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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL PARKS, Defendant and Appellant.	B285035 (Los Angeles County Super. Ct. No. PA087400)

APPEAL from judgment of the Superior Court of Los Angeles County, Hilleri G. Merritt, Judge. Affirmed.

David Andreasen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb,

Supervising Deputy Attorney General, David A. Voet, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Michael Parks guilty of murder. (Pen. Code, § 187, subd. (a).)[1] It found true firearm use allegations under sections 12022.5, subdivision (a), and 12022.53, subdivisions (b)–(d). It also found true the allegation that Parks used a deadly weapon (sharp object) in commission of the murder. (§ 12022, subd. (b)(1).)

In a bifurcated bench trial, the trial court found true the allegations that Parks had suffered two prior strike convictions (§§ 667, subd. (d), 1170.12, subd. (b)), a prior serious felony (§ 667, subd. (a)(1)), and seven prior prison terms (§ 667.5, subd. (b)).

Parks was sentenced to a total of 113 years to life in state prison, consisting of 25 years to life for the murder, tripled under the three strikes law, plus 25 years to life for the firearm enhancement pursuant to section 12022.53, subd. (d), plus 1 year for the section 12022, subdivision (b)(1) enhancement, plus 5 years for the prior serious felony conviction under (§ 667, subd. (a)(1)), and 7 years for the prior prison term enhancements pursuant to section 667.5, subdivision (b).

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

On appeal, Parks contends the trial court erred by admitting the preliminary hearing testimony of a witness improperly deemed unavailable, admitting evidence of the victim's state of mind, and excluding evidence of third party culpability. Parks claims that even if he was not prejudiced by these trial errors individually, their cumulative effect deprived him of a fair trial. Parks also claims sentencing error. He specifically argues that there was insufficient evidence for the court to find that his prior juvenile adjudication qualified as a strike offense, and that the court erred when it failed to stay the one-year section 12022, subdivision (b)(1) enhancement as required under section 1170.1, subdivision (f). Finally, Parks contends that we must remand the matter to the trial court to allow it to exercise its discretion to strike the 25-year firearm enhancement imposed under section 12022.53, subdivision (d) pursuant to Senate Bill No. 620, and the 5-year prior serious felony conviction enhancement under section 667, subdivision (a)(1) pursuant to Senate Bill No. 1393. The People concede that the amendments effectuated by Senate Bill Nos. 620 and 1393 apply retroactively, but contend remand is not appropriate in this case, because it would be futile. We affirm the judgment.

FACTS[2]

The victim, G'Teasha Fisher, dated Parks for about eight months. Parks's uncle, Paul,[3] and his girlfriend, Wendy Gutierrez, lived in a house in Pacoima. Parks stayed with them frequently and slept on the living room couch. Fisher also stayed at Paul's house for between one and three months, both when Parks was there and when he traveled.[4]

The Day Before the Murder

On September 6, 2016, Fisher met her cousin, Mary Allen, at a car wash, where they sat and talked for about two hours. Fisher told Allen that she had left Parks and there was no going back. She had to get away from him because she was tired of being disrespected and did not like how he treated her son. Fisher said she and Parks had been arguing that day.

Parks called Fisher three times during her conversation with Allen. During one of the calls, Fisher

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[2] The facts are as presented by the prosecution.

[3] Because Paul Parks and Michael Parks share the same last name, we refer to Paul Parks as Paul for clarity.

[4] Gutierrez testified she never saw any violence between Fisher and Parks. She had once seen Parks with a gun. The last time Gutierrez saw Fisher at the house was on September 1, 2016, when she and Parks stopped by.

placated Parks by saying she did not leave him and she was coming back, but as she did so she mouthed to Allen that she was not actually going back. Fisher was very calm when speaking to Parks. After hanging up, Fisher said something about Parks leaving on a plane the next day, after which she would be "done with him" or "free."

Immediately after the last phone call with Parks, Fisher wanted to leave the car wash. A car honked nearby, and Fisher told Allen she heard the same car horn on Parks's end of the line while they were on the phone. Allen invited Fisher to her house, but Fisher replied, "No, he knows where you live." Fisher was afraid Parks would find her and appeared to be afraid of him. She told Allen she would be fine because she was going to stay at a friend's house. She would not tell Allen her friend's name.

At 9:43 p.m., Fisher received a text message from Parks reading, "You serious? You doing this?"

Two minutes later, she texted back, "Do you seriously think it's okay to talk to me and treat me like that?"

Parks then asked Fisher to take him to the airport. Five minutes later he texted, "Police taking me to jail, knocking on the door."[5]

That night, Fisher stayed with Larry Brown at his apartment in Sylmar. She slept on the couch. The two of them did not have a relationship. Fisher just went to his house occasionally. Fisher mentioned to Brown that she had

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[5] It was stipulated that no police came to Parks's door that day and that he had not been arrested.

broken up with Parks. She had never discussed any violence between her and Parks with Brown and never said she feared Parks.

Gutierrez saw Parks at Paul's house that night. At around 10:00 p.m. or 11:00 p.m., Parks asked her if Fisher had stopped by, and Gutierrez told him she had not.

Paul saw Parks sleeping on the couch at around 11:00 p.m.

Fisher texted with someone later identified by a detective as an old friend of hers around the same time that night:

Friend (10:55 p.m.): "[You] need to bring my money back."

Fisher (10:56 p.m.): "I hot [sic] you calm down."

Fisher (10:56 p.m.): "I got you."

Friend (11:09 p.m.): "On bloods I want my money."

Fisher (11:10 p.m.): "Ok Why are u tripping?"

The Day of the Murder

At 7:30 a.m. or 8:00 a.m. on September 7, 2016, Fisher left Brown's apartment. She agreed to come back at 10:00 a.m., but never returned.

Gutierrez left Paul's house at 5:00 a.m. or 6:00 a.m. She did not see Parks there.

Paul saw Parks at the house at 7:00 a.m. Parks wanted Paul to take him to LAX because he was going to fly to Chicago. Paul had to work, so he paid Cynthia Davis to

drive Parks to the airport. Paul went to work at Lakeview Terrace. When he finished, he went to Burger King to play chess. Paul left Burger King between 1:00 p.m. and 2:00 p.m. to go to Los Angeles for another job.

Gutierrez's friend, Brittany Loud, rode her bicycle to Paul's house between 8:00 a.m. and 10:00 a.m. to find Gutierrez, take a shower, and get dressed. The door was unlocked and she let herself in.[6] No one was there when she arrived. When Loud got out of the shower Parks was in the living room.

Davis arrived. She and Parks discussed that he was running late and would miss his flight. Davis drove him to LAX. Parks had a duffel bag with him. Davis observed that Parks did not move his phone away from his face during the entire ride. He looked crazy. Davis dropped him off at the airport.

Cell phone records indicated that Parks's phone was pinging cell towers in the vicinity of LAX between 9:10 a.m. and 9:51 a.m.

At 11:31 a.m., Parks sent Paul a text reading, "Unc, toy coming," which could be interpreted as, "Uncle, you coming?"

At 11:45 a.m., Parks texted Fisher that he told Paul to give her some marijuana.

Parks's phone was pinging cell towers in Pacoima between 11:57 a.m. and 12:55 p.m.

