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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LINO JESUS ACERO, Defendant and Appellant.	B278213 (Los Angeles County Super. Ct. No. KA106410)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed.

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

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Lino Jesus Acero (defendant) walked into an AM/PM Mini-Mart in 1994 and demanded that the clerk empty the register; when the clerk refused, defendant pulled out a gun, shot him in the chest, and fled in a waiting car. Defendant was 17 years old at the time. More than 20 years later, defendant was charged with, and convicted of, murdering the store clerk, and was sentenced to prison for life without the possibility of parole. On appeal, defendant, who is now 40 years old, argues that he should have been tried in juvenile court; that the trial court made numerous instructional and evidentiary errors; that substantial evidence does not support the special circumstance justifying his life sentence; that the trial court erred in handling a juror who was reported to be sleeping; that the cumulative effect of these errors warrants reversal; that his sentence is cruel and unusual punishment; and that he is entitled to a remand to allow the trial court discretion to strike a firearm enhancement. We conclude that defendant's arguments lack merit, and affirm his conviction and sentence.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *The Crime*

On a Friday in November 1994, two men walked into an AM/PM Mini-Mart in Diamond Bar, California. One of them approached the store clerk and demanded money from the cash register. The clerk did not comply. The man making demands walked behind the counter, pulled out a gun, and pointed it at the clerk with his left hand; the clerk still did not comply. The man then shot the clerk in the chest. Without taking any money, the shooter and his companion fled to a car waiting outside the Mini-Mart. The clerk died.

B. *The Investigation*

1. *Immediate investigation*

Law enforcement could not immediately identify the shooter or his companion.

Two customers were inside the Mini-Mart at the time of the attempted robbery and shooting: One described the shooter as a thin-built Hispanic man approximately five feet seven or five feet nine inches in height who was dressed "like a cholo," while the other described the shooter as "definitely white" but was unable to assign any ethnicity.

The Mini-Mart's rotating surveillance cameras recorded most of the incident, but they were of poor quality. The resulting videotapes did not capture the shooter's facial features, but still made it possible to identify the shooter's sex, skin color, hair, and clothing as well as the fact that the shooter had a tattoo on the back of his neck and that he was left handed.

Without any definitive leads regarding the shooter's identity, the investigation was shelved.

2. *Ten years later*

In 2004, law enforcement reopened the investigation into the shooting by airing the Mini-Mart surveillance video on "L.A.'s Most Wanted," a television show showcasing unsolved crimes. Jennifer Estes (Estes) called in, and reported that she immediately recognized defendant as the shooter in the video. Estes confirmed that defendant had a tattoo on the back of his neck and was left handed. Estes and defendant had dated and used drugs together for many years after the shooting. Defendant is five feet five inches tall.

Because defendant was incarcerated on other matters for months and years at a time, the investigation was once again put on hiatus.

3. *Twenty years later*

In 2013, law enforcement showed the two Mini-Mart customers a photo spread containing defendant's photograph; neither identified defendant as the shooter.

In 2014, law enforcement followed up on defendant as a possible subject by shaking the proverbial trees: They uploaded the Mini-Mart's surveillance video onto YouTube, obtained a wiretap on defendant's phone, and began interviewing defendant's friends and family regarding the shooting.

On the wiretapped calls, defendant spoke with his family and friends about the YouTube video. During some conversations, he denied any involvement in the robbery/murder. In others, he acknowledged his involvement: He told one friend, "Dude, they . . . got me on fucking camera"; he told his aunt, "when I was 17 years old, I went into an AM/PM and fucking shot some fucking guy at the register and didn't get nothing. And I didn't wear no ski mask and—it's on YouTube"; he told his brother that one of his ex-girlfriends "knows it's me"; and when his nine-year-old daughter said, "it doesn't look like you," defendant responded, "I know, but it is, that's, that's when I was 17 years old." Defendant also told his brother not to answer any questions from the police.

Law enforcement interviewed Crystal Perry (Perry), a woman who dated defendant after the robbery and had two children with him. When the interviewing officers showed Perry the surveillance video, she began to cry; when asked why, she said, "because it looks like [defendant]."

Thereafter, law enforcement arrested defendant and placed him in a jail cell with an undercover officer. Law enforcement then staged a lineup; afterwards, defendant told the undercover officer that he had changed his walk during the lineup so it was unlike the video.

II. Procedural Background

The People charged defendant with a single count of murder (Pen. Code, § 187, subd. (a)).[1] The People also alleged the special circumstance that the murder occurred while defendant was "engaged in the attempted commission of the crime of robbery," thereby rendering defendant eligible for the death penalty or life without the possibility of parole (§ 190.2, subd. (a)(17)). The People further alleged that defendant "personally used a firearm" (§ 12022.5, subd. (a)).

Because defendant was 17 years old at the time of the crime, the trial court transferred the matter to the juvenile court for a "fitness hearing." The juvenile court held an evidentiary hearing and, applying the law in effect at 1994, found that defendant was not fit for adjudication in juvenile court. The case was transferred back to adult court.

The matter proceeded to a jury trial.

