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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DARRYL L. MASON, Defendant and Appellant.	B267828 (Los Angeles County Super. Ct. No. BA406660)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura F. Priver, Judge. Affirmed as modified.

John P. Dwyer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie A. Miyoshi and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Darryl Mason (defendant) appeals his convictions for possessing two kilograms of cocaine and more than $68,000 in drug proceeds. He does not contest the sufficiency of the evidence presented at trial, but instead challenges the trial court's refusal to grant his motion to acquire law enforcement personnel records under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), his motions to dismiss due to the prosecution's deportation of a material witness and the failure to maintain the cash seized from his house for fingerprinting, his motion to unseal the sealed portion of the affidavit to the search warrant that led to the discovery of the drugs and cash in his house, and his motion to suppress his post-arrest confession. Defendant also argues that the abstract of judgment incorrectly reflects the sentence imposed. Only defendant's final argument has merit. Accordingly, we affirm his convictions and sentence, but order the abstract of judgment to be modified to reflect the correct sentence.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

On December 19, 2012, law enforcement officers from several local, state and federal agencies who were part of an interagency task force conducted surveillance on a house on West 87th Place in Los Angeles. Defendant lived there at the time.

That afternoon, defendant's brother walked out of the house and proceeded to look into the windows of all of the cars parked up and down the block, then reentered the house. This is a counter-surveillance tactic, designed to ascertain whether anyone is staking out the house from a car.

A few moments later, a grey truck drove up to the house and down its long driveway; someone got out of the truck and

entered the house. Ten minutes later, the same person got back into the truck and drove away.

A California Highway Patrol officer stopped the truck for having illegally tinted windows. The driver, Victor Lopez (Lopez), consented to a search of the truck. Tucked in the truck's center console was $26,700 in cash wrapped in a black plastic bag. Ten cell phones were scattered through the truck. Lopez had $800 in the pocket of his pants. When questioned about the cash, Lopez said the money belonged to his brother. Lopez was arrested and booked; facing deportation, he voluntarily left the United States.[1]

Based on their observations, on the opinion that Lopez was acting as a drug courier who had just dropped off cocaine and picked up $26,700 in cash plus an $800 commission for himself, and on additional information contained in a sealed portion of the affidavit, law enforcement agents sought and obtained a search warrant for the house on West 87th Place.

The warrant was executed a little after 1:00 a.m. on December 20. Defendant, his girlfriend, the girlfriend's seven-year-old daughter and defendant's brother were in the house or its back house. Inside a closet in one of the main house's bedrooms was (1) a shopping bag containing two "bricks" of cocaine (weighing one kilogram each) wrapped in black electrical tape, and (2) a shoebox containing $68,724 in cash. A small plastic baggie containing rock cocaine was found in the rear den.

To secure the premises, officers escorted all four occupants out of the house. Because it was cold outside and because

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1 Lopez subsequently returned to the United States, and the People provided defense counsel with the address they had for Lopez; however, counsel was unable to locate Lopez.

defendant was only in his pajama bottoms, police brought defendant back into the house within 15 minutes. Approximately 30 minutes later, defendant was arrested and transported to the Hawthorne police station. At some point thereafter, a social worker from the Los Angeles County Department of Children and Family Services arrived at the house and took custody of the seven-year-old due to child endangerment arising from the girl's presence in a house where drug dealing was taking place.

Defendant was interviewed at the police station approximately two hours and fifteen minutes after he was transported away from his house. During the recorded interview, defendant admitted to buying drugs on consignment from "Vic" for "26-five, 26-seven" or "27"; admitted to reselling the cocaine to others in bulk quantities rather than "break[ing] it down and sell[ing]" it; and that he knew he had "68, 67" thousand in cash in the shoebox.