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[6] Loud testified that she usually hung out and did drugs at Paul's house. She was intoxicated the morning of the murder.

Davis returned to Paul's house at around 1:30 p.m. Loud was there. Davis asked Loud if Parks had made his flight, and Loud said he had not. Davis then saw Parks walk outside. She asked him what happened. Parks smiled and walked away. Parks was at the house the whole time Loud and Davis were there. He had a black duffel bag with him.

Parks took photos of Loud at Paul's house on his cell phone at 1:45 p.m. and 1:46 p.m. Loud did not remember posing for the photos. She needed a ride to the house where her child's father lived, so Davis drove her there. Before they left, Loud borrowed Parks's phone and called Paul.

At 3:50 p.m., Fisher called her friend, LaCheryl Nash. She told Nash that Parks had left. She said he tried to get on a plane with $100 worth of marijuana, but could not, so she was going to Paul's house to pick it up.

At 3:53 p.m., Paul received a call from Fisher while he was driving. She asked him if she could come to his house to pick up her belongings.

At 3:59 p.m., Fisher called Parks.

Paul missed calls from Parks at 4:00 p.m. and 4:04 p.m., then answered a call from Fisher at 4:05 p.m. At 4:10 p.m., Paul answered a call from Parks.

Fisher made four calls to other people between 4:16 p.m. and 4:21 p.m.

At 4:24 p.m., Paul answered a call from Fisher. This was the last time he spoke with her.

Shortly before 4:30 p.m., Loud and Davis returned to Paul's house. The front door was wide open. Loud walked in

and saw Fisher on the living room floor, lying on her stomach. She was trying to breathe and there was a lot of blood on the floor.

Loud ran out of the house and told Davis they needed to call somebody and to come inside. Davis went in and saw Fisher lying on the floor, blowing bubbles in her blood.

At 4:30 p.m., Loud borrowed a phone from a neighbor and called 911.

At 4:36 p.m., Parks's cell phone logged an internet search for "herb store downtown in the fashion district."

At 4:41 p.m., Paul called Parks. Parks asked him if Fisher had picked up her things. Either during this call or the 4:10 p.m. call, Parks said something happened with Fisher and "it wasn't good" and he "lost it." This was the last time Paul spoke with Parks.

Shortly after the call with Parks, Paul received calls from friends, informing him there had been a murder at his house and that he needed to come home.

The Los Angeles Police Department was notified of the homicide at 4:41 p.m.

Paul's neighbor Reina Pineda was in her backyard between 4:00 p.m. and 5:00 p.m. She saw an African American man passing by, jumping over people's fences. The man had a cell phone in his hand. The man tried to jump into her backyard but was scared by her dogs. He asked Pineda's son-in-law, Shousy Diaz, if he could go through the backyard, but Diaz refused. The man continued going toward the street.

Between 1:00 p.m. and 4:45 p.m., Parks's phone pinged cell towers in the area of Paul's house.[7] Afterwards, the phone moved toward downtown Los Angeles.

At 5:00 p.m. and 5:01 p.m., Parks called Fisher, but the calls were not answered.

The Investigation

The crime scene was secured at around 5:00 p.m.

There was a large pool of blood on the hallway floor, red stains on the couch, and a blood stain on an electrical cord. The hallway had blood smear.[8]

Police discovered a .40 caliber casing on the living room floor and a balled-up plain t-shirt on the couch with red spatter on it. Parks's black duffel bag was on the kitchen table, as it had been when Loud found Fisher. The bag had male clothing, a receipt for an airline ticket in Parks's name, and photos of three people, one of whom resembled Parks. There were blue jeans with a belt on a chair. Fisher's cell phone was at the back of the couch.

After 8:00 p.m. that evening, Pineda identified Parks in a six-pack photo lineup as the man she had seen.

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[7] The towers also serviced the area where Parks's grandmother lived. Parks was close with his grandmother. Paul often saw Parks at his grandmother's house.

[8] No blood or DNA from the crime scene was tied to Parks.

An autopsy revealed that Fisher suffered five sharp force injuries, strangulation injuries, and a single close-range gunshot wound to the head. The gunshot wound would likely have been immediately fatal, but she would have had approximately 90 seconds of reserve air from which to continue breathing.

Parks's Flight and Arrest in Las Vegas

Parks called his cousin, Chiquita Williams, at 5:47 p.m. on the evening of the murder. Williams lived in Las Vegas.

Parks told Williams he was coming to Las Vegas and needed a ride from the Greyhound bus station. The visit was not planned, but it was not unusual for Parks to visit unannounced.

Security camera footage from a Greyhound bus station in downtown Los Angeles showed Parks entering at 8:00 p.m. and standing at the ticket kiosk at 8:12 p.m. At 12:22 a.m. he was standing in the loading area for a bus to Las Vegas.

Williams received another call from Parks at 5:00 a.m. He said he needed to be picked up from the bus station and asked if he could stay with her.

Williams and her boyfriend picked Parks up at around 5:15 a.m. Parks was wearing black pants, black Nike shoes, a grey hoodie or long-sleeved shirt, and a white shirt underneath the hoodie. The hoodie or long-sleeved shirt was

too small for Parks. They drove back to Williams's apartment and went to sleep.

An FBI fugitive apprehension unit was dispatched to Williams's apartment that day. Parks did not answer when agents knocked on the door, but he answered their phone call and confirmed he was inside the apartment. He said he had a gun and wanted a bit more time before he came out. Parks eventually surrendered and was taken into custody. He was wearing black pants, the same gray shirt, and shoes that belonged to Williams's boyfriend.

No gun was found. Parks told an agent he only said he had a gun to buy time.

Williams gave the officers a Greyhound bus ticket in the name of Reggie Smith, showing a departure from Los Angeles at 12:30 a.m. with arrival in Las Vegas.[9]

Williams called officers the next day and gave them a shirt reading "For sale, husband," with blood on it, which she had thrown away along with a pair of shoes. Parks was the sole source of the blood on the shirt.

Parks's cell phone had a small amount of dried blood on it. He was the sole source of the blood on the phone.

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[9] Parks's DMV file did not reflect prior use of the name Reggie Smith.

DISCUSSION

Unavailable Witness

Parks contends the trial court's determination that Pineda was unavailable to testify and the subsequent admission of her preliminary hearing testimony was based on incompetent evidence and violated his constitutional right to confront witnesses against him. We conclude that his contention that the prosecutor's representations were insufficient to establish reasonable diligence is without merit; Parks's right to confront witnesses was not implicated.

Law

"A defendant has a constitutional right to confront witnesses, but this right is not absolute. If a witness is unavailable at trial and has testified at a previous judicial proceeding against the same defendant and was subject to cross-examination by that defendant, the previous testimony may be admitted at trial. (*Barber v. Page* (1968) 390 U.S. 719; *People v. Enriquez* (1977) 19 Cal.3d 221, 235, disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [(*Cromer*)]; [Fed.] Evid. Code, § 1291.) The constitutional right to confront witnesses mandates that, before a witness can be found unavailable, the prosecution must 'have made a good-faith effort to obtain his

presence at trial.' (*Barber v. Page*, *supra*, at p. 725, quoted in *People v. Enriquez*, *supra*, at p. 235; see also *Ohio v. Roberts* (1980) 448 U.S. 56, 74.)" (*People v. Smith* (2003) 30 Cal.4th 581, 609 (*Smith*).)