At trial, the People introduced the evidence discussed above. Also, one of the two Mini-Mart customers identified defendant as the shooter. Defendant called his brother to testify that the person on the video was not defendant as well as three expert witnesses—an expert on eyewitness identifications, a medical expert who testified about the trajectory of the clerk's wounds, and a forensic video expert.

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

The jury found defendant guilty of first degree murder, and found the special circumstance and firearm allegations to be true.

The trial court sentenced defendant to prison for life without the possibility of parole, and struck the firearm enhancement.

Defendant filed a timely notice of appeal.

DISCUSSION

I. Trial in Adult Court

Defendant argues that this case should have been tried in juvenile court because he was 17 years old at the time of the crime and because the newly enacted Proposition 57 entitles him to a hearing before the juvenile court to decide whether he should be tried as a juvenile or an adult. We need not decide what standard of review to apply to this claim because we independently conclude that defendant is not entitled to the relief he seeks.

The Public Safety and Rehabilitation Act of 2016 was adopted by the voters in November 2016 as Proposition 57. (Welf. & Inst. Code, § 707, subd. (a).) Under Proposition 57, the People can no longer file charges against a juvenile charged with more serious felonies, including murder, directly in adult court. Instead, the People must first file in juvenile court and ask the juvenile court to transfer the case to adult court; the juvenile court is then tasked with evaluating whether the juvenile is fit for adjudication in adult court after considering five statutorily enumerated factors. (*Id.*, § 707, subd. (a)(2); *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303.) Proposition 57's provisions apply retroactively to any defendant whose conviction was not "final" as of November 2016. (*Id.* at pp. 303-304.) Although defendant was tried, convicted, and sentenced before

November 2016, his conviction is not yet final (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1465); accordingly, Proposition 57's procedures apply to him.

We nevertheless conclude that defendant is not entitled to relief under Proposition 57, and do so for two reasons.

First, the juvenile court in this case already held a fitness hearing that is functionally indistinguishable from the one required by Proposition 57. To be sure, the juvenile court applied the law in effect in 1994. Under that law, a juvenile court was tasked with deciding whether the juvenile is "fit" for adjudication in juvenile court after considering five statutorily enumerated factors;[2] if the juvenile is charged with a serious felony (such as murder), the juvenile is presumed not to be fit for juvenile court but the juvenile may rebut that presumption by showing that he is fit for juvenile court under all five factors. (*Edsel P. v. Superior Court* (1985) 165 Cal.App.3d 763, 773-774.) The five factors enumerated by the 1994 law are the same as the five factors enumerated in Proposition 57. (Compare *id.* at p. 773 with Welf. & Inst. Code, § 707, subd. (a)(2).) Those factors are: (1) "[t]he degree of criminal sophistication exhibited by the minor"; (2) "[w]hether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction"; (3) "[t]he minor's previous delinquent history"; (4) "[s]uccess of previous attempts by the juvenile court to rehabilitate the minor"; and (5) "[t]he circumstances and gravity of the offense alleged in the petition to have been committed by the minor." (Welf. & Inst. Code, § 707, subd. (a)(2).) The juvenile court heard evidence, considered all

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2 The law that allowed for direct filing of certain felonies in adult court did not take effect until 2000. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 544-545.)

five factors, and found that all but one factor (his previous delinquent history) rendered him unfit for adjudication in juvenile court. The juvenile court's analysis and finding under the 1994 law is a near perfect substitute for the analysis and finding the court would be required to make under Proposition 57.

Defendant disagrees, noting that the 1994 law erects a presumption *against* fitness for juveniles involved in serious crimes (like murder), whereas Proposition 57 contains no such presumption. This is true, but irrelevant here. The juvenile court expressly noted its doubt that the burden of proof (which, under the 1994 law, was sometimes assigned to the People and other times to the defendant) would matter to its analysis or its "result." Even without that express statement by the court, however, the juvenile court's finding that four of the five factors counseled against fitness for juvenile court leaves no doubt that defendant was unfit for juvenile adjudication; any theoretical difference in the burden of proof would not have affected the result and was consequently not prejudicial. (Cal. Const., art. VI, § 13.)

Second, and even if the fitness hearing defendant had was insufficient under Proposition 57, convening another Proposition 57 transfer hearing would be a waste of time. That is because defendant cannot at this point be adjudicated in juvenile court. The jurisdiction of the juvenile court expires when a juvenile turns 21, or at the latest, turns 25. (Welf. & Inst. Code, §§ 607, subd. (a) [jurisdiction generally expires when juvenile turns 21], subds. (b)-(d) [excepts where jurisdiction extends to age 25], 607.1, subd. (b) [same].) Defendant is now 40. Because a "juvenile court may not act in a case over which it no longer has

jurisdiction" (*In re M.M.* (2007) 154 Cal.App.4th 897, 906), a court conducting a Proposition 57 hearing at this point in time *cannot* send defendant to juvenile court. Its sole option is to send defendant to adult court for trial because the only other possibility would be to send defendant to juvenile court to have the case dismissed. But there is nothing in the language or legislative history of Proposition 57 indicating an intent to have juveniles who commit murder but are not tried before age 25 face no trial or punishment. "There is no statute of limitations for murder" (*People v. Frazer* (1999) 21 Cal.4th 737, 743), and we decline to fashion one from whole cloth.

