Filed 1/19/18 P. v. Gurule CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DARREL MARK GURULE, Defendant and Appellant.	B280034 (Los Angeles County Super. Ct. No. BA369369)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Affirmed as modified with directions.

Robert D. Bacon, 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, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Over thirty-eight years ago, on September 20, 1979, Barbara Ballman was raped and murdered. She was 23 years old. Her killer was not identified until 2004, when DNA collected from her body in 1979 was matched to defendant Darrel Mark Gurule.

Thirty-seven years after Ballman died, on September 21, 2016, a jury convicted defendant of first degree murder. (Pen. Code,[1] § 187, subd. (a).) The jury found true a personal firearm use allegation. (§ 12022.5, subd. (a).) Two special circumstances were also found true—that defendant was previously convicted of first degree murder, and that he murdered Ballman while committing rape. (§ 190.2, subds. (a)(2), (a)(17).)

The jury was unable to reach a verdict on imposing the death penalty. After that result, the prosecution declined to retry the penalty phase. The trial court sentenced defendant to life without the possibility of parole plus four years. The sentence was imposed consecutive to the life-without-parole sentence defendant was then serving on a 1987 conviction for kidnapping to commit a sex act and murder. We modify the judgment as to reduce the firearm enhancement to the length available at the time of the offense, and to eliminate the restitution fine, authority for which had not been enacted at the time of the offense. In all other respects, we affirm the judgment as modified.

---

[1] Further statutory references are to the Penal Code except where otherwise noted.

II. THE EVIDENCE

At 11 p.m. on September 20, 1979, Ballman left her sister's Glendale home. Ballman told her sister she was going straight home to her nearby apartment. It should have taken Ballman five minutes to get there, but she never arrived. The following morning, Ballman's mostly naked body was discovered in her Volkswagen parked on Edison Place, about a block and a half from her apartment complex, near an elementary school.

A witness had heard one or two gunshots around 11:15 p.m. Ballman was lying across the front seats of her car. Her shirt and bra had been pushed up around her neck. She was naked from the waist down but for a pair of socks. She had been shot once in the abdomen. The fatal bullet's trajectory was consistent with Ballman having been shot while lying in the position in which she was found. She did not die immediately, but the nature of the gunshot wound would have prevented her from moving. A vaginal smear collected from Ballman's body contained a very high concentration of sperm. The DNA material could not be tested using technology available at the time, and the case remained unsolved for many years.

In 2004, after DNA testing became available, defendant was identified as the sperm's sole contributor. Defendant had lived near the elementary school at the time Ballman was raped and murdered. In 2009, Glendale police detective Arthur Frank interviewed defendant in state prison custody. Defendant denied any knowledge of either the victim or the crime. Defendant conceded, however, that he "was getting loaded all the time" in the late 70s, and it "could be possible" he had committed the crime but did not remember. At trial, the defense theory was

that someone else killed Ballman after defendant had consensual sex with her.

At trial, a victim of a similar sexual assault that occurred two years before Ballman's murder testified. On March 29, 1977, 21-year-old Lynn R. was sitting in her car in a parking lot waiting for someone who was to meet her when a man, later identified as defendant, approached with a shotgun. Defendant got into Lynn R.'s car on the driver's side, forcing her at gunpoint into the passenger seat. Defendant drove away and parked on a nearby street. He ordered Lynn R. to remove her clothing, threatened to kill her if she did not cooperate, and, after she removed some of her clothing, he sexually assaulted her. Defendant became angry at some point and reached for the shotgun, which fired. The bullet struck the passenger side floorboard. Lynn R. escaped, naked, when a man approached a car parked in front of them. Defendant drove away. At trial, Lynn R. identified a contemporary photograph of defendant as that of the perpetrator. On cross-examination, Lynn R. confirmed that at a preliminary hearing, she testified defendant's speech was slow and deliberate, his eyes were glassy and dilated, and he smelled of alcohol.

III. DISCUSSION

A. *Third-Party-Culpability Evidence*

Defendant sought to introduce evidence purportedly pointing to Ballman's friend, Gregory Sereika, who had died in 2008, as the murderer. During the 1979 investigation of Ballman's murder, Sereika was a suspect, and much of

defendant's proffer of evidence of Sereika's culpability came from that investigation.

