Filed 2/6/19 P. v. Brumfield CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. PAUL RANDOLF BRUMFIELD JR., Defendant and Appellant.	B282348 (Los Angeles County Super. Ct. No. SA092218)

APPEAL from judgment of the Superior Court of Los Angeles County, Mark E. Windham, Judge. Affirmed as modified and remanded.

Stephen M. Vasil, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Allison H. Chung, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Paul Randolf Brumfield, Jr. guilty of second degree murder (Pen. Code, § 187, subd. (a) [count 1]),[1] driving or taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a) [count 2]), gross vehicular manslaughter (§ 192, subd. (c)(1) [count 3]), and hit-and-run driving resulting in death (Veh. Code, § 20001, subd. (b)(2) [count 4]). The jury found true the allegation that Brumfield fled the scene of the collision in count 3.[2] (Veh. Code, § 20001, subd. (c).)

In a bifurcated trial, the trial court found true the allegations that Brumfield suffered a prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)–(i) & 1170.12, subds. (a)–(d)), suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), and suffered three prior prison terms

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] The trial court issued a judgment of acquittal as to the allegation that Brumfield used a deadly or dangerous weapon in commission of the murder pursuant to section 12022, subdivision (b)(1).

for felony offenses within the meaning of section 667.5, subdivision (b). The court granted Brumfield's motion to strike the prior strike conviction under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

Brumfield was sentenced to 15 years to life in count 1 (§ 187, subd. (a)), plus a 5-year enhancement pursuant to section 667, subdivision (a)(1). The court selected count 4 as the principal determinate term and imposed a consecutive high term of four years. (Veh. Code, § 20001, subd. (b)(2).) It imposed a second consecutive sentence of eight months (one-third the midterm) in count 2. (*Id.*, § 10851, subd. (a).) The trial court imposed the upper term of six years in count 3 (§ 192, subd. (c)(1)), plus a 5-year term for the attached special allegation (Veh. Code, § 20001, subd. (c)), both of which it stayed pursuant to section 654. Finally, it imposed three one-year prior prison term enhancements under section 667.5, subdivision (b). Brumfield was sentenced to a total determinate term of 4 years 8 months and total indeterminate term of 23 years to life.

Brumfield contends: (1) the trial court erroneously instructed the jury that a violation of the speeding law was an act dangerous to human life; (2) the trial court abused its discretion when it prevented defense counsel from questioning a prosecution expert regarding a supplemental report; (3) the prosecutor improperly impeached Brumfield's trial testimony with his post-arrest silence; and (4) the prior prison term enhancements imposed under section 667.5, subdivision (b), must be reversed because Brumfield's most

recent felony was recalled and he was resentenced to a misdemeanor.

In supplemental briefing, Brumfield contends that we must remand the matter to the trial court to allow it to exercise its discretion to strike his 5-year prior serious felony conviction enhancement under section 667, subdivision (a)(1) in count 1, pursuant to Senate Bill No. 1393. The People concede that the amendments effectuated by Senate Bill No. 1393 will apply retroactively to Brumfield's case if it is still pending when the amendments take effect on January 1, 2019, but argue that remand is not warranted because the trial court clearly indicated it would not have dismissed the enhancement even if it had discretion to do so.

We modify the judgment to strike the three 1-year enhancements imposed under section 667.5, subdivision (b), and remand the matter to the trial court for the limited purpose of determining whether to exercise its discretion to strike the section 667, subdivision (a)(1) enhancement in count 1, but otherwise affirm the judgment.

FACTS

Prosecution

Theft and Use of the Buick LaSabre

On October 30, 2015, James Yap's Buick LaSabre was stolen from a car lot located on Venice Boulevard and National Boulevard in or around Culver City.

Guillermo Manjarrez saw Brumfield driving and living in the Buick during the period between Halloween and the second week of November 2015.[3] Brumfield parked the Buick in the Palms or Mid-City areas of Los Angeles. Brumfield stored personal items inside the Buick and in the trunk. The Buick had a bike rack attached to the rear that held a bike on occasion. Brumfield sometimes rode a bike when he was not driving the car.

Manjarrez and Brumfield stole bikes together. Manjarrez rode in the Buick a few times, but he never drove it, and never saw anyone other than Brumfield drive it. He may have opened the Buick's trunk or helped Brumfield put a bike on the rack.

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[3] Manjarrez testified at trial under a grant of immunity. Manjarrez had prior convictions of possession of narcotics for sale, fraud, unlawful driving or taking of a vehicle, identity theft, receiving stolen property, petty theft, possession of burglar's tools, and negligent discharge of a firearm.

Delton Bowen knew Brumfield. Brumfield and Bowen both lived in their vehicles, and Brumfield parked the Buick in front of Bowen's motor home on a street in Mar Vista.[4] Bowen saw Brumfield driving the Buick "all the time." Bowen also knew Manjarrez. Bowen never saw Brumfield with Manjarrez, and never saw Manjarrez in the Buick.

The Murder

On November 15, 2015, at about 8:40 p.m., Los Angeles Police Department Officers Michael Schaefer and Gina Roh were in a marked black-and-white hybrid police car[5] patrolling a parking lot located at Sawyer Street and La Cienega Boulevard in Los Angeles. Officer Schaefer noticed the Buick because it had a bike attached to it. There were many bike thefts in West Los Angeles. The Buick was

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[4] Bowen's preliminary hearing testimony was presented as evidence after the trial court found Bowen was an unavailable witness. Bowen had nine prior misdemeanor convictions for burglary, vehicle tampering, petty theft with a prior theft conviction, sexual battery, domestic abuse, assault with a deadly weapon, unlawful taking of a vehicle, possession of drug paraphernalia, and petty theft, and had prior felony convictions for burglary and assault with a deadly weapon.

[5] The hybrid police car had a forward-facing red light by the center mirror and a light bar inside the back windshield behind the seats, but did not have a light bar at the top of the vehicle as did a typical police car.

driven in an unusual way, circling the parking lot after the officers drove behind it. Officer Schaefer could not see the driver's face, but based on the slightly tanned or dark skin color of the driver's neck and side of the face, he believed the driver was Hispanic, Black, or Indian.

The officers checked the Buick's license plate number and discovered the car had been stolen. They followed the Buick at a close distance but did not activate their patrol car's lights and siren. The officers requested backup, a supervisor, and an airship. They continued following the Buick, but waited until additional police units arrived to conduct a tactically safe traffic stop of the stolen vehicle.