II. Instructional Errors

Defendant argues that the trial court committed three instructional errors: (1) it failed to instruct the jury on the lesser included offense of second degree murder; (2) it omitted one element of the special circumstance instruction; and (3) it gave an improperly tailored version of the instruction on eyewitness testimony. We review claims of instructional error de novo. (*People v. Hamilton* (2009) 45 Cal.4th 863, 948.)

A. *Lesser Included Instruction on Second Degree Murder*

The trial court instructed the jury on the elements of murder, informed the jury that murder may be first degree or second degree, outlined and defined the two circumstances under which the murder would be first degree murder in this case (namely, because "the murder was willful, deliberate, and premeditated" or because "the murder was committed during the commission or attempted commission of [a] robbery'), and then told the jury: "If the People have not met this burden" of showing "that the killing was first degree murder," "you must find the defendant not guilty of first degree murder and the murder is

second degree murder." The court also provided the jury with verdict forms for first degree murder and second degree murder.

Defendant points out that the trial court (1) did not expressly state that second degree murder includes "when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation" (as CALJIC No. 8.30 does), and (2) did not provide "guidance" on what acts can constitute second degree murder. Defendant then asserts that these omissions (1) are the "functional equivalent" of not instructing on second degree murder, or (2) otherwise render the instruction on second degree murder defective.

The trial court properly instructed the jury. Second degree murder is a lesser included offense to first degree murder. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344 (*Bradford*).) We need not decide whether the court was required to instruct on this lesser included offense in this case (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155), because the court actually *did* instruct on the lesser included offense of second degree murder and did so adequately. Specifically, the court enumerated the elements for *any* type of murder, spelled out the two ways in which murder could be elevated to first degree murder, and told the jury that it must find defendant guilty of second degree murder if the People did not carry "the burden of proving beyond a reasonable doubt that the killing was first degree murder." Because """"we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given""" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 915), we must assume that the jury understood that second degree murder included all murders other than those proven to be first degree murders.

Neither of defendant's two criticisms of this instruction are persuasive.

Although the trial court did not expressly state that an intentional but unpremeditated killing constitutes second degree murder, its instructions necessarily did so when they defined first degree murder as an intentional and premeditated killing and then said that any non-first degree murder—which would include an intentional but unpremeditated killing—constituted second degree murder. (Accord, *People v. Ramirez* (2006) 39 Cal.4th 398, 464 (*Ramirez*) [intentional but unpremeditated murder; second degree murder]; *People v. Long* (1870) 39 Cal. 694, 696 [same].)

Nor are the instructions defective for not spelling out the three "acts" typically viewed as second degree murder—namely, (1) "unpremeditated murder with express malice," (2) "implied malice murder," and (3) "second degree felony murder." (*People v. Swain* (1996) 12 Cal.4th 593, 601.) As explained above, the court's instructions *did* spell out the first type. (Cf. *People v. Rogers* (2006) 39 Cal.4th 826, 866-868 [trial court instructed *only* on second degree murder with implied malice; error not to instruct on unpremeditated murder with express malice].) The instructions also spelled out the second type because they defined "murder" to include killings committed with "implied malice" and then defined second degree murder as the default level of murder. And defendant makes no argument that the third type is relevant in this case.

B. *Special Circumstance Instruction*

The trial court instructed the jury that the special circumstance that defendant committed the murder in the course of a robbery required proof that (1) "[t]he defendant committed or attempted to commit robbery," (2) "[t]he defendant intended to

commit robbery," and (3) "[t]he defendant did an act that caused the death of another." The court also explained that "[t]he defendant must have intended to commit the felony of robbery before or at the time of the act causing the death."

Defendant argues that the trial court erred because it did not also require the jury to find that the robbery was not "merely part of or incidental to the commission of that murder." (CALCRIM No. 730, Optional Language.)

By statute, a person convicted of first degree murder may be sentenced to death or to prison for life without the possibility of parole if, among other things, "[t]he murder was committed while the defendant was engaged in . . . the commission of [or] attempted commission of . . . robbery." (§ 190.2, subd. (a)(17)(A).) However, this provision applies only if the robbery is the "primary crime" rather than "incidental to the murder"; a robbery is incidental when the "sole object" of the robbery "is to facilitate or conceal" the murder. (*People v. Green* (1980) 27 Cal.3d 1, 61; *People v. Navarette* (2003) 30 Cal.4th 458, 505; *People v. Rundle* (2008) 43 Cal.4th 76, 156 [the robbery must "not merely [be] an afterthought to the murder"].) A trial court is required to instruct the jury on the requirement that the robbery not be incidental "'where the evidence suggests'"—that is, when "the evidence supports an inference"—that the robbery was "'merely incidental to achieving the murder.'" (*People v. D'Arcy* (2010) 48 Cal.4th 257, 296-297 (*D'Arcy*); *People v. Monterroso* (2004) 34 Cal.4th 743, 767.)

The evidence in this case did not support an inference or otherwise suggest that the robbery was incidental to, or an afterthought to, the murder of the Mini-Mart store clerk. To the contrary, the facts of this case reveal a textbook robbery:

Defendant entered the Mini-Mart, demanded money from the cash register, and shot the clerk who did not comply with his demands. On these facts, defendant had the "'independent intent to commit the felony that forms the basis of th[is] special circumstance allegation.'" (*D'Arcy*, *supra*, 48 Cal.4th at p. 296.)

