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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JAMES LEMON and VENDA JOHNSON, Defendants and Appellants.	B262406 (Los Angeles County Super. Ct. No. NA096742)

APPEAL from the judgments of the Superior Court of Los Angeles County. Tomson T. Ong, Judge. As to Defendant and Appellant James Lemon, affirmed; as to Defendant and Appellant Venda Johnson, affirmed as modified.

Randi Covin, under appointment by the Court of Appeal, for Defendant and Appellant James Lemon.

Madeline McDowell, under appointment by the Court of Appeal, for Defendant and Appellant Venda Johnson.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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In 2014, a jury convicted defendants and appellants Venda Johnson and James Lemon of the 1995 murder of an unarmed pizza delivery driver during the course of an attempted robbery. The jury also found true that a principal was armed with a firearm in the commission of the offense. Defendant Johnson, the shooter, was sentenced to life without the possibility of parole. Defendant Lemon was sentenced to a term of 25 years to life.

In this joint appeal, defendants Johnson and Lemon, who were juveniles when the murder was committed, and were 35 and 36 years old, respectively, when tried, both argue that the prosecution's direct filing of charges in criminal court in 2014 was an unconstitutional application of Welfare and Institutions Code section 707, subdivision (d) (hereafter "section 707(d)") in violation of the ex post facto clauses of the federal and state Constitutions.

Defendant Lemon raises numerous additional contentions: (1) the record lacks substantial evidence supporting first degree murder and the robbery-murder special-circumstance finding; (2) the court imposed unconstitutional restrictions on his cross-examination of the main prosecution witness; (3) the court erred in admitting an out-of-court statement made by defendant Johnson that implicated Lemon; (4) the court erred in instructing the jury on first degree felony murder and in failing to instruct on the lesser included offenses of theft and involuntary manslaughter; (5) his 25-years-to-life sentence is unconstitutionally cruel and unusual; (6) the court abused its discretion in denying his discovery motion for peace officer personnel records without holding an in camera hearing; and (7) cumulative error.

Defendant Johnson joins in Lemon's contentions regarding the first degree felony-murder instruction and the restriction on cross-examination. Defendant Johnson further contends the court's imposition of a parole revocation fine was unauthorized.

As to defendant Johnson, we agree the parole revocation fine must be stricken from his sentence as he received a life term without the possibility of parole. We therefore modify the judgment accordingly and affirm Johnson's conviction in all other respects.

As to defendant Lemon, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 22, 1995, Renato Teniente, a 60-year-old pizza delivery driver, was fatally shot at close range while sitting in his car in front of an apartment complex in Long Beach. The initial investigation of the crime led the homicide detectives to suspect defendants Lemon and Johnson who lived in the area. At that time, Lemon was 17 years old and Johnson was 16 years old.

In December 1995, a juvenile petition was filed alleging that defendant Lemon was responsible for the attempted robbery and murder of Mr. Teniente. It appears defendant Johnson could not be located and no juvenile petition was filed against him at that time. In April 1996, while the prosecution's motion to determine Lemon's fitness for adjudication in juvenile court was pending, the petition was dismissed without prejudice for insufficient evidence.

In 2012, the investigation of the murder was re-opened by the Long Beach Police Department. In March 2014, Defendants Johnson and Lemon were charged by information with one count of first degree murder during the commission of an attempted robbery. (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17).) It was further alleged that a principal was armed with a firearm during the commission of the offense. (§ 12022, subd. (a)(1).) The information also alleged that both defendants were juveniles who were at least 16 years of age at the time the offense was committed, and had fled the jurisdiction after the murder. (Welf. & Inst. Code, §§ 216, subd. (a), 707(d).)

Defendant Lemon moved to dismiss the information, arguing primarily that the prosecutor's direct filing of charges in criminal court pursuant to section 707(d), and the court's denial of his right to a fitness hearing under the law in effect in 1995, constituted violations of the ex post facto clauses of the federal and state Constitutions. Defendant Johnson joined the motion. The motion was denied.

Defendant Lemon also made a pretrial motion to discover peace officer personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). Defendant sought records from the personnel files of Long Beach Police Department

Detectives Tim Cable and William Collette, two of the detectives involved in the initial investigation, reflecting any past incidents or complaints involving the preparation of false reports, lying and untruthfulness. The court denied the motion.

The joint jury trial proceeded in November 2014. The trial testimony and evidence revealed the following material facts.

1. The Murder and Initial Investigation in 1995 and 1996

In 1995, Mr. Teniente worked two jobs to support his family. One of those jobs was delivering pizzas for a Pizza Hut restaurant in Long Beach. Just before 9:00 p.m. on November 22, 1995, Officer Aldo Decarvalho of the Long Beach Police Department responded to a report of shots being fired at an apartment complex on East 55th Way. When Officer Decarvalho arrived at the apartment building, he saw a car parked near the curb. The engine was running, the driver's side door was closed, and the front passenger door was open. As Officer Decarvalho approached the car, he found Mr. Teniente slumped over the steering wheel from an apparent gunshot wound. After emergency medical personnel arrived on the scene, Mr. Teniente was pronounced dead. The cause of his death was later determined to be a fatal gunshot wound to his chest, the bullet having entered through his shoulder.

In November 1995, 12-year-old S.D.[1] lived in the apartment complex where the shooting occurred. When Long Beach police officers first came to her family's apartment on the night of the shooting to ask if anyone had seen or heard anything, S.D. was very scared so she told them she did not know anything about what happened. Her 15-year-old sister, Y.W., also denied any knowledge of the incident.

The detectives working the case learned that Mr. Teniente was delivering pizza that night to S.D. and Y.W.'s apartment. The call to Pizza Hut had come from their apartment. On November 30, Sergeant William Blair and his partner, Detective Paul

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[1] We refer to the witnesses, many of whom were juveniles at the time, only by their initials to protect their privacy.

Arcala, went back to the apartment complex to re-interview S.D. and Y.W. Sergeant Blair spoke to Y.W., and Detective Arcala spoke separately to S.D.

When Sergeant Blair asked Y.W. about the pizza order being phoned in from their apartment, she initially said she had made the call. He told her the caller had been identified as a male. Y.W.'s "demeanor changed quickly." She teared up and said that "James" (defendant Lemon)[2] had made the call. She said James was a friend of her boyfriend "Venda" (defendant Johnson) who had also been over at the apartment that night. She said that she and Venda had been upstairs kissing in her mother's bedroom. About 20 minutes after the pizza was ordered, S.D. came upstairs and Venda gave her money to go pay the delivery man. Shortly thereafter, Venda left Y.W. in the bedroom and went downstairs. A few minutes after that, her sister and brother came into the bedroom "hysterical" and told her that the delivery man had been shot. Y.W. claimed to not know Venda's last name or to have any contact information for him or his friend James.

While Sergeant Blair was talking with Y.W., Detective Arcala talked with S.D. and asked her what really happened that night. S.D. said that she and Y.W. had been home, and two male friends had dropped by to visit. She said their names were James and Venda and that Venda was Y.W.'s boyfriend. At some point, James called Pizza Hut and ordered pizza. Before the pizza delivery man arrived, James and Venda were talking "secretively." Y.W. and Venda then went upstairs to their mother's bedroom and S.D. and James stayed downstairs. After a short while, S.D. went upstairs and Venda gave her money to go outside to pay for the pizza when it arrived.

S.D. went outside and paid the delivery man who was parked at the curb. While she was walking back toward the apartment building with the pizzas, both James and Venda ran past her towards the delivery man's car. S.D. saw a gun in Venda's hand. Venda went to the driver's side of the car and James went to the passenger side. She

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[2] To be consistent with how the information developed during the investigation, we occasionally refer to defendants Lemon and Johnson by their first names.

heard Venda repeatedly yelling at the delivery man to give him the money and to open the door. She saw James open the passenger side door. She ran to her apartment and after she got inside, she heard a gunshot. S.D. looked out a window that overlooked the courtyard and saw James and Venda running together through the courtyard. Shortly thereafter, "Tyrone" contacted her and told her to get rid of the pizza boxes. S.D. initially placed the boxes under her bed, but she got nervous when she saw all of the police officers arriving at the building so she climbed out her bedroom window and tossed the boxes onto the roof.

S.D. also told Detective Arcala that Venda called a couple of days after the shooting. She asked Venda why he shot the delivery man and he told her that the man had not braced himself quickly enough, which S.D. understood to mean he had not given up his money quickly enough. Venda also told her that the delivery man had a gun and if he had not shot him first, then "he and James would be dead."