The trial court concluded defendant presented insufficient direct or circumstantial evidence linking Sereika to the actual perpetration of the crime, so the evidence did not raise a reasonable doubt as to defendant's guilt. On appeal, defendant argues the trial court's ruling was prejudicial error and a violation of his constitutional right to present a defense. Defendant particularly focuses on two types of evidence that the trial court declined to rely upon—hearsay evidence from statements that Sereika and Ballman's sister made in previous law enforcement interviews, and a sketch purportedly made when a witness was under hypnosis. Our review is for an abuse of discretion (*People v. Elliott* (2012) 53 Cal.4th 535, 581). As discussed below, it was within the trial court's discretion to decline to rely upon both of these types of evidence, and, in any event, the evidence did not link Sereika to the actual perpetration of the crime. We further conclude that when, as here, there is no state law error, defendant's constitutional rights were not infringed. (*People v. Prince* (2007) 40 Cal.4th 1179, 1243.)

1. The applicable law

Relevant evidence linking a person other than the defendant to the commission of the charged offense, and therefore raising a doubt as to the defendant's guilt, is admissible unless the trial court exercises its discretion to exclude the evidence pursuant to Evidence Code section 352. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1136.) To be relevant and admissible,

however, "'evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt[] must link the third person either directly or circumstantially *to the actual perpetration of the crime*. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352.' [Citations.]" (*People v. Elliot, supra*, 53 Cal.4th at p. 580, italics added.) Evidence of mere motive or opportunity in another person, without more, will not suffice. (*People v. Hall* (1986) 41 Cal.3d 826, 833.) Similarly, "Evidence that another person . . . had some 'remote' connection to the victim or crime scene [] is not sufficient to raise the requisite reasonable doubt. [Citation.]" (*People v. DePriest* (2007) 42 Cal.4th 1, 43.)

Here, the trial court properly concluded defendant presented insufficient direct or circumstantial evidence linking Sereika to the actual perpetration of Ballman's murder. Because the trial court found that defendant had not demonstrated that the proffered evidence was relevant, it did not exercise any discretion under Evidence Code section 352.

2. There was no abuse of discretion

a. prior statements from Ballman's sister

Defendant offered evidence arguably supporting a claim that Sereika had a motive to kill Ballman. In a 1979 interview, Sereika told investigators he had known Ballman for three to four weeks; they did not have a sexual relationship because

Ballman wanted only to be friends; he was a heavy drinker who had once spent the night on Ballman's couch after consuming alcohol; and he had visited Ballman at her sister's house several hours prior to the murder. Defendant wished to assert that Sereika wanted to be more-than-friends with Ballman; moreover, he was possessive and he stalked her. That assertion rested on hearsay evidence—statements by Ballman's sister, Linda Friscia (now Benjamin), in 1979 and 1996 as to information that Ballman told her about Sereika before Ballman's murder.

Defendant also identified some evidence suggesting Sereika might have had a gun that could have been used to kill Ballman. That claim was based on Sereika's stepfather missing three guns he owned, one of which had a caliber that could have fired the bullet. The possibility of a gun also rested on hearsay statements from Friscia's earlier interviews—statements relating what Ballman told her, as well as what Sereika's stepfather told her, some of which was based on what Sereika's mother told Sereika's stepfather.

The trial court declined to consider hearsay evidence in its pretrial ruling on the third-party-culpability evidence question. This was not an abuse of discretion, particularly where it appears that defendant offered little, if any, evidence that would be admissible at trial. (*People v. Adams* (2004) 115 Cal.App.4th 243, 253 [affirming exclusion of third-party culpability evidence in part because it was inadmissible hearsay]; *People v. Frierson* (1991) 53 Cal.3d 730, 746 [defendant not entitled to present evidence of third-party culpability using inadmissible evidence].) And even if the evidence was not excludable as hearsay, it did not directly or circumstantially connect Sereika to the actual commission of the rape and murder. It was at best merely motive

and opportunity evidence, which, without more, does not raise a reasonable doubt about a defendant's guilt. Instead, as noted above, direct or circumstantial evidence linking the defendant to the actual perpetration of the crime is required. (*People v. Elliot, supra*, 53 Cal.4th at p. 580.)