Defendant makes three arguments. First, he asserts that he left immediately after shooting the clerk and without taking any money. But this does not negate that his intent up until the moment of the shooting was to commit a robbery by obtaining money by force. Second, he points to *People v. Thompson* (1980) 27 Cal.3d 303. However, the defendant in *Thompson* refused to take the money the victims offered him; only demanded the victims' car keys at the end of his confrontation; and, before shooting his victims, told them, "you know why I'm here and you know who sent me." (*Id.* at pp. 322-324.) These facts are vastly different from the facts of this case. Lastly, defendant asserts that he was a gang member and hence must have been intending all along to shoot innocent people for his gang, rather than to commit a robbery. This is pure speculation, and "[s]peculation is not substantial evidence." (*People v. Ramon* (2009) 175 Cal.App.4th 843, 851.) Further, defendant's speculative inference is contrary to the law. (E.g., *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661, fn. 7 ["the fact that an individual gang member commits . . . crimes . . . is not substantial evidence that he did so for the benefit of . . . the gang"].)

C. *Eyewitness Testimony Instruction*

The trial court gave CALCRIM No. 315, which listed 14 factors for the jury to consider in evaluating the "eyewitness testimony of Jeffrey Burd [(Burd)]," the Mini-Mart customer who identified defendant during the trial. One of the 14 factors was:

"How certain was the witness when he or she made an identification?"

Defendant asserts that the trial court erred (1) in limiting the instruction to eyewitnesses *to the crime* (such as Burd) rather than people who identified defendant from the video (such as Estes and Perry), and (2) in not deleting the factor regarding certainty, in light of recent social science and out-of-state case law developments disputing any correlation between the certainty of an identification and its accuracy.

1. *Instruction as to non-eyewitnesses*

An eyewitness to a crime may testify to what he or she perceived, and a court must typically admit expert testimony on the topic of eyewitness testimony except when the eyewitness identification is "substantially corroborated" by other evidence. (*People v. McDonald* (1984) 37 Cal.3d 351, 361-377; *People v. Jones* (2003) 30 Cal.4th 1084, 1111.) A person who was not an eyewitness to a crime may also testify to the fact that someone in a "surveillance photograph[]" or video resembles someone they know, but only if (1) "the witness [can] testify from personal knowledge of the defendant's appearance at or before the time the photo was taken," and (2) "that testimony [will] aid the trier of fact in determining the crucial identity issue." (*People v. Mixon* (1982) 129 Cal.App.3d 118, 128; *People v. Ingle* (1986) 178 Cal.App.3d 505, 513.)

Is a witness who identifies a person on a video an eyewitness to the crime as to whom the standard eyewitness instruction must be given? We conclude the answer is no. First, CALCRIM No. 315 refers to "*eyewitness* testimony," and an "eyewitness" is a person who witnesses the crime—not someone who subsequently views some piece of evidence gathered from the

crime scene. Second, many of CALCRIM No. 315's factors apply only to persons who are eyewitnesses *to the crime*—such as (1) "Did the witness know or have contact with the defendant before the event?" (which would be irrelevant as a factor to evaluate post-crime identifications from videos because prior familiarity with a defendant is a prerequisite to such an identification and hence true for all such identifications); (2) "How closely was the witness paying attention?"; (3) "Was the witness under stress when he or she made the observation?"; (4) "How much time passed between the event and the time when the witness identified the defendant?" (CALCRIM No. 315.)

2. *Certainty factor*

Although defendant makes a persuasive case as to why, as a matter of social science, it may well be time to consider deleting the "certainty" factor from CALCRIM No. 315, our Supreme Court in *People v. Sánchez* (2016) 63 Cal.4th 411 recognized this tension but declined to rule that the instruction was invalid. (*Id.* at pp. 461-462.) This ruling binds us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

III. Evidentiary Rulings

Defendant levels challenges at four of the trial court's evidentiary rulings, contending that the trial court erred (1) in not allowing him to play the excerpt from Perry's interview with law enforcement where she said the videotape was "blurry"; (2) in excluding a field identification card from 1994 indicating that defendant only had one tattoo; (3) in excluding evidence that, after the "L.A.'s Most Wanted" episode aired, other people called law enforcement and reported that the shooter in the Mini-Mart video looked like other people they knew; and (4) in limiting the reach of his eyewitness expert's testimony to Burd, an actual

eyewitness to the crime. We review evidentiary rulings for an abuse of discretion. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 405.) Defendant asserts that each of these evidentiary rulings also violates his Sixth and Fourteenth Amendment rights, but we need only reach the constitutional issues if the trial court's rulings transgress the rules of evidence. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611 ["'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense.'"].)