On concluding the interviews with the girls, which lasted about 30 minutes, Sergeant Blair told Y.W. not to talk to anyone involved in the case.

After returning to the station and attempting to determine the identities of James and Venda, the detectives decided they needed to speak with the girls again. This time, Detectives Thrash and McGuire went to the girls' apartment. Y.W. told Detective McGuire that she had spoken to "Tyrone" who told her that James and "Fatts" had walked by her apartment and saw the police car there, and that James and Venda were "gone." Police discovered that Y.W. had paged defendant Johnson, though he did not respond, and that she had spoken to members of his family by telephone. Y.W. was therefore arrested as an accessory after the fact.

Detective Collette interviewed Tyrone H. in December 1995 and again in early 1996. Tyrone had lived in the apartment complex but his family moved out a few days before the shooting. Tyrone told Detective Collette that about a week after the shooting, Y.W. called him and asked if he had seen Lemon or Johnson. He told her he had not. She then said that the police were looking for both of them because they had shot a pizza delivery man. He asked her how she knew that and she said she had seen what happened.

During that phone call, Tyrone's call waiting beeped and it was defendant Lemon on the other line. He told Lemon he was speaking to Y.W. on the other line and that she said he and Johnson had shot the delivery man. Lemon responded, "I was there, but I didn't shoot." Tyrone then called Lemon and Y.W. back as a three-way call. Lemon asked Y.W. how the police knew about him. She said she did not know, but that the police were looking for him and were going to go to his house.

Tyrone denied telling S.D. to get rid of the pizza boxes. He said that about a week before the shooting, he remembered defendant Johnson showing him a .38-caliber revolver. Tyrone also reported that after Y.W. was released from jail, he spoke with her again and she said that she no longer had anything to do with Johnson because of "all the trouble" he got her into.

In March 1996, Detective Collette interviewed V.B., another resident of the apartment complex. V.B. said that on the night of the shooting he had gone outside to take out some trash, when he saw three young African-American males go into the laundry room. One of them was carrying a trash bag and another one was holding a revolver. After the three men left, V.B. looked inside the trash bag which had been left in the laundry room. It contained a shirt and a pair of pants that appeared to have blood on them. He went back to his apartment and told his mother what he had seen. When he went back to the laundry room, the trash bag was gone.

When shown six-pack photographic lineups, V.B. was unable to positively identify either Lemon or Johnson as one of the three individuals he saw go into the laundry room that night. However, he did point to Lemon's photograph and said he looked like one of the three individuals, but he could not be sure. He thought the individual's hair had been longer. When Detective Collette pointed to defendant Johnson's photograph in another group of photographs and asked if he could eliminate him as one of the individuals he saw, V.B. said he could not do so. He told Detective Collette that one of the individuals that night may have been someone from the neighborhood he knew as "Fatts."

After defendant Lemon was detained, a live lineup was arranged. Detective Cable picked up V.B. and brought him to the juvenile detention facility to view the lineup. V.B. said the individuals standing in position numbers three and six looked like possibilities, but he was unable to positively identify anyone. However, after the lineup procedure was concluded, Detective Cable overheard V.B. tell the deputy district attorney that he thought the person in position number three was one of the individuals he saw go into the laundry room that night. Defendant Lemon had been standing in position number three. However, V.B. did not sign any form formally making an identification.

2. The Reopening of the Investigation in 2012

In 2012, Detective Todd Johnson of the Long Beach Police Department was assigned to review the 1995 murder of Mr. Teniente as a "cold case."

On March 9, 2012, Detective Johnson re-interviewed S.D. with his partner Detective Evans. He did not show her any old police reports, but simply asked her what she recalled of the events in November 1995. He did not ask her specific questions because he wanted her to just make a statement about what she remembered without influencing her. S.D. was "very emotional" and cried during the interview. She said the shooting had been a traumatic experience for her as a young girl and had been "weighing" on her for a long time. S.D. said she had been at home with her sister and brother when defendants Lemon and Johnson came over to visit. She recalled Johnson ordering pizza and defendants giving her money to go downstairs to meet the pizza delivery man and pay for the pizzas. She said her little brother went with her and when the two of them were walking back to the apartment with the pizzas, Johnson and Lemon ran past them. S.D. said she saw a gun in Johnson's hand as he went by. She remembered something like "brace yourself, give me the money" being yelled at the delivery man. Johnson was on the driver's side of the car, and Lemon was on the passenger side. She then heard a gunshot and saw the delivery man slump forward. She ran upstairs with her brother and told Y.W. that Johnson had just shot the delivery man. S.D. was scared about having the pizzas in the apartment, so she first put the boxes under her bed, then decided to climbed out her window and threw them outside. S.D. identified

Lemon and Johnson in six-pack photographic lineups. She also identified a photograph of someone from the neighborhood she knew as Fatts.

Some of the details S.D. provided were slightly different, but Detective Johnson thought "the gist of who was there and how the facts lined up" was the same as what she told the police in 1995. The main differences in 2012 were that she admitted to actually seeing the shooting, and not just hearing the gunshot, and did not mention speaking with defendant Johnson after the shooting.

Toward the end of the interview, Detective Johnson said S.D. appeared to be weak and very tired, so he and his partner drove her to the emergency room where she received treatment related to her diabetes. Because they had been unable to record her statement before the episode occurred, they arranged to meet with her again about 12 days later. S.D. was in custody at the time on an unrelated drug possession charge. S.D. agreed to have her statement recorded.

Detective Johnson saw S.D. again about two years later when she was in custody on an unrelated charge. He asked her if she remembered him and the "pizza man case" and she "blurted out" that "Venda killed the pizza man; James wasn't there; I'm not testifying; they are going to kill me if I testify."

About six months after the initial interview of S.D. in 2012, Detective Johnson and his partner interviewed Tyrone while he was in custody on an unrelated charge in Colorado. Tyrone identified both defendants in photographic lineups and confirmed his prior statements to police that, after the shooting, he had a three-way conversation with defendant Lemon and Y.W. in which Lemon admitted "they" had robbed the pizza delivery man but he had not done the shooting.

Detective Johnson said it was common for witnesses in a homicide case to express concern about testifying, particularly if there are any gang ties to the people involved. Tyrone expressed concern for his safety. Detective Johnson explained that the Los Angeles County had a program to assist witnesses with relocation expenses if they had safety concerns related to testifying. He offered relocation assistance to Tyrone, to Y.W.,

S.D. and V.B. The only one who accepted the offer was Tyrone. Detective Johnson applied for him to receive several months of relocation assistance.

Detective Johnson interviewed V.B. in November 2012. His memory of the incident was "fuzzy," but he did recall going to a live lineup procedure at the juvenile detention facility in 1996. Detective Johnson showed V.B. six-pack photographs and V.B. acknowledged knowing defendant Lemon. Detective Johnson asked him why he did not identify Lemon in 1996, and V.B. said he had been scared. He did not want his family to get hurt. V.B. told him several times that he did not want to be a snitch and that he was very concerned for his safety, particularly after seeing all of defendant Lemon's family at the courthouse.

3. S.D.'s Trial Testimony

S.D. admitted she first told police officers in 1995 that she did not know anything about the shooting. She had denied any knowledge because she was scared. About a week later, the police officers returned to interview her and her sister again. She and Y.W. were interviewed separately in different rooms of the apartment. The police told S.D. they were going to take Y.W. to jail, so she started to answer their questions. S.D. explained her memory of the incident was better in 1995 and she had tried to be honest with the police officers in answering their questions.

S.D. testified that around 8:00 p.m. on November 22, 1995, she was at home with her sister, Y.W., and their 10-year-old brother. Neither her mother nor grandmother were home at the time. Y.W. was dating defendant Johnson. He came over that evening with his friend, defendant Lemon, to hang out at their apartment. They decided to order pizza. She could not remember who called Pizza Hut, but acknowledged she told the officers in 1995 that it was Lemon who phoned in the order. Lemon had been downstairs with her while Y.W. was upstairs in a bedroom with Johnson. S.D. did not recall telling the police she saw Johnson and Lemon talking "secretly" in the apartment.

S.D. recalled getting money from Lemon to go outside and pay for the pizza when it arrived, but acknowledged telling the police in 1995 that Johnson had given her the money. She went downstairs and paid the pizza delivery man who was parked at the

curb. As she started to walk back toward the apartment, Johnson and Lemon ran past her. Johnson went to the driver's side door of the delivery man's car, and Lemon went to the passenger side. S.D. heard Johnson yell at the man to give him his money. The driver said he did not have any more money. S.D. did not hear Lemon make any demands of the driver, and she did not recall telling the police she saw Lemon open the passenger side door. She recalled that Johnson shot the driver after demanding his money and the driver then slumped forward toward the steering wheel.