As the Buick drove out of the parking lot onto La Cienega Boulevard, Officer Roh saw the driver's face in the side mirror for about three seconds. Officer Roh broadcasted over the police radio that the driver was male and Black, or possibly another race, had a medium to heavyset build, and wore glasses.

The Buick's driver held a phone to his left ear as he drove up the La Cienega Boulevard ramp to the 10 Freeway. The Buick initially traveled at a normal speed but then accelerated to a much higher speed than other vehicles on the freeway. The driver drove erratically. He made unsafe lane changes, moving to the farthest left lane and then immediately moving to the farthest right lane and exiting at the first available freeway off ramp at Robertson Boulevard.

The officers continued following the Buick northbound on Robertson Boulevard to Cattaraugus Avenue where it

accelerated to a high rate of speed, faster than the flow of traffic, and drove through two stop signs without stopping. The officers fell behind the Buick because they had to clear the intersections safely.

The Buick turned right onto Venice Boulevard and immediately accelerated to a high rate of speed again. It weaved in and out of about 20 to 40 other vehicles. The speed limit on Venice Boulevard was 35 miles per hour. The Buick drove faster than the officers' speed of 40 to 45 miles per hour and maintained a distance of about three to four businesses from the officers.[6]

Once the Buick cleared the traffic, it accelerated even more. Officer Schaeffer testified that he saw a pedestrian on the center island of Venice Boulevard at the Hughes Avenue intersection look to his right toward the traffic. The pedestrian stepped off the island into the crosswalk and crossed against a red light. There were no oncoming vehicles approaching the intersection at that point. The pedestrian looked down at his phone or his hand and walked at a normal speed. The Buick accelerated out of traffic and hit the pedestrian as he walked between the number one and number two lanes of Venice Boulevard. The officers saw a cloud of blood, and Officer Schaeffer saw the victim's decapitated body flying through the air. Officer Schaeffer

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[6] Footage from surveillance video showed the relative speeds of the Buick and the patrol car driving a couple car lengths behind it on Venice Boulevard as they approached the intersection at Hughes Avenue.

testified that the Buick could have avoided the victim by moving to either the number two or number three lane, which were both unoccupied, but instead lined up with the victim and accelerated. The Buick did not brake before or after the impact. It continued traveling at a high rate of speed, accelerating away from the intersection.

The impact caused the victim's head to go through the windshield, decapitated the victim, launched his body into the air, amputated his left leg above the knee, nearly severed his right leg below the knee, dislocated his hip, and caused multiple abrasions and lacerations.

Brumfield's Actions Following the Collision

Manjarrez testified that on the night of the collision, he was at the Best Western Airpark Hotel in Inglewood in room number 423 with several friends, including Charles Lazzaro.[7] Brumfield called Manjarrez multiple times that night between 8:00 p.m. and 11:00 p.m. asking for a ride. Brumfield said that while fleeing from police he drove his car into a wall and "totaled" it. He sounded anxious and hurried, and talked fast.

Manjarrez did not have a car so he offered to call Brumfield a cab. Brumfield told Manjarrez to send the cab to the apartment where Manjarrez had lived with his ex-

[7] The hotel's records show Charles Lazzaro checked into the hotel on November 15, 2015, and was registered to room number 423.

girlfriend Renee. Manjarrez had lived in two apartments with Renee; one on Bagley Avenue and another located at 10751 Rose Avenue.

Manjarrez requested a cab at the Bagley apartment address. Brumfield called Manjarrez and told him the cab had not arrived. Manjarrez realized he had sent the cab to the wrong apartment and offered to send a cab to Rose Avenue but Brumfield said he had already left. Brumfield also said he abandoned his vehicle near Rose Avenue.

Bowen testified that two or three days before November 20, 2015, Brumfield told Bowen he wanted to buy his SUV and asked him for a ride to pick up some of his things. Brumfield did not have the Buick and was riding a bike. Bowen drove him to an apartment building at 10751 Rose Avenue. Brumfield picked up 10 bags and several items that were scattered around the area of the apartment building.

Recovery of the Buick and Brumfield's Arrest

John Mueller managed an apartment building at 10960 Rose Avenue in Los Angeles. On November 16 or 17, 2015, a tenant informed Mueller that an unfamiliar vehicle was parked in the apartment building's ungated underground carport. Mueller investigated and saw the Buick, which was damaged and had a hole in the windshield surrounded by a pink stain. Mueller asked the residents, including David Drekter, if they knew who owned the Buick.

On November 19, 2015, Drekter saw the Buick in the carport. He noticed that the Buick had damage to the front end, the right side of the hood, and the windshield. On the passenger side, the windshield had a blood-stained hole. Based on his training and experience as a former emergency medical technician and deputy sheriff, Drekter believed a body had struck and damaged the hood of the Buick. Drekter called the police because he thought the Buick had been involved in a fatal accident.

On November 19, 2015, Officer Jeffrey Chiantaretto and his partner responded to the apartment building on Rose Avenue, and determined the Buick was stolen and had been involved in a crime. Officer Chiantaretto observed a blanket and blood on the front passenger floorboard. The victim's severed head was later recovered from the front passenger floorboard underneath the blanket and some clothing. All four interior door panels of the Buick were spattered with blood.

On November 20, 2015, Brumfield was arrested in the area of National and Sawtelle Boulevards in Los Angeles for an unrelated offense, stealing a crowbar from Bowen's vehicle. Brumfield's shoes, cell phone, and SIM card were collected when he was booked into jail.

Forensic Evidence[8]

A bloodstain on the right Puma shoe Brumfield was wearing when he was arrested yielded a major DNA profile that was consistent with the victim. The major DNA profile obtained from the bloodstain occurred in approximately one in 20 trillion unrelated individuals.

Three of four cigarette butts found under the driver's seat of the Buick yielded a DNA profile that matched Brumfield's profile and the fourth cigarette butt yielded a partial DNA profile that was consistent with Brumfield's profile. The statistical rarity of the DNA profile obtained from the cigarette butts was one in approximately 700 quintillion unrelated individuals.

A toothbrush recovered from the Buick yielded a partial DNA profile that was consistent with Brumfield's profile. The statistical rarity of the DNA profile obtained from the toothbrush was one in approximately two quintillion unrelated individuals.