A. *Excerpt from Perry's Recorded Interview*

The People called Perry as a witness. During her direct examination, Perry initially testified that she told the law enforcement officers who interviewed her that the person depicted in the Mini-Mart video "didn't look like" defendant, but subsequently acknowledged that she started crying during the interview and admitted telling the officers she was crying because the photos "looked like" defendant. The prosecutor also played the excerpt from the recorded interview where she admitted that the photos from the video "looked like . . . defendant." Perry testified that she was "confused" and said she did not "know what [she] meant" when she said the photo "looked like" defendant. During cross-examination, Perry testified that the photos were "really blurry" but that they did not "look like" defendant and reemphasized that she "didn't mean it" when she told the law enforcement officials that the photos looked like defendant. On redirect, Perry said she did not know how the same photos could be "too blurry" to positively identify defendant but clear enough to rule him out. She testified that she told the law enforcement officers at the time of the interview that the photos were blurry. During re-cross-examination, Perry

reaffirmed that she told the officers that the photos were too blurry. When defendant sought to have Perry review the transcript from her interview tape, the prosecutor objected. At a sidebar, the court sustained the objection because Perry "already established she had said it was blurry."

Citing the "rule of completeness" embodied in Evidence Code section 356, defendant asserts that the trial court erred in not allowing him to play the portion of the recorded interview where Perry told law enforcement that the photos were too blurry. Defendant is correct that Evidence Code section 356 entitles a party to introduce portions of "an act, declaration, conversation, or writing" in order to ensure that the portions already introduced into evidence do not "create a misleading impression." (*People v. Williams* (2006) 40 Cal.4th 287, 319; Evid. Code, § 356.) However, the rule of completeness does not obligate a trial court to introduce other portions of a conversation where those portions do nothing more than repeat statements that are already in evidence. Here, Perry repeatedly testified that she told the law enforcement officers during her interview that the photos were too blurry for a meaningful identification. The excerpts defendant wanted to introduce merely confirmed that testimony. A trial court does not abuse its discretion in excluding cumulative evidence. (*People v. Mincey* (1992) 2 Cal.4th 408, 439.)

B. *The Field Identification Cards*

The lead detective testified that he did not know "either way" whether defendant had a tattoo on the back of his neck in 1994. Defendant sought to question the detective about, and to introduce into evidence, a field identification card prepared by an unknown officer six months before the charged murder (on May

16, 1994), which indicated that defendant had a single tattoo. The trial court excluded the field identification card, ruling that (1) it contained multiple levels of hearsay, and that (2) its content regarding the *absence* of a tattoo is "a negative" because the neck tattoo was "*not* listed."

Defendant asserts that the trial court erred in excluding the field identification card because it was properly admitted as an official record under Evidence Code section 1280 and as evidence of habit under Evidence Code section 1105.

Evidence Code section 1280 creates an exception to the hearsay rule for a "writing made as a record of an act, condition, or event" "to prove the act, condition, or event" if (1) "[t]he writing was made by and within the scope of duty of a public employee," (2) "[t]he writing was made at or near the time of the act, condition, or event," and (3) "[t]he sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1280.) This exception can apply to police reports (e.g., *Murphey v. Shiomoto* (2017) 13 Cal.App.5th 1052, 1064-1065; *People v. Baeske* (1976) 58 Cal.App.3d 775, 780), but, if applicable, only excepts the report itself as hearsay—not further layers of hearsay contained *in* the report (unless, as some courts have said, they come from other public officials under a duty to report what they observe) (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 430, fn. 6; see generally *People v. Reed* (1996) 13 Cal.4th 217, 224-225 ["As with all multiple hearsay, the question is whether each hearsay statement fell within an exception to the hearsay rule."]).

The trial court did not abuse its discretion in excluding the field identification card as an official record for two reasons. First, defendant did not lay any foundation as to *who* observed

the tattoo on defendant's body (was it the officer who filled out the card, another officer, or a private citizen?) Second, the card reflects, at most, the *absence* of an "act, condition, or event" (that is, the lack of a tattoo) and not an "act, condition, or event." The hearsay exception for *business* records allows in evidence of "the nonoccurrence of [an] act or event" (Evid. Code, § 1272), but no parallel exception exists for *public* records. This makes sense as well because, with the nonoccurrence of an act or event in a public record, testimony is necessary to explain the extent and thoroughness of the investigation.

Evidence Code section 1105 admits "[a]ny otherwise admissible evidence of habit or custom" "to prove conduct on a specified occasion in conformity with the habit or custom." (Evid. Code, § 1105.) The trial court did not err in declining to admit the field identification card under this provision because defendant never so requested (Evid. Code, § 354) and, more to the point, because the evidence was not "otherwise admissible" for the reasons explained above.

C. *Identifications of Other People in the Video*

Defendant's argument in this regard contests two evidentiary rulings by the trial court.

First, defendant sought to call George Rodriguez as a witness to testify that, when he saw the Mini-Mart video, he thought the shooter was a person named Jose Solis (Solis). Defendant argued that Rodriguez's testimony was relevant "strictly" to show "the reliability of the video and the reliability of . . . Estes's" identification of defendant from the video. The trial court excluded the evidence, reasoning that (1) Rodriguez's identification was factually incorrect because court records definitively established that Solis was in jail on the date and time

of the Mini-Mart robbery, and (2) Rodriguez's testimony was not independently relevant to show the video's unreliability because (a) it only demonstrated the video's unreliability if Rodriguez had been correct that the robber was somebody else (and he was not), and (b) it did not undermine Estes's identification of defendant on the video in light of Estes's longtime familiarity with defendant—something Rodriguez lacked.