S.D. said she told the police in 1995 that she saw the gun in Johnson's hand, but she did not actually see it because it was dark outside and she has suffered from diabetes since childhood which affects her vision. She admitted she only saw the fire or flash from the gunshot.

After the shooting, Johnson and Lemon ran toward the back of the apartment complex, and S.D. ran upstairs to her apartment. She told her sister Johnson had shot the pizza delivery man. S.D. was scared and in a state of panic. She acknowledged telling the police in 1995 that Tyrone told her to get rid of the pizza, so she climbed out her bedroom window and tossed the pizza boxes up onto the roof.

S.D. recalled that a couple of days after the shooting, Y.W. spoke to defendant Johnson on the phone. During that conversation, Johnson told Y.W. he shot the pizza delivery man because he thought he was reaching for a gun and would shoot him and Lemon. He also said the driver was not "bracing" quickly enough, which S.D. understood to mean he was not giving up his money quickly enough. S.D. said she also "may" have spoken to Johnson on the phone.

S.D. said the police interviewed her again in 2012, and she once again had tried her best to tell them the truth. Towards the end of the interview, she started to feel ill and was taken to the hospital to be treated for diabetic issues, mental health issues and anxiety. About two weeks later, she spoke with the police again and they recorded her statement. The recording of the 2012 interview was played for the jury. A transcript was admitted as People's Exhibit 5. S.D. confirmed it was her voice on the recording.

During cross-examination, S.D. denied that she was unsure whether it was in fact defendants who ran past her toward the delivery man, reiterating that "it was Venda and James." Her preliminary hearing testimony in which she had testified she was unsure who it was and that she believed Lemon had left by the time she heard the gunshot were read into the record. S.D. admitted on both direct and cross-examination that in addition to poor vision from diabetes, she also has had substance abuse problems over the years. She admitted she had been charged with possession of methamphetamine and the case was resolved with a drug diversion program. She said she often felt pressured by the police officers to respond to their questions, including when they went to her son's school to attempt to question her. S.D. also felt the police had sometimes tried to put words in her mouth.

4. Y.W.'s Trial Testimony

Y.W. testified that the shooting in 1995 had been a "terrible event." She had been at home with S.D. and their younger brother. Defendant Johnson was her boyfriend at the time and he had come over with his friend, defendant Lemon. Her mother and grandmother were not at home. They decided to order pizza but she could not recall who called in the order. She had been "making out" with Johnson, so she knew it was not him. She acknowledged she may have agreed with the police that it was defendant Lemon because he was the only other male in the apartment. Her brother was too little at the time to have called in the order. The police told her the call had been made by a male so she assumed it was Lemon, but he was downstairs and she had no idea what he was doing. At some point, Johnson left the bedroom and did not come back. She then heard a gunshot and she believes her sister started screaming about the pizza delivery man having been shot. Y.W. denied that her sister ever told her that she saw Johnson shoot the delivery man or that Lemon and Johnson had robbed him.

Y.W. denied ever having a phone conversation with Tyrone or with defendant Lemon, and definitely could not recall a three-way phone call. She said they were not good enough friends for her to do that. She said she did not know Lemon that well, but remembered he was a "good kid." She said she did not recall ever telling Tyrone that the

police were looking for Lemon and Johnson. She denied ever telling Tyrone in person or over the phone that Lemon and Johnson had robbed the pizza delivery man or that Johnson had shot him.

Y.W. admitted that she had paged defendant Johnson after the police told her not to have contact with him, but he had not returned the page. She said she was arrested after that. She was detained in the same juvenile facility as defendant Lemon and would see him at church services. The accessory charge against her was eventually dismissed. When asked if she knew how Tyrone would have known information like she had no further relationship with defendant Johnson or that she saw defendant Lemon at church while at the juvenile facility if she had not had telephone conversations or other contact with Tyrone, Y.W. said she did not know. She said she did not recall any telephone conversations with Tyrone.

Y.W. was re-interviewed by the police in 2009. She believes her memory of what happened was probably better when she was interviewed in 1995 and 2009 than in 2014. The recording of her 2009 interview was played for the jury. A transcript was admitted as People's Exhibit 7.

5. Tyrone's Trial Testimony

Tyrone testified that he used to live in the apartment complex where the shooting occurred but his family had moved out either the day of, or the day before, it occurred. A few days after the shooting, he received a phone call from Y.W. She told him the police were looking for Venda and James. During the call, his call waiting beeped and when he switched over to see who was on the other line, it was defendant Lemon. He told both of them he would call back and he called them back so they could talk together on a three-way call. Lemon told Tyrone and Y.W. that "they" had robbed the pizza delivery man, but he had not done the shooting.

Tyrone also said he had seen defendant Johnson with a .38-caliber revolver. He was not certain of how long before the shooting Johnson had shown the gun to him, but it may have been a couple of weeks before. He also recalled speaking to Y.W. after the charges were dropped against her for being an accessory, and she told him that she had

seen defendant Lemon during church services on Sundays at the juvenile detention center. She also told him that she did not want to have anything further to do with defendant Johnson because of all the trouble he had gotten her into.

Tyrone's 2012 interview with Detectives Johnson and Evans was played for the jury. A transcript was admitted as People's Exhibit 9. He acknowledged his voice on the recording and confirmed that the statements he made to the detectives were truthful. He also recalled speaking to detectives in 1995 but could not recall the details of what he said. He said however, that whatever statements he made, he assumed he had been trying to be truthful at the time.

Tyrone could not recall the names of the detectives he spoke with in December 1995 and early 1996, or some of the specifics of what he said. But, he recalled telling them that when he spoke with defendant Lemon on the phone after the shooting, Lemon admitted to robbing the pizza delivery man, but that he did not shoot him. The recording of the interview in 1996 was played for the jury. A transcript was admitted as People's Exhibit 11. Tyrone acknowledged it was his voice on the recording. He said he thought his memory of the events was probably better at the time he gave the statement.

On cross-examination, Tyrone acknowledged that what he told the police was that Lemon admitted being present when the pizza delivery man was shot, but that he did not shoot him, and not that Lemon ever admitted to robbing the man.

Tyrone also admitted when he was initially questioned about the incident in 1995, he had been arrested as a suspect in the shooting. He told the officers that he knew defendant Johnson better than defendant Lemon but they had all hung out together. He had known them for a few years before the incident. Lemon was always doing his homework and Tyrone told the police he thought it was surprising for Lemon to be involved in any shooting. He said another friend from the neighborhood was known as "Fatts." He did not recall telling the detectives that Johnson had been calling him from Texas to find out if it was safe for him to come home. He admitted that while he was not at the apartment complex on the night of the shooting, he had called S.D. and Y.W.'s

apartment and told S.D. to get rid of the pizza boxes. He did not remember previously telling the detectives that he had not done so.

Tyrone admitted he had prior convictions for grand theft, drug distribution, and felony menacing. He also confirmed that he had been given money by the prosecution for relocation expenses. He said he showed the money to Y.W. because she told him she was scared to testify and he told her that the prosecution had helped him relocate and they could probably help her too.

6. V.B.'s Trial Testimony

V.B. testified he lived in the apartment complex at the time of the 1995 shooting. He could not recall much about it since it happened so many years before. He did not remember his interview with the detectives. V.B. repeatedly expressed his desire not to be involved and that he did not want to be testifying. He said snitches do not last that long on the street. However, he also said he does not lie and if he made statements to the detectives earlier, he would not disavow them. He recognized a photograph of defendant Lemon in court and said he had known a lot of the boys from the neighborhood since they were very young. He denied being scared of Lemon or telling the detectives that Lemon's father and uncle were Southside Crips. The recording of his 2012 interview was played for the jury. A transcript was admitted as People's Exhibit 13. He acknowledged it was his voice on the recording.

7. The Prosecution's Other Witnesses

Deputy Araceli Hernandez testified to being a deputy providing security at a hospital facility while S.D. was there in 2014. At one point during her shift, S.D. was crying and told Deputy Hernandez she was frightened about testifying because if she told the truth about what she saw "they were going to kill her." She told Deputy Hernandez that when she was a little girl, her sister's boyfriend and friend ordered pizzas, robbed the delivery man and then shot him.

