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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. MAGIC KNIGHT, Defendant and Appellant.	B266162 (Los Angeles County Super. Ct. No. TA128513)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allen J. Webster, Jr., Judge. Remanded in part and affirmed in part.

Dan Mrotek, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, Shawn McGahey Webb, and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Magic Knight (defendant) appeals from the judgment entered following a jury trial that resulted in his conviction of one count of first degree murder (Pen. Code, § 187),[1] two counts of attempted premeditated murder (§§ 187, 664) and one count of possessing a concealed weapon in a motor vehicle (§ 25400, subd. (a)(1)). The jury found true the allegations defendant personally used a handgun in the commission of the murder and attempted murders within the meaning of section 12022.53, subdivisions (b) through (d) and committed those crimes for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b). The trial court sentenced defendant to an aggregate term of 120 years to life in prison, consisting of (1) a term of 25 years to life for the count 1 murder conviction plus a 25-year-to-life enhancement term for firearm use; (2) a term of 15 years to life for the count 2 attempted murder conviction plus a 20-year-to-life enhancement for the firearm use; and (3) a term of 15 years to life for the count 3 attempted murder conviction plus a 20-year-to-life enhancement for the firearm use.

Following his conviction, defendant retained new counsel, who filed a motion for new trial on four grounds. This motion was denied. On appeal, defendant argues the trial court erred in refusing to consider the ineffective assistance of counsel claim made as part of the new trial motion. He further contends there could have been no tactical explanation for his counsel's failure to introduce certain firearms evidence at trial and argues this evidence showed sheriff's deputies substituted the murder weapon for the weapon found in defendant's car during a traffic stop. Defendant additionally asserts the trial court articulated an incorrect standard of prejudice when discussing the ineffective assistance of counsel claim.

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1 All further undesignated statutory references are to the Penal Code.

Defendant was 16 years old when he committed the crimes in this case. He maintains his 120-year-to-life sentence is effectively life without the possibility of parole (LWOP) and the trial court misunderstood its discretion under *Miller v. Alabama* (2012) ___ U.S. ___ [132 S.Ct. 2455] (*Miller*) to sentence him to LWOP as a juvenile. He alternatively contends if the *Miller* error is moot in light of section 3051, which provides for youth offender parole hearings, he is still entitled to a remand under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) to make a record for that hearing.

The trial court did adjudicate defendant's ineffective assistance of counsel claims and did not abuse its discretion in ruling defense counsel was not deficient: a competent attorney could have made a reasonable tactical decision not to argue the firearm substitution theory. The court's discussion of prejudice did not involve the ineffective assistance of counsel claim. Defendant's Eighth Amendment claims are moot in light of section 3051, which provides that defendant will receive an opportunity for release after 25 years in prison. Defendant is entitled to a remand to create a record for that eventual hearing pursuant to *Franklin*. We remand the matter for such a hearing and affirm the judgment of conviction in all other respects.

BACKGROUND

On May 17, 2013, about 2:00 p.m., Michael Flynn was driving his mother's Toyota Highlander down Wilmington Avenue in Los Angeles County when his front seat passenger, Michael Grim, noticed a sedan turn from El Segundo onto Wilmington behind them. Flynn believed the car was following them. Flynn's rear seat passenger, Shyanne Mathews described the car as a metallic green Lexus with four doors. When Flynn stopped the Highlander at a red light at Stockwell, the sedan pulled up next to the passenger side of the Highlander. According to Mathews, the Highlander's

front windows were about halfway down and the back windows were all the way up. Similarly, the window on the driver's side of the sedan was part way down and the rear passenger windows were all the way up. Flynn later told sheriff's deputies he heard the sedan's driver say, "What's up, blood." Mathews heard him say, "something, something 'blood."

The intersection of Wilmington and Stockwell marks the northern and eastern boundaries of territory claimed by the Fruit Town Piru Bloods gang (FTP). The territory extends south to Rosecrans. A rival gang, the Front Hood Compton Crips (FHC), claims the territory on the other side of Wilmington. Grim was a member of the FHC gang.

The sedan's driver fired three to four shots at the Highlander. The front passenger's window shattered and Grim was hit in the head and killed. Flynn made a U-turn and the sedan made a U-turn as well. Flynn sped up. The sedan followed them to Stockwell, then turned back. Flynn drove to a gas station on El Segundo and stopped.

1. Victim Interviews

Los Angeles County Sheriff's Deputy Garcia-Toscano (Garcia) responded to a call about a shooting. The location of the call turned out to be the gas station, where Garcia saw a man running and waving at him to flag him down. A woman was with him. Deputy Garcia stopped and spoke with them. The man, Flynn, appeared frantic and in shock. He did not appear to be under the influence of marijuana or any other narcotic. Flynn and Mathews told him their friend had been shot. Garcia separated Flynn from Mathews and spoke with him alone. Flynn appeared cooperative. He said he and his friends were driving on Wilmington when someone in another vehicle began firing at them. Flynn drove away. He pulled over when he saw Garcia and attempted to make contact. Flynn said the driver was a male Black

adult with gold-colored teeth, wearing a baseball cap and driving a late 1990's to early 2000's dark-colored Lexus. Garcia was the first deputy to speak with Flynn. He broadcast Flynn's description of the car and suspect to other deputies. Other sheriff's deputies soon arrived at the scene. Garcia placed Flynn and Mathews in his patrol car for protection.