Defendant also proffered evidence that at 5 or 6 p.m. on September 20, 1979, a witness saw a male driving a blue van with oversized wheels in the neighborhood, and Sereika's vehicle was "a blue van with rims." There was no identification of the person driving the van. Even if a jury could somehow conclude Sereika was driving the van, the evidence did not link him to Ballman's murder, which occurred several hours later, around 11:15 p.m.

Sereika's left thumb print was on the inside driver's doorframe of Ballman's Volkswagen. But, as the trial court found, the thumbprint could not be tied to any date. Sereika could have touched the doorframe at any time during the three to four weeks that Sereika and Ballman were friends, including on one occasion when, according to Sereika, he spent the afternoon driving Ballman in her car. In this context, the presence of Sereika's thumbprint on the doorframe was not direct or circumstantial evidence linking him to the actual perpetration of Ballman's murder.

b. Susan W.

Defendant's third-party-culpability evidence proffer rested in significant part on a witness who possibly saw Ballman and a man shortly before Ballman's murder, 15-year-old Susan W., and in particular on a composite sketch created after Susan W. was

hypnotized. Defendant claimed the composite sketch resembled Sereika. The trial court declined to consider the sketch because Susan W. was under hypnosis when it was produced. On appeal, defendant claims Susan W. "plac[ed] Sereika and Ms. Ballman together—or so the jury could conclude—at the place and shortly before the time of her demise." We disagree. Even if we view Susan W.'s statements and testimony in the light most favorable to defendant, she did not link Sereika to the actual perpetration of the crime.

Six days after the murder, on September 26, 1979, Susan W. told investigators that at the approximate time of Ballman's murder, in the place where it occurred, she saw a man and a woman in a parked Volkswagen.[2] They were engaged in a loud argument. It also appeared they were attempting to have sex. Susan W. did not hear any gunshots. Susan W. never identified Sereika as the man in the car. There was no evidence Susan W. was ever shown a photographic lineup containing Sereika's photograph.

Many years later, at the August 28, 2015, hearing on the admissibility of third-party-culpability evidence, Susan W. testified she had contacted the police only after her mother's friend told her a murder had occurred. Susan W. did not know for a fact that the night she saw the two people in the Volkswagen was the same evening Ballman was murdered. She

---

[2] The trial court noted uncertainty as to whether Susan W. observed Ballman's vehicle at all, as when officers arrived the following morning, there were two Volkswagens parked on Edison Place in close proximity to each other on the same side of the street.

remembered sitting on a curb by herself "crying hysterically" after breaking up with her boyfriend. It was around 10 p.m. or later. But she testified that if she told police at the time that it was later, that was more accurate. She heard screaming and yelling. It sounded like a man and a woman were having an argument. They were "screaming really loud." There was some kind of commotion. The car was moving around. Susan W. felt very uncomfortable so she left. She did not remember hearing any gunshots. If she had heard gunshots, she would have told the police.

Our record indicates that if Susan W. were to have testified at trial, she would not have been able to testify as to any description of the man in the car. For that reason, presumably, defendant wished to admit the composite sketch, which defendant believed bore a resemblance to Sereika. The evidence is that the sketch was made when, two days after giving her initial statement to police, on September 28, 1979, Susan W. was hypnotized to assist the investigators. During the 2015 hearing on the admissibility of third-party-culpability evidence, Susan W. testified she remembered being hypnotized, but she did not remember anything she had said while under hypnosis. When she came out of hypnosis, police officers showed her the composite sketch. This was the sketch that defendant wished to use to link Sereika to the crime.

The trial court here declined to consider the composite sketch, following the law at the time that Susan W. was hypnotized. Under that law, "[T]he testimony of a witness who has undergone hypnosis for the purpose of restoring his [or her] memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session

forward." (*People v. Shirley* (1982) 31 Cal.3d 18, 66-67.) Under the law at the time, Susan W. could nevertheless have testified to events she *both* recalled and related prior to being hypnotized. (*People v. Hayes* (1989) 49 Cal.3d 1260, 1263, 1270, 1273.)[3] However, as discussed further below, we have not been provided with evidence that shows what Susan W. told investigators about the suspect subsequent to her initial statement but prior to being hypnotized.