II. Procedural History

The People charged defendant with (1) possessing a controlled substance for sale (Health & Saf. Code, § 11351), and (2) possessing more than $25,000 in proceeds from a drug transaction (*id.*, § 11370.9, subds. (a) & (f)). The People further alleged that defendant possessed more than one kilogram of cocaine (*id.*, § 11370.4, subd. (a)(1)), that his 1994 conviction for the attempted murder of a federal agent constituted a strike under our "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d)), and that his 1994 federal conviction for possessing a controlled substance with intent to sell (21 U.S.C. § 841) constituted a prior drug conviction (Health & Saf. Code, § 11370.2, subd. (a)).

Defendant filed several pretrial motions, including (1) a motion to obtain law enforcement personnel records under *Pitchess*; (2) a motion to dismiss the charges due to Lopez's unavailability; (3) a motion to dismiss the charges due to the People's commingling and destruction of the cash seized from his house and from Lopez; (4) a motion to unseal the sealed portion of the search warrant affidavit; and (5) a motion to suppress his confession because it was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and was involuntary. The trial court denied all of these motions.

The matter proceeded to trial, and a jury convicted defendant of all counts and found all enhancements to be true. The court subsequently found all prior convictions true.

The trial court imposed a prison sentence of 11 years. Specifically, the court imposed a nine-year sentence on the possession count (comprised of a base term of three years, doubled due to the prior strike, plus an additional three years due to drug quantity), to be followed by a two-year sentence on the drug proceeds count (comprised of one-third the midterm (one-third of three years) doubled due to defendant's prior strike).

Defendant filed this timely appeal.

DISCUSSION

I. Discovery-Related Motions

A. Pitchess *Motion*

1. Additional background

Defendant filed a motion asking the trial court to review the personnel records of 35 law enforcement officers from 12 different agencies who were on the task force or who otherwise had anything to do with the stop of Lopez's truck or the execution of the search warrant at defendant's house. He sought

information regarding prior incidents of the "use of improper tactics, suppression of evidence, improper reporting, violation of the Fourth, Fifth and/or Sixth Amendment, false testimony, and acts of untruthfulness, fabrication, and lack of credibility." In support of the motion, defense counsel submitted an affidavit stating, on information and belief, that all of the 35 officers "fabricated" the grounds for Lopez's arrest, placed or caused false statements to be placed in the affidavit attached to the search warrant for defendant's house, "falsely reported discovery of evidence" (presumably, the cocaine and cash located in defendant's house), and falsely reported that defendant confessed.

The trial court denied the motion without granting an in camera hearing. Specifically, the court reasoned that defendant's "accusation[s]" of a "massive" and "gigantic" "conspiracy" among "30-some members of a task force" did not constitute a "plausible scenario" of officer misconduct because defendant did not "set forth . . . why this would have occurred, how it would have occurred, what the motivation for it to have occurred would have been, how all of these officers could have been drawn into this conspiracy."

2. Analysis

The "personnel records" of "peace" and "custodial officers," as well as "complaints by members of the public," are conditionally privileged under California law. (Pen. Code, §§ 832.5, 832.7, 832.8.) They are not wholly immune from disclosure; instead, they may be disclosed if the party seeking them follows separate procedures articulated in *Pitchess*, *supra*, 11 Cal.3d 531 and later codified in Evidence Code sections 1043 through 1047. Under these procedures, a court must find "good

cause for the discovery or disclosure"—that is, a showing that the agency from which the records and complaints are sought possesses them and, more relevant here, a showing that the records and complaints are "material[] . . . to the subject matter involved in the pending litigation." (Evid. Code, § 1043, subd. (b)(3).)

To establish materiality, the requesting party must (1) set forth a "specific" and "plausible" "factual scenario of officer misconduct," and (2) must establish both how the information sought is "similar" to the misconduct alleged in the pending litigation and how the information would support a defense or negate the People's case. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1021, 1025-1027; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1021.) To qualify as "good cause," the "factual scenario of officer misconduct" must be an "alternate version of the facts" that is "internally consistent" and comports with "common sense." (*People v. Sanderson* (2010) 181 Cal.App.4th 1334, 1340-1341; *Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1064; *People v. Galan* (2009) 178 Cal.App.4th 6, 12-13 (*Galan*).) The proffered scenario need not be "persuasive," "reasonably probable" or even "credible" (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1316-1317 (*Thompson*); *Sanderson*, at p. 1340; *Warrick*, at pp. 1025-1026), but must be more than merely "possible," "conceivable" or "imaginable" (*Thompson*, at pp. 1318-1319). We review a trial court's assessment of good cause for an abuse of discretion. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 992.)