Deputy Raul Madagan and his partner arrived at the gas station while Flynn and Mathews were still present. The deputies were working as gang detectives at the Compton sheriff's station. They believed the shooting was gang related. Madagan questioned Flynn, who was in the back of a patrol car and visibly distraught, possibly crying. Flynn was cooperative. Madagan's questions were based on his belief the shooting was gang related, and he asked questions such as, "Do you know where he was from?" Flynn volunteered information that the shooter was from FTP and was a dark-skinned, skinny Black male with a gold grill wearing a long gold necklace with a pendant and driving a green Lexus. Mathews gave Madagan "basically the same description" of the shooter, but added that he had "small, kind of stuck out ears." Based on these descriptions, Madagan believed the shooter was either defendant or Marcus Knight (Marcus). Madagan knew defendant drove a green Lexus.

At some point, Deputy Garcia drove Flynn and Mathews to the Compton sheriff's station. Los Angeles County Sheriff's Department (LASD) Sergeant Donald Walls and his partner Sandra Nava were assigned to the case. That evening, they interviewed Flynn and Mathews and showed them two six-pack photographic lineups which included defendant and Marcus. Flynn's interview was audio-taped. Flynn said he could close his eyes and see the shooter. He felt he had seen him before. Walls showed Flynn the lineup and Flynn said it was number 3. On the audio-tape, Walls can be heard

asking Flynn, "You're definite it was this guy here, number 3?" Flynn replied, "number 3." Number 3 was defendant. Walls then can be heard saying, "I'm going to circle it here for you. Okay? This is the guy I'm circling here. That's the one?" Flynn replied, "Mm-hmm." Flynn later acknowledged that "mm-hmm" was agreement. In her interview, Mathews said she did not want to have to come to court or testify because she did not want to walk the streets in fear. According to Walls, Mathews "focused" on the number 3 photo in the lineup but did not identify anyone.

On December 17, 2013, Mathews viewed a live lineup with defendant in the number 2 position. Mathews stated she could not identify anyone. Mathews's mother Annette Mixon accompanied Mathews to the lineup. According to Mixon, when Mathews walked forward to see the lineup, she stumbled forward and put her hand on the glass in front of defendant. Mixon said Mathews told her privately after the lineup that she was afraid and had recognized number 2 as the shooter. Mathews said she did not want to identify him because she still had to "live out there." Mathews said Mixon did not understand what it was like to walk in Mathews's shoes. Mixon urged Mathews to tell the truth. When Mathews did not, Mixon told Detective Nava that Mathews had identified number 2 as the shooter to her.

At trial, Mathews denied recognizing anyone in the live lineup. She also denied telling her mother the shooter was number 2 and that she was scared.

At the preliminary hearing and at trial, Flynn gave a different account of the shooting than the one he gave to sheriff's deputies on the day of the shooting. At both the preliminary hearing and at trial, he claimed he was high on marijuana and did not remember much. At trial, he further claimed the first responders on the scene told him the make and model of the car and

the suspect's description. They conspired and made up a story and tried to get him to go along with it. Detective Walls told him who to pick in the lineup. He was pressured about going to jail, and so he lied and went along with them. Although he testified at the preliminary hearing that he lied, his trial testimony was the first time he testified the deputies at the scene told him what to say.[2] At trial, Flynn claimed the shooter's car was really a two-door gray Maxum (or Maxima). He described the driver as actually being a light-skinned "mixed Mexican" about 25 years old who was heavyset.

All sheriff's deputies who were at the scene or were later involved in the investigation who spoke with Flynn denied providing any information to Flynn or telling him what to say. Deputy Garcia testified he was at the gas station minutes after the shooting, at 2:24 p.m. and broadcast the description of the suspect and car minutes after that, at about 2:30 p.m. The broadcast referred to the suspect car as a green Lexus.

2. Forensic Investigation

LASD Crime Scene Investigator John Chun went to the shooting scene within hours of the shooting. He found a fired/expended bullet on the street, photographed it and put in an evidence envelope.

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[2] The transcript of the December 19, 2013 preliminary hearing is contained in the clerk's transcript on appeal. Flynn's testimony is brief. He claimed he remembered being shot at, but did not remember anything that happened after that. He did not remember talking to anyone, including Sergeant Walls. When Flynn heard a recording of his interview with Walls, he claimed he lied about a lot of information to sheriff's deputies, including seeing the shooter and how the shooting went down. He was not asked and did not explain why he lied or how he came up with the lies. On cross-examination, Flynn stated he had smoked marijuana earlier on the day of the shooting and was high when it happened.

Two days later, on May 19, Sheriff's Deputies Steve Fernandez and Orlando Saldana conducted a traffic stop of a Lexus with expired registration tags. Defendant was the driver of the Lexus. He had two passengers. There was a smell of marijuana inside the car. Deputy Fernandez knew defendant to be a FTC gang member from prior contacts. Deputy Fernandez learned defendant's driver's license was suspended. The deputies contacted Madagan and asked him to assist. He came to the scene. Deputy Saldana searched the car and found a Smith and Wesson nine-millimeter handgun in a hidden compartment (the Lexus weapon). Fernandez observed the weapon in the compartment as well. The deputies photographed the handgun and took it back to the station. Defendant and his passengers were also transported to the station.