The trial court did not abuse its discretion in excluding Rodriguez's testimony, as both of its rationales for doing so were sound. A court may be required to admit evidence that a third party committed a crime if (1) the evidence is "'capable of raising a reasonable doubt of defendant's guilt'" because it "link[s] the third person either directly or circumstantially to the actual perpetration of the crime" (*People v. Vines* (2011) 51 Cal.4th 830, 860; *Bradford*, *supra*, 15 Cal.4th at p. 1325), and (2) the probative value of such evidence is not substantially outweighed by the danger of undue prejudice, of confusing the issues, or of misleading the jury (*People v. McWhorter* (2009) 47 Cal.4th 318, 367-368). This standard was not met here because the evidence affirmatively *disproved* that Solis could have committed the murder. Moreover, the trial court was also correct that Rodriguez's proffered testimony did not impeach Estes's identification for the simple reason that Rodriguez's *inability* to identify someone on the tape has no bearing on Estes's *ability* to do so.

Second, defendant later asked a law enforcement witness whether other people had called police after the "L.A.'s Most Wanted" show aired, and the question suggested those people had identified people other than defendant as the shooter. Defendant indicated he was not going to follow up with those other callers,

and the trial court sustained the prosecutor's objection to the question.

The trial court did not abuse its discretion in sustaining an objection to the question whether other unnamed callers identified unknown third persons as the shooter from the video. That is because there was no *evidence* of such, as defendant never introduced any evidence of those other identifications. Further, the other identifications about which defendant wanted to inquire were in any event too vague to raise a reasonable doubt as to defendant's guilt and did not otherwise cast any doubt on Estes's identification from the video. Defendant proclaims that the other callers "likely were more confident" than Estes, but this proclamation is wholly speculative.

D. *Limitations on Eyewitness Expert Testimony*

Echoing his criticism of CALCRIM No. 315, defendant argues that the trial court erred in limiting the applicability of his eyewitness expert's testimony to eyewitnesses to the crime. This argument is indistinguishable from his criticism of the jury instruction, which we have already rejected.

IV. Sufficiency of the Evidence

Defendant contends that insufficient evidence supports the jury's special circumstance finding that he committed the murder in the course of a robbery. Specifically, he asserts that there is insufficient evidence that the robbery was the "primary crime" and not merely incidental to the murder. In evaluating a sufficiency of the evidence claim, we """review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt."""" (*People*

v. Nguyen (2015) 61 Cal.4th 1015, 1054-1055.) Because we have already concluded that the evidence does not even "support[] a inference" or otherwise "suggest" that the robbery was anything but the primary crime, it follows that the same conclusion is supported by substantial evidence.

V. Juror Misconduct

Defendant asserts that the trial court erred in (1) investigating whether Juror No. 5 was sleeping during the trial, and (2) not removing Juror No. 5 from the panel.

On the seventh day of trial, the court interrupted a witness's testimony to ask Juror No. 5, "Are you . . . ?" and before the court finished its question, Juror No. 5 responded, "I'm listening." Previously, the court had heard reports from other jurors who thought Juror No. 5 "has been falling asleep." Later that day, the trial court questioned Juror No. 5 outside the presence of the public and the other jurors. The court told the juror that it had "noticed, [in] the past couple days, that it looked like your eyes were closed"; commented that the court was "not sure if you were dozing off or having trouble staying awake"; and asked, "Can you tell me what's going on?" The juror explained she was taking cold medication and was "clos[ing] [her] eyes." In response to the court's questions, the juror stated she was not sleeping, was listening, and had "not missed anything in the trial." She also stated she was "well enough to continue."

The court held that there was an insufficient basis to remove Juror No. 5 as a juror. The court explained that it had been watching Juror No. 5 ever since receiving the reports from other jurors, and that while it had observed Juror No. 5 closing her eyes, she did not do so "for a significant period of time"; she did not tilt her head or otherwise nod off; she did not snore; and

when asked a question by the court, she did not jerk back awake and responded immediately to the court's inquiry. The court recognized that its decision whether to believe Juror No. 5's statements that she had been awake and listening the whole time was a "credibility call." However, because the court's observations of Juror No. 5 "were consistent" with Juror No. 5's statements, the court had no reason to doubt her credibility. The court asked whether the parties would stipulate to removing Juror No. 5, but the prosecutor refused. Juror No. 5 served for the remainder of the trial.

A trial court may remove a sitting juror from a case for "good cause." (§ 1089; *People v. Espinoza* (1992) 3 Cal.4th 806, 821.) Good cause exists when a juror is sleeping (*People v. Bonilla* (2007) 41 Cal.4th 313, 350 (*Bonilla*); *People v. Williams* (2015) 61 Cal.4th 1244, 1277 (*Williams*); *Ramirez*, *supra*, 39 Cal.4th at p. 458), but not when there is a "mere suggestion of juror 'inattention'" (*Espinoza*, at p. 821). "Once a trial court is put on notice that good cause to discharge a juror may exist," the court must "'make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged." (*Ibid.*) The inquiry must entail a hearing if the "court is informed of allegations which, if proven true, would constitute good cause for a juror's removal." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1051 (*Barnwell*).) At the conclusion of its inquiry, a court may remove a seated juror only if their unfitness to serve is a "demonstrable reality." (*Id.* at p. 1052.)