Defendant Johnson's father, Venda Johnson, Sr., testified that he spoke with homicide detectives in 1999 about his limited contact with his son while he was growing

up. He denied ever telling them anything about the shooting in Long Beach because he said he did not know anything about it.

Officer Dana Hatfield testified that she was a police officer for the city of Aurora in Colorado. In 1999, she was investigating a crime that had occurred in Aurora and as part of her investigation, she came to Los Angeles to interview defendant Johnson's father. She interviewed him while he was in custody on an unrelated charge in Men's Central Jail. Mr. Johnson told her that he had been in prison for a part of his son's childhood, but had tried to see him when he could after he was released. Mr. Johnson asked Officer Hatfield if she knew anything about "what happened" in Long Beach. She asked him to explain and he said that his son had called him and told him that he had shot a pizza delivery man. He had been with his girlfriend and friend and they decided to order pizza and rob the pizza man. Mr. Johnson said his son only shot the delivery man because he thought the man was reaching for a gun to shoot him.

8. The Defense Case

Defendants exercised their rights not to testify. Defendant Johnson did not call any witnesses. Defendant Lemon offered the testimony of several witnesses.

Katherine Chavers-Yanes, a private investigator, testified to interviewing S.D. in early 2014. Defense counsel accompanied her. S.D. told her that she only had a vague recollection of the 1995 shooting and that she was feeling pressured by the detectives who had gone to her son's school to find her and question her. S.D. told Ms. Yanes that she told the detectives what they wanted to hear. S.D. said she had only been clean and sober for about a year, following completion of a drug diversion program. She told Ms. Yanes that Lemon had not robbed or shot the delivery man. She admitted she did know Lemon and that he had been at the apartment that night.

Robin Sawyer, another defense investigator, also attested to interviewing S.D., Y.W. and V.B. He said that Tyrone was the only witness who would not agree to speak with him. He said that Y.W. acknowledged that she, S.D., possibly her brother, Johnson and Lemon were all at the apartment that night, but that she had no information whatsoever about Lemon being involved in any robbery or the shooting. She was not

sure but she thought Johnson might have called in the pizza order. She said S.D. never told her that Johnson and Lemon were involved. She denied having any three-way phone conversation with Tyrone and Lemon. When Mr. Sawyer interviewed S.D., also in 2014, she said she has very poor vision and was supposed to wear glasses, but was not wearing any glasses on the night of the shooting. She said she had no knowledge of Lemon being involved in taking anything from the delivery man or shooting him. When he interviewed V.B., he denied ever making any identification of defendant Lemon. Mr. Sawyer noted that V.B. seemed genuinely concerned about testifying, and expressed a strong desire not to be labeled a snitch.

Defendant Lemon's wife and one of his daughters attested to his non-violent nature. His wife said they had known each other for 18 years and had four children together. Lemon went to school to become an electrician and they moved to Las Vegas, Nevada after he completed his education. He has worked as an electrician ever since. She said he never argues and always tries to diffuse a difficult situation peacefully. His daughter said he was very involved with his children, helped with coaching and their other activities, and was always trying to teach them right from wrong.

9. The Verdict and Sentencing

The jury found defendants guilty of first degree felony murder, and found true the special-circumstance allegation that the murder was committed during the attempted robbery of the victim within the meaning of Penal Code section 190.2, subdivision (a)(17)(A). The jury also found true the allegation that a principal was armed with a firearm.

Defendant Lemon filed a motion to arrest the judgment or alternatively for a new trial, raising numerous issues, including that the denial of a fitness hearing constituted an ex post facto application of section 707(d). The motion was denied.

Defendant Johnson was sentenced to a life term without the possibility of parole. Defendant Lemon was sentenced to a term of 25 years to life. The court imposed and stayed sentences on the firearm enhancement as to both defendants. The court also

imposed various fines and fees. The fines imposed on defendant Johnson included a $10,000 parole revocation fine pursuant to Penal Code section 1202.45.

Both defendants filed timely appeals.

DISCUSSION

1. Defendants' Ex Post Facto Claim

Defendants Johnson and Lemon both contend the prosecutor's direct filing of charges in criminal court in 2014 pursuant to section 707(d) was an unconstitutional retroactive application of the statute. We disagree.

The Gang Violence and Juvenile Crime Prevention Initiative (Proposition 21) was passed by the voters March 7, 2000, and became effective the next day. (*People v. John L.* (2004) 33 Cal.4th 158, 165 (*John L.*).) Proposition 21 made numerous changes to certain laws applicable to juveniles accused of committing criminal offenses. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 545 (*Manduley*).) As relevant here, Proposition 21 amended section 707(d) to confer "upon prosecutors the discretion to bring specified charges against certain minors directly in criminal court, without a prior adjudication by the juvenile court that the minor is unfit for a disposition under the juvenile court law." (*Manduley*, at p. 545.)

As amended by Proposition 21, section 707(d) provides that "[e]xcept as provided in subdivision (b) of Section 602, the district attorney or other appropriate prosecuting officer may file an accusatory pleading in a court of criminal jurisdiction against any minor 16 years of age or older who is accused of committing an offense enumerated in subdivision (b)." Murder is an enumerated offense in subdivision (b) of Welfare and Institutions Code section 707.

In November 1995 when the murder was committed, Johnson was 16 and Lemon was 17. Defendants argue that because they were juveniles at the time the offense was committed, they were statutorily entitled in 2014 at the ages of 35 and 36 to a fitness hearing to determine whether they would have been able to establish their fitness to be tried in juvenile court in 1995. They argue that the direct filing of charges in 2014 deprived them of a juvenile adjudication fitness hearing and was a retroactive application

of Proposition 21 that offends the ex post facto clause of both the federal and state Constitutions. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.)

"In general, the high court has established that no statute falls within the ex post facto prohibition unless 'two critical elements' exist. [Citations.] First, the law must be retroactive. Such a law ' "change[s] the legal consequences of an act completed before [the law's] effective date," *namely the defendant's criminal behavior*.' [Citation.]" (*John L., supra*, 33 Cal.4th at p. 172.) "Second, only *certain* changes in the statutory effect of past criminal conduct implicate ex post facto concerns. Since its decision in *Collins v. Youngblood* (1990) 497 U.S. 37, 41-42 (*Collins*), the United States Supreme Court has followed the original intent of the Constitution, and reaffirmed the principles first announced in *Calder v. Bull* (1798) 3 U.S. (3 Dall.) 386, 390 (opn. of Chase, J.) (*Calder*). [Citations.] Specifically, retroactive amendments to penal statutes do not violate ex post facto principles unless they implicate at least one of four categories described in *Calder*[.]" (*Ibid.*)

The four *Calder* categories may be summarized as follows: (1) any law that criminalizes conduct that was innocent went done; (2) any law that aggravates a crime or makes it greater than when it was committed; (3) any law that inflicts greater punishment on conduct than that which was affixed to the crime at the time it was committed; and (4) any law that lessens the burden of proof or the quantum of evidence necessary to convict the offender. (*John L., supra*, 33 Cal.4th at p. 172, fn. 3.)

In *Collins*, the Supreme Court "criticized some of its own decisions for disallowing any 'procedural change' that withdraws ' "substantial protections" ' or ' "substantial personal rights" ' existing at the time of the crime. [Citation.] *Collins* explained that regardless of its label or form [citation], a law does not raise ex post facto concerns unless it works in the manner [proscribed by *Calder*]. [¶] *Collins* also overruled two high court cases invalidating statutes merely because they ' " 'alter[ed] the situation of a party to his disadvantage' " ' after the crime occurred." (*John L., supra*, 33 Cal.4th at p. 173.)

Of particular significance here, the Supreme Court has also explained "that adjustments in 'the procedures by which a criminal case is adjudicated' rarely implicate ex post facto concerns. [Citation.] Such laws do not typically enhance punishment under the third *Calder* category." (*John L., supra*, 33 Cal.4th at p. 173; accord, *People v. Williams* (1987) 196 Cal.App.3d 1157, 1160.) "[A] substantial and disadvantageous change is prohibited only if it 'inflicts a greater *punishment*, than the law annexed to the crime, when committed.' [Citation.] Unless the consequences are penal in nature, defendants cannot rely on statutes in existence at the time of the crime, or otherwise complain of oppressive retroactive treatment." (*People v. Ansell* (2001) 25 Cal.4th 868, 884.)