Madagan interviewed defendant and his two passengers at the station. Defendant was wearing a black and red hat. Other deputies recovered a gold grill and a gold necklace. Defendant was arrested for firearm possession.

The gray sweatshirt defendant was wearing when arrested was analyzed and found to contain gunshot residue.

On May 22, 2013, the Lexus weapon was submitted to the crime lab for testing. It went first to LASD Criminalist Gregory Hadinoto, who was a forensic biologist. Hadinoto swabbed the gun and magazine for DNA. In July 2013, Hadinoto received a reference DNA sample for defendant. He compared defendant's DNA profile with DNA found on the trigger and trigger guard areas. The trigger area DNA was a mixture consistent with two contributors. Hadinoto opined defendant was a possible contributor to the mixture, based on matches on comparisons to the four available loci out of a possible 15. Out of a population of 44 randomly selected unrelated Black males, Hadinoto would expect "at most one individual to be included as a

possible contributor" to the DNA profile from the trigger. In percentage terms, 1 in 44 is slightly over 2 percent. Minimal DNA was found on the magazine and supported no conclusions as to defendant. A mixture of DNA was found on the gun's slide and grip areas of the gun, but it supported no conclusions as to defendant.

On May 22, 2013, LASD Criminalist Manuel Munoz searched Flynn's Highlander, which had been taken to a tow yard and found a fired/expended bullet in the Highlander's right passenger side inner wheel well. He preserved the bullet.

On May 23, 2013, Los Angeles County Coroner's Office Forensic Pathologist Dr. Martina Kennedy performed an autopsy on Grim and recovered a bullet fragment from his brain. The gunshot wound was the cause of Grim's death.

On May 28, 2013, Investigator Chun went to the tow yard to execute a search warrant on defendant's Lexus. When Chun opened the car's door, he immediately saw a cartridge standing upright slightly under the driver's seat, near the rear passenger floorboard area. Chun photographed the cartridge and placed it in an evidence envelope.

Criminalist Munoz test-fired the Lexus weapon and compared the test-fired bullet to the three fired/expended bullets and the cartridge recovered in this case. Munoz opined the Lexus weapon fired all four.

3. Gang evidence

Detective Madagan testified as an expert on Compton gangs, particularly the FTP gang. Defendant had admitted to Madagan that he was a member of FTP and had tattoos for that gang. His membership dated to 2011. FTP's primary activities included committing murders and assaults with deadly weapons, possessing firearms and possessing narcotics for sale.

According to Madagan, FTP had been in an ongoing feud with the neighboring FHC gang for years. In response to a hypothetical in which a FTP gang member said "what's up blood" to a FHC gang member and then shot and killed him in the border area between the two gangs' territories, Madagan opined the shooting was done for the benefit of the FTP gang. It would boost the shooter's internal FTP reputation and would bolster the gang's reputation by instilling fear in the community and in the gang's rivals, thereby allowing criminality without fear of prosecution.

4. Defense evidence

Defendant's maternal grandmother Dorothy Ross testified her daughter Joyce (defendant's mother) and defendant had been with her all day on May 16 and spent the night with her because Joyce was sick. The next day, May 17, defendant was sick and so Joyce planned to take him with her to work rather than to his school.

Joyce testified defendant was with her from 8:00 a.m. to 4:00 p.m. on May 17, primarily at Joyce's job taking care of her father-in-law Curtis at a senior citizens' home. Joyce stated defendant was scheduled to attend school but went with her instead because he was ill.

Young Kim, who worked at his mother's Compton jewelry store, testified that on May 11 defendant paid $3,200 for a gold grill for his teeth and a double Franco gold neck chain. Defendant picked up the items on May 18, 2013.

Also on May 18, defendant recorded a music video. According to two of defendant's friends, Ronnie Fagan and Willie Jones, defendant went to a house party with them that night. Defendant found a firearm at the party, picked it up, wiped it off and put it in his Lexus. He said he was going to

take the firearm to his mother. Eventually, they left the party. According to Jones, defendant was stopped on the way home by sheriff's deputies.

Psychologist Dr. Mitchell Eisen offered expert testimony on the deficiencies of eyewitness identification. He also opined that six-pack photographic lineups can be suggestive.

5. Rebuttal and Sur-rebuttal

The prosecution offered the testimony of Dorothy Brown, who was the property manager at the senior citizens' center where Joyce worked. She testified Joyce usually signed the sign-in sheet. Brown also testified she had never seen Joyce bring a teenager to work. The defense responded with the testimony of Joyce's coworker, Kelly, that the sign-in sheet was not regularly used around May 17.

DISCUSSION

I. New Trial Motion

After his conviction, defendant replaced his trial counsel with new, post-trial counsel. These post-trial attorneys filed a written motion for a new trial which listed four grounds: (1) the verdict was inconsistent with the evidence because the identifications of defendant were unreliable; (2) there was newly discovered evidence that the wrong gun and bullets were introduced at trial; (3) the trial court erred in permitting the prosecutor to impeach a defense witness with evidence of bad character; and (4) there was no evidence to support the true finding on the gang allegation.