The trial court did not abuse its discretion in concluding that defendant had not set forth a "plausible" "factual scenario." Although it is sometimes "plausible" that one or more officers

might falsify a police report recording a defendant's allegedly illegal acts (*Uybungco v. Superior Court* (2008) 163 Cal.App.4th 1043, 1049-1050), a trial court does not abuse its discretion in concluding that it is not plausible that a large number of officers conspired to "fabricate virtually all the events preceding and following [a defendant's] arrest"—at least without some explanation of why they would single out the defendant. (*Thompson*, *supra*, 141 Cal.App.4th at pp. 1317-1318). As the trial court noted, *Thompson* is directly on point. There, the court held that the defendant had not shown a "plausible" factual scenario when he asserted that "11 police officers conspired to plant narcotics and recorded money in his possession" and "to fabricate virtually all the events preceding and following his arrest" without also providing some "nonculpable explanation for his presence in an area where drugs were being sold" or for why police were singling him out. (*Thompson*, at pp. 1317-1319.) For the same reasons, defendant's assertion that 35 officers conspired to plant drugs and money in his house, as well as to fabricate Lopez's prior arrest and defendant's subsequent confession, is also not plausible, especially when he provides no explanation as to why he was singled out, no explanation for his brother's counter-surveillance behavior or the smaller quantity of cocaine located elsewhere in the house, and no explanation for how nearly three dozen officers from a dozen different agencies could have been drawn into such a conspiracy.

Defendant raises two further arguments. First, he asserts that on appeal he is only seeking the personnel records for the lead detective who interviewed him (and thus abandoning his request for the records of the 34 other officers involved in the events leading up to and postdating his arrest). However, this

does not remedy the absence of "good cause," which, as explained above, is still premised on the existence of an implausible conspiracy to lie about everything that happened on December 19, and 20, 2012.

Second, defendant argues that the trial court was wrong, in finding that his proffered factual scenario was internally inconsistent, to rely upon his failure to deny that cocaine was found in his house or to repudiate his recorded confession because those events occurred *after* the search of his house, and he was seeking personnel records to attack the search itself. This argument ignores that defendant was also seeking the records to impeach any testifying officers at trial, for which the post-search inconsistencies remain relevant. (*Galan*, *supra*, 178 Cal.App.4th at p. 13.) Further, even if we were to agree that the trial court should not have considered the post-search inconsistencies in evaluating plausibility with respect to whether the search was valid, defendant's proffered factual scenario is independently implausible for the reasons set forth above. (Cf. *People v. Chism* (2014) 58 Cal.4th 1266, 1295 & fn. 12 [we review a court's ruling, not its reasoning].)

B. Motion Based on Lopez's Unavailability

1. Additional background

Prior to trial, defendant moved and then renewed his motion to dismiss the case against him on the ground that the People allowed Lopez, a material witness, to be deported. Although defendant frankly acknowledged that he did not know what testimony Lopez might offer, he argued that Lopez was "material" because he had been inside defendant's house and might testify that he (Lopez) had secretly planted the cocaine in defendant's house and that the car stop was bogus because his

windows were not illegally tinted. The trial court denied the motion, finding that the law enforcement agencies involved in the task force did not secure Lopez's deportation and that defendant's assertion that Lopez's testimony would exculpate defendant was "speculat[ive]."