A. *Adequacy of the Court's Investigation*

Because the trial court held a hearing to question Juror No. 5, the sole question before us is whether that hearing was adequate. A court has "broad discretion" when it comes to "[t]he

manner in which [it] conduct[s] its inquiry." (*People v. Fuiava* (2012) 53 Cal.4th 622, 711-712; *People v. Clark* (2011) 52 Cal.4th 865, 971.) Here, the trial court questioned Juror No. 5 about whether she had been sleeping, whether she had missed any of the trial, and whether she was able to continue being attentive. This is a sufficient inquiry. Defendant argues that the court should have also questioned Juror No. 3, who had reported seeing Juror No. 5 sleeping. The court initially offered to do so, but ultimately decided not to because Juror No. 3's "side view" of Juror No. 5 from "two seats away" was less insightful than the court's own multi-day head-on observation of Juror No. 5. The court did not abuse its discretion in declining to question a juror who was likely to have less helpful information than the court itself, particularly when judicial inquiry into a still-sitting jury risks tainting the jury if it is "overly" "intrusive" (*Fuiava*, at pp. 710, 712).

B. *Decision Not to Dismiss*

We review a trial court's "ultimate decision whether to discharge a given juror" for an abuse of discretion. (*Bonilla*, *supra*, 41 Cal.4th at p. 351.) Here, there was no abuse. The court based its decision on Juror No. 5's explanation, which was confirmed by the trial court's own observations. We defer to the trial court's credibility call. (*Id.* at pp. 352-353.) When it comes a sleeping juror, the basis for a "demonstrable reality" of unfitness exists only when "there is convincing proof the juror actually slept during trial." (*People v. Bowers* (2001) 87 Cal.App.4th 722, 731.) That standard was not met here.

Defendant raises two further arguments. He points us to *Williams*, *supra*, 61 Cal.4th 1244, *Ramirez*, *supra*, 39 Cal.4th 398, and *People v. Johnson* (1993) 6 Cal.4th 1. In each of those

cases, however, the appellate court was tasked with deciding whether the trial court abused its discretion in removing a sleeping juror. And, more to the point, each case involved a juror who was actually asleep. (*Williams*, at pp. 1277-1278 [juror disoriented]; *Ramirez*, at p. 457 [juror's head jerked up abruptly]; *Johnson*, at p. 21 [juror had "actually fallen asleep during trial"].) This case lacks such evidence. Further, defendant asserts that other jurors said Juror No. 5 was sleeping. However, such a conflict in the evidence would not defeat a finding of substantial evidence (*People v. Panah* (2005) 35 Cal.4th 395, 489); such a conflict certainly does not rise to the level of a demonstrable reality of unfitness to serve, as that standard is more onerous than the substantial evidence standard (*Barnwell*, *supra*, 41 Cal.4th at pp. 1052-1053).

VI. Cumulative Evidence

Defendant argues that the cumulative effect of the errors he alleges warrants reversal of his conviction. Because, as we conclude, there was no error, there was no cumulative error. (*People v. Melendez* (2016) 2 Cal.5th 1, 33.)

VII. Sentencing Errors

A. *Cruel and Unusual Punishment Challenge*

Defendant argues that being sentenced to prison for life without the possibility of parole violates his constitutional rights. We review the constitutionality of a sentence de novo. (*People v. Palafox* (2014) 231 Cal.App.4th 68, 83 (*Palafox*).)

Both the United States and California Constitutions prohibit the imposition of sentences so excessive that they constitute "cruel *and* unusual" punishment (under the federal Eighth Amendment) or "[c]ruel *or* unusual" punishment (under the California Constitution). (U.S. Const., 8th Amend., italics

added; Cal. Const., art. I, § 17, italics added; see *Palafox*, *supra*, 231 Cal.App.4th at p. 82 [difference in conjunction does not translate to different meaning when it comes to excessive sentences].) In a series of cases culminating in *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*), the United States Supreme Court has ruled that sentences that are constitutional when imposed on an adult may be constitutionally excessive when imposed on persons who were juveniles at the time of their crime because juveniles, unlike adults, (1) "have a '"lack of maturity and an underdeveloped sense of responsibility,"' leading to recklessness, impulsivity, and heedless risk-taking [citation]"; (2) '"are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings [citation]"; and (3) do not have "character . . . as 'well formed' as an adult's," such that their "traits are 'less fixed' and [their] actions less likely to be 'evidence of irretrievabl[e] depriva[ity].' [Citation.]" (*Miller*, at p. 471, quoting *Roper v. Simmons* (2005) 543 U.S. 551, 569-570 (*Roper*).)