Arguably, if the current standard in Evidence Code section 795 were more favorable to defendant, he should receive the benefit of that standard. But section 795 is not more favorable to defendant, as it provides, like prior law and along with other requirements, that Susan W.'s testimony would be limited to "those matters that the witness recalled and related prior to the hypnosis." (§ 795, subd. (a)(1).) Under Evidence Code section 795, the composite was inadmissible as well.

We note that we have no evidence that this is a case where a witness's recollection was *restored* based on hypnosis. From the record we have, there is no indication that if Susan W. were to testify at trial, she would be able to describe the man in the Volkswagen, adopt the composite sketch as an accurate depiction,

---

[3] The *Shirley* rule applied in all cases not yet final as of the date *Shirley* was decided, March 11, 1982. (*People v. Guerra* (1984) 37 Cal.3d 385, 390.) *People v. Hayes, supra*, 49 Cal.3d 1260, governs the admissibility of all pre-hypnosis evidence predating January 1, 1985, the date on which Evidence Code section 795 took effect. (*Id.* at p. 1274.) Evidence Code section 795 now controls the admission of witness testimony in a criminal proceeding when the witness has previously undergone hypnosis.

or even state that it was accurate at the time it was rendered. She thus would not be able to provide satisfactory foundation for admitting a composite sketch of an individual, apart from whether it was produced during hypnosis. (*People v. Cooks* (1983) 141 Cal.App.3d 224, 309 ["the party offering the composite drawing must lay a proper foundation by showing . . . the witness testifies that he made the identification on which the drawing is based and that it was a true reflection of his opinion at that time"].) The trial court did not err in excluding the sketch.

c. conclusion

The trial court did not abuse its discretion in concluding the proffered evidence did not link Sereika to the actual perpetration of the crime and, as a result, did not raise a reasonable doubt concerning defendant's guilt. It is not surprising that there are some facts connecting Sereika to Ballman, because, in investigating the crime in 1979, Sereika was a suspect. Officers focused in part on determining whether the evidence implicated Sereika, and he was not charged. The evidence defendant has identified did not satisfy his burden to attempt to show third-party culpability under California law. In all, even if there was evidence of motive and opportunity, none of the evidence put Sereika at the crime scene or otherwise connected him to the crime's commission.

That is, Sereika's thumbprint could have been left in Ballman's car at anytime during the three to four weeks they were friends, including when he drove her around for an afternoon. That a van resembling his was in the neighborhood roughly five hours before the murder was inconsequential. There

was no identification of Sereika as that van's driver, and, even if the man in the van *was* Sereika, he could have been present simply because Ballman lived nearby. And the man Susan W. heard and saw with Ballman in the Volkswagen could have been anyone, including defendant. She never identified Sereika as that man. There was no admissible description and no evidence Sereika resembled the man Susan W. saw. Finally, because the trial court did not abuse its discretion under state law, defendant's federal constitutional rights were not infringed. (*People v. Prince, supra*, 40 Cal.4th at p. 1243.)

3. The trial court did not usurp the jury's function

Related to his argument about admitting third-party culpability evidence, defendant argues the jury should have been permitted to decide whether Susan W. linked Sereika to the crime. In other words, defendant claims the trial court usurped the jury's fact-finding function and made improper credibility determinations in reaching its decision. We conclude the trial court's third-party-culpability evidence ruling was well within the parameters of its decision-making power.

In *People v. Hall, supra*, 41 Cal.3d 826, 834, our Supreme Court acknowledged that the trial court's inquiry into the admissibility of third-party-culpability evidence necessarily requires it to weigh the facts. The court cautioned: "Yet courts must weigh those facts carefully. They should avoid a hasty conclusion . . . that evidence [is not credible]. Such a determination is properly the province of the jury. [¶] . . . '[I]f the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is

purely speculative and fantastic but should afford the accused every opportunity to create that doubt.' [Citation.]" (*Ibid.*)