2. Analysis

A criminal defendant has a constitutional right, as part of the right to compulsory process and the right of due process, not to have the government make witnesses unavailable to the defense, including through deporting those witnesses. (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 872-873 (*Valenzuela-Bernal*) [noting federal constitutional right]; *People v. Jacinto* (2010) 49 Cal.4th 263, 267 [noting state constitutional right]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 52.) However, this right only extends to witnesses who can offer testimony or who possess evidence that is "both material *and favorable* to the defense." (*Valenzuela-Bernal*, at pp. 872-873, italics added.) Although the absence of a missing witness "relax[es]" "the specificity required in showing materiality," it does not "afford[] the basis for wholly dispensing with such a showing." (*Id.* at pp. 870, 873.) We review a trial court's factual findings for substantial evidence, but review de novo its ultimate determination of whether those facts satisfy the constitutional standard. (E.g., *People v. Ramos* (1997) 15 Cal.4th 1133, 1154.)

The trial court did not err in denying defendant's motion to dismiss because defendant did not establish that Lopez's testimony would have been favorable to his defense. Lopez's statements to police at the time of the traffic stop did not exonerate defendant, and defendant freely admits that he has no idea what Lopez might actually say. This is insufficient. Indeed,

based on what is known so far, Lopez's testimony would *not* exculpate defendant because Lopez said the money belonged to Lopez's brother and because defendant admitted to trafficking drugs with Lopez.

Defendant asserts that he need not show that Lopez's testimony would be favorable to him; all that is required, defendant says, is that Lopez be a material witness—that is, someone in a position to have been a percipient witness to the alleged crime. For support, defendant cites *People v. Mejia* (1976) 57 Cal.App.3d 574. Defendant correctly summarizes *Mejia's* holding (*Mejia*, at pp. 579-581 ["No showing that [the absent witness's] potential testimony would exonerate [the defendant is] required"]), but overlooks that *Valenzuela-Bernal* displaced *Mejia's* laxer standard. (*People v. Jenkins* (1987) 190 Cal.App.3d 200, 205-206.) Defendant resists this conclusion, noting that *Mejia* still sets forth the pertinent standard under the *California* Constitution. (*Cordova v. Superior Court* (1983) 148 Cal.App.3d 177, 183-184.) This is true, but irrelevant to the question of suppression because our state's Constitution prohibits a court from suppressing evidence in a criminal case unless its admission violates the *federal* Constitution, even if it violates the California Constitution. (Cal. Const., art. I, § 28, subd. (f)(2); *In re Lance W.* (1985) 37 Cal.3d 873, 895-896.) Because defendant has not established that Lopez's testimony would have been favorable to him, he has not demonstrated a violation of the federal Constitution and is not entitled to suppression.[2]

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2 In light of this conclusion, we need not decide whether the People are responsible for Lopez's unavailability.

C. Motion Based on Destruction of Evidence

1. Additional background

Defendant sought dismissal of the charges against him on the ground that law enforcement commingled the cash seized from his house and the cash seized from Lopez with cash seized in other investigations, and allowed the cash in this case to be forfeited—which, in the end, made it impossible for defendant to test the cash from his house to show that it did not have his fingerprints on it. The trial court denied the motion, finding that defendant had not sufficiently shown that "the money would in any material meaningful way—[through, for example, the] testimony from a [finger]print expert—exonerate" or "exculpat[e]" defendant. The court also found no evidence that law enforcement acted in bad faith.

2. Analysis

Although law enforcement generally has no duty to *collect* evidence (*People v. Montes* (2014) 58 Cal.4th 809, 837), it has a constitutional duty in certain instances to *preserve* the evidence it collects (*People v. Carrasco* (2014) 59 Cal.4th 924, 961). If the evidence collected has an "apparent" "exculpatory value," its destruction violates due process if it cannot be obtained "by other reasonably available means"; however, if the evidence may only be useful to the defense but does not have "apparent" "exculpatory value," its destruction violates due process only if it the police act in bad faith. (*Carrasco*, at pp. 961-962; *People v. DePriest* (2007) 42 Cal.4th 1, 41-42 (*DePriest*); see also *California v. Trombetta* (1984) 467 U.S. 479, 489; *Arizona v. Youngblood* (1988) 488 U.S. 51, 57.) The standard of review is somewhat unsettled (*People v. Velasco* (2011) 194 Cal.App.4th

1258, 1262); we will give defendant the benefit of the doubt by reviewing the trial court's ruling de novo.