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[8] At trial the parties stipulated that Manjarrez's right palm print was lifted from the outside driver's side rear panel/trunk area, his right ring fingerprint was lifted from the top of the trunk, his right index fingerprint was lifted from the outside passenger side front door on the metal trim, and his left palm print was lifted from the outside passenger side rear panel/trunk area. A right palm print was lifted from the outside driver's side rear door and a right index fingerprint lifted from the trunk matched an individual named Navnit Chandar.

Cell Phone Evidence

Cell phone records showed that on November 15, 2015, between 8:32 p.m. and 11:20 p.m., 13 phone calls were made from Brumfield's phone to Manjarrez's phone and two phone calls were made from Manjarrez's phone to Brumfield's phone. Brumfield's cell phone calls connected to cell towers positioned along the route the Buick took while it was followed by Officers Schaeffer and Roh and continuing to the area around Rose Avenue where the Buick was abandoned.

The parties stipulated that on November 15, 2015, between 8:00 p.m. and 11:30 p.m., phone calls were made to and from Manjarrez's cell phone number and all of those phone calls connected to the nearest cell tower located at 917½ West Hyde Park Boulevard in Inglewood.

Expert Testimony

Officer Andrew Cullen and coroner's investigator Kristy McCracken both testified that traumatic decapitation and limb amputation are much more common in vehicle versus pedestrian collisions on the freeway than on surface streets. Officer Cullen testified that when a vehicle strikes a pedestrian, the pedestrian usually rolls over and is hit away from the vehicle, resulting in trauma such as broken bones or a fatality. The amount of force necessary to decapitate a human being is "massive." McCracken had investigated over

a hundred vehicle versus pedestrian collision scenes on surface streets and freeways over 15 years and had never observed a traumatically amputated head in a surface street collision. Officer Cullen had investigated 900 to 1,500 vehicle versus pedestrian collisions on surface streets and had only observed traumatic decapitation in one case in which a dump truck had run over a pedestrian.

Los Angeles Police Department Officer and collision reconstructionist Jahna Rinaldi examined the data taken from a vehicle event data recorder in the Buick's airbag control module. The Buick's event data recorder showed that between five seconds and one second before the collision, the driver requested 100 percent throttle, which meant the accelerator was pushed down to the furthest extent possible. The Buick's speed increased from 83 miles per hour at five seconds before impact, to 85 miles per hour at four seconds before impact, to 87 miles per hour at three seconds before impact, to 89 miles per hour at two seconds before impact, to 91 miles per hour at one second before impact. The driver removed his foot from the accelerator one second before the collision. The Buick's brakes were not engaged from five seconds preceding the collision to eight seconds following it.

Officer Rinaldi testified that antilock brakes like the brakes in the Buick caused visible skid marks when hard braking was applied. There were no skid marks at the crime scene. Based on the Buick's event data recorder and crime

scene evidence, Officer Rinaldi estimated that the Buick's speed at the time of the impact was about 87 miles per hour.

Los Angeles Police Department senior equipment mechanic Sanford Young performed a safety inspection and test drive of the Buick on December 30, 2015. The Buick's braking system was in good condition, and met the Department of Motor Vehicle's safe vehicle brake performance criteria. The Buick had good throttle function and its motor was fully operational and ran well. The Buick had three rear brake lights; the center high-mounted brake light and the driver's side brake light were functional, but the passenger's side brake light was not.

Defense

Brumfield's Testimony

Brumfield testified that he was with his friend Don on the night of the collision. Just after sundown, Manjarrez arrived at Don's house to get drugs on credit. When Brumfield asked Manjarrez if he had his car that night, Manjarrez said he did.

Brumfield testified that Manjarrez owned the Buick, but let Brumfield use or rent it for more than one day in exchange for drugs. Brumfield denied he had stolen the Buick, and denied driving the Buick on the night of the murder. He loaned his cell phone to Manjarrez that night so that Manjarrez could make two drug drops, one at Corning

Street and Cadillac Avenue and the other at La Cienega Boulevard and Sawyer Street. Brumfield asked Manjarrez to deliver the drugs because it was late and he was high on methamphetamine.

On November 17, 2015, Brumfield rode a bike to Manjarrez's apartment at 10751 Rose Avenue to get his cell phone back. Brumfield found three bags that contained property belonging to him and Manjarrez on a walkway near the apartment. His Puma shoes were in one of the bags. Later that day, Bowen gave him a ride to get the bags, which he loaded into Bowen's van.

Brumfield did not get his cell phone back when he went to Manjarrez's apartment, so he bought a new phone on or about November 19, 2015. Brumfield's cell phone contacts included Manjarrez's cell phone number listed under Manjarrez's name. According to Brumfield, the cell phone number belonged to Manjarrez's girlfriend.

Brumfield had only known Bowen for 24 hours when he borrowed the Buick and parked it in front of Bowen's vehicle for a single night. When Bowen drove Brumfield to pick up the bags at Rose Avenue, they had only known each other two days.

Brumfield testified that he became homeless for about a year in 2014, and then lived in a van that he usually parked in the Robertson Boulevard area in Los Angeles.

Brumfield was convicted of receiving stolen property in 2000 and 2002, second degree burglary in 2004, 2007, and 2008, and petty theft with a prior in 2005 and 2013.

Expert Testimony

Accident reconstructionist Babak Malek opined that the Buick's speed at impact was approximately 74 miles per hour based on the area of impact, the pedestrian's point of rest, the throw distance, and the range of the pedestrian's speed.

In Malek's opinion, the Buick had applied hard braking because it was traveling at 91 miles per hour one second before impact, and the Buick's speed could only have been 74 miles per hour at impact if hard braking had occurred. If hard braking had not occurred, Malek opined that the Buick's speed at impact would have been approximately 88 miles per hour. Skid marks did not always accompany hard braking and would not necessarily be present if the brakes were applied for one second.

Malek disagreed with Officer Rinaldi's opinion that the Buick's speed at impact was 87 miles per hour. Officer Rinaldi calculated the speed at impact using calculations that are employed in bumper-to-bumper cases, which are not appropriate in a pedestrian versus vehicle scenario.

DISCUSSION

Instructional Error

Brumfield contends that when read together the gross vehicular manslaughter and second degree murder instructions removed an element of the implied malice theory of second degree murder from the jury's consideration in violation of his constitutional rights. Alternatively, he argues that even if the error did not preclude the jury's consideration of the element, it created an ambiguity in the second degree murder instruction. In either case, he asserts the error was not harmless beyond a reasonable doubt.