In California, a witness is "unavailable" if the declarant is "[a]bsent from the hearing and the court is unable to compel his or her attendance by its process" under Evidence Code section 240, subdivision (a)(4), or "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process" under Evidence Code section 240, subdivision (a)(5). The burden of establishing unavailability and due diligence is on the proponent of the evidence. (*Smith*, *supra*, 30 Cal.4th at p. 609; *People v. Foy* (2016) 245 Cal.App.4th 328, 339.)

We independently review a trial court's due diligence determination. (*Cromer*, *supra*, 24 Cal.4th at p. 901.)

Proceedings

At arraignment on January 3, 2017, Parks refused to waive time for trial. Over Parks's objection, the trial was continued twice for good cause on defense counsel's motion until April 24, 2017, and then until June 1, 2017. On Thursday, May 25, 2017, the parties estimated that four weeks would be needed for trial. The court ordered a jury panel for June 1, 2017, and ordered the parties to appear for a pretrial motions hearing on May 31, 2017. The court

requested that defense counsel inform it as soon as possible if the June 1, 2017 trial date did not afford her adequate time to prepare. The court reconvened on May 30, 2017, and began jury selection.

On May 31, 2017, the prosecution informed the court that Pineda and Diaz had been served with subpoenas the night before and had informed the serving detective that they were leaving for El Salvador on May 31, 2017, and would not return until June 30, 2017. The prosecutor stated, "[e]ven though they are cooperative, they said they can testify after June 30, although I don't know if the case will go that far, even though we gave a four-week estimate." The court noted that even if trial went to June 30, Pineda and Diaz would be returning at the end of trial, not at the end of the prosecutor's case-in-chief. The prosecutor requested that Pineda's preliminary hearing testimony be read into the record "since she is now unavailable to testify and cannot move her flight."[10] The prosecutor alternatively asked for a continuance.

The court stated that it did not have authority to subpoena Pineda in El Salvador, and that under Evidence Code section 240, subdivision (a)(4), a witness is unavailable if she is absent and the court is unable to compel her attendance by its process. Defense counsel summarily objected to a finding of unavailability. The court stated that more research was required because Parks had not waived

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[10] The prosecutor made no request with respect to Diaz, who had not testified at the preliminary hearing.

time. The court noted that due to the uncertainty of the start date for the trial it was difficult for the parties to subpoena witnesses in advance. It did not "think the People were in any way, shape or form being dilatory." The court reiterated: "So the question becomes is this enough under Evidence Code section 240 to make a witness unavailable? So if you can do research on that, I'll rule on that later."

In a subsequent discussion of various evidentiary issues, the court reiterated that it would take up those issues when the parties were "more prepared," and stated, "we'll also deal with whether or not Ms. Pineda's prelim testimony would come in, because if she is unavailable under 240, it would." Parks's counsel clarified for the court the nature of Pineda's prior statements and preliminary hearing testimony, stating: "[Pineda] did not with 100 percent certainty positively identify my client, ever. In a six pack, she put it at five out of ten. At prelim she was asked to look at my client twice, never identified him, and then stated she could have been mistaken."

On June 2, 2017, the prosecutor filed a written motion requesting that Pineda be deemed unavailable and that the court either allow her preliminary hearing testimony to be read into the record or grant a short continuance to ensure Pineda's testimony upon her return from El Salvador on June 30, 2017. The motion stated that a detective had served Pineda on May 30, 2017. Because Pineda is a Spanish speaker the detective also contacted Diaz, who speaks English, via telephone. Diaz informed the detective

that the family had a planned vacation to El Salvador and were leaving the next day. They were cooperative and would testify when they returned on June 30, 2017. The detective returned to the residence the next day with a Spanish-speaking officer and witnessed many family members gathered at Pineda's house preparing to leave the country. The prosecutor informed the court of the situation the same day.

In the motion, the prosecution asserted that Pineda was unavailable under Evidence Code section 240, subdivisions (a)(4) and (a)(5). The prosecutor claimed she had exercised due diligence by effecting service on Pineda on the second court day after the defense announced readiness for trial. At that time, Pineda informed the serving detective that she had a pre-planned paid vacation scheduled for El Salvador the next day. The prosecution was not aware of any treaty between the United States and El Salvador for the transfer of witnesses testifying at trial, but even if such a mechanism existed it would likely take longer to effectuate the transfer than it would take for Pineda to return to the United States to testify of her own volition. Pursuing transfer would therefore be futile. There were no reasonable means to compel Pineda's attendance at trial. Parks had the opportunity to fully cross-examine Pineda at the preliminary hearing, so the requirements for unavailability had been met.

Later on June 2, 2017, the trial court heard further argument on the issue of whether Pineda was unavailable

under Evidence Code 240. The court asked if defense counsel wanted more time to research the issue. Defense counsel declined, stating: "I think, for the record, and informally, I think we need to have Detective Dinlocker come in and have a due diligence hearing to determine what, in fact, he did." The court responded, "Well, here's the thing. Usually a due diligence hearing is required when the witness has not been served. In this case it was served. She just essentially ignored it because she had a pre-planned vacation. So the question becomes what more diligence can the People show, other than serving the witness, that Detective Dinlocker could help us with?" Defense counsel submitted without further comment.

The trial court ruled, "I think the People have met their burden. They did what they could. They subpoenaed the witness. The witness then promptly took off on vacation. I don't see -- I mean she's the definition of unavailable. Unless there was evidence to the contrary that, in fact, they said, 'No, no, go ahead, we'll deal with it,' which I don't have any evidence before me of that, I think under 240 the People have met their burden. Therefore, Ms. Pineda is the embodiment of unavailability. [¶] So the People can use her preliminary hearing transcript to be read at the time they would normally have called her." The court ordered that any portions of the testimony to which objections had been sustained be redacted, and noted that it would instruct the jury on the preliminary hearing transcript evidence under CALCRIM No. 317.

Pineda's preliminary hearing testimony was read to the jury. She testified that on September 7, 2017, between 4:00 and 5:00 p.m., while in her backyard she saw a man crossing her neighbors' fences. When asked whether the person she previously saw crossing the fences was present in the courtroom during her testimony, Pineda said she could not describe the person she saw, and did not see him in the courtroom. When she was asked a second time if the man she previously saw from her backyard was in the courtroom, she stared at Parks for approximately five seconds, and said, "Oh, Jesus." When asked if Parks was the man she had seen, Pineda said she did not remember. Pineda agreed that the person she had circled on the six-pack line-up (Parks) when interviewed by the police was the person she told the police she had seen running near her backyard.

During cross-examination at the preliminary hearing, Pineda rated her certainty of the photo identification she had made as a 5 on a scale of 1 to 10. She was not 100 percent sure the photo she chose was the man she saw. She testified that she told the prosecutor during a break, that she may have made a mistake in her identification from the photographs.

At trial, investigating Detective Robert Dinlocker testified that he was present at counsel table when Pineda testified at the preliminary hearing. In Detective Dinlocker's opinion, Pineda appeared "terrified." She told Detective Dinlocker she was afraid and did not want to get involved. He described Pineda as nervous and reluctant to

answer questions. During the break in Pineda's testimony, Detective Dinlocker noticed Pineda physically shaking.