Defendant made three subsidiary claims under the heading of newly discovered firearms evidence. First, he made a straightforward claim of newly discovered evidence, contending his trial counsel "did not have the expertise to be aware that the wrong weapon and bullets were used in his case" and that counsel could not have with reasonable diligence discovered

and produced evidence showing that it was the wrong weapon at trial. Second, he claimed in the alternative that trial counsel was ineffective in failing to discover and introduce evidence concerning the incorrect weapon and bullets. He later elaborated on this claim to state that trial counsel was ineffective in failing to hire a ballistics or firearms expert to evaluate the evidence. Third, he argued the prosecutor committed misconduct by "allowing" evidence of the wrong weapon and bullets to be introduced "while knowing that the wrong firearm and bullets were being presented."

Although the written motion refers to the "wrong" weapon being tested, defendant's theory was the Lexus weapon was not the murder weapon. He contended deputies had the actual murder weapon, took that weapon to the crime lab and falsely presented it as the Lexus weapon, and then removed the Lexus weapon from the evidence locker at the Compton station and presumably disposed of it. Defendant's theory of the "wrong" bullet was simply that a bullet from the murder weapon was planted in defendant's Lexus at some point after he was detained and the car impounded. Trial counsel did make the bullet argument at trial, and post-trial counsel did not devote much attention to this issue at the new trial hearing. Although post-trial counsel argued in his written motion that trial counsel was ineffective in failing to hire a ballistics or firearm expert to evaluate the evidence, post-trial counsel did not offer any evidence at the new trial hearing demonstrating that such an expert would have been helpful.

On appeal, defendant makes three primary claims of error concerning his ineffective assistance of counsel claim: (1) the trial court erroneously failed to consider his ineffective assistance of counsel claim; (2) no reasonable attorney would have failed to offer the gun substitution evidence as a defense; and (3) the trial court articulated the incorrect standard for

prejudice for an ineffective assistance of counsel claim. We find these claims to lack merit.

A. Ruling

Defendant claims the trial court erroneously believed that ineffective assistance of counsel was not a ground for a new trial motion and further erroneously believed that it had discretion to allow the defense to present ineffective assistance of counsel evidence while declining to adjudicate the ineffective assistance of counsel claim.

Section 1181 sets forth nine grounds for granting a motion for a new trial. Ineffective assistance of counsel is not one of those grounds. The California Supreme Court has explained, however, that "in appropriate circumstances, the trial court should consider a claim of ineffective assistance of counsel in a motion for new trial, because '*justice is expedited* when the issue of counsel's effectiveness can be resolved promptly at the trial level.' (*People v. Smith* [1993] 6 Cal.4th [684,] 695, 25 Cal.Rptr.2d 122, 863 P.2d 192, italics added.) But our assumption has been that courts would decide such claims in the context of a motion for new trial when the court's own observation of the trial would supply a basis for the court to act expeditiously on the motion. As we stated in *People v. Fosselman* [1983] 33 Cal.3d 572: 'It is undeniable that trial judges are particularly well suited to *observe courtroom performance* and to rule on the adequacy of counsel in criminal cases tried before them. [Citation.] Thus, in appropriate circumstances justice will be expedited by avoiding appellate review, or habeas corpus proceedings, in favor of presenting the issue of counsel's effectiveness to the trial court as the basis of a motion for new trial. If the court is *able* to determine the effectiveness issue on such motion, it should do so.' (*Id.* at pp.

582–583, italics added.)" (*People v. Cornwell* (2005) 37 Cal.4th 50, 101, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390.)

Here, defendant's claim of ineffective assistance of counsel was not necessarily appropriate for resolution in a new trial motion because it involved trial counsel's action, or inaction, outside the courtroom, in evaluating the firearms evidence. As the trial court remarked at the new trial hearing, "I'm just kind of curious, this idea of two guns, because I never heard of two guns before." (See *Cornwell*, *supra*, 37 Cal.4th at p. 101 [court acted within its discretion in concluding that claim which "rested primarily on upon matters other than what the trial court could have observed during trial" should not be considered in new trial motion].) Accordingly, the trial court did not abuse its discretion in stating at the beginning of the hearing on the new trial motion that the court would only consider statutory grounds for a new trial motion.

By the end of the new trial hearing, a significant amount of testimony and documentary evidence had been introduced which expanded on the firearm evidence offered at trial. This evidence was relevant to defendant's claim of newly discovered evidence, a statutory ground for a new trial. (§ 1181, subd. 8.) It also had some relevance to defendant's nonstatutory ineffective assistance of counsel claim, which was phrased as an alternative to the newly discovered evidence claim. This overlapping evidence explains in part the court's remark that "I know defense counsel basically dealt with the issue of ineffective assistance of counsel, which is not really one of the prongs of 1181, but the court allowed it." The court continued, "there's a case of *Strickland versus Washington*. It's a 1984 case at 466 U.S. 668. And basically that case holds for the proposition that counsel's representation

must fall below the objective standards of reasonableness. And if that happens, then I think that's a basis for reversing a case."