We conclude that giving the modified gross vehicular manslaughter instruction in combination with the second degree murder instruction was error, but that the error was harmless because the evidence presented at trial established that Brumfield's violation of the prima facie speed law was both an act that "might cause death" (as stated in the gross vehicular manslaughter instruction) and "dangerous to human life" (as stated in the second degree murder instruction) beyond a reasonable doubt, and because the verdict demonstrates that the jury resolved the issue in favor of the prosecution.

Proceedings

At trial, the jury was instructed regarding second degree murder under the unmodified pattern instruction, CALCRIM No. 520, as follows:

"The defendant is charged in Count One with murder.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant committed an act that caused the death of another person; AND

"2. When the defendant acted, he had a state of mind called malice aforethought.

"There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

"The defendant acted with express malice if he unlawfully intended to kill.

"The defendant acted with *implied* malice if:

"1. He intentionally committed an act;

"2. *The natural and probable consequences of the act were dangerous to human life*;

"3. At the time he acted, he knew his act was dangerous to human life;

"AND

"4. He deliberately acted with conscious disregard for human life.

"Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed

before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

"If you find the defendant guilty of murder, it is murder of the second degree." (Original italics omitted.)

The jury was instructed regarding gross vehicular manslaughter under a modified version of CALCRIM No. 592 as follows:

"The defendant is charged in Count three with gross vehicular manslaughter.

"To prove that the defendant is guilty of gross vehicular manslaughter, the People must prove that:

"1. The defendant drove a vehicle;

"2. While driving that vehicle, *the defendant committed an infraction that might cause death: violation of the prima facie speed law*;

"3. The defendant committed the infraction with gross negligence; AND

"4. The defendant's grossly negligent conduct caused the death of another person.

"Gross negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when:

"1. He or she acts in a reckless way that creates a high risk of death or great bodily injury; AND

"2. A reasonable person would have known that acting in that way would create such a risk.

"In other words, a person acts with gross negligence when the way he or she acts is so different from how an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.

"The People allege that the defendant committed the following infraction: Violation of the Prima Facie Speed Law.

"Instruction 595 tells you what the People must prove in order to prove that the defendant committed Violation of the Prima Facie Speed Law.

"The People have the burden of proving beyond a reasonable doubt that the defendant committed gross vehicular manslaughter. If the People have not met this burden, you must find the defendant not guilty of that crime and you must consider whether the defendant is guilty of the lesser crime of misdemeanor vehicular manslaughter." (Original italics omitted.)

Finally, the jury was instructed regarding violation of the prima facie speed law under the unmodified pattern instruction, CALCRIM No. 595:

"To prove that the defendant committed a violation of the prima facie speed law, the People must prove that:

"1. The defendant drove a vehicle on a highway;

"2. The defendant drove faster than 35 mph;

"3. The defendant drove on Venice Boulevard at Hughes, a business or residence district; AND

"4. The defendant's rate of speed was faster than a reasonable person would have driven considering the weather, visibility, traffic, and conditions of the highway.

"The term *highway* describes any area publicly maintained and open to the public for purposes of vehicular travel and includes a street.

"When determining whether the defendant drove faster than a reasonable person would have driven, consider not only the speed, but also all the surrounding conditions known by the defendant and also what a reasonable person would have considered a safe rate of travel given those conditions.

"The People have the burden of proving beyond a reasonable doubt that the defendant's rate of travel was not reasonable given the overall conditions, even if the rate of travel was faster than the prima facie speed law. If the People have not met this burden, you must find the defendant did not violate the prima facie speed law."

Law

The question whether a challenged instruction accurately conveys the legal requirements of a particular offense is one of law which we independently review. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

Jury instructions that relieve the prosecution of the burden of proving each element of the charged offense beyond a reasonable doubt violate a defendant's due process

rights under the United States and California Constitutions. (*People v. Flood* (1998) 18 Cal.4th 470, 480–481, 491 (*Flood*).) Such erroneous instructions also violate United States and California constitutional principles requiring all material issues be decided by the trier of fact. (*Ibid.*) An instruction that requires the jury to find an elemental fact based on proof of a predicate fact is unconstitutional because it "subvert[s] the presumption of innocence accorded to accused persons and also invade[s] the truth-finding task assigned solely to juries in criminal cases." (*Carella v. California* (1989) 491 U.S. 263, 265 (*Carella*); *People v. Vanegas* (2004) 115 Cal.App.4th 592, 599 (*Vanegas*).) "In determining whether a challenged instruction constitutes an impermissible mandatory presumption we put ourselves in the place of the jurors and ask whether the instruction, 'both alone and in context of the overall charge, could have been understood by reasonable jurors to require them to find the presumed fact if the State proves certain predicate facts.'" (*Vanegas*, *supra*, 115 Cal.App.4th at pp. 599–600, fn. omitted, quoting *Carella*, *supra*, 491 U.S. at p. 265.)

When scrutinizing an ambiguous or purportedly ambiguous instruction under the United States Constitution or California law, we inquire "whether there is a reasonable likelihood that the jury misconstrued or misapplied the words in violation" of such laws. (*People v. Clair* (1992) 2 Cal.4th 629, 663 (*Clair*).) In deciding the issue, we consider the specific language challenged, the whole of the instructions, and the jury's findings. (*People v. Cain* (1995)

10 Cal.4th 1, 36.) Arguments of counsel may also shed light on whether the jury correctly understood the law as presented by the instructions as a whole. (See *People v. Kelly* (1992) 1 Cal.4th 495, 526–527.)

The standard of reversal applicable to an instructional error that creates an improper mandatory presumption is the *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) "harmless beyond a reasonable doubt" standard. (*Vanegas*, *supra*, 115 Cal.App.4th at p. 602; *Flood*, *supra*, 18 Cal.4th at pp. 502–503.) Ambiguous instructions lead to reversal only if there is a """"reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution."' [Citation.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 192.)

Analysis

Brumfield contends that the modified language in the gross vehicular manslaughter instruction—"the defendant committed an infraction that might cause death: violation of the prima facie speed law"—told the jury that if it determined that he violated the prima facie speed law he necessarily committed an act that might cause death, when in fact, it is not required that the infraction might cause death to meet the requirements for conviction of gross vehicular manslaughter. He posits that the jury, which believed the infraction "might cause death" by definition, would have also believed that once it found he had violated

the prima facie speed law, it must find that the natural and probable consequences of the infraction were dangerous to human life—an element of the implied malice theory of second degree murder—because the phrases "might cause death" and "dangerous to human life" are equivalent. As a result, the issue of whether the infraction was "dangerous to human life" as required for a conviction of second degree murder was effectively removed from the jury's consideration, or at the very least made ambiguous.