Under this precedent, a court may sentence a person who committed a crime as a juvenile (that is, while under the age of 18) to life without the possibility of parole only after determining that the person is '"the rare juvenile offender whose crime reflects irreparable corruption"' rather than one whose crime '"reflects unfortunate yet transient immaturity."' (*Miller*, *supra*, 567 U.S. at 479-480, quoting *Roper*, *supra*, 543 U.S. at p. 573; *Montgomery v. Louisiana* (2016) 136 S.Ct. 718, 734; see also *Graham v. Florida* (2010) 560 U.S. 48, 74-75 [juveniles defined as persons under 18].) The Court has identified five factors courts should

consider in making this determination: (1) the juvenile's "'chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences'"; (2) the juvenile's "'family and home environment,'" from which "'he cannot usually extricate himself'"; (3) "'the circumstances of the homicide offense, including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him'"; (4) whether the juvenile "'might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors . . . or his incapacity to assist his own attorneys'"; and (5) any other evidence "bearing on 'the possibility of rehabilitation.'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1388-1389, quoting *Miller*, at pp. 477-478.)

The trial court in this case followed this precedent. The court understood that its task was to assess whether defendant was an "offender whose crime reflects unfortunate yet transient immaturity" or instead "the rare juvenile offender whose crime reflects irreparable corruption." And it proceeded to evaluate each of the five factors enumerated above. Specifically, the court found that (1) defendant was almost an adult when he shot the store clerk and that his crime did not reflect "immaturity, impetuosity, [or] failure to appreciate risks and consequences" because defendant executed a robbery that required planning, including bringing a backup robber, arranging a getaway driver, and acquiring and bringing a gun to overcome any resistance; (2) defendant, as a juvenile, lived in a household with "a lot of . . . turmoil and unsettlingness," including exposure to drugs and to abuse; (3) the homicide offense grew out of "a planned

robbery" in which defendant brought a gun and, as the shooter, "definitely [had] an intent to kill"; (4) defendant's juvenile status had no effect on the charges or their disposition because he was in his late 30's by the time he was charged; and (5) defendant was unlikely to be rehabilitated because, during all the years when defendant believed he had literally gotten away with murder, he chose to continue a life of crime—racking up eight felony and 12 misdemeanor convictions (many of which involved him carrying a firearm), violating parole four times, and spending 12 of those intervening 20 years in prison or in jail. Summing up, the court found that "all the . . . choices [defendant] has made as an adult"—and which reflected his choice to live a life of crime—"demonstrate[] . . . in spades" that the murder defendant committed at age 17 was a product of "irreparable corruption" rather than any "transient immaturity."

Defendant levels three attacks at the trial court's analysis. First, he argues that the court effectively diluted the analysis called for by *Miller* by considering evidence that postdated the date of his crime, such as his age at the time of charging and trial, and the life choices he made in the intervening 20 years (bearing on the fourth and fifth factors noted above). We conclude there was no error. The evidence defendant attacks is certainly *relevant* to the two factors with which it was discussed as well as to the ultimate question of whether the murder of the store clerk was a product of "irreparable corruption" or "transient immaturity": Defendant's decisions about how to defend his case and how to assist his attorney were not affected by the impetuousness of youth because he was in his 30's when he made those decisions, and the life of crime defendant has chosen to lead over the last 20 years strongly suggests that he was not likely to

be rehabilitated and that the murder he committed at age 17 was part of a larger pattern of criminality reflecting an irreparable corruption. Defendant cites no authority for his argument that a court must engage in an artificial and wholly hypothetical inquiry about what a court might have thought about defendant's future life prospects had defendant been sentenced at age 18 or 19 while ignoring evidence of what defendant *has* chosen to do with his life in the last 20 years.

Second, defendant asserts that the trial court erred in not making a finding that he was "irreparably corrupt." As explained above, the trial court *did* make such a finding.

Lastly, defendant disagrees with the trial court's weighing of the various factors, including the court's failure to recognize that the murder was relatively quick, its failure to give greater mitigating effect to his family and home environment, and its reliance on the erroneous premise that people do not possess firearms unless they intend to use them. In our view, the trial court fairly and objectively examined each of the five factors, and we independently agree with its ultimate balancing of those factors. The court also did not rely on any general premise that people do not possess firearms unless they intend to use them; instead, the court made its statement in the context of explaining why defendant's decision to keep carrying a firearm while committing crimes later in life—*after he already used one to kill someone*—reflected a decision to be "in a position of being able to use a firearm again" and thus shed light on "the trajectory of his life and choices."

In light of our conclusion that the trial court appropriately considered the *Miller* factors, we have no occasion to determine whether defendant's entitlement to a youth offender parole

hearing under section 3051 renders his constitutional challenge moot.

B. *Firearm Enhancement*

Defendant asserts that he is entitled to a remand so that the trial court may apply its newfound discretion, under Senate Bill No. 620, to consider striking the previously mandatory firearm enhancement. Defendant is correct that Senate Bill No. 620 applies retroactively to persons, like defendant, whose convictions are not yet final on appeal. (See *In re Estrada* (1965) 63 Cal.2d 740, 742; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) However, remand in this case would accomplish nothing because the trial court already struck the firearm enhancement (even though it lacked the authority to do so at the time). The enactment of Senate Bill No. 620 simply legitimizes what the trial court already did.

VIII. Ineffective Assistance of Counsel

Defendant lastly asserts that any omissions by his trial counsel that precluded us from reaching the merits of his claims on appeal constitutes the ineffective assistance of counsel. Because we have reached and rejected the merits of each of defendant's claims, any failure to raise those claims was neither deficient performance nor prejudicial. (See *Strickland v. Washington* (1984) 466 U.S. 668.)

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