Although the court continued to state an ineffective assistance of counsel claim should be resolved on appeal rather than as part of a new trial motion, the court discussed the requirements of such a claim in some detail, stating, "It has to be proved. It can't just be conjecture that somehow this particular person's standards fell below that of a reasonable attorney. Now, you know, a lot of it has to do with strategy, theory and predilection as to what's brought in and what's not brought in. And sometimes when a lawyer calls a particular witness or doesn't call a particular witness it doesn't have anything to do with incompetency. It has to do with strategy or theory, maybe a particular person can't be called because they might be impeached, they may be poor witnesses, there might be any number of factors." Although the court again indicated that the appellate court would look at the ineffective assistance of counsel claim, the court expressed its conclusion that "from our standpoint, there's nothing to suggest that [trial counsel's] level of representation fell below the standard that's been promulgated in *Strickland versus Washington*." This last statement is an adjudication of defendant's ineffective assistance of counsel claim. A defendant has the burden of proving such a claim (*People v. Pope* (1979) 23 Cal.3d 412, 425), and the trial court's statement here is a finding defendant did not meet his burden of proving his trial counsel's representation fell below the level of representation of a reasonable attorney.

B. Deficiency

Because we have determined the trial court ruled on defendant's ineffective assistance of counsel claim, we review that ruling on appeal. Although defendant does not concede a ruling was made, he contends the

probative value of the firearms evidence introduced at the new trial hearing is too great to allow an inference that it would have been a reasonable tactical decision to omit the evidence at trial. We treat this argument as a contention the trial court's ruling was incorrect. We conclude the trial court did not abuse its discretion in finding defendant had not proven his trial counsel's "level of representation fell below the standard that's been promulgated in *Strickland versus Washington*."

A trial court has broad discretion in ruling on a motion for a new trial and its ruling will be disturbed only for clear abuse of that discretion. We accept the trial court's credibility determinations and findings of historical fact which are supported by substantial evidence. (*People v. Verdugo* (2010) 50 Cal.4th 263, 308.)

A defendant has the burden of proving he received ineffective assistance of counsel. (*People v. Pope, supra,* 23 Cal.3d at p. 425.) In order to establish such a claim, defendant must show his counsel's performance fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) ""Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" [Citation.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 530-531.)

"If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to

provide one, or unless there simply could be no satisfactory explanation.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

Here, the record sheds no light on why trial counsel did not raise the alleged inconsistencies in the firearm evidence during trial, and the record does not show counsel was asked for an explanation. Accordingly, we consider if there could be any satisfactory explanation for trial counsel's inaction.

As we have explained, defendant contends the Lexus weapon was not the murder weapon and that at some point after the Lexus weapon was taken from his car, the police substituted the murder weapon for the Lexus weapon. At the new trial hearing, defendant pointed to two inconsistencies in the evidence to support his gun substitution theory.

First, defendant pointed to inconsistencies in the paperwork related to the gun while it was at the sheriff's station: (1) an Operation Safe Streets (OSS) hold was shown as authorized by Rodriguez, Madagan's partner, but she denied placing a hold; (2) Nava's notes showed she got the gun from Madagan, but Walls said he got the gun from Evidence Clerk Tanya Stone and gave it to Nava; (3) Nava and Walls each filled out a part of the receipt for the gun but both denied writing "SN obliterated" on the receipt; and (4) crime lab records show that gun arriving on May 22, but sheriff's station records show it still at the station on May 23.

Second, defendant pointed to varying descriptions of the legibility of the gun's serial number. The paperwork for the gun prepared by Saldana and Fernandez after they seized the Lexus weapon and the lab receipt prepared by Nava and Walls described the serial number as obliterated. Criminalist Munoz testified the serial number of the weapon he tested was only partially obliterated. He was able to read the serial number. According to defendant,

photographs also showed the Lexus weapon had a completely obliterated serial number while the murder weapon tested at the crime lab had only a partially obliterated serial number.

On appeal, defendant also points to what he describes as a third inconsistency, a change in the color of the gun. He claims photographs and documents show the Lexus weapon was blue and the murder weapon which was tested at the crime lab was black. Since this color change was not an argument made in the trial court, we do not consider it in evaluating the trial court's ruling.

At the new trial hearing, Evidence Clerk Stone testified and explained the May 23 date in the computer system was the result of someone copying that date from her Master Property Control Ledger. She believed she had written the incorrect date in the ledger. Stone also opined Rodriguez's name was on the hold because she was the OSS detective assigned to the case. Nava also testified and explained she had recently refreshed her memory by reviewing a supplemental report and remembered she received only information from Madagan, not a firearm. Nava opined it was possible someone at the crime lab wrote "SN obliterated" on the receipt.

Also at the new trial hearing, LASD personnel testified about their practice concerning partial serial numbers. Deputy Fernandez testified he would not write a partial serial number in a report as that would do no good. Sergeant Walls testified it is LASD practice to write "obliterated" unless all of a serial number can be observed. He looked at exhibit 2, a photo of the firearm, and stated he could see a partial serial number and "absolutely that is an obliterated serial number." Criminalist Munoz testified he told field officers not to write down a partial serial number because they might write it wrong or "screw up" the investigation. While photos of the gun after it

reached the crime lab show a legible serial number, photos of the gun taken while it was still in the Lexus do not clearly show the state of the serial number. The serial number is on a white area of the gun, and there is a great deal of reflection from the flash in the photo defendant relies on.

