation between a defense witness's statement and the prosecution's case as a threshold to calling that witness for the defense." We understand the trial court's ruling as focusing more on relevance than trustworthiness. However, assuming the trial court found Yaps's statement untrustworthy, we would see no abuse of discretion in that conclusion.

It is not clear what appellant means by the phrase "the prosecution's case." It is, however, quite clear that there must be an evidentiary correlation between the defense witness's statement and the *facts* of the crime. For example, a witness's statement that he saw someone stab to death the victim in the case would not be a trustworthy statement if the autopsy evidence showed the victim was killed by a gunshot wound and had no cuts on his body. Here, Yaps's claim that he ran up to a guy, shot him and then ran away does not match the facts of the January 30, 2010 shootings, which involved two men being shot with the same gun at the same location.

Since Yaps's statement was neither relevant nor trustworthy, the trial court's exclusion of the statement did not violate appellant's federal constitutional rights.

e. Harmless error

Even if the trial court erred in excluding Yaps's statement, the error would be harmless under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The only proof of Yaps's statement would have been Maya's testimony. Maya would not have been a credible witness. Maya sought out police and volunteered the information about Yaps only after Maya had been picked up on an outstanding warrant and was in custody. This timing suggests Maya was seeking an advantage in his own case. Further, Maya claimed that Yaps had left town and he did not know Frosty's real name. Thus, Maya's statement deflected blame from appellant without giving police viable suspects.

Maya's description of events also did not match appellant's description. Each man described an incident which occurred at a house near the Cordova/Aguirre

shootings, but the incidents had nothing else in common. Maya stated that Yaps and Frosty left a party at "Erica's" house at about 9:00 p.m. in Frosty's blue Yukon. Maya said Yaps said he went to a motel after the shooting. At trial, appellant testified that around 11:00 p.m., he was at Roberto Padilla's house when Herrera (Frosty) and Yaps asked to borrow his car, he agreed and the two men drove away in it. Appellant heard shots 25 minutes later. A minute after that, Yaps and Herrera returned. [9] Thus, admission of Maya's statement would have hurt the defense.

Further the evidence against appellant was very strong. Aguirre identified appellant as the shooter. Appellant's reaction to the press release put out by the police was to immediately camouflage his car by getting it painted and adding hubcaps. Appellant also destroyed his nine-millimeter handgun. Appellant boasted of killing a Barrio Pobre member, and described shooting a second person who survived, a description of the crime that was consistent with Aguirre's description. Appellant later lamented that the survivor had seen his face. Although appellant claimed at trial that Herrera participated in the shooting, his claim made no sense, since in none of the recorded conversations did appellant or Herrera or Padilla (or anyone else) indicate that Herrera or Yaps were involved, or that the gun came from Herrera.

There is no reasonable possibility or probability that appellant would have received a more favorable verdict if Maya had been permitted to testify.

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[9] Appellant contends there is no way to know if he "would have given the same testimony or any testimony at all" if the trial court had admitted Maya's testimony. Appellant's contention that he might not have given the same testimony if Maya had testified is baffling. Appellant took an oath to tell the truth when he testified at trial. His testimony should be the same regardless of who testifies before him. It is possible, but highly unlikely that appellant might have elected not to testify if Maya did. Much of appellant's testimony was devoted to explaining his incriminating statements made during intercepted telephone calls, and his attempts to suppress evidence by painting his car and disposing of the gun used in the shootings. Maya's testimony would not have helped with that.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MINK, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

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