Defendant asserts the jury should have been permitted to decide whether Susan W. was present *on the night* and *at the time* Ballman was killed as opposed to some other time that evening or some other evening altogether, whether Sereika stole a .38-caliber gun from his stepfather, and whether he exhibited it in Ballman's presence in a menacing manner. This argument might be meritorious if the trial court's ruling turned on those facts, but it did not. Even if Susan W. *did* see Ballman and her murderer in the Volkswagen, even if Sereika *was* in possession of a .38-caliber weapon, and even if he *had* menaced Ballman with it on a prior occasion, as discussed above, there was evidence only of possible motive and opportunity. There was no evidence that Sereika was the man Susan W. saw in the Volkswagen, and there was no evidence linking Sereika to the actual perpetration of the rape and murder. In reaching its decision, the trial court did not resolve any credibility issues. Instead, the court simply accepted Susan W.'s testimony she could not be certain about the date she observed the Volkswagen on Edison Place and she was in fact under hypnosis when the composite sketch was created. The trial court did exactly what it was required to do—it considered the evidence in order to determine whether, directly or circumstantially, it linked Sereika to the crime's actual commission. Under *People v. Hall, supra*, 41 Cal.3d 826, absent substantial direct or circumstantial evidence linking Sereika to the actual perpetration of Ballman's murder, it was not an abuse of discretion to conclude the suggestion that Sereika may have been involved could not be placed before the jury.

B. *Evidence Preservation*

Defendant sought a dismissal in the trial court for violations of his due process rights based on the failure to preserve two types of evidence.

1. Applicable law

Under the federal Constitution, a state's duty to preserve evidence is limited to evidence "that might be expected to play *a significant role* in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488-489, italics added.) The duty does not extend to evidence that might have had some minimal exculpatory value. (*People v. Beeler* (1995) 9 Cal.4th 953, 977.) "To meet th[e] standard of constitutional materiality, . . . evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*California v. Trombetta, supra*, 467 U.S. at p. 489.) A state's duty is further limited when there is a failure to preserve *potentially* useful evidence, that is, evidence that could have been subjected to tests, the results of which might have exonerated the defendant. In that circumstance, due process is not violated unless the defendant can establish the police acted in bad faith. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57-58.) The presence or absence of bad faith turns on what the police knew about the exculpatory value of the evidence at the time it was lost or destroyed. (*People v. Beeler, supra*, 9 Cal.4th at p. 976.) Stated differently, the police cannot act in bad faith if they do not know that the

evidence has potential exculpatory value. (*People v. Montes* (2014) 58 Cal.4th 809, 838.) The burden is on the defendant to show bad faith. (*People v. Memro* (1995) 11 Cal.4th 786, 831, disapproved on another point in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.)

The parties disagree about the applicable standard of review. We agree with the Attorney General that, as our Supreme Court has held, our review of a *Trombetta*/*Youngblood* ruling is for substantial evidence: "'On review, we must determine whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to support its ruling. [Citation.]' [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1215, 1246; accord, *People v. Duff* (2014) 58 Cal.4th 527, 549.) Our review is based on the evidence that was before the trial court at the time it ruled on defendant's pretrial motion. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1172, disapproved on another point in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

2. Audio recordings of Susan W.'s September 28, 1979 interview

Susan W. testified at the pretrial third-party-culpability evidence hearing that on September 28, 1979, a week after Ballman's murder: she had been hypnotized at the request of investigating officers; she did not remember anything she said while hypnotized; and when she came out of the hypnosis, officers showed her a composite sketch. Audio recordings of Susan W.'s September 28, 1979 interview were in the Glendale Police Department's possession as of February 1996, when the murder

was reinvestigated, but the tapes could not be played because they were in an outdated format. Sometime thereafter, but prior to defendant's trial, the tapes were lost. Defendant argues: "Because the tapes have been lost, we do not know how much detail [Susan W.] provided prior to being hypnotized or if she was successfully hypnotized at all. The failure to preserve the tapes made the proceedings fundamentally unfair, particularly by impairing [defendant's] ability to present third-party[-]culpability evidence."

Defendant speculates the tapes may have contained pre-hypnosis statements describing a man matching Sereika's description as the perpetrator of the rape and murder. Defendant further speculates the tapes might contradict Susan W.'s testimony she was in fact successfully hypnotized. But there was no evidence Susan W. made any pre-hypnosis statements. There was no evidence she gave a pre-hypnosis description of the man in the Volkswagen. There was no evidence she was *not* successfully hypnotized. On the contrary, her own testimony was that she was successfully hypnotized and that, when she came out of hypnosis, the officers showed her a composite sketch. There was no evidence something on the audio recordings or based on them would have contradicted Susan W.'s testimony she was successfully hypnotized.