Analysis

Defense counsel's objections to admission of Pineda's preliminary hearing testimony at trial consisted of her summary affirmation that she objected to its admission under Evidence Code section 240, subdivisions (a)(4) and (a)(5) because Pineda was not "unavailable." Specifically, counsel asserted that the prosecution did not exercise reasonable diligence to secure Pineda's appearance at trial. Counsel also objected to the court's reliance on the representations of the prosecutor regarding Pineda's unavailability, stating: "I think, for the record, and informally, I think we need to have Detective Dinlocker come in and have a due diligence hearing to determine what, in fact, he did." The specific objection was that the detective's sworn testimony was necessary to establish what occurred on May 30, 2017, and May 31, 2017, when he was present at the residence. On appeal, Parks also argues that the court's finding that Pineda was "unavailable" under Evidence Code section 240, and the admission of her preliminary hearing testimony violated his Sixth Amendment right to confront witnesses at trial.[11]

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[11] The Attorney General contends that Parks forfeited his confrontation clause challenge by failing to specifically raise it in the trial court. We agree that the confrontation

We reject Parks's contention that the prosecutor's unsworn statements were insufficient to establish unavailability. The arguments below concerned only the "reasonable diligence" requirement for unavailability. Our Supreme Court has held that although such representations may be legally incompetent to establish whether a witness is in the country, they are sufficient to show that the prosecution made reasonable efforts to procure the witness. (*People v. Fuiava* (2012) 53 Cal.4th 622, 677 (*Fuiava*); *Smith*, *supra*, 30 Cal.4th at pp. 608–611 [court accepts district attorney's representation without requiring formal testimony that witness had left the country to support the

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clause violation was not specifically raised below. A defendant may forfeit a confrontation clause argument by failing to specifically raise it with the trial court. (See *People v. Chaney* (2007) 148 Cal.App.4th 772, 777 [confrontation clause argument forfeited because "[b]ased on the context of the objection as well as its language, the objection was one of hearsay, not the Sixth Amendment"]. We assume without deciding, however, that Parks's Sixth Amendment claim was appropriately preserved by his objection that the prosecution had not met its burden under Evidence code section 240. "As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*People v. Yeoman* (2003) 31 Cal.4th 93, 117; see also *People v. Partida* (2005) 37 Cal.4th 428, 436.)

fact that the prosecution made a good faith effort to secure witness's attendance at trial].) Here, the prosecutor represented that she had taken steps to have Pineda subpoenaed and subsequently confirmed that service had been effected. She had spoken to the detective who had relayed to her that it appeared Pineda was ignoring the subpoena and preparing to leave for El Salvador on vacation. These representations were properly considered by the trial court to establish that the prosecution had acted with reasonable diligence and in good faith, but that the witness was nonetheless absent and the court was unable to compel her attendance by process under Evidence Code section 240, subdivision (a).

Parks next argues that, even if it was proper to consider the prosecutor's representations, the People's efforts to secure Pineda's testimony do not reflect reasonable diligence and good faith. "Considerations relevant to the due diligence inquiry 'include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were completely explored.' [Citations.]" (*People v. Herrera* (2010) 49 Cal.4th 613, 622.) Here, the prosecution quickly located Pineda, effecting service on her within two court days of defense counsel announcing readiness for trial. Given their success in serving the witness quickly after the trial date was set, the prosecution acted timely and was not in any way dilatory, as found by the trial court.

Although Parks correctly argues that Pineda's testimony was important, as she was the only eyewitness purporting to see him leaving the area near the crime scene shortly after the time of the murder, securing her testimony nevertheless did not require more of the prosecution than service of process. Significantly, the preliminary hearing transcript that the prosecution offered in lieu of trial testimony included admissions on direct examination and cross-examination that undermined Pineda's identification of Parks. Indeed, as Parks's own counsel noted, "In a six pack, she put it at five out of ten. At prelim she was asked to look at my client twice, never identified him, and then stated she could have been mistaken." Other evidence placed Parks near the scene on the afternoon of the murder, including photos Parks took on his cell phone at Paul's house a few hours before the murder; cell phone records showing Parks's phone pinging cell towers in the area of Paul's house during the time period of the murder; and Parks's black duffel bag, which was left at the scene. Parks also told Paul in a phone call around the time of the murder that something happened with Fisher, "it wasn't good" and he "just lost it." The prosecution's efforts to secure Pineda's testimony were reasonable given how her testimony fit into the overall evidence. (*Fuiava*, *supra*, 53 Cal.4th at pp. 675–676 [prosecution exercised reasonable diligence attempting to secure trial testimony from witness where her testimony at preliminary hearing that she saw defendant running from scene of a shooting after hearing gunshots fired was not of

critical importance because other witnesses and evidence provided stronger support identifying defendant as the shooter.])

Although Parks suggests numerous avenues that the prosecution could have pursued beyond serving Pineda, he did not raise those arguments below. Regardless, "'[a] defendant's ability to suggest additional steps (usually, as here, with the benefit of hindsight) does not automatically render the prosecution's efforts "unreasonable." [Citations.] The law requires only reasonable efforts, not prescient perfection.' [Citation.] 'That additional efforts might have been made or other lines of inquiry pursued does not affect [a] conclusion [that there was due diligence] . . . .'" (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706.) Moreover, defendant's arguments on appeal that Pineda could have changed her plans, or could have been detained under material witness provisions, or returned from El Salvador pursuant to 28 U.S.C. section 1783—none of which were raised before the trial court—are entirely speculative.

The trial court did not err in finding Pineda unavailable pursuant to Evidence Code section 240 and admitting Pineda's preliminary hearing testimony. (See, e.g. *People v.* Cogswell (2010) 48 Cal.4th 467, 472, 477– 479 [witness properly declared unavailable when subpoenaed at the prosecution's behest but refused to comply; prosecution was not required to take "drastic step" of invoking procedures to take witness into custody].) Given the prosecution's due diligence and good faith, there was no

violation of defendant's Sixth Amendment rights under the confrontation clause. (*Smith*, *supra*, 30 Cal.4th at pp. 610–611 [holding that prosecution met state requirement of reasonable or due diligence and demonstrated a good faith effort to obtain witnesses' presence at trial as required under the federal constitution].)

Victim's State of Mind

Parks next contends that evidence of Fisher's fear of him was erroneously admitted because it was inadmissible to prove identity, which was the only issue in dispute at trial. He argues that, to the extent defense counsel failed to object at trial, she rendered constitutionally ineffective assistance.

Even if we were to assume Parks preserved his claim, it fails. Identity was not the only issue in contention. The jury was charged with deciding whether Parks premeditated the murder, and Fisher's state of mind was relevant to that issue. The evidence relevant to her state of mind provided an explanation for her conduct and Parks's reaction. Knowledge of Fisher's fear caused Parks to take steps to lure her to the residence while assuring her that he would not be there. That he knew she would avoid him and orchestrated a plan to ambush her demonstrates that he premeditated the murder. The trial court did not abuse its discretion.

Law

"'Hearsay evidence' is evidence 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" and is inadmissible except as provided by law. (Evid. Code, § 1200, subds. (a) & (b).)