The provision of Proposition 21 authorizing the filing of criminal charges directly in the criminal division did not change the legal consequences of defendants' behavior. In 1995 when the offense was committed, a juvenile over the age of 16 charged with murder was statutorily presumed unfit for juvenile court administration. (*People v. Superior Court of San Francisco* (1981) 119 Cal.App.3d 162, 174; see also Welf. & Inst. Code, former § 707, subds. (b)(1) & (c) (1994 Stats., ch. 448).) As defendants concede, in 1995 they could have been punished with a sentence of life without parole for first degree murder in criminal court. Proposition 21 did not increase the penalty for first degree murder.

The provision of Proposition 21 authorizing a prosecutor to file criminal charges directly in the criminal division also does not fall into any of the four *Calder* categories. Instead, it is a change in procedure that can be applied to crimes committed before its enactment. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288 [concluding that provisions of Proposition 115 affecting the conduct of criminal trials can constitutionally be applied to trial of a crime committed before its enactment]; see also *People v. Williams, supra,* 196 Cal.App.3d at p. 1160 ["procedural changes generally are considered outside the reach of the ex post facto clause"].)

Defendants, who were 35 and 36 years old when tried, had no statutory or constitutional right to have their case heard in the juvenile division of the superior court

as opposed to the criminal division. That is a matter for the Legislature or the electorate to decide. (See *Manduley, supra,* 27 Cal.4th at pp. 564-565; accord, *Hicks v. Superior Court* (1995) 36 Cal.App.4th 1649, 1658.) We see no purpose to be served by engaging in a speculative and utterly theoretical inquiry whether either of them might have been fit for juvenile adjudication in 1995. Clearly, as mature adults, they were unfit for juvenile adjudication, and it is utterly speculative whether either might have been fit for juvenile adjudication 20 years ago.

2. Defendant Lemon's Insufficient Evidence Claims

Defendant Lemon contends the record lacks substantial evidence supporting his conviction for first degree felony murder and the jury's true finding on the robbery-murder special-circumstance allegation. We disagree.

Our task is to review " 'the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 988.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; accord, *People v. Manriquez* (2005) 37 Cal.4th 547, 577 (*Manriquez*).) "These same standards apply to challenges to the evidence underlying a true finding on a special circumstance." (*People v. Banks* (2015) 61 Cal.4th 788, 804 (*Banks*).)

a. First Degree Felony Murder

"One who unlawfully kills a human being during the commission of a robbery or an attempted robbery is guilty of first degree murder under the felony-murder rule. [Citations.] 'Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.' (§ 211.)" (*People v. Thompson* (2010) 49 Cal.4th 79, 115 (*Thompson*).) "All persons concerned in the commission of a crime . . . whether they

directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." (Pen. Code, § 31.)

Defendant Lemon was convicted as an aider and abettor of Johnson in the attempted robbery and resulting murder of Mr. Teniente. Lemon argues there is insufficient evidence he had an intent to aid and abet a robbery. He contends the evidence does not demonstrate any knowledge on his part that Johnson had a gun or intended to use force against the delivery man. At best, he argues, there is evidence from which it could be inferred he entertained the intent to aid and abet *a theft*, but not a taking "accomplished by means of force of fear." (Pen. Code, § 211.) We disagree.

" 'Aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea.' [Citation.]" (*Thompson, supra,* 49 Cal.4th at p. 116.) "Under the felony-murder rule, an accomplice is liable for killings occurring while the killer was acting in furtherance of a criminal purpose common to himself and the accomplice, or while the killer and the accomplice were jointly engaged in the felonious enterprise." (*Id.* at p. 117.) "The mental state required is simply the specific intent to commit the underlying felony; neither intent to kill, deliberation, premeditation, nor malice aforethought is needed." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1085, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

The evidence, judged in its totality and under the appropriate standard, demonstrates that defendants Lemon and Johnson planned to rob the pizza delivery man. Lemon ordered the pizza from S.D. and Y.W.'s apartment while Johnson was upstairs with Y.W. The defendants gave S.D. money to go pay for the pizzas, and then immediately after she had paid for them, they ran past her and confronted the delivery man. A reasonable inference from such conduct is that they used S.D. as a diversion, letting Mr. Teniente believe this was just an ordinary delivery and would likely be taken off guard by their abrupt appearance and demands for money. Johnson and Lemon positioned themselves on either side of the car, preventing any means of escape and reasonably raising Mr. Teniente's feelings of fear and vulnerability. Johnson yelled at Mr. Teniente to give him the money, while Lemon opened the passenger side door, an act

which also could be reasonably viewed as a further physical threat to Mr. Teniente. When Mr. Teniente apparently did not turn over the money quickly enough, Johnson fatally shot him at close range. Johnson and Lemon then fled the scene together.

Such evidence amply supports the conclusion that Johnson and Lemon were engaged in a "felonious enterprise" to rob Mr. Teniente, during the commission of which Mr. Teniente was fatally shot. (*Thompson*, *supra*, 49 Cal.4th at p. 117; see also *People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 743 ["The 'act' required for aiding and abetting liability need not be a substantial factor in the offense."]; *People v. Campbell* (1994) 25 Cal.App.4th 402, 409 [" 'factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense' "]; *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531-532 [perpetrator need not expressly communicate criminal purpose that is apparent from the circumstances as "[a]iding and abetting may be committed 'on the spur of the moment,' . . . as instantaneously as the criminal act itself"].) The record contains solid evidence supporting the jury's determination that Lemon was guilty, as an aider and abettor, of first degree felony murder arising from the attempted robbery of Mr. Teniente.

Defendant Lemon argues there were inconsistencies in the witness statements from the initial investigation and the witnesses' trial testimony, particularly as to the main prosecution witness, S.D. Given the 19-year lapse between the murder and the trial, it is not surprising there would be some inconsistencies as to certain details. In our view, to the extent there are inconsistencies, they are largely as to minor or collateral matters. S.D.'s core description of the events of November 22, 1995 remained remarkably consistent.

Moreover, in many instances, other testimony corroborated and bolstered her original account. For instance, S.D. could not recall at trial that she told detectives in 1995 that she saw defendant Lemon open the passenger side door of the car when he and Johnson confronted the delivery man. But, Officer Decarvalho, the first officer to arrive on the scene, testified that the front passenger door was open. Further, defendant Lemon

argues S.D. first described seeing the shooting in her 2012 re-interview, but had previously said she had run upstairs after seeing the confrontation and only heard the gunshot. Again, Officer Decarvalho testified that Mr. Teniente was slumped over the steering wheel. That is precisely how, in her 2012 interview, S.D. described seeing Mr. Teniente after the gunshot. The reasonable inference is that she did witness the shooting, irrespective of her inability to articulate that as a 12-year-old in 1995.

Alternatively, Lemon contends there was no evidence he acted with actual malice to support first degree murder (Pen. Code, § 187). He contends the felony-murder rule, which relieves the prosecution of proving actual malice, rests on an unconstitutional mandatory presumption of malice. Lemon concedes *People v. Dillon* (1983) 34 Cal.3d 441 held to the contrary and that we are constrained to follow it. Nevertheless, he argues the felony-murder rule "is a disfavored doctrine" that should be narrowly construed and not applied to juvenile offenders. The felony-murder rule applies in cases involving juvenile offenders accused of murder. Indeed, *Dillon* involved a 17-year-old defendant. We are bound by Supreme Court precedent and there is no basis for deviating from its dictates here.

b. The Special-circumstance Finding

Penal Code section 190.2 specifies the penalty to be imposed on a defendant convicted of first degree murder when a special-circumstance allegation is found to be true. As relevant here, subdivision (d) provides that "every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a [robbery] which results in the death of some person or persons, and who is found guilty of murder in the first degree therefore, shall be punished by death or imprisonment in the state prison for life without the possibility of parole[.]"

Where, as here, the defendant is over the age of 16 and under the age of 18 at the time of the murder, Penal Code section 190.5 specifies the penalty as life without the possibility of parole, but vests the trial court with discretion to impose a sentence of 25 years to life. Here, the court exercised its discretion to sentence defendant Lemon to

the minimum sentence of 25 years to life under section 190.5. Thus, the special-circumstance allegation in this case is mere surplusage. We need not consider Lemon's substantial evidence argument since there is no prejudice to him resulting from the jury's true finding on the special circumstance.

In any event, substantial evidence supports the true finding. Lemon and Johnson together planned to rob the pizza delivery man. Lemon ordered the pizza from S.D. and Y.W.'s apartment while Johnson was upstairs with Y.W. The defendants gave S.D. money to go pay for the pizzas, and then immediately after she had paid for them, they ran out together and confronted the delivery man. Johnson and Lemon positioned themselves on either side of the car, preventing any means of escape. Lemon opened the passenger door, thereby adding an element of intimidation and fear. He maintained his position and did not withdraw, even after Johnson escalated the encounter with his gun. After Johnson shot the victim, Lemon fled the scene with him. Lemon never did anything to aid the victim. We do not agree that Lemon has minimal culpability like the aider and abettor who acted only as a getaway driver in *People v. Banks* (2015) 61 Cal.4th 788.