In support of his argument, Brumfield relies on *Vanegas*, *supra*, 115 Cal.App.4th 592. In *Vanegas*, the trial court instructed the jury that "to find Vanegas guilty of second degree murder based on implied malice it must find: 'The killing resulted from an intentional act . . . the natural consequences [of which] are dangerous to human life and the act was deliberately performed with the knowledge of [the] danger to, and with conscious disregard for, human life." (*Id*. at pp. 598–599.) "The court further instructed the jury if it found the killing was committed without malice it could find Vanegas guilty of vehicular manslaughter if it found, among other things: 'The driver of the vehicle committed an unlawful act not amounting to a felony, which under the circumstances of its commission was dangerous to human life, namely, a violation of Vehicle Code section 22350, the basic speed law . . . .' In addition, the court instructed the jury it could find Vanegas guilty of driving with a .08 blood-alcohol level and causing bodily injury if it found Vanegas 'did an act forbidden by law in the driving of the vehicle,

namely violated [the basic speed law] . . . .' [¶] With respect to the basic speed law itself, the court instructed the jury: 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent . . . and in no event at a speed which endangers the safety of persons or property. *A violation of the basic speed law is the commission of an act inherently dangerous to human life and safety* . . . .' (Italics added.)" (*Id*. at p. 599.)

Vanegas argued that, as worded, the basic speed law instruction directed the jury that if it found he violated the basic speed law the "dangerous to human life" element of implied malice for second degree murder was necessarily established. Because not all violations of the basic speed law are dangerous to human life, the language of the basic speed law instruction removed an element of implied malice from the jury's consideration in violation of the Fifth, Sixth and Fourteenth Amendments. (*Vanegas*, *supra*, 115 Cal.App.4th at p. 599.)

A majority of the Court of Appeal agreed. It explained that "[a]n instruction which requires the jury to find an elemental fact (dangerousness to human life) upon proof of a predicate fact (violation of the basic speed law) would be unconstitutional because '[s]uch directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases.'" (*Vanegas*, *supra*, 115 Cal.App.4th at p. 599, fn. omitted.) The court had "no doubt reasonable jurors who are told a violation of the basic speed law is 'the commission

of an act inherently dangerous to human life' would interpret this instruction to mean 'the natural consequences' of a violation of the basic speed law 'are dangerous to human life.'" (*Id.* at p. 600.)

The *Vanegas* court further found that the error was not harmless, because ample evidence in the record supported the conclusion that Vanegas's actions were not dangerous to human life. The majority concluded that "a reasonable juror would have . . . found Vanegas was traveling approximately one mile per hour over the alley speed limit at the time he struck [the victim]." (*Vanegas*, *supra*, 115 Cal.App.4th at p. 604.) The prosecution produced no evidence that Vanegas's intoxication impaired his ability to drive and, in fact, argued that it did not. (*Id.* at pp. 603–604.) Vanegas did not demonstrate "a pattern of dangerous and erratic driving." (*Id.* at p. 604.) As the prosecutor summarized in closing argument, "Vanegas 'was driving northbound up the alley, without hitting any of the telephone poles, without hitting the fence, without hitting any people.' After striking [the victim], 'he straightens out his vehicle to go north and exit the alley. He doesn't hit anyone or anything else, not the truck that's parked right behind the telephone pole, not the people standing near the Jack-in-the-Box area, and not the cars . . . . He makes a decision to not go left because he sees the cars coming. He's not so drunk that he does not know what's going on.'" (*Ibid.*) In contrast, "[t]he evidence Vanegas committed an act whose natural consequences were dangerous to human life consisted of evidence he was

intoxicated (as much as three times the legal limit), people were present in the alley, the alley was wet, and his speed exceeded the 15 miles per hour prima facie speed limit." (*Id.* at p. 603.) The majority "[did] not view this evidence as so convincing on the issue of dangerousness the unlawful presumption could have had only 'minimal' effect on the jury's verdict." (*Ibid.*)

Both the instructions and the facts in this case differ significantly from *Vanegas*. In *Vanegas*, the basic speed instruction expressly stated that "'[a] violation of the basic speed law is the commission of an act inherently dangerous to human life and safety.'" (*Vanegas*, *supra*, 115 Cal.App.4th at p. 599, italics omitted.) There was only one way to interpret the instruction: violation of the basic speed law is by definition an act inherently dangerous to human life and safety. Here, the instruction at issue asked the jury to determine whether "[w]hile driving that vehicle, the defendant committed an infraction that might cause death: violation of the prima facie speed law." This language could be interpreted either to mean that a violation of the prima facie speed law was an infraction that might cause death by definition and that the jury had only to determine whether Brumfield committed the infraction, or that the jury must determine whether Brumfield committed an infraction that might cause death as opposed to an infraction that might not cause death, or no infraction at all.

Additionally, the basic speed instruction and second degree murder instruction in *Vanegas* employed identical

language: "dangerous to human life." It was thus impossible to escape the conclusion that the jury would believe that if it found Vanegas violated the basic speed law it must also find that he committed an act "dangerous to human life" when determining whether the defendant had acted with implied malice. In the instant case, the gross vehicular manslaughter and second degree murder instructions did not include the same language. The gross vehicular manslaughter instruction asked the jury to determine whether Brumfield committed an infraction that "might cause death," whereas the second degree murder charge asked the jury to determine whether "the natural and probable consequences of the act [Brumfield committed] were dangerous to human life." The two formulations are not exactly equivalent. It is arguable that "probable" implies a higher bar than "might," which would leave the question of whether the elements of second degree murder to the jury regardless of whether they found Brumfield committed an infraction that might cause death.

As a result of these differences, the argument that the instruction in this case created an impermissible mandatory presumption is substantially weaker than it was in *Vanegas*, and we question whether the alleged instructional error is best categorized as creating a mandatory presumption or an ambiguity. We need not decide the issue, however, as under either standard giving the modified gross vehicular manslaughter instruction was error—it "'could have been understood by reasonable jurors'" to mean either that the

jurors must find that if Brumfield violated the prima facie speed law the natural and probable consequences of the violation were dangerous to human life (*Vanegas*, *supra*, 115 Cal.App.4th at pp. 599–600, quoting *Carella*, *supra*, 491 U.S. at p. 265), and in light of our discussion we conclude "there is a reasonable likelihood that the jury misconstrued or misapplied" the instruction. (*Clair*, *supra*, 2 Cal.4th at p. 663.) The prosecutor did not clarify the ambiguity in closing argument, and the jury requested individual copies of the second degree murder and gross vehicular manslaughter instructions in the same query, which lends further supports to the conclusion that the instructions were at best unclear.