Certainly, the inconsistencies identified by post-trial counsel would permit an attorney to argue the murder weapon was substituted for the Lexus weapon at some point after the Lexus weapon was booked into evidence. The evidence is not so strong that a reasonable attorney would have no choice but to make the gun substitution argument, however. The paperwork inconsistencies suggest some minor carelessness in record keeping and note taking at the station. Such minor carelessness might slightly increase the chances of success for an argument of evidence tampering but does not itself suggest evidence tampering occurred. The explanations for the use of the term "obliterated" were plausible and the photographic evidence of the gun's serial number was not clear or conclusive.[3]

In contrast, there would have been some implausible aspects of arguing the murder gun was planted. For example, why was there DNA on the murder weapon which had a 2 percent probability of a random match with defendant's DNA? Under the substituted gun theory, defendant would never have had any contact with the murder weapon. Why leave the Lexus weapon at the station for a whole day after taking the murder weapon to the lab? The chances of detection would seem to have been much lower if deputies had taken the Lexus weapon from the station and substituted the murder weapon in transit to the lab.

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[3] Defendant did not offer any testimony showing that the use of the term "obliterated" in the LASD was not as the witnesses contended, or that other law enforcement agencies followed a different practice.

A reasonable attorney could have decided the testimony of defendant's friends that defendant found the gun after a party would be a better approach to attacking the gun evidence because it would explain the DNA on the gun. A reasonable attorney could have decided it would undermine defense credibility to further argue that although the gun defendant found at the party was the identical model to the murder weapon, it was not the murder weapon and that deputies later engaged in an elaborate and illogical scheme to substitute the murder weapon for the Lexus weapon.

To the extent defendant argues the substituted gun theory was consistent with his defense of being framed and so no reasonable attorney would forgo it as a tactical matter, we do not agree. A reasonable attorney could have decided as a tactical matter that a simpler theory that the detectives framed defendant by pressuring the victim's friends to misidentify defendant as the shooter, advanced primarily by one of the friend's testimony, was the most effective defense and that this defense would be weakened by being joined with an elaborate theory of gun substitution which had many holes in it. For example, how did the deputies know the Lexus weapon was not the murder weapon? Did they find a weapon at the scene of the murder shortly after the shooting and hold on to it? Did they secretly test it to make sure it was the murder weapon? If they had the murder weapon from the beginning, why not substitute it for the Lexus weapon much earlier in the investigation, before the Lexus weapon was booked into evidence?

We have reached our conclusion that the trial court did not abuse its discretion in ruling counsel's performance was not deficient without considering defendant's evidence that the description of the gun's color changed and his argument that this evidence showed there were two guns. If

we were to consider the color changing argument on appeal, it would not change our analysis.

There are several deficiencies in this argument. First, defendant's description of the color of the Lexus weapon is based on photographs and brief descriptions of the gun in LASD paperwork. Trial exhibits 26 and 27 are photographs of the gun taken in the Lexus. In one photo the gun appears to be a light-blue gray and in the other it appears black. Similarly in the photos presented in support of the new trial motion (exhibits A-2 and A-3), also taken in the Lexus, the gun appears to vary in color from black to blue-black to blue. Thus, contrary to defendant's argument, these photographs do not show the Lexus weapon was clearly and unmistakably blue and not black. Perhaps an expert on photography could analyze the photographs and determine the precise colors of objects in the photographs, but there is no such expert evidence in the record.

As defendant points out, Fernandez or Saldana, who found the Lexus weapon, checked a box on their report indicating the Lexus weapon was "blue steel." Others described the gun as black. Defendant did not question Fernandez or Saldana about this description of the gun's color at the new trial hearing, and did not present any expert evidence on firearm finishes. We note "the term 'blue steel' [is] the 'firearm lingo for blue or black.'" (*Bhimji v. Adams* (C.D.Cal. 2009) 2009 U.S. Dist. LEXIS 126810 at *23, fn. 8.)[4] In light of this common usage, the use of the term "blue steel" does not indicate the Lexus weapon was clearly and unmistakably blue and not black or blue-black.

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[4] Unpublished federal district court cases may be properly considered. (*Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 744, fn. 3.)

In sum, even if we were to consider defendant's color changing "evidence" for the first time on appeal, it would not strengthen his ineffective assistance of counsel claim or alter our conclusion that a reasonable attorney could have chosen as a tactical matter not to argue a gun substitution theory.

C. Prejudice

Defendant contends the trial court's use of the phrase "definitely it would" during closing arguments at the hearing on the motion for new trial shows the court applied the incorrect standard for prejudice to his ineffective assistance of counsel claim.[5] We understand the trial court's remarks, in context, to be referring to defendant's statutory claims for a new trial motion, not his ineffective assistance of counsel claim. Defendant has not claimed error in the denial of his statutory claims and so we do not consider whether the trial court inaccurately articulated the prejudice standard for a statutory new trial motion.

Post-trial counsel began her closing argument by addressing whether the two guns evidence was newly "discoverable." Following a very brief reference to ineffective assistance of counsel, the court told counsel they were not discussing ineffective assistance of counsel, and counsel moved on to discuss defendant's claim of prosecutorial misconduct related to gang and character evidence. The court then asked counsel if she had anything else and she argued that if the firearm evidence introduced at the new trial motion had been introduced at trial, it "could have materially affected the outcome of [defendant's] case." The court countered, "You can't say it would have." Counsel replied, "It could have." The court replied, "We're not here for

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[5] Defendant makes this argument in a piecemeal fashion, arguing in his opening brief that the use of the word "would" shows error, then arguing in his reply brief that the court's use of the word "definitely" shows error. We treat this as one claim, directed to the phrase "definitely it would."

playing a guessing game, you know." The court added, "We got to have something that but for this, definitely it would have been a different perspective. It's almost saying if I was the defense attorney he would have been found not guilty." It is the trial court's use of the phrase "definitely it would" in this exchange which defendant contends shows the trial court applied an incorrect standard of review for prejudice to his ineffective assistance of counsel claim.