"Section 1250 provides in relevant part that 'evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan . . .) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant.' The evidence admitted under section 1250 is hearsay; it describes a mental or physical condition, intent, plan, or motive and is received for the truth of the matter stated. (See 1 Witkin, Cal. Evidence (3d ed. 1986) The Hearsay Rule, § 735, p. 716.) If offered to prove the declarant's state of mind, the statement may be introduced without limitation, subject only to section 352. However, the declarant's state of mind must be at issue in the case. For instance, evidence of the victim's general fear or dislike of the [defendant] is not relevant unless the victim's state of mind has been placed in issue. (*People v. Noguera* (1992) 4 Cal.4th 599, 622 (*Noguera*).)

"In contrast, a statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. It is not received for the truth of the matter stated, but rather whether the statement is true or not, the fact such statement was made is relevant to a determination of the declarant's state of mind. [Citation.] Again, such evidence must be relevant to be admissible . . . ." (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.)

"Relevant evidence is evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' (Evid. Code, § 210.)" (*People v. Jablonski* (2006) 37 Cal.4th 774, 821 (*Jablonski*).) "We review a trial court's relevance determination under the abuse of discretion standard. (*Jablonski*, *supra*, 37 Cal.4th at p. 821.)" (*People v. Riccardi* (2012) 54 Cal.4th 758, 815 (*Riccardi*) abrogated by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216, on another ground.)

Analysis

In this case, the prosecution sought to admit evidence of Fisher's mental state in the time leading up to the murder through Allen's testimony regarding the conversation she had with Fisher at the car wash the day before the murder. In a written motion, the prosecution moved for admission of the testimony as evidence of Fisher's "then and prior mental state" under Evidence Code sections 1250 through 1252, and

"for the non-hearsay purpose of relevancy to prove Defendant's motive to kill due to the potential break-up, Defendant's intent to harm victim and Defendant's actions the next day of not boarding the plane and instead his plan to kill victim."

Citing to *People v. Hernandez* (2003) 30 Cal.4th 835 (*Hernandez*) [overruled on another point in *Riccardi*, *supra*, 54 Cal.4th 758], *Noguera*, *supra*, 4 Cal.4th 599, and *People v. Ruiz* (1988) 44 Cal.3d 589 (*Ruiz*), Parks argues that "a murder victim's expressed fear of the person charged with the murder [is inadmissible] when the purpose is to prove the killer's identity." He specifically objects to the following evidence, which the court admitted on the stated bases of "fear" and "state of mind":

(1) In a phone conversation the night before the murder, Allen overheard Fisher telling Parks that she was not leaving him. Immediately afterward, Fisher mouthed to Allen that she did not intend to return to Parks.

(2) During the same phone conversation with Parks, Fisher told Allen she heard a car honking nearby which she thought she heard on Parks's end of the line, too, and that she wanted to leave immediately. She said, "Hurry up and get out this car. We gotta go."

(3) Fisher appeared to be afraid of Parks.

(4) Fisher told Allen she would not go to Allen's house that night because Parks knew where Allen lived.

(5) Fisher was afraid Parks would find her.

(6) Fisher told Allen she would spend the night with a friend but refused to tell her who the friend was.

Looking at the statements individually, we conclude that (1), (2), (4) and (6) are nonhearsay statements. These statements were not admitted for their truth, but as circumstantial evidence of Fisher's mental state in the hours before she died. Fisher's fear and desire to avoid Parks were relevant to the issue of premeditation because they explained Parks's actions. Parks tried to persuade Fisher to come to him the night before he killed her by falsely telling her the police were coming after him to gain her sympathy. When this failed he told her he left marijuana at Paul's house and could not retrieve it because he was traveling to Chicago. Parks checked with Paul several times to ascertain whether Fisher had taken the bait and gone to the house. He even texted Fisher to see if she had picked up the marijuana. Because Fisher feared and avoided him, Parks orchestrated a plan to trick Fisher into being at Paul's house when he arrived. Parks's plan to entice Fisher, which he devised in response to her fear, enabled him to ambush her. It provided strong evidence that he premeditated the murder. This circumstantial evidence of Fisher's mental state was admissible to show premeditation. (See *Riccardi*, *supra*, 54 Cal.4th at p. 820 [defendant's actions reflected he used his knowledge of victim's fear as a means to ambush and kill her; fear was relevant to issue of premeditation]; *Jablonski*, *supra*, 37 Cal.4th at p. 821 [evidence of victim's mental state relevant to "[defendant's] mental state in going

to visit the [victims]—as the trial court expressed it, 'he was not going for a friendly visit'—and how he planned to approach the victims (by stealth as opposed to open confrontation) both of which, in turn, were relevant to premeditation"].)

Hernandez, *Noguera*, and *Ruiz* are distinguishable. In *Hernandez* and *Noguera*, the courts held that the victims' fear was inadmissible to prove identity. The defendants did not raise the issue of whether the victims' mental states were admissible to demonstrate premeditation. Both murders were proved to be of the first degree through evidence that they were committed for financial gain. (*Hernandez*, *supra*, 30 Cal.4th at p. 859; *Noguera*, *supra*, 4 Cal.4th at pp. 631–632.) Here, no financial gain was involved; premeditation was proven through evidence of Fisher's fear, her avoidance of Parks, and the actions Parks took in response to her fear to ensnare her.

In *Ruiz*, there was no evidence that "the defendant was aware of and reacted to the decedent victim's fearful state of mind and the victim's actions in conformity with that fear." (*Riccardi*, *supra*, 54 Cal.4th at p. 818.) The court held that "[t]his circumstance is crucial in determining a relevant connection between a defendant's motive and the victim's state of mind." (*Ibid.*) The instant case is replete with evidence that Parks knew of and reacted to Fisher's fear. The trial court did not abuse its discretion in finding that this evidence of Fisher's mental state and conduct were relevant and admissible.

With respect to the evidence described in (3) and (5), it is unclear from the record whether Allen was describing Fisher's demeanor (3) and relaying a statement that Fisher made (5), or presenting her own conclusions and opinions. Neither of the parties attempted to clarify the testimony at trial. The trial court previously ruled that Allen could testify regarding her personal observations of Fisher's demeanor, and could testify to Fisher's statement that she was fearful of Parks as evidence of her state of mind under Evidence Code 1250. If the evidence was consistent with the type of evidence contemplated in these rulings, it was relevant to state of mind and admissible to demonstrate premeditation for the reasons we have discussed above.

If the evidence was not of the type contemplated in the court's rulings, it would not have been relevant to Fisher's mental state—Allen was no more capable of drawing conclusions from the evidence than the jury. Given the other admissible evidence of Fisher's fear, however, it is not reasonably probable that Parks would have obtained a more favorable verdict if the evidence had not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Third Party Culpability

Parks contends that the trial court erred when it refused to admit evidence of third party culpability. He specifically objects to the exclusion of evidence with respect to Lewis Greenwood, who sent Fisher the text message

demanding she return his money "on bloods." Parks argues that he was prejudiced by the exclusion of evidence that Greenwood: (1) denied that he had sent the text message when questioned by police, (2) was a mile away from the scene on the day of the murder, (3) received a call from Fisher shortly before she died, and (4) gave police a false alibi. He asserts that the evidence was sufficient to raise a reasonable doubt regarding his own guilt.[12]

We agree with the People that the evidence was inadmissible because it was not sufficient to raise a reasonable doubt as to Parks's guilt.