Moreover, the potentially exculpatory nature of the recordings would not have been apparent to law enforcement officers before the tapes were lost. The detective reinvestigating the crime in 1996 was unable to listen to the tapes because they had been recorded in an outdated format. The officer did not know what the tapes contained. There was no reason for police to foresee a dispute relating to third-party-culpability evidence

would arise as to whether Susan W. was hypnotized and whether she gave pre-hypnosis statements helpful to the defense in showing third party culpability. The record supports the trial court's ruling. Defendant's speculation about the tapes' content does not support a conclusion the exculpatory value would have been apparent to the police before the tapes were lost. (*People v. Alexander* (2010) 49 Cal.4th 846, 878-879.)

Defendant asserts bad faith in that the tapes were retained for 17 years but then "inexplicably vanished" after officers began to reinvestigate the cold case. Because defendant did not show apparent exculpatory value, he cannot establish bad faith. (*People v. Montes, supra*, 58 Cal.4th at p. 838.)

Additionally, the evidence of defendant's guilt was such that any error was harmless under any standard. (*People v. Yeoman* (2003) 31 Cal.4th 93, 126-127.) Defendant's argument is that if the tapes had not been lost, and if they contained Susan W.'s pre-hypnosis statements, and if those statements included a description of the man she saw in the Volkswagen, and if that description was consistent with Sereika, then the trial court might have granted defendant's motion to introduce third-party-culpability evidence and, after hearing that evidence, the jury likely would have acquitted him. But the evidence overwhelmingly pointed to defendant. Ballman was raped, shot, and left to die. She was found lying across the front seats of her car. Her shirt and bra had been pushed up around her neck. She was naked from the waist down but for a pair of socks. She had been shot once in the abdomen. She did not move after she was shot. The fatal bullet's trajectory was consistent with Ballman having been shot while lying in the position in which she was found. Although she did not die immediately, the nature of the

gunshot wound prevented her from moving. Defendant's sperm was present in high concentration in Ballman's vaginal swab. He had lived in the neighborhood and was frequently "loaded" at the time. In his own interview, he conceded it "could be possible" he had committed the present crime but did not remember. There was evidence that he had committed a very similar crime two years earlier. The defense theory was implausible—that someone else murdered Ballman after defendant had consensual sex with her. There was no evidence Ballman even knew defendant, let alone that she would have engaged in consensual sex with him.

3. The victim's underwear

Ballman's underwear, with a yellow-stained panty liner attached, was found on the floor of her car. There is no evidence the items underwent any testing prior to 2011. They were "place[d] in [a] brown bag" and shelved. In June 2011, criminalist Learden Matthies tested both items for the presence of blood or semen. None was found. A defense expert retested the underwear and liner in 2014. Again, they tested negative for semen. Nevertheless, "[m]iniscule amounts of male DNA were detected in four of the samples tested; however, the levels were too low to obtain a human male forensic DNA profile, so no further test[ing] was performed on these samples."[4]

---

[4] Defense counsel relied on this evidence in closing argument. He told the jury that there was semen on the underwear or panty liner that had been taken off Ballman and thrown on the floor of the car, and the semen could belong to defendant. This argument was used to support a defense theory that consensual sex with defendant could have occurred earlier,

Defendant argues the police failed to properly preserve this evidence by storing it in a paper bag rather than refrigerating it, which allegedly allowed the biological material to degrade. Defendant further asserts the improper storage prevented him from testing the evidence for the presence of semen and the blood type of the donor. Because defendant's theory at trial was that he had consensual sex with Ballman before someone else murdered her, defendant reasons evidence of semen in the underwear would have supported his claim it was deposited earlier, not immediately before the victim died. Defendant claims, "This inference would be far stronger if serological testing matched the stain in the underwear to the vaginal sample." At the same time, defendant emphasizes his argument does not concern DNA testing.

Defendant's claim is without merit for several reasons. First, given the facts surrounding the crime, the police would have had no reason to believe the underwear possessed any potential exculpatory value different from that Ballman's body would have yielded. Ballman's mostly naked body was found lying across the front seats of her car. She had not moved after being shot. There was an unusually high concentration of semen in her vagina. Her underwear with the attached panty liner was on the floor of her car. The police would reasonably have surmised Ballman was raped and then killed immediately—before she could even pull her shirt and bra down from around her neck. There was no reason to believe evidence identifying the

---

leading to semen on the underwear, with the killer later taking off Ballman's underwear (and other clothing) in the Volkswagen but not raping her.

perpetrator or otherwise relevant to solving the crime would be found in her underwear, which was removed prior to the rape and murder and remained on the car's floor. The logical assumption would have been that the person who raped Ballman also killed her; it would not be logical to conclude that any biological evidence on her underwear or panty liner would have shown otherwise.