While the court did initially characterize post-trial counsel's argument as "almost saying if I was the defense attorney he would have been found not guilty," which could be a reference to ineffective assistance of trial counsel, post-trial counsel and the prosecutor clearly did not understand the remark that way. Post-trial counsel responded by stating the evidence was not "discoverable" before trial, and also alluded to the possibility of misconduct by the prosecution in failing to produce the evidence before trial, both statutory grounds for a new trial. When the trial court gave the prosecutor an opportunity to respond, the prosecutor made no mention of ineffective assistance of counsel, and concluded by arguing "the factors under 1181 have not been met."

We do not understand the court's remarks as a reference to the ineffective assistance of counsel claims either, particularly since, after some further discussion of the gun substitution evidence, the court stated, "what we are talking about is the elements of the prongs of Penal Code section 1181." The trial court then proceeded to discuss those prongs at some length. Only after completing that discussion did the court turn to a discussion of defendant's ineffective assistance of counsel claims. As we discuss above, the court found trial counsel's level of representation was not deficient. The court

did not consider prejudice as part of this ineffective assistance of counsel discussion.

Because the ineffective assistance of counsel claim was at times framed as a failure to discover evidence, we point out that the trial court's remarks on the prejudicial impact of the "newly discovered" evidence cannot be understood as also being applicable to the ineffective assistance of counsel claim. For example, a key area of "newly discovered" evidence involved the differing descriptions of the visibility of the gun's serial number. As defendant acknowledges, factual evidence showing the different descriptions of the gun's serial number was presented at trial.[6] The evidence presented at the new trial hearing as "newly discovered" evidence included some additional corroboration of these differing descriptions but primarily explained the reasons for the differences. The ineffective assistance of counsel claim was not dependent on this additional evidence. Trial counsel could have argued the gun substitution theory based on trial evidence. He did not. Thus, a finding that the mere introduction of additional marginal serial number evidence "would" not have changed the outcome of the trial is not also a finding about what would or would not have happened if trial counsel had chosen to argue the gun substitution theory.

II. Sentence

Defendant was 16 years old when he committed the crimes in this case. He contends his sentence of 120 years to life in prison is the functional equivalent of LWOP, and that under *Miller,* LWOP may only be imposed on a juvenile offender for a homicide offense upon a finding of incorrigibility. He

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[6] Trial counsel referred to an "obliterated" serial number in his cross-examination of Fernandez. The Nava receipt with "SN obliterated" was a trial exhibit. (People's exhibit 71.) Munoz testified at trial that the serial number was "slightly" obliterated but could be read.

maintains the trial court did not understand its sentencing discretion under *Miller* and the matter must be remanded to permit the court to properly exercise its discretion. Respondent contends defendant's claims are moot in light of section 3051, which provides for youth offender parole hearings during or before a juvenile offender's 25th year of incarceration. Defendant responds section 3051 does not apply to his aggregate sentence because that sentence is the result of the court's discretionary decision to impose sentence on his three convictions consecutively. He further contends, if section 3051 applies to his sentence, he is entitled to a remand to prepare a record for his eventual youth offender parole hearing. We hold section 3051 does apply to defendant and he is entitled to a remand to create and preserve a record.

A. Section 3051

In *Miller*, the U.S. Supreme Court held the Eighth Amendment prohibits mandatory LWOP sentences for juvenile offenders in homicide cases. The court stated such a sentence would be appropriate only on "uncommon" occasions in which the court is faced with "'the rare juvenile offender whose crime reflects irreparable corruption.' [Citation.]" (*Miller, supra*, 132 S.Ct. at p. 2469.) Absent a finding of "irreparable corruption," a juvenile defendant must be afforded a meaningful opportunity for release. (*Ibid*.) Shortly after *Miller* was decided, the California Supreme Court held the prohibition on LWOP for juvenile nonhomicide offenders established in *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*) applied to sentences that are the "functional equivalent of a life without parole sentence." (*People v. Caballero* (2012) 55 Cal.4th 262, 268 (*Caballero*).) The 110-year-to-life sentence in *Caballero* is such a sentence. (*Ibid*.)

Defendant's sentence for his first degree murder conviction is 25 years to life, plus a 25-year-to-life enhancement term for the section 12022.53

firearm use allegation. While defendant's appeal was pending, the California Supreme Court issued its opinion in *Franklin, supra,* 63 Cal.4th 261. In *Franklin*, the juvenile offender received the same sentence for first degree murder that defendant received in this case: he was sentenced to a 25-year-to-life term for murder plus a mandatory 25-year-to-life firearm enhancement. As the court in *Franklin* noted, firearm enhancements are mandatory; they cannot be stricken or stayed by the trial court. (*Id.* at p. 273.) Thus, the 50-year-to-life sentence imposed on the juvenile offender in *Franklin* was mandatory, as was the sentence imposed on the defendant in this case.