Law

"Third party culpability evidence is treated like all other evidence; if relevant it is admissible. (*People v. Alcala* (1992) 4 Cal.4th 742, 792 (*Alcala*).) It is admissible if it is "'capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's

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[12] Parks also contends that relevant third party evidence should not be excludable on the basis that, standing alone, it does not raise a reasonable doubt regarding the defendant's guilt. As Parks acknowledges, in *People v. Hall* (1986) 41 Cal.3d 826, at page 833, our Supreme Court held that this is the correct standard. We are bound to follow *Hall*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [appellate court is bound to follow holdings of the Supreme Court].)

possible culpability . . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt; there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.'" (*People v. Page* (2008) 44 Cal.4th 1, 38.) To introduce third party culpability evidence, a defendant must show that the evidence is relevant and that its probative value is not "'substantially outweighed by the risk of undue delay, prejudice, or confusion.'" (*Alcala*, *supra*, at p. 792.)" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1174 (*Samaniego*).)

"A trial court has wide discretion in determining the relevance of evidence. (*People v. Warner* (1969) 270 Cal.App.2d 900, 908.) We review the admission and exclusion of evidence on relevance grounds for abuse of that discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1198; *People v. Kipp* (2001) 26 Cal.4th 1100, 1123 [relevance objection].)" (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1174.)

Proceedings

Prior to trial, defense counsel represented that she was going to "make . . . attempts to subpoena" Greenwood, but that she could proceed to trial without him "because there is information that wouldn't necessarily be hearsay that was provided to [Detective Dinlocker] during his interview of Mr. Greenwood [at Burger King two months earlier]," which

would demonstrate third party culpability. The prosecutor argued that the statements Greenwood made to the detective were inadmissible. The court agreed that absent evidence that Greenwood was unavailable and that defense counsel had exercised due diligence to compel his presence, the evidence could not be admitted.

Later, the court held an in camera hearing with respect to whether third party culpability evidence relating to Greenwood was sufficient to raise a reasonable doubt as to Parks's guilt, such that it would be admissible. In the hearing, defense counsel argued that Greenwood stated he had been at Burger King playing chess with Paul when Paul got the call informing him that Fisher had been murdered, which was inconsistent with Paul's statement that he received the call while driving after he left the Burger King—i.e. that Greenwood gave a false alibi for his whereabouts at the time of the murder. Counsel represented that the Burger King in question was approximately one mile away from Paul's house. She also stated that Fisher made a call to Greenwood and left a 4-second message for him either 6 or 20 minutes before she was killed, which would have been enough time for Fisher to tell Greenwood where she was. The court was concerned that presenting the evidence might entail putting on a "mini trial" within the trial, which would involve an undue consumption of time, but ultimately stated that there might be enough evidence to warrant admission.

Defense counsel relayed the substance of the in camera hearing to the prosecution in a later hearing. The court stated that the issue was close and that it would need to listen to the interview Detective Dinlocker conducted with Greenwood in the Burger King. The court expressed that the detective's assessment of Greenwood's demeanor would be of key importance to its ruling. Defense counsel represented that the evidence would involve only minimal questioning of Detective Dinlocker and would mostly be presented in the form of telephone records. She stated that Greenwood had not been subpoenaed, but did not inform the court what measures she had taken to secure his presence. The prosecutor responded that the defense had an address for Greenwood, and that the fact that the defense had been unable to locate him playing chess at the Burger King at his regular time did not mean that he was evading process.

Detective Dinlocker later testified outside the presence of the jury. He interviewed Greenwood at the Burger King on March 29, 2017. Although Greenwood looked very different than his photograph from the Department of Motor Vehicles, the detective was able to find him because Greenwood voluntarily identified himself. He was cooperative, open and straightforward. He moved away from the loud music in the restaurant so the detective could obtain a clearer recording of their interview.

Greenwood remembered sending Fisher the text, and admitted that he had been angry with her because he had given her money to purchase marijuana and she had not

given him marijuana or returned his money. He did not recall having the phone number that the text originated from, but the detective did not find that unusual. Greenwood was a transient and it was not unusual for transients to use numerous phones. Paul had mentioned to the detective that Greenwood had many phone numbers in an earlier conversation.

There was no indication that Greenwood had been at Paul's house. When questioned, Greenwood denied going to Paul's house on the day of the murder. This was consistent with Paul's statement that Greenwood had never been to his house and did not know where he lived.

Greenwood told Detective Dinlocker that he was playing chess with Paul at Burger King when Fisher was killed. Detective Dinlocker was unable to locate any witnesses who could confirm this statement.

The detective stated that all of the offenses in Greenwood's criminal record were related to narcotics. There was no documentation indicating that he was affiliated with a gang. The detective had been trying to locate him again but had not been successful. Greenwood was not a suspect.

After the detective finished testifying, the court pointed out that his recollection of what Greenwood said on the recorded interview was not consistent with the recording. The court quoted Greenwood in the recording: "I was here playing chess with Paul. Paul got a call. Paul got a call. He got up and left. I go over to Shawnny house.

Shawnny tell me [Parks] killed [Fisher]." The court reasoned that how Paul and Greenwood learned of the murder did not directly or circumstantially tie into the commission of the murder itself as admissible third party culpability evidence must. Additionally, although defense counsel argued that Greenwood was within a mile of the murder scene at the time of the murder, the last person who actually saw Greenwood at the Burger King was Paul, who saw him approximately three hours before Fisher was killed, which did not place Greenwood near the scene of the murder right before it occurred.

Defense counsel then stated that Pineda identified a person matching Greenwood's description near the scene around the time the crime was committed, and provided the court a photograph of Greenwood. The court did not see a resemblance between the two men—their faces were not similar, and Pineda had described the person she saw in the backyard as having a shaved head, but Greenwood had hair. There was also no information regarding when the photograph was taken. Even if the court assumed that Detective Dinlocker's version of his conversation with Greenwood was true, there simply was not sufficient evidence, particularly in light of the Court of Appeals' holding in *Samaniego*, *supra*, 172 Cal.App.4th at page 1175, a case which presented analogous facts. The *Samaniego* court affirmed the trial court's exclusion of third party culpability evidence where a third party held a knife to the victim's neck when they argued two to three hours before the

victim was shot to death because nothing tied the third party to the scene at the approximate time of the killing. Here there was even less evidence tying Greenwood to the scene near the time of Fisher's murder.

The court excluded the proffered evidence relating to third party culpability without prejudice. It noted that the parties had stipulated to the admission of Fisher's phone records, and that defense counsel was permitted to argue that someone texted Fisher threats from a phone number not associated with Parks. The defense could make any third party culpability argument it desired based on otherwise admissible evidence.

Analysis

We cannot say the trial court erred by excluding the defense's proffered evidence of Greenwood's culpability on this record. Only one of the facts that Parks sought to establish—that Greenwood received a call from Fisher shortly before she died—was supported by the evidence that Parks sought to admit, and even if all the facts that Parks sought to admit had been supported, they were not sufficient to raise a reasonable doubt as to Parks's guilt.