3. Cross-examination of Prosecution Witness S.D.

Defendant Lemon next contends the court prejudicially erred in denying his constitutional right to confront and cross-examine S.D., the main prosecution witness, about her alleged mental illness. Lemon argues the restriction on cross-examination also violated his constitutional rights to due process and to present a defense, and amounted to an abuse of the court's discretion under Evidence Code sections 352 and 780. Defendant Johnson joins in Lemon's arguments.

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest

miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Defendant Lemon sought and obtained pretrial access to S.D.'s medical records. Those records were transmitted under seal to this court for consideration on appeal. During the preliminary hearing, S.D. admitted on cross-examination that she had, at some unspecified time, been committed to hospitals on "a couple of holds" for mental health reasons. But she denied ever being diagnosed with schizophrenia or any kind of paranoid or delusional disorder. She denied ever being suicidal, and said she just suffered from anxiety and had at some point been diagnosed as bipolar.

At trial, defendant Lemon renewed his request to cross-examine S.D. about her mental health issues. Defense counsel conceded S.D. had the capacity to testify, but he wanted the ability to cross-examine her about any mental health issues as it pertained to her credibility. During proceedings outside the presence of the jury, defense counsel elaborated that there were records showing that on the same day she was released from the hospital with a diagnosis of manic depressive psychosis in March 2012, she was then interviewed by Detective Johnson and her statement was recorded.

Citing Evidence Code section 352, the court denied defendant's request finding such evidence was not substantially probative of S.D.'s ability to have perceived the events she attested to in 1995, and that it would be confusing to the jury and constitute and undue consumption of time.

"[T]he confrontation clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense wishes. [Citation.] Judges retain wide latitude to impose reasonable limits on cross-examination." (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 841-842; see also Pen. Code, § 1044 ["It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."].)

Moreover, "[a] witness may be cross-examined about his mental condition or emotional stability *to the extent it may affect his powers of perception, memory (recollection), or communicatio*n. [Citations.] Also, expert psychiatric testimony may be admissible to impeach the credibility of a prosecution witness where the witness' mental or emotional condition may affect the ability of the witness to tell the truth. The admissibility of such testimony rests within the discretion of the trial court. Generally, however, attempts to impeach a prosecution witness by expert psychiatric testimony have been rejected." (*People v. Cooks* (1983) 141 Cal.App.3d 224, 302, italics added.)

Here, there was no evidence S.D. suffered from any mental health issues in 1995 when she perceived the events to which she attested, nor any evidence that during the trial in November 2014 she suffered from any condition that impacted her ability to testify. As the trial court noted in its ruling, her testimony and statements over the 19 years showed a high degree of consistency. Defendant Lemon noted that a doctor had been hired, but did not say that the individual had examined S.D., had prepared a report or opinion as to her mental health status, or had any foundation for testifying.

We have reviewed the sealed medical records and are satisfied the court did not abuse its discretion under Evidence Code section 352 in excluding further cross-examination as requested by Lemon. In addition, there was extensive cross-examination of S.D. on a wide range of issues, including the inconsistent portions of her statements regarding the shooting, the level of her vision problems that may have impacted her ability to perceive the shooting, and her substance abuse problem, including that she had been arrested for possession of methamphetamine.

Nor do we find any constitutional error. " ' "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' " [Citation.] However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause,

the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, *unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility*" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]' [Citation.]" (*People v. Linton* (2013) 56 Cal.4th 1146, 1188, italics added; accord, *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.)

Defendant has not demonstrated that cross-examination regarding any mental health treatment S.D. may have received in 2012 would have produced a significantly different impression of her credibility as a witness. He has also not demonstrated that he was denied a fair trial or the ability to present a defense. " 'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." ' " (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Assuming for the sake of argument the court's ruling was error, it was harmless by any standard.

4. Admission of Defendant Johnson's Out-of-court Statement

Defendant Lemon contends the court erred in admitting the out-of-court statement by defendant Johnson that implicated Lemon as an accomplice. Lemon argues the hearsay statement was not admissible under Evidence Code section 1230 as a statement against interest, and the court's error was not only an abuse of discretion, but deprived him of his due process right to a fair trial. Respondent contends the due process objection was forfeited, and that in any event, the statement was properly admitted under section 1230.

First, we reject respondent's claim of forfeiture. Defendant Lemon moved pretrial to exclude evidence of any hearsay statements that inculpated him, including the 1995 statement by defendant Johnson to S.D. to the effect that he had shot the delivery man because if he had not done so then "he and James would be dead." The motion was denied.

"[A] trial objection must fairly state the specific reason or reasons the defendant believes the evidence should be excluded. If the trial court overrules the objection, the defendant may argue on appeal that the court should have excluded the evidence for a reason asserted at trial. A defendant may *not* argue on appeal that the court should have excluded the evidence for a reason *not* asserted at trial. *A defendant may, however, argue that the asserted error in overruling the trial objection had the legal consequence of violating due process*." (*People v. Partida* (2005) 37 Cal.4th 428, 431, second italics added.) "To the extent, if any, [the defendant] argues that due process required the court to exclude the evidence for a reason not included in the trial objection, that argument is forfeited[.]" (*Ibid.*)

Defendant Lemon's objections below fairly informed the court and counsel of his grounds for seeking to exclude the hearsay statements of defendant Johnson, and have been preserved for appeal. We review the court's ruling to admit such statements for abuse of discretion. (*People v. Cortez* (2016) 63 Cal.4th 101, 125, fn. 5 (*Cortez*).)

"Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.) "The proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611 (*Duarte*).)

Declarations against penal interest, however, may also contain self-serving and unreliable information, and " ' "a self-serving statement lacks trustworthiness whether it accompanies a disserving statement or not." ' " (*Duarte, supra,* 24 Cal.4th at p. 611.) "Even a hearsay statement that is facially inculpatory of the declarant may, when considered in context, *also* be exculpatory or have a net exculpatory effect." (*Id.* at p. 612.) Because of such concerns, Evidence Code "section 1230's exception to the

hearsay rule [is] 'inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant.' " (*Ibid.*) Thus, a hearsay statement " 'which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible.' " (*Ibid.*)

Defendant Lemon argues the portion of Johnson's statement implicating Lemon as being at the scene was "entirely collateral" and not self-inculpatory under *Duarte* and therefore should have been excluded. But, *Duarte* explained that " 'whether a statement is self-inculpatory or not can only be determined by viewing it in context.' " (*Duarte, supra,* 24 Cal.4th at p. 612.) No part of Johnson's statement was exculpatory. No part of it was "self-serving." (*Id.* at p. 611.) The statement did not attempt to shift blame to Lemon or otherwise try to place the "the major responsibility" for the shooting on Lemon. (*Id.* at p. 612; see also *Cortez, supra,* 63 Cal.4th at p. 128.)

In short, defendant Johnson's reference to Lemon was an integral part of the statement in which he implicated himself in the robbery and shooting. The context in which the statement was made was plainly self-inculpatory as Johnson admitted his responsibility for the murder. The reference to Lemon was part of his explanation for his motive in shooting the victim, and did not implicate Lemon in any conduct other than his presence at the scene. The fact that Lemon was present was largely uncontradicted in the evidence. Moreover, the attendant circumstances under which Johnson made the statement provided further indicia of reliability. The statement was made in a private setting, on the telephone, to someone deemed to be a friend, and thus without coercion or reason to fabricate. Under such facts, there was no error in the trial court's admission of Johnson's statements to S.D. implicating Lemon. (*Cortez, supra,* 63 Cal.4th at p. 128.)

Lemon argues that the admission of the hearsay statement was an error of such magnitude that it amounted to a violation of his due process right to a fair trial. "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*Partida, supra,* 37 Cal.4th at p. 439.) Lemon argues only that the prosecution's case was weak, and the hearsay

statement of defendant Johnson was improperly admitted to bolster the otherwise weak and conflicting statements of the witnesses. As we explained, the statement was not improperly admitted, but even assuming it was, Lemon has not articulated an argument that the admission resulted in a trial that was fundamentally unfair.