The trial court committed no error in denying defendant's motion. The money (or its wrapping) had no apparent exculpatory value; it had not been examined for fingerprints, so there is no way to know whether any prints that might have been found would exonerate or inculpate defendant. At best, the money was potentially useful to the defense but defendant adduced no evidence that the police acted in bad faith in commingling the cash or in allowing it to be forfeited. (*DePriest*, *supra*, 42 Cal.4th at p. 42.) To the contrary, the reason law enforcement gave for not preserving the cash's wrapping for later fingerprinting was a good one—namely, that defendant already admitted the cash was his.

Defendant cites *People v. Bowles* (2011) 198 Cal.App.4th 318, 322-324, for the proposition that an "inconclusive" fingerprint result is "favorable" to a defendant for purposes of criminal discovery under the Criminal Discovery Act (Pen. Code, § 1054 et seq.) and *Brady v. Maryland* (1963) 373 U.S. 83. However, there was no fingerprint result—conclusive or not—in this case. (See *People v. Medina* (1990) 51 Cal.3d 870, 893 [police destroyed bottle bearing fingerprint; no violation because police "could not know at the time . . . whether, or to what extent, the . . . bottle's print matched defendant's prints"].) What is more, *Bowles* did not speak to whether an inconclusive result was obviously—or apparently—exculpatory, and strongly suggested that it was not when it stated that the inconclusive result was not material. (*Bowles*, at pp. 324-326.)

II. Suppression Motions

A. Motion to Unseal Search Warrant Affidavit

1. Additional background

Defendant filed a motion to unseal the sealed portion of the affidavit accompanying the search warrant for his house. The trial court went in camera to examine the sealed portion of the affidavit. The court ultimately denied the motion to unseal, concluding that there was "no basis to find that there were either material omissions or misstatements [in the affidavit], nor was there a lack of probable cause." The court also declined to examine, in chambers, the confidential informant referenced in the sealed portion of the affidavit.

2. Analysis

The People have the right, when seeking a search warrant, to ask the magistrate to seal any portion of the affidavit if that portion is protected by either the official information or informant's identity privileges. (*People v. Hobbs* (1994) 7 Cal.4th 948, 971; Evid. Code, §§ 1040 [official information privilege] & 1041 [informant's identity privilege].) In striking a balance between the People's interest in maintaining the applicable privilege against a criminal defendant's right to challenge a search warrant, a defendant may ask the court to unseal the affidavit. (*Hobbs*, at pp. 962, 971-972; *People v. Heslington* (2011) 195 Cal.App.4th 947, 957.) A court asked to unseal a warrant must examine the sealed portions of the affidavit in camera, and ask two questions: (1) Does the applicable privilege continue to apply to the sealed portions of the affidavit?, and, if a "significant" portion of the affidavit remains sealed, (2) Is there a "reasonable probability" that the defendant would prevail on a motion to quash (by demonstrating no substantial basis for a

finding of probable cause) or to traverse the warrant (by establishing that the affiant knowingly or recklessly included in the affidavit a false statement material to probable cause)? (*Heslington*, at pp. 957-958 & fn. 7.) If the court's answer to both questions is "yes," the People are put to a choice: Consent to the unsealing of the affidavit or suffer suppression of the search's fruits. (*Ibid.*; see also Evid. Code, § 1042, subd. (d).) We review a trial court's ruling on a motion to unseal by independently reviewing the sealed portions ourselves and asking whether the trial court abused its discretion. (*Hobbs*, at p. 976; *People v. Martinez* (2005) 132 Cal.App.4th 233, 241-242.)

The trial court did not abuse its discretion in denying the motion to unseal. We have examined the sealed portion of the affidavit, and agree with the trial court's ruling that there is no "reasonable probability," based on the information in that portion, that defendant would prevail on a motion to quash or traverse the warrant. Indeed, there is ample probable cause based solely on the unsealed portion of the affidavit. Thus, the trial court properly denied defendant's suppression motions as well as his motion to unseal.