That does not end the inquiry, however. The error may be harmless if "we [are] able to say beyond a reasonable doubt '[the] unconstitutional presumption did not contribute to the verdict.'" (*Vanegas*, *supra*, 115 Cal.App.4th at p. 602, quoting *Yates v. Evatt* (1991) 500 U.S. 391, 404.) While not every instance of violating the prima facie speed limit will constitute an act that might cause death, here the evidence overwhelmingly supported the conclusion that Brumfield's violation was an act that might cause death, such that we are able to conclude beyond a reasonable doubt that the jury would not have found otherwise absent the erroneous instruction.

Brumfield's own expert witness did not contest that he had been driving 91 miles per hour one second before the collision. The defense expert further testified that, assuming Brumfield braked hard for one second he would have been

traveling at a speed of 74 miles per hour at the time of impact—39 miles per hour above, and more than two times the speed limit. The prosecution presented evidence that he may have been traveling as fast as 93 miles per hour—58 miles per hour above, and well more than two-and-a-half times the speed limit. Officers Schaefer and Roh both testified that Brumfield was driving at excessive speeds while surrounded by other cars on Venice Boulevard.[9] Officer Schaefer estimated that, even prior to his final acceleration, Brumfield passed approximately 20 to 40 vehicles that were driving at the posted speed limit.

Prior to reaching Venice Boulevard, Brumfield had violated several traffic laws, running stop signs and making dangerous lane changes. Brumfield continued to accelerate as he was pulling away from the other cars on Venice Boulevard, and reached such excessive speeds that the officers determined not to pursue him with lights and sirens activated because it would endanger the public to do so.[10]

Officer Schaefer testified that when the victim stepped into the street he appeared to be walking at a normal speed, and in the officer's opinion, at that time the victim would

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[9] Brumfield asserts that he only began to speed when he had moved ahead of other cars, but the record does not support his assertion.

[10] Brumfield's representation that the officers did not activate their lights and sirens because the situation did not warrant these actions severely twists Officer Schaefer's testimony.

have had time to cross the intersection safely if Brumfield had not increased his speed even further. All of the lanes ahead of Brumfield were clear. He had room to swerve and avoid the victim. Instead, Brumfield lined the car up with the victim and accelerated. Officer Schaeffer never saw the brake lights activate, and the car did not slow down. There were no visible signs of braking either before or following impact.

The prosecution's expert accident reconstructionist testified that she read data recorded by the airbag control module covering the 5 seconds prior to the impact and the 8 seconds following it. According to the data recorder in the module, Brumfield was going 83 miles per hour five seconds before impact, 85 miles per hour four seconds before impact, 87 miles per hour three seconds before impact, 91 miles per hour two seconds before impact, and 93 miles per hour one second before impact. The data recorder showed that Brumfield had been using 100 percent of the throttle—meaning that he was accelerating as fast as the car would allow—until one second prior to impact. Although he removed his foot from the accelerator in the final second, according to the data recorder he did not engage the brakes during the five seconds preceding or the eight seconds following impact. The vehicle slowed by only 3.12 miles per hour when it hit the victim. When tested, the car brakes were found to be operational within safety standards.

The force with which the victim was hit belies Brumfield's argument that he was not driving at a speed

that might cause death. An investigator with the Los Angeles County Medical Examiner's office testified that she had investigated over 100 vehicle versus pedestrian accidents that took place on surface streets in her career, and had never encountered a decapitation under those conditions. She testified that the traumatic amputation of heads and limbs is usually observed in accidents on the freeway where vehicles are traveling at a high speed. Officer Cullen also testified that he had investigated between 900 and 1500 pedestrian versus car accidents on surface streets and had only once encountered a decapitated victim. In this case, both the victim's head and lower leg were amputated. The defense's expert testified that the impact caused the body to fly a distance of 230 feet.

To summarize, in *Vanegas*, the appellate court determined that the jury accepted the defendant's evidence that he was traveling at a speed of 16 miles per hour—only 1 mile per hour over the speed limit—when he struck the victim. There was no evidence of "a pattern of dangerous and erratic driving" other than when the defendant struck the victim, and there was no evidence that the defendant's intoxication impaired his ability to drive. Here, Brumfield was driving at a minimum speed of 74 miles per hour according to his own expert. It is undisputed that he violated several traffic laws prior to hitting the victim. The overwhelming weight of the evidence establishes that he made no attempt to brake, but even if he did brake the results of the impact are undisputed—the victim was

decapitated, his leg was amputated, and his body was thrown 230 feet from the site of impact. The facts relating to the harmless error analysis here, and those in *Venegas*, are starkly different, and lead to different conclusions. There is no question that, under the facts and circumstances of this case, the collision could only have been the result of an action that was dangerous to human life.

Finally, the jury convicted Brumfield of second degree murder, finding that he acted intentionally with knowledge of and conscious disregard for the danger to human life. To do so it must have made an independent determination that Brumfield's driving in fact endangered the lives of others and that he was actually aware of or consciously disregarded that danger.

Cross-Examination of Prosecution Expert

Brumfield next contends that the trial court abused its discretion by preventing him from cross-examining Officer Cullen regarding Officer Maurice Hallauer's supplemental report. Brumfield alleges: in the supplemental report, Officer Hallauer revised the conclusions in his original report, which Officer Cullen relied on in formulating his expert opinion. Brumfield argues that the court's prohibition on this line of questioning violated California's rules of evidence and his constitutional due process and confrontation rights. We disagree.

Proceedings

Testimony

Los Angeles Police Department Officer Andrew Cullen testified as an expert in accident reconstruction for the prosecution. On direct examination the officer testified he was a secondary team leader and worked with team leader Maurice Hallauer to document the scene a few hours after the accident took place. Officer Cullen assisted Hallauer in taking measurements for a to-scale diagram of the scene, which Hallauer prepared. Officer Cullen reviewed the diagram and agreed with the calculations. The diagram showed the resting place of the victim's shoes, leg, and body, and biofluid marks where the body had skidded on the road, which were measured and noted on the diagram. Officer Cullen surveyed the entire block and did not find any pre- or post-impact tire marks.