Finally, we note that defendant Lemon concedes the challenged statement was nontestimonial and that the Sixth Amendment has no application to nontestimonal hearsay statements. (See *Whorton v. Bockting* (2007) 549 U.S. 406, 420; *People v. Arceo* (2011) 195 Cal.App.4th 556, 571-574.) Defendant therefore did not raise any confrontation clause argument.

5. Defendant Lemon's Claims of Instructional Error

Defendant Lemon argues the court erred by instructing the jury on first degree felony murder, and in failing to instruct on lesser included offenses. We review claims of instructional error de novo. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.) We find no such error.

a. First Degree Felony Murder

Defendant Lemon's arguments are threefold: First, he restates his substantial evidence argument that proof of malice is required for first degree murder but the record lacked any evidence of malice aforethought, and therefore the instruction should not have been given. Next, Lemon argues the felony-murder rule should not apply to juveniles. And finally, he argues that under the merger doctrine, robbery, which has an assaultive aspect, merges with homicide and instruction on felony murder was therefore improper. Defendant Johnson joined in Lemon's arguments. The arguments are without merit.

As we already explained in part 2.a above, the felony-murder rule applies to juveniles and does not require proof of malice. We need not address those points further.

In *People v. Gonzales* (2011) 51 Cal.4th 894 (*Gonzales*), the Supreme Court rejected an argument analogous to Lemon's argument regarding the merger doctrine and felony murder. In *Gonzales*, the defendant argued that a conviction of mayhem felony murder violated the merger doctrine as "articulated in *People v. Ireland* (1969) 70 Cal.2d 522, a second degree murder case, and extended to first degree felony murder in *People*

v. Wilson (1969) 1 Cal.3d 431, 441-442 (*Wilson*)." (*Gonzales*, at p. 942.) The defendant admitted that *Wilson* had recently been overruled in *People v. Farley* (2009) 46 Cal.4th 1053 (*Farley*) which "held, *prospectively*, that the merger doctrine has no application to first degree felony murder." (*Gonzales*, at p. 942, italics added.) But, the defendant argued her charged offense predated *Farley* and therefore the rule of *Wilson* still applied to her case. The *Gonzales* court disagreed, explaining that the court's pre-*Farley* jurisprudence "had limited *Wilson* to cases of burglary felony murder where the defendant's only felonious purpose was to assault or kill the victim." (*Gonzales*, at p. 942.)

Defendants here were charged and convicted of first degree felony murder with attempted robbery, not burglary, as the underlying felony. Thus, under *Gonzales*, instruction on first degree felony murder was proper irrespective of the prospective application of *Farley*. Defendants' reliance on *People v. Chun* (2009) 45 Cal.4th 1172 (*Chun*) is unavailing. *Chun* concerned *second degree* felony murder and concluded that where the elements of the underlying felony "have an assaultive aspect, the crime merges with the underlying homicide even if the elements also include conduct that is not assaultive." (*Chun*, at p. 1200.) Defendants, failing to address *Gonzales* at all, argue that under *Chun* robbery has "an assaultive aspect" and therefore merges with homicide. Not so. It is well established that robbery, while it may include assaultive behavior, nonetheless has an independent felonious purpose, namely to "acquire money or property belonging to another." (*People v. Burton* (1971) 6 Cal.3d 375, 387 (*Burton*), overruled in part on other grounds in *People v. Lessie* (2010) 47 Cal.4th 1152, 1157-1158.) Robbery therefore does not merge with homicide. (*Burton*, at pp. 387-388.) *Chun*, while it overruled a number of earlier precedents, did not, as defendants concede, overrule *Burton*. (See *Chun*, *supra*, at p. 1201.)

b. Lesser Included Offenses

Defendant Lemon claims the court erred in failing to instruct on theft and involuntary manslaughter as lesser included offenses. "Theft is a necessarily included offense of robbery." (*People v. Ledesma* (2006) 39 Cal.4th 641, 715.) "Involuntary

manslaughter is ordinarily a lesser offense of murder." (*People v. Abilez* (2007) 41 Cal.4th 472, 515.) Lemon argues there was substantial evidence upon which the jury could have found that he only aided and abetted an attempted theft, not robbery, and therefore any resulting death could be no more than involuntary manslaughter. We are not persuaded.

The court's obligation to instruct on all principles of law relevant to the issues raised by the evidence at trial includes the obligation to instruct " 'on any lesser offense "necessarily included" in the charged offense, if there is substantial evidence that only the lesser crime was committed.' [Citation.]" (*People v. Smith* (2013) 57 Cal.4th 232, 239; accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1344-1345.) "An instruction on a lesser included offense *must be given only when the evidence warrants such an instruction*. [Citation.] To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, 'evidence from which a rational trier of fact could find beyond a reasonable doubt' that the defendant committed the lesser offense. [Citation.] Speculation is insufficient to require the giving of an instruction on a lesser included offense." (*People v. Mendoza* (2000) 24 Cal.4th 130, 174, italics added.)

As we explained in part 2.a above, there was substantial evidence that defendant Lemon aided and abetted an attempted robbery that resulted in a murder. Under no reasonable interpretation of the evidence was there only a theft and not a robbery.

6. Defendant Lemon's Eighth Amendment Claim

Defendant Lemon argues his sentence of 25 years to life is "effectively" a life sentence given his age at the time of sentencing and his life expectancy, and thus violates both the federal and state constitutional proscriptions against cruel and unusual punishment. Lemon also argues the record demonstrates he was not only under the age of 18 at the time of the crime but less culpable than Johnson and not deserving of a sentence in which he has no meaningful opportunity to obtain parole. "Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496 (*Martinez*).)

"A sentence violates the state prohibition against cruel and unusual punishment (Cal. Const., art. I, §§ 6, 17) if ' "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience." ' [Citations.] [¶] A sentence violates the federal Constitution [(U.S. Const., 8th & 14th Amends.)] if it is 'grossly disproportionate' to the severity of the crime." (*People v. Russell* (2010) 187 Cal.App.4th 981, 993.) Outside the context of a capital sentence, " 'successful challenges to the proportionality of particular sentences have been exceedingly rare.' [Citation.]" (*Ewing v. California* (2003) 538 U.S. 11, 21 [affirming sentence of 25 years to life imposed on a third-strike offender convicted of felony grand theft for the theft of $1,200 worth of merchandise].)

Where, as here, the defendant was a juvenile at the time the offense was committed, the sentencing court must take into consideration the juvenile offender's " 'chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.' " (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1388 (*Gutierrez*), quoting *Miller v. Alabama* (2012) 567 U.S.___ [132 S.Ct. 2455, 2468] (*Miller*).) *Miller* reasoned that "children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, . . . 'they are less deserving of the most severe punishments.' [Citation.]" (*Miller,* at p. 2464.)

Defendant Lemon was convicted of first degree felony murder. Penal Code section 190.5, subdivision (b) provides, in relevant part, that "[t]he penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances . . . has been found to be true . . . , who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." *Gutierrez* concluded that the sentencing scheme created by section 190.5 does not offend the Constitution as it "authorizes and indeed requires consideration of the distinctive attributes of youth highlighted in *Miller*." (*Gutierrez*, *supra*, 58 Cal.4th at p. 1361.)

The record demonstrates the trial court gave serious consideration to the parties' sentencing memoranda and allowed for significant argument regarding the appropriate sentence. Indeed, defendant Lemon makes no claim that the trial court failed to take into consideration the *Miller* factors in imposing sentence. Rather, Lemon focuses almost exclusively on the fact that he was in his 30's at the time of sentencing and therefore a 25-to-life sentence operates as a de facto life sentence, delaying any chance at parole until he is 61.

Defendant Lemon actively participated with Johnson in the attempted robbery and murder of an unarmed pizza delivery man. He left the state following the crime and was free for some 19 years without having to face the consequences of his conduct. He has an opportunity to be paroled at the age of 61. We do not agree that defendant's sentence is grossly disproportionate to the crime, that it shocks the conscience, or that defendant does not have a meaningful chance at parole.