Second, there was no evidence the police failed to follow routine evidence storage practices. "A showing that evidence was disposed of in accordance with standard procedures in the ordinary course of business suggests police acted in good faith. [Citation.]" (*People v. Duff, supra*, 58 Cal.4th at p. 550.)

Third, as defendant recognizes, DNA testing was nonexistent at the time, so there was no reason for the police to be concerned about preserving DNA evidence.

Fourth, there was evidence sperm deposited in 1979 would still have been visible in 2011 regardless of the manner in which the evidence was stored. During the preliminary hearing, criminalist Matthies testified that if semen had been deposited in the panty liner or underwear in 1979, she would have expected to (but did not) see sperm upon microscopic examination in 2011 regardless of how the evidence was stored. Defendant never presented any contrary evidence. In fact, defendant's own expert testified at trial that even after 30 years of unrefrigerated storage in a paper bag, he would expect to (but did not) see sperm cells.

Under any standard, there also is no showing of prejudice to defendant from the fact that the underwear was not refrigerated. First, the jury was not persuaded that, as defense counsel argued, defendant had consensual sex with Ballman sometime before someone else killed her. Defense counsel argued

the presence of male DNA, presumably sperm, in Ballman's underwear or panty liner was inconsistent with the theory defendant raped and murdered her in the car. Defense counsel asked, if that is what happened, then "how did male DNA from sperm end[] up in her underwear." But the overwhelming evidence was that Ballman had been raped and immediately murdered. She had been unable to move after she was shot. Defendant's sperm was present in high concentration in her vagina. There was no evidence Ballman knew defendant. And defendant had committed a similar assault on a young woman two years before Ballman was killed. Second, there was evidence from both prosecution and defense witnesses that, had sperm been present on the underwear in 1979, the manner in which the evidence was stored would not have prevented the detection of the sperm in 2011. We are not persuaded that the refrigeration of the underwear between 1979 and 2011 would have made a difference in this case.

C. *Defendant's Motion to Suppress his Custodial Statements*

Glendale police detectives Arthur Frank and John Perkins (retired) interviewed defendant at a state prison on September 9, 2009. Detective Frank had acquired the case from Detective Perkins in May 2009, after Perkins retired. Warnings were not given pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. During the interview, defendant repeatedly denied any knowledge of Ballman or her murder, including after Detective Perkins told him his DNA matched the evidence.

Defendant filed a pre-trial motion to suppress his statements. After listening to the recorded interview and

entertaining argument, the trial court denied defendant's motion to suppress his September 9, 2009 statements. The trial court found defendant was not in custody and the conversation was voluntary.

On appeal, defendant asserts the trial court prejudicially erred. Defendant reasons he was in custody and should have been advised of his rights: the detectives did not tell him he was free to leave and a reasonable person in his position would not perceive that he could summon a guard for that purpose independent of the detectives' wishes. Defendant cites the obvious prejudice—his denials were inconsistent with his defense at trial.

Miranda warnings are not required when the person questioned is not "in custody." (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) Though a prisoner is of course in custody in one sense, it does not mean he is "in custody" for *Miranda* purposes as to a particular interrogation. (*Howes v. Fields* (2012) 565 U.S. 499, 510-514 (*Howes*).) The United States Supreme Court discussed the meaning of "in custody" in *Howes*: "As used in our *Miranda* case law, 'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of 'the objective circumstances of the interrogation,' [citation], a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.' [Citation.] And in order to determine how a suspect would have 'gauge[d]' his 'freedom of movement,' courts must examine 'all of the circumstances surrounding the interrogation.' [Citation.] Relevant factors include the location of the questioning,

[citation], its duration, [citation], statements made during the interview, [citation], the presence or absence of physical restraints during the questioning, [citation], and the release of the interviewee at the end of the questioning, [citation]." (*Id.* at pp. 508-509.) That defendant was a prison inmate who was privately questioned about events outside the prison did not alone establish he was in custody for *Miranda* purposes. (*Id.* at pp. 510-514.)