Defendant argues that the trial court erred in not examining the confidential informant in chambers, asserting that it is mandatory. It is not mandatory. (*Davis v. Superior Court* (2010) 186 Cal.App.4th 1272, 1277-1278 ["The confidential informant's presence is not required at the in camera hearing"].) Nor was the failure to examine the confidential informant an abuse of discretion, as he/she was not a percipient witness to the events occurring on December 19, 2012, and, instead, "'simply point[ed] the finger of suspicion toward a person who has violated the law.' [Citation.]" (*People v. Goliday* (1973) 8 Cal.3d 771,

782.) What is more, the search itself turned up drugs and money, thereby confirming the validity of the information he/she provided. (See *People v. Benjamin* (1999) 77 Cal.App.4th 264, 268, 275-276 [noting that results of search may be used to support truthfulness of statements in affidavit, when their veracity is attacked].)

B. Motion To Suppress Statement

1. Additional background

At the beginning of the interview of defendant at the police station, a local police detective handed defendant a written document delineating the *Miranda* rights, had defendant read it aloud, and asked for defendant's signature below a line that read: "I have read this statement of my rights, or I have been informed orally of my rights, and I understand what my rights are. I am willing to make a statement and answer questions. I do not want an attorney." The detective asked defendant to read the form's contents aloud, then asked him, "Can you just sign this just telling me that I read all this and you understand what's on this paper[?] Right there, it says signature, and I'll sign below." Defendant asked, "That's waiving my rights, though, right?" The detective responded, "Uh, no. That's just you acknowledging that you understand what's on the paper. That's not waiving your rights." At that point, a federal agent who was the second interviewer, said, "Yeah, speaking of those rights, you can stop any time you want. You can just say, I don't want to talk to me." The agent then asked, "[s]o what brought us to your house today?" Defendant immediately responded, "I mean, you gonna ask me trick questions, we gonna stop talking. Just tell me, fuck that bullshit. What brought you to my house? You tell me, what

brought you to my house. A search warrant brought you to my house."

Defendant moved to suppress the admission of his subsequent confession on two grounds: (1) his confession was involuntary because he confessed only after police adduced his cooperation by threatening to have social services take custody of his girlfriend's daughter and after being outside in the cold; and (2) his *Miranda* waiver was involuntary in light of the detective's advisement that defendant was not waiving his rights and in light of the threats he received.

After conducting an evidentiary hearing at which the local detective, defendant's girlfriend and defendant testified, the trial court denied the motion. The court ruled that defendant's confession was not coerced, rejecting as not credible defendant's testimony that the police threatened to put his girlfriend's daughter in foster care if he did not cooperate. The court criticized the local detective's explanation of the *Miranda* form as not "the best practice," but went on to find—based on the federal agent's subsequent advisement that defendant could stop talking at any time and on defendant's threat to "stop talking"—that defendant understood his right to remain silent and impliedly waived it by continuing to talk with the investigators.

2. Analysis

a. Due process

Both the federal and California Constitutions, as a matter of due process, preclude the admission of an involuntary confession. (*People v. Winbush* (2017) 2 Cal.5th 402, 452; U.S. Const., 14th amend.; Cal. Const., art. I, § 7.) A confession is "involuntary" if the defendant's will is overborne by coercive police conduct. (*Winbush*, at p. 452; *People v. Carrington* (2009)

47 Cal.4th 145, 169.) In assessing whether a confession is involuntary, courts look to the totality of the circumstances, including factors relevant to the interrogation itself (that is, the interrogation tactics used, the length of the interrogation, its location, its continuity) as well as factors relevant to the defendant (that is, his maturity, education, physical condition, and mental health). (*People v. Massie* (1998) 19 Cal.4th 550, 576.) We review the trial court's factual findings for substantial evidence, but its ultimate determination of voluntariness de novo. (*Winbush*, at pp. 452-453.)