Officers Hallauer and Cullen recorded the initial point of impact based on witness statements. In Officer Cullen's experience, it was common for a shoe to be left at or near the initial point of impact. In this case, the victim's shoe and amputated foot were found near the place where the officers believed the impact occurred based on the witness statements.

Officer Cullen also testified that he had investigated between 900 and 1500 car versus pedestrian collisions on surface streets. The officer had seen only one other

decapitation on surface streets, which occurred when a dump truck hit a pedestrian. It takes a "massive" amount of force to decapitate a victim. Decapitation occurred more frequently on the highway.

Sidebar

Shortly after cross-examination began, defense counsel requested a sidebar outside the presence of the jury regarding whether he would be permitted to question Officer Cullen about a supplemental report authored solely by Officer Hallauer several weeks after the initial report. The court excused the jury. The prosecutor argued that: the supplemental report was unconnected to Officer Cullen, who had no role in creating it and had not given any input regarding it; the report was also based on evidence of hard braking, of which there was no physical evidence; and bringing in a secondary report unrelated to the first and written by an unavailable author would be confusing to the jury.

The trial court initially ruled that it would allow cross-examination. A few minutes later the court reconsidered its ruling. The court reasoned that Evidence Code 721, subdivision (b) allows an expert to be cross-examined on a publication when the expert has referred to, considered, or relied on the publication or when the publication has been admitted into evidence. Evidence Code 721 was designed to prevent an adverse party from presenting the inadmissible

hearsay views of an absent expert witness through cross-examination.

Defense counsel argued that Officer Cullen may have relied on the supplemental report. The prosecutor disputed that Officer Cullen relied on the supplemental report in any way.

The prosecutor argued that Officer Cullen had not offered an opinion on the issue that the defense sought to raise by cross-examining him on the supplemental report. Rather, the officer had testified that the original report reflected the measurements he had taken, and then offered his opinion that decapitation was extremely rare in pedestrian versus vehicle accidents on surface streets. He had offered no other opinions.

The court asked defense counsel how the supplemental report was relevant. Counsel explained that the point of impact identified in the original report had been modified in the supplemental report. The prosecutor responded that the initial report merely showed where the point of impact would have occurred based on witness statements. Officer Cullen had not offered an opinion—he described what the diagram depicted. The supplemental report was not relevant to his testimony.

The court asked defense counsel what he was trying to prove or negate by questioning Officer Cullen. Defense counsel responded, "Well, through this witness the supplemental report gets the speed of the vehicle down."

The trial court ruled that the purpose was not appropriate because the officer had not testified regarding the vehicle's speed. Although the issue was relevant to the case as a whole, cross-examination was not the proper vehicle for its delivery. Experts can only be cross-examined on the issues about which they testify. The court stated that the defense could call a witness to testify on the issue, but could not get the supplemental report into evidence by cross-examining Officer Cullen.

Analysis

Evidence Code Section 721

Brumfield first argues, as he did at trial, that the trial court erred in curtailing his cross-examination of Officer Cullen because the cross-examination should have been permitted under Evidence Code section 721.

We review the claim for abuse of discretion. (*People v. Peoples* (2016) 62 Cal.4th 718, 765–766.) Evidence Code section 721 provides in relevant part:

"(a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.

"(b) If a witness testifying as an expert testifies in the form of an opinion, he or she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless any of the following occurs:

"(1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion.

"(2) The publication has been admitted in evidence.

"(3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice."

"An expert witness may not be cross-examined regarding matters that are not relevant to the expert's opinion or qualifications." (*People v. Smithey* (1999) 20 Cal.4th 936, 960 (*Smithey*).)

In this case, the defense sought to elicit testimony regarding the speed at which the vehicle was traveling at impact. Officer Cullen did not offer an opinion regarding the speed of the vehicle, thus the questioning did not regard a subject "to which his . . . expert testimony relate[d]" under Evidence Code 721, subdivision (a)(2). There was also no evidence that Officer Cullen considered the supplemental report—the prosecutor represented that "[h]e agreed with the first report. The second report has never been brought up." Thus it was not admissible under Evidence Code 721, subdivision (a)(3).[11] Moreover, cross-examination was

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[11] Brumfield does not contend that cross-examination was permitted under Evidence Code 721, subdivision (a)(1).

prohibited under Evidence Code 721, subdivision (b)(1), as there was no indication Officer Cullen "referred to, considered, or relied upon such publication in arriving at or forming his or her opinion."[12]

The trial court did not abuse its discretion in circumscribing cross-examination on a subject to which Officer Cullen did not testify. (*Smithey*, *supra*, 20 Cal.4th at p. 960.)

Evidence Code Section 356 and Confrontation Clause Arguments

Brumfield also argues that cross-examination of Officer Cullen should have been permitted under Evidence Code section 356, and that his Sixth and Fourteenth Amendment rights were violated by curtailment of cross-examination. He did not raise these arguments at trial and has therefore forfeited them. However, because he argues that counsel was ineffective for failing to object, we address the arguments on the merits.

A criminal defendant's right to effective assistance of counsel is based upon the constitutional right to counsel guaranteed by the Sixth Amendment to the United States Constitution and by Article I, section 15 of the California Constitution. (*People v. Pope* (1979) 23 Cal.3d 412, 422,

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[12] Brumfield does not claim admissibility under Evidence Code 721, subdivisions (b)(2) or (b)(3).

overruled on other grounds by *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) In order to establish such a claim, a defendant must establish (1) that his counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that, but for counsel's error, a different result would have been reasonably probable, thus resulting in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, at p. 694.) The defendant has the burden of proving ineffective assistance of counsel. (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.) "If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) The Supreme Court has held that "[t]he performance component [of the analysis] need not be addressed first. 'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' (*Strickland v. Washington*, [*supra*,] 466 U.S.[at p.] 697.)" (*Smith v. Robbins* (2000) 528 U.S. 259, 286, fn. 14.)

Brumfield's claim of ineffective assistance of counsel is not cognizable on direct appeal because the record fails to

indicate the motivations for counsel's acts or omissions. "'If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus. [Citation.]' [Citations.]" (*People v. Carter*, *supra*, 36 Cal.4th at p. 1189.) Here, the record is silent on the issue raised by defendant, so it must be addressed in a habeas corpus petition. Even if we were to consider the merits of Brumfield's contentions, they fail on both the performance and prejudice prongs of *Strickland v. Washington*, *supra*, 466 U.S. 668, however.