7. The Denial of Defendant Lemon's *Pitchess* Motion

Defendant Lemon contends the court erred in denying his motion for discovery pursuant to *Pitchess* without reviewing any personnel records in camera. Lemon's motion sought personnel records of Detectives Cable and Collette related to false reports, lying, and untruthfulness. On appeal, Lemon argues only that he established good cause for production of records related to Detective Cable. "A trial court's ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion." (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

"To show good cause as required by [Evidence Code] section 1043, defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges. The declaration must articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024 (*Warrick*).) "Counsel's affidavit must also describe a factual scenario supporting the claimed officer misconduct." (*Ibid.*)

The *Pitchess* motion in this case did not propose a defense to the charge of murder nor articulate how the requested discovery would support that proposed defense. Neither did the motion describe a factual scenario supporting the claimed officer misconduct and explaining Lemon's own actions in a manner that would have established some type of defense. The motion asserted that defendant was looking for witnesses to testify that the officer has character traits and habits of providing false reports, lying and untruthfulness. In other words, defendant sought evidence of the officer's character or a trait of his character, evidence made inadmissible by Evidence Code section 1101. Counsel added in his points and authorities that "*it would not hurt* for the court to examine" the personnel records in camera (italics added). Such argument ignores the duty of the trial court to carefully balance the peace officer's just claim to confidentiality against defendant's right to a fair trial. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1227 [*Pitchess* and Evidence Code sections 1043 through 1047 recognize that the officer in question has a strong privacy interest in his or her personnel records and that such records should not be disclosed unnecessarily].)

Counsel's declaration fell far short of demonstrating good cause for an in camera hearing as explained fully by our Supreme Court in *Warrick*. In *Warrick*, the police report stated that three police officers on patrol noticed the defendant standing next to a wall holding a baggie containing off-white solids; the officers approached; the defendant fled, discarding off-white lumps resembling rock cocaine; one of the officers retrieved 42 lumps from the ground; and when the two other officers arrested the defendant after a short pursuit, he held an empty baggie in his hand and had $2.75 cash in his pockets. (*Warrick, supra,* 35 Cal.4th at p. 1016.) Defense counsel's declaration described an alternate version of the events, explaining that the defendant fled when the officers got out of the patrol car because he feared an arrest on an outstanding parole warrant, and when the officers caught up with him " 'people [were] pushing and kicking and fighting with each other' " as they collected rock cocaine from the ground; two officers retrieved some of the rocks; when one of them told the defendant he must have thrown it, the defendant denied possessing or discarding any rock cocaine, and explained he was in the

area to buy cocaine from a seller there. (*Id.* at p. 1017.) Defense counsel linked this version to the potential defense by suggesting "that the officers, not knowing who had discarded the cocaine, falsely claimed to have seen defendant, who was running away, do so." (*Ibid.*)

In contrast to the declaration of defense counsel in *Warrick*, the declaration here did not describe an alternate version of events in contrast to the police reports. It summarily described two facts and one omission in two police reports which counsel asserted might lead to the discovery of evidence of a character for dishonesty. It also stated that Detective Cable was fired from the Long Beach Police Department. The declaration says nothing about *when* Detective Cable was fired, or *why* he was fired, or even the basis for counsel's statement that he had been fired. The declaration offers no facts based on which one might infer that Detective Cable was fired for false reports, lying or dishonesty or for anything at all having to do with the investigation of the murder of Mr. Teniente.

The declaration stated that Detective Cable and another detective wrote a report that included Tyrone's statement that Lemon told Tyrone he was there when Johnson shot the delivery man but he, Lemon, did not do the shooting. A copy of this report was attached as an exhibit to counsel's declaration. The declaration states that Lemon denied making that statement. The declaration did *not* say that Tyrone denied repeating Lemon's out-of-court statement to Detective Cable, or that Detective Cable did not accurately report what Tyrone told him. Counsel also declared this report omitted to mention that at one stage of the investigation, Tyrone had been arrested as a suspect involved in the murder. The declaration did *not* state that fact was withheld from the defense; only that it was not mentioned in this particular report. Indeed, defense counsel attached as an exhibit to his declaration a portion of Tyrone's preliminary hearing testimony in which the defense cross-examined him about his arrest. Tyrone testified at the preliminary hearing three months before Lemon filed his *Pitchess* motion, so there is no doubt that Tyrone's arrest was disclosed to the defense well before Lemon was held to answer in this case.

The only other fact cited in counsel's declaration is that Detective Cable wrote in another report that he was present at the live lineup in which Lemon was in position number three. Counsel's declaration states that, "At the line-up, [V.B.] twice failed to identify anyone. [¶] . . . Nonetheless, Detective Cable claims that outside the line-up he heard [V.B.] later tell the Deputy District Attorney that he could identify Mr. Lemon." Defense counsel declared, "Our investigation reveals that [V.B.] never made such a statement." Counsel attached a copy of this report as an exhibit to his declaration. In relevant part, the report summarized the conversation between V.B. and the deputy district attorney as follows: "I heard [the deputy district attorney] say to [V.B.] something along the lines of, 'So now you're telling me it's number three?' I also heard her ask the witness if he was positive and I heard his response to be that he was. The witness was then asked by the District Attorney why he filled out the form the way he did, which caused the witness to respond in an aggravated manner. [¶] The witness told the District Attorney that he did not want to be stressed, that he was sick and this was not doing him any good. [¶] I suggested to the District Attorney that we not talk with the witness any further regarding his statement and I suggested to her that, maybe after thinking about the line-up by himself, he was now able to make an identification."

Warrick explained how to assess the evidence in support of a *Pitchess* motion to determine whether the defendant has established good cause for in-chambers review of an officer's personnel records. "[T]he trial court looks to whether the defendant has established the materiality of the requested information to the pending litigation. The court does that through the following inquiry: Has the defense shown a logical connection between the charges and the proposed defense? Is the defense request for *Pitchess* discovery factually specific and tailored to support its claim of officer misconduct? Will the requested *Pitchess* discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense? Under what theory would the requested information be admissible at trial?" (*Warrick, supra,* 35 Cal.4th at pp. 1026-1027.)

Defense counsel's declaration here did not show a logical connection between any statements or omission in the police reports and any defense. Nothing is offered to explain how Lemon's denial that he told Tyrone he was there when Johnson shot the delivery man supports any proposed defense. Lemon's denial that he made the out-of-court statement to Tyrone in no way implicated the accuracy of Detective Cable's report of what Tyrone told him. Defense counsel did not state the defense believed Detective Cable lied about what Tyrone told him. Likewise, nothing is offered to explain how V.B.'s statement to the deputy district attorney might be admissible at trial or might support any defense. The report of V.B.'s conversation with the deputy district attorney accurately states that V.B. did *not* identify Lemon in the lineup, although he admitted afterward and "off the record" that he could have. Counsel's declaration that some undisclosed investigation revealed V.B. never made such a statement is insufficient without more to demonstrate police misconduct, and it does not show a logical connection to any proposed defense.

In *People v. Thompson* (2006) 141 Cal.App.4th 1312, which was decided after *Warrick*, the court affirmed the denial of the *Pitchess* motion because the declaration merely denied the elements of the offense, without presenting a factual account of the scope of the alleged police misconduct, explaining the defendant's own actions in a manner that supported his defense, suggesting a nonculpable reason for his presence in an area where drugs were being sold or for being singled out by the police, or asserting "any 'mishandling of the situation' prior to his detention and arrest." (*Thompson*, at p. 1317.)

Similarly, here there is no factual account of police misconduct nor any facts offered to explain Lemon's own actions in a manner that suggested a nonculpable reason for his presence in the apartment of S.D. and Y.W. on the night of the murder of the pizza delivery man. Lemon has not demonstrated the trial court abused its discretion.

8. Cumulative Error

Defendant Lemon urges us to find that even if none of his claims of error individually warrants reversal, their cumulative effect nonetheless requires reversal. We

are not persuaded. "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' [Citation.]" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) Whether viewing his claimed errors individually or cumulatively, defendant has failed to show he was deprived of a fair trial. At most, defendant has shown his trial was " ' " 'not perfect—few are.' " ' " (*People v. Farley*, *supra*, 46 Cal.4th at p. 1124.)

9. Defendant Johnson's Parole Revocation Fine

Defendant Johnson contends the court erred in imposing a parole revocation fine because he was sentenced to a term of life without the possibility of parole. Respondent concedes the fine is improper. The imposition of a parole revocation fine pursuant to Penal Code section 1202.45 is unauthorized where the defendant's sentence contains no period of parole. (See *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819; accord, *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1185-1186.) Defendant Johnson's $10,000 parole revocation fine must be stricken.

DISPOSITION

Defendant and appellant James Lemon's judgment of conviction is affirmed.

Defendant and appellant Venda Johnson's judgment of conviction is modified in the following respects: the parole revocation fine of $10,000 is stricken. The superior court is directed to prepare and transmit a modified abstract of judgment to the Department of Corrections and Rehabilitation. The judgment of conviction as to defendant Johnson is affirmed in all other respects.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.