There was no evidence that Greenwood denied texting Fisher a demand for money. At the hearing, Detective Dinlocker testified that Greenwood freely admitted to sending the text. He explained to the detective that he had given Fisher money for marijuana and was angry because

she had not procured it for him. Greenwood did not remember the number for the phone he used to send the text because he used many phone numbers, but he never denied having sent the text.

There was no evidence that Greenwood was a mile away from Paul's house at the time Fisher was killed. The last person who saw him was Paul, and he saw Greenwood three hours before the murder occurred. Greenwood's location within a mile of the crime scene several hours before the murder is not relevant evidence tying him to the crime. (See *Samaniego*, *supra*, 172 Cal.App.4th at p. 1175 [evidence that third party threatened victim with a knife at crime scene two hours before murder occurred did not amount to evidence of third party's location at time of murder and did not tie third party to crime scene].)

In the audio recording of his conversation with Detective Dinlocker, Greenwood did not state he was with Paul at the Burger King when Fisher was killed. He stated that Paul left the Burger King after receiving a phone call, and that "Shawnny" later told Greenwood that Parks had killed Fisher when he was at Shawnny's house. The detective's personal characterization of Greenwood's recorded statement is not relevant.

The only remaining fact that Parks sought to establish was that Fisher called Greenwood shortly before her death and left a 4-second voice message. That Fisher called Greenwood and left a very brief message is not relevant to Greenwood's location at the time of the murder and does not

tie him to the crime in any way. The fact that Greenwood sent the text demanding money the night before was relevant only to a possible motive to kill, and that without more is not sufficient to raise a reasonable doubt. (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1174.)

Cumulative Trial Error

Parks argues the cumulative trial court errors require remand of the case for a new trial. We have found only a minimal trial court error, if any, and therefore reject the claim of cumulative error. (*People v. Bolin* (1998) 18 Cal.4th 297, 345.)

Juvenile Conviction

Parks contends his juvenile adjudication for robbery should not have been used as a prior strike conviction because the People failed to prove he was at least 16 years old at the time he committed the offense, as required by sections 667, subdivision (d)(3)(A), and 1170.12, subdivision (b)(3)(A). He also contends the juvenile adjudication cannot be used to enhance his sentence because a jury did not determine the facts underlying the adjudicated offense.

Proceedings

In a bifurcated bench trial, the trial court found true the allegations that Parks had suffered two prior strike convictions (§§ 667, subd. (d), 1170.12, subd. (b)), a prior serious felony (§ 667, subd. (a)(1)) and seven prior prison terms (§ 667.5, subd. (b)). One of the strike priors was based on Parks's 1985 juvenile robbery adjudication in Case No. J824368.

The prosecution provided written records referencing Parks's prior convictions and juvenile adjudication, which were designated as court exhibits and moved into evidence.

Court Exhibit No. 1 was a California Law Enforcement Telecommunication System report stating Parks's date of birth as March 17, 1969, but also stating his date of birth as August 7, 1973.

Court Exhibit No. 2 was California Department of Corrections and Rehabilitation (CDCR) documentation. The documentation included abstracts of judgment from March 2005 and October 2015, and a fingerprint card, reflecting Parks's date of birth as March 17, 1969. Abstracts of judgment from February 2005 and October 2014, and another fingerprint card indicated Parks's date of birth as August 7, 1973.

Court Exhibit No. 3 was the juvenile court petition for the robbery (Case No. J824368). It stated Parks's date of birth as March 17, 1969, and indicated that he was 16 years of age on March 17, 1985. The petition alleged that Parks

committed robberies on October 14, 1985 (count 1) and October 15, 1985 (count 2).

Court Exhibit No. 4 included the disposition of arrest and court action for the juvenile robbery case indicating Parks's date of birth as March 17, 1969. A booking and identification card also indicated the March 17, 1969 date of birth.

Court Exhibit No. 5 consisted of a booking photograph, dated October 22, 1985, a completed Los Angeles Police Department "Photography Unit Order Form," and a letter from the Los Angeles County District Attorney's Office requesting certified copies of the photograph, fingerprints or 5.1 thumb prints, and disposition of arrest and court action for Parks. The letter included the case number (Case No. PA087400), booking number, prior case number (Case No. J824368), CII/SID number, and Parks's date of birth as March 17, 1969.

Court Exhibit No. 6 contained four minute orders for Case No. J824368, all indicating Parks's birth date as March 17, 1969, and the date of the juvenile petition as October 23, 1985. The minute order from October 24, 1985, stated that the count 1 robbery charge in the October 1985 petition was found true and that the petition was sustained. The minute order from November 5, 1985, also stated that Parks's birthdate was "as shown in the petition" and indicated that the robbery was a felony.

Court Exhibit No. 8 was a document which referenced Parks's juvenile adjudication for robbery in Case No.

J824368 and indicated his date of birth as March 17, 1969. The document was certified by the Supervisor of the Ward Master File Unit of the Division of Juvenile Justice of the CDCR.

The court found the 1985 juvenile adjudication for robbery qualified as a strike conviction under the three strikes law.

Law

Section 667, subdivision (d)(3), provides, "A prior juvenile adjudication shall constitute a prior serious and/or violent felony conviction for purposes of sentence enhancement if: [¶] (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense. [¶] (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code . . . . [¶] (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law. [¶] (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code."

Similarly, section 1170.12, subdivision (b)(3), provides: "A prior juvenile adjudication shall constitute a prior serious and/or violent felony conviction for the purposes of sentence enhancement if: [¶] (A) The juvenile was sixteen years of age or older at the time he or she committed the prior

offense, and [¶] (B) The prior offense is [¶] (i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or [¶] (ii) listed in this subdivision as a serious and/or violent felony, and [¶] (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and [¶] (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code."

Robbery is an offense listed in Welfare and Institutions Code section 707, subdivision (b)(3).

"The People must prove all elements of an alleged sentence enhancement beyond a reasonable doubt." (*People v. Miles* (2008) 43 Cal.4th 1074, 1082 (*Miles*); *People v. Tenner* (1993) 6 Cal.4th 559, 566.) When reviewing whether the People have proved a sentence enhancement, "we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*Miles*, *supra*, 43 Cal.4th at p. 1083.)

Analysis

Parks relies on the Supreme Court's holding in *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*) that "[w]hile a sentencing court is permitted to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict or admitted by the defendant in entering a guilty plea, the court may not rely on its own independent review of record evidence to determine what conduct 'realistically' led to the defendant's conviction." (*Id.* at p. 124.) Parks contends that the court was limited to considering the "record of conviction" to determine if the People had proved he had suffered a qualifying prior strike adjudication. He argues that the record of conviction contained only the juvenile petition stating his date of birth and the date of the robbery, neither of which were elements of the offense. Thus, neither his birth date nor the date of the offense had been found true by the juvenile court beyond a reasonable doubt.[13]

Gallardo held, "a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the 'nature or basis' of the prior conviction based on its independent conclusions about what facts or conduct 'realistically' supported the conviction."

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[13] It is undisputed that Parks was found fit to be dealt with under juvenile court law and, thereafter, was adjudged a ward of the juvenile court pursuant to Welfare and Institutions Code section 602 for committing robbery.