Evidence Code section 356 provides that "[w]here part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." (Evid. Code, § 356.) "'The purpose of this section is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.' [Citation.]" (*People v. Melendez* (2016) 2 Cal.5th 1, 25.) The comments note that "[t]he rule stated in Section 356 . . . only makes admissible

such parts of an act, declaration, conversation, or writing as are relevant to the part thereof previously given in evidence. See, e.g., *Witt v. Jackson*, 57 Cal.2d 57, 67 (1961) (the rule 'is necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced')." (Assem. Com. On Judiciary, Com. 29B pt. 1A West's Ann. Evid. Code (2011) ed.) foll. § 356, p. 650.)

Here, the supplemental report was not a part of the original report as contemplated by Evidence Code 356. The diagram Officer Cullen referred to in testimony depicted the measurements he took at the site right after the incident, and showed the location of impact based on witness statements. Also, consistent with Officer Cullen's experience, the victim's shoe and amputated foot were found near where witnesses placed the point of impact. The supplemental report contained calculations performed by Officer Hallauer based on his independent interpretation of what had occurred. In short, the reports were different in nature and were the work product of different people: the diagram in the original report recorded *data* collected by a team; the supplemental report reflected *analysis* performed by a single person based on his own view of events. The supplemental report was not admissible pursuant to Evidence Code section 356, so counsel did not perform below the standard to be expected of a reasonably competent attorney by failing to object on the basis that he should be able to cross-examine Officer Cullen regarding the

supplemental report for completeness. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687–688.)

We also reject Brumfield's constitutional claims. "Although the Sixth Amendment to the federal Constitution provides a defendant with the right to engage in appropriate cross-examination of witnesses, the trial court retains the ability to impose reasonable limits on counsel's inquiry if it is repetitive or marginally relevant. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) Additionally, the court's 'limitation on cross-examination . . . does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted.' (*People v. Quartermain* (1997) 16 Cal.4th 600, 623–624; see *People v. Linton* (2013) 56 Cal.4th 1146, 1188 (*Linton*) [court '"retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance"'].)" (*People v. Williams* (2016) 1 Cal.5th 1166, 1192.) As we have discussed, Officer Cullen did not offer an opinion on Brumfield's speed, so any cross-examination with respect to the supplemental report would be irrelevant to his testimony. Similarly, it would not be relevant to his credibility, as he had never testified contrary to the report regarding speed. The jury would not '"have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted.' [Citations.]" (*Ibid.*)

Finally, Brumfield's due process claim fails. "'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." [Citations.]' (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103.)" (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203.) Where, as here, the trial court only excludes some evidence of a defense, the error is of state law and is reversible only if it is reasonably probable that the defendant would have achieved a more favorable outcome if the error had not occurred. (*Ibid.*) In light of our previous discussion, we conclude that a more favorable outcome was not reasonably probable. Counsel did not fall below the standard to be expected of a reasonably competent attorney by failing to object on the ground of due process. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687–688.)

Doyle Error

Brumfield contends that the prosecutor improperly impeached his trial testimony with his silence in violation of his constitutional right to remain silent and *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*). Because there is no evidence that Brumfield had been advised of his *Miranda*[13] rights before the time period in question, we conclude that the prosecutor did not commit error under *Doyle*.

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[13] *Miranda v. Arizona* (1966) 384 U.S. 436.

Proceedings

Officer Chiantaretto testified that he arrested Brumfield and took him into custody for burglarizing Bowen's van on Friday, November 20, 2015. That same day, he informed Detective Hassanzai that Bowen described Brumfield as someone who lived in or used to drive a maroon Buick LaSabre in the area. Based on this information, Detective Hassanzai told Officer Chiantaretto he was going to try to interview Brumfield, who was at Van Nuys jail. Detective Hassanzai testified that he visited Brumfield at the jail on either Saturday or Sunday.

On cross-examination, Brumfield denied driving around the parking lot of a CVS Pharmacy located at Sawyer Street and La Cienega Boulevard on November 15, 2015, around 8:30 p.m.; driving on La Cienega Boulevard while being pursued by officers; driving down Venice Boulevard in a Buick LaSabre at about 8:45 p.m.; and driving into the pedestrian victim and killing him. The prosecutor then asked:

"[Prosecutor:] Did you tell the police any of this?

"[Brumfield:] No.

"[Prosecutor:] Did you ask to talk to the detective on this case to say, 'You've got the wrong guy. I didn't do this?'

"[Brumfield:] No. Mr. Hassan, he -- he came to visit me in the -- in the valley jail. He didn't tell me what he wanted to talk about. [¶] And then I think the next time I saw him was in L.A. County Jail, and they -- they were like -

- they would not tell me why they were there. And I mean, you know what, it could have been anything. It could have been a lot of things. [¶] I mean the *Miranda* rights states [*sic*] anything you say can and will be held against you. It doesn't -- they don't say they might possibly use [*sic*] to help you. Because I know that -- that if I said anything good, they would just ignore it. That's not their job. So there's no reason to talk to police."

The prosecutor questioned Brumfield regarding when he learned that he was being charged with murder. Brumfield responded:

"[Brumfield:] Umm, when the sheriff handed me the indictment papers. And I asked him, 'What's this for,' and he said, 'murder.'

"[Prosecutor:] So that was at the beginning of this process; correct?

"[Brumfield:] Yeah, yeah.

"[Prosecutor:] So when you became aware that you were being charged with this crime, did you ask to speak to the detective to say, 'I didn't do it. I wasn't there?'

"[Brumfield:] No. That wasn't an option given to me."

The court stopped the proceedings and held an unreported sidebar conference.

The next morning, outside the presence of the jury, the court explained what occurred in sidebar:

"I was just doing a little work. I called counsel to sidebar because I thought [the prosecutor] was on the verge of *Doyle* error, which I don't know that there was. There's a

question I need to look at the phrasing of it. The answer by the defendant was -- referred to him having been advised of his rights and knowing his words could be used against him. I'm not sure that was actually responsive to the question.

"Post-arrest pre-*Miranda* statements or lack thereof may be fair game, but statements after admonition are not fair game. That is *Doyle* error. There was no objection to the question so -- but just the same, I