"The question whether defendant was in custody for *Miranda* purposes is a mixed question of law and fact. (*Thompson v. Keohane* [(1995)] 516 U.S. [99,] 112-113.) 'Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is . . . reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." [Citations.] The first inquiry, all agree, is distinctly factual. . . . The second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate determination . . . presents a "mixed question of law and fact". . . .' (*Ibid.*, fn. omitted.) Accordingly, we apply a deferential substantial evidence standard (*People v. Memro* (1995) 11 Cal.4th 786, 826) to the trial court's conclusions regarding "'basic, primary, or historical facts: facts 'in the sense of recital of external events and the credibility of their narrators . . . .'"" (*Thompson v. Keohane*, *supra*, 516 U.S. at p. 110.) Having determined the propriety of the court's findings under that

standard, we independently decide whether 'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.' (*Id.* at p. 112.)" (*People v. Ochoa*, *supra*, 19 Cal.4th at pp. 401-402.)

The record demonstrates that, taking into account all of the circumstances, the trial court did not err in concluding that defendant was not in custody. Defendant was in state prison in protective custody when the interview occurred. As noted above, this fact alone does not establish defendant was in custody for *Miranda* purposes. (*Howes v. Fields, supra*, 565 U.S. at pp. 510-514.) Defendant also had no prior knowledge he was to be interviewed and did not know why the detectives were there. He repeatedly asked why the detectives had come to see him. But the surrounding circumstances were not coercive and would not have caused defendant to believe he was not free to terminate the interview. Although defendant was escorted to the conference room in handcuffs, they were removed before the interview commenced. Hence he was not physically restrained while speaking with the detectives. No corrections officer remained in the room. The door was left partially open. Detectives Frank and Perkins wore casual clothing. They were not armed. The conversation, which was audio recorded, was brief, lasting only about an hour. The detectives did not say or imply defendant was required to speak with them and did not threaten him with arrest or otherwise. Defendant spoke willingly. The tone was conversational. There were only brief moments when it became slightly heated. The conversation covered several topics including defendant's family relationships and his experience with gangs in prison as well as the 1977 incident involving Lynn R., which he admitted, and the present crime, which he denied.

Toward the end of the interview, defendant briefly resisted giving the detectives a requested DNA sample stating, "I'm gonna wait and get a lawyer." But he agreed to the oral swab after the detectives presented a search warrant. At the conclusion of the interview, defendant asked, "Uh, that's it?" to which Detective Perkins responded, "I'm finished if you are." Considered as a whole, the foregoing circumstances do not demonstrate defendant was subjected to a custodial interrogation requiring a *Miranda* warning. (*Howes v. Fields, supra*, 565 U.S. at pp. 514-517.)

D. *Cumulative Prejudice*

Defendant contends he is entitled to reversal because of cumulative prejudicial error. We have not found any error, prejudicial or otherwise. Therefore, "there is no cumulative prejudice to address." (*People v. Landry* (2016) 2 Cal.5th 52, 101.)

E. *Sentencing Errors*

1. The section 12022.5 firearm enhancement

The trial court erred when it imposed a four-year sentence under section 12022.5. At the time defendant committed the present offense, a violation of section 12022.5 was punishable by a two-year sentence. (Stat. 1977, ch. 165, § 92.) The judgment must be modified to reflect a two-year sentence under section 12022.5. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

2. The section 1202.4 restitution fine

The trial erred when it imposed a $300 restitution fine under section 1202.4. That statute was not enacted until 1983, several years after defendant murdered Ballman. (Stats. 1983, ch. 1092, § 320.1, eff. Sept. 27, 1983, op. Jan. 1, 1984.) Imposing the restitution fine violated the ex post facto clause of the United States Constitution. (*People v. Souza* (2012) 54 Cal.4th 90, 143.) The judgment must be modified to strike that fine.

IV. DISPOSITION

The judgment is modified to impose a two-year sentence under Penal Code section 12022.5 and to strike the $300 restitution fine imposed under Penal Code section 1202.4. The judgment is affirmed in all other respects. On remand, the trial court must prepare an amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

RAPHAEL, J.*

We concur:

KRIEGLER, Acting P.J. BAKER, J.

---

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