We independently agree that defendant's confession was voluntary. The local detective testified that he never threatened defendant that his girlfriend's daughter would be taken away by social services if defendant did not cooperate, and the trial court accepted that testimony and rejected defendant's testimony to the contrary. We are required to defer to that credibility finding. (*People v. Armstrong* (2016) 1 Cal.5th 432, 451.) As a result, there is no credible evidence in the record of any threats or leniency to support a finding that defendant's confession was involuntary. (Cf. *People v. McWhorter* (2009) 47 Cal.4th 318, 347 ["A confession may be found involuntary if extracted by threats or . . . obtained by direct or implied promises"]; *Lynumn v. Illinois* (1963) 372 U.S. 528, 534-535 [police told woman that she will lose welfare benefits for her children if she does not cooperate; involuntary]; *People v. Trout* (1960) 54 Cal.2d 576, 585 [police threatened to incarcerate defendant's wife; involuntary], overruled on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 509, fn. 17; *United States v. Tingle* (9th Cir. 1981) 658 F.2d 1332, 1335-1336 [police threatened to remove defendant's children from her; involuntary].) To the extent defendant

suggests that the social worker did not have sufficient grounds to remove his girlfriend's daughter, that suggestion is both wrong on the law (Welf. & Inst. Code, § 306, subd. (a)) and irrelevant because the social worker did not arrive at defendant's house (or take custody of his girlfriend's daughter) until defendant had been transported to the police station. Defendant also argues on appeal that his confession was involuntary because he was required to wait outside for 15 minutes in the cold until he could be escorted back into his house. Although subjecting a defendant to extreme physical conditions can render a confession involuntary, defendant's brief but justified exposure to a night's chill did not render involuntary the confession that he gave nearly three hours later while in a climate-controlled interrogation room.

b. Miranda

As a prophylactic means of protecting against the pressures inherent to custodial interrogation, police must advise suspects of their rights to remain silent and to the assistance of counsel and obtain a waiver of those rights before the People may use any subsequent statement in its case-in-chief. (*People v. Jackson* (2016) 1 Cal.5th 269, 338-339.) A suspect's waiver may be express or implied. (*People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 218.) An implied waiver is one "inferred from the [suspect's] words and actions" (*People v. Cunningham* (2015) 61 Cal.4th 609, 642), and may be based on the defendant's conduct, after understanding his rights, in answering questions posed to him by law enforcement (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 382-384). Any waiver—express or implied—must, viewed in the totality of the circumstances, be both knowing and voluntary; a wavier is knowing if it is "'made with a full

awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it'" and is voluntary if it is "'the product of a free and deliberate choice rather than intimidation, coercion, or deception.'" (*Sauceda-Contreras*, at p. 219, quoting *Moran v. Burbine* (1986) 475 U.S. 412, 421.) We review de novo the question of whether a waiver was knowing and voluntary, while reviewing the underlying facts found by the trial court for substantial evidence. (*People v. Williams* (2010) 49 Cal.4th 405, 425.)

The trial court correctly concluded that defendant impliedly waived his right to remain silent. The local detective's advisement that defendant was not waiving his rights by signing the waiver undoubtedly precluded any finding of *express* waiver based on defendant's signing of the written form. However, the federal agent's subsequent advisement that defendant could stop talking at any time—and, critically, defendant's demonstrated willingness to invoke that right to stop talking if the investigators kept asking him "trick questions"—shows that defendant *knew* he had a right to remain silent and that his answers to those "trick questions" could be used against him. Defendant's implied waiver was also voluntary because, as explained above, it was not the product of threats to take away his girlfriend's daughter or the 15 minutes of being outdoors in the cold nearly three hours earlier.

III. Cumulative Error

Because there was no error, there was no cumulative error. (E.g., *People v. Melendez* (2016) 2 Cal.5th 1, 33.)

IV. Clerical Error in Sentence

Defendant points out, and the People concede, that the abstract of judgment does not correctly reflect the court's oral

sentence on the currency possession count—that is, one-third the midterm (one-third of three years) doubled due to the strike.

DISPOSITION

The sentence on count 2 is modified to reflect that the consecutive sentence imposed was one-third of the middle term. The clerk of the superior court is directed to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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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.