(*Gallardo*, *supra*, 4 Cal.5th at p. 136.) However, neither Parks's date of birth nor the date of commission of the robbery is part of "the nature and circumstances of the underlying conduct," (*People v. Martinez* (2000) 22 Cal.4th 116, 117), or the "nature or basis" of the underlying conduct that led to the prior conviction (*Gallardo*, *supra*, at p. 136). Proving the date of a defendant's birth and the date of the offense, like proving the defendant's identity, does not involve relitigating the circumstances of a crime committed many years ago or implicate double jeopardy or speedy trial concerns, as is the case where the basis of the conviction is concerned. Accordingly, the trial court here properly looked to the exhibits taken into evidence to determine Parks was at least 16 years old at the time of the robbery. (See also *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1476 [record-of-conviction limitation only applies "where the question is the *substance* of the prior conviction (i.e., the nature of the conduct giving rise to it"].)

With respect to whether substantial evidence of Parks's age was presented, the exhibits contain multiple documents indicating a birth date of March 17, 1969. The juvenile petition reflected the date of the robbery as October 14, 1985, at which time Parks would have been 16 years old. No contrary evidence was presented, and the defense did not contest the accuracy of the documents. Substantial evidence supports the trial court's finding.

Section 12022, Subdivision (b)(1) Enhancement

In his opening brief, Parks argued that section 1170.1, subdivision (f), which prohibits imposition of multiple weapons enhancements in connection with a single crime when a defendant is subject to a determinate term, applies to defendants subject to indeterminate terms of imprisonment as well. In a letter filed October 1, 2018, Parks informed us of new authority, *People v. Wong* (2018) 27 Cal.App.5th 972 (*Wong*), which rejected this argument. (*Id.* at pp. 981–982.) We agree with our sister court that section 1170.1, which is part of the Determinate Sentencing Law, does not apply to enhancements to indeterminate sentences, and reject the contention.[14]

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[14] In his letter informing us of new authority, Parks states: "The Court of Appeal held in *Wong* that imposition of more than one weapon enhancement for the same crimes violates Penal Code section 654. [Citation.] The decision is relevant to Argument 6 in Parks' opening brief, in which he claims the Penal Code section 12022(b)(1) enhancement must be stayed. [Citation.] Apart from appellant's claim in his opening brief, this Court has the authority to correct the unauthorized sentence. [Citations.]" We note that the California Rules of Court, rule 8.254(b) prohibits "[any] argument or other discussion of the authority . . . in the letter." Parks has not requested permission to file supplemental briefing on the question of whether section 654 applies to the weapons enhancements imposed, and we do not decide the issue here.

Firearm and Prior Serious Felony Conviction Enhancements

Parks contends that under recently enacted Senate Bill Nos. 620 and 1393, the trial court has discretion to strike the 25-year firearm enhancement imposed under section 12022.53, subdivision (d), and the 5-year prior serious felony conviction enhancement imposed under section 667, subdivision (a)(1), respectively. Parks claims that both amendments apply to him retroactively. He asserts that the case should be remanded to allow the trial court to exercise its discretion to strike the enhancements because the court lacked the power to do so at the time of sentencing. The People concede the amendments effectuated by Senate Bill Nos. 620 and 1393 apply retroactively, but contend remand is not appropriate in this case, because remand would be futile.

We agree with the parties that Senate Bill No. 620, which became effective on January 1, 2018, applies to Parks retroactively because the trial court lacked the discretion to strike the 12022.53, subdivision (d) enhancement at the time of sentencing, and Parks's appeal was pending at the time the legislation became effective. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1089–1091 (*Woods*).) Like Senate Bill No. 620, Senate Bill No. 1393 "provides discretion to impose a lesser sentence, and . . . there is nothing in the amendment to suggest the Legislature intended it to apply prospectively only." (See *Woods*, *supra*, at p. 1090 [discussing Senate Bill No. 620].) By analogy, we hold that Senate Bill No. 1393

applies retroactively to cases pending on appeal in which the court lacked the discretion to strike a 667, subdivision (a)(1) enhancement at the time of sentencing. The judgment will not become final in Parks's case until after Senate Bill No. 1393 takes effect on January 1, 2019. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306 ["'for the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed'"].) Accordingly, the amended legislation will apply to his case retroactively when it goes into effect.

We agree with the Attorney General that remand is not appropriate in this case, however, because there is no reasonable possibility the trial court would exercise its discretion to dismiss either enhancement upon remand. Resentencing is required "'unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations.' ([*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896].)" (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.) That was the case here.

Following several victim impact statements by the victim's family, the court expressed its view of the severity of the crime and cited Parks's statement following the jury's verdict as evidence of his complete lack of remorse: "Mr. Parks stood at that door, turned to the family . . . [¶] . . . [a]nd he said the following: 'Well, I'm still breathing, and that bitch is dead.'" The court continued: "Everyone here

kept asking me today to send Mr. Parks away, to make sure he never sees the light of day. I understand where that sentiment is coming from." The court indicated that although it would reserve final judgment until the date of sentencing, it was the court's intention to "give the maximum [sentence]." It emphasized, "This was a vicious crime. [The victim] was strangled, stabbed, and shot. And the utter lack of remorse, as evidenced by [this] statement . . . leaves this court with the opinion there is no other sentence to give."

The court had broad discretion in imposing sentence in this case. The defense moved to strike Parks's prior strike convictions under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, and requested that the court stay the seven one-year sentence enhancements alleged under 667.5, subdivision (b). The court could have granted the *Romero* motion and imposed a significantly shorter sentence of 56 years to life, or shortened Parks's sentence by a few years by running some or all of the seven one-year sentence 667.5, subdivision (b) enhancements concurrently. Instead, it chose to impose the maximum sentence of 113 years to life.[15]

In light of these clear indications of the court's intent, we conclude that remand for the court to exercise its discretion under either Senate Bill No. 620 or No. 1393 would be futile.

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[15] The court discussed the numerous circumstances in aggravation and emphasized that no mitigating circumstances had been presented.

DISPOSITION

The judgment is affirmed.

MOOR, J.

I concur:

SEIGLE, J.*

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

The People v. Michael Parks
B285035

BAKER, Acting P. J., Concurring

I join the court's opinion, which correctly resolves the contentions of error presented by defendant and appellant Michael Parks (defendant)—including the contention that the trial court erred in finding witness Reina Pineda (Pineda) unavailable.

I write separately to register concern about an issue defendant has not directly raised. At trial, Detective Dinlocker was permitted to offer his opinion of witness Pineda's demeanor during the earlier preliminary hearing (and to relate Pineda's non-testifying statement that she was afraid and did not want to get involved). In my view, when a witness is unavailable, the party offering the witness's testimony must take the bitter with the sweet and present the testimony solely by recitation of the pertinent hearing transcript. That is the appropriate limit of the exception admitted by confrontation and hearsay rules, and here, that limit would have avoided invading the jury's province to decide, as best it could, Pineda's credibility and her certainty that defendant was the person she saw running.

Counsel for defendant may have reasons, strategic or otherwise, for opting not to argue Detective Dinlocker's

demeanor-related testimony should have been excluded. It is also unclear whether such an argument, if successful, would warrant reversal of the judgment below. But, in my view, this is an issue that should not have arisen in the first place. Absent some extraordinary circumstance I cannot now imagine, a party who succeeds in getting a witness declared unavailable should not be permitted to ask another of its witnesses to favorably opine on the testifying demeanor of the absent witness.

BAKER, Acting P. J.