The juvenile offender in *Franklin* contended his 50-year-to-life sentence was the functional equivalent of LWOP and because it was a mandatory sentence, it violated *Miller*'s prohibition on mandatory LWOP sentences for juveniles. The court held the juvenile's claim that his sentence was the functional equivalent of a mandatory LWOP sentence—and so unconstitutional—was moot because section 3051 applied to the juvenile's sentence, and afforded him a meaningful opportunity for release during or before his 25th year of incarceration. (*Franklin, supra,* 63 Cal.4th at p. 268.) The court noted that in light of this holding, it need not decide whether a 50-year-to-life sentence was the functional equivalent of LWOP and so unconstitutional. (*Ibid*.)

After holding the juvenile offender's *Miller* claim was moot due to the applicability of section 3051 to his sentence, the court in *Franklin* made the following statement: "Our mootness holding is limited to circumstances where, as here, section 3051 entitles an inmate to a youth offender parole hearing against the backdrop of an otherwise lengthy mandatory sentence. We express no view on *Miller* claims by juvenile offenders who are ineligible

for such a hearing under section 3051, subdivision (h), or who are serving lengthy sentences imposed under discretionary rather than mandatory sentencing statutes." (*Franklin*, *supra*, 63 Cal.4th at p. 280.) It is this statement which is at the heart of defendant's claim on appeal.

The juvenile in *Franklin* was convicted of one count of murder. Defendant was convicted of one count of murder, plus two counts of premeditated attempted murder. The trial court in this case had discretion to impose the sentences for the attempted murder convictions concurrently to the murder sentence or consecutively to it. The court exercised its discretion and imposed the sentences consecutively, resulting in a 120-year-to-life sentence.

The *Franklin* court's reference to "lengthy sentences imposed under discretionary rather than mandatory sentencing statutes" (63 Cal.4th at p. 280) is terse, and we acknowledge defendant's concern with the reference to "discretionary" sentencing statutes. Given the particular facts of defendant's case, however, it is clear defendant will be entitled to a parole hearing under section 3051 before or during the 25th year of his incarceration.

As the court explained in *Franklin*, the California Legislature enacted section 3051 in response to a plea from the court in *Caballero*, as well as in response to the U.S. Supreme Court's decisions in *Miller* and *Graham*. (*Franklin, supra,* 63 Cal.4th at p. 277) In *Caballero*, our Supreme Court held that a 110-year-to-life sentence for three attempted murder convictions and accompanying firearm enhancements was the functional equivalent of LWOP and so contravened *Graham*'s absolute prohibition of LWOP for a juvenile for nonhomicide offenses. (*Caballero, supra*, 55 Cal.4th at pp. 268-269.) The court remanded the matter to the trial court to impose a sentence which

provided the defendant with a meaningful opportunity to obtain release. (*Id.* at p. 269.) The court concluded its opinion by urging the Legislature "to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release upon a showing of rehabilitation and maturity." (*Id.* at p. 269, fn. 5.) The Legislature complied.

The sentence in *Caballero* totaled 110 years to life only because the sentencing court exercised its discretion to impose sentence on three premeditated attempted murder convictions (and accompanying firearm enhancements) consecutively. Since the Legislature enacted section 3051 in response to *Caballero*, it clearly intended section 3051 to be applicable to a lengthy sentence which consists of multiple indeterminate terms imposed consecutively for crimes of violence which involved separate victims. That is precisely defendant's situation. He is entitled to a section 3051 hearing before or during his 25th year of incarceration. His Eighth Amendment claims, whether under *Miller* or *Graham*, are moot, and there is no need to remand for resentencing.

B. Remand to create a record

Defendant contends even if his Eighth Amendment claims are moot, he is entitled to a remand to make a record of information relevant to his eventual youth offender parole hearing. We agree.

When defendant was sentenced in 2015, the holding of *Miller* was directed at the trial court's sentencing decision. It was only after defendant was sentenced that the U.S. Supreme Court held in *Montgomery v. Louisiana* (2016) __ U.S. __ [136 S.Ct. 718] that a state parole eligibility statute such as section 3051 would satisfy *Miller*. It was during the pendency of this appeal

that the California Supreme Court held in *Franklin* that section 3051 applied to a sentence which permitted parole but only after a lengthy minimum period of incarceration such as defendant's 50-year-to-life sentence for murder.

Respondent contends such a remand is unwarranted because defendant filed a written sentencing brief in the trial court regarding *Miller* and *Caballero*, and the trial court considered defendant's arguments at sentencing.

Although defendant does not dispute he filed such a sentencing brief, the clerk of the superior court has certified it cannot be found. The trial court's consideration of counsel's oral argument is not an adequate substitute for a more detailed written brief, at least for purposes of review by a parole board in 25 years. Further, the trial court denied defendant's request for a continuance to obtain school and mental health records in the belief these were not relevant because "none of this was ever placed in issue" during the trial. Regardless of the records' relevance to the trial court, the records will be relevant at defendant's eventual youth offender parole hearing. Defendant must be afforded the opportunity, recognized by the court in *Franklin*, to place on the record the kinds of information that "will be relevant to the [parole board] as it fulfills its statutory obligations under sections 3051 and 4801." (*Franklin, supra*, 63 Cal.4th at p. 287.)

DISPOSITION

The matter is remanded to permit defendant the opportunity to prepare a record for his eventual youth offender parole hearing. We affirm the judgment of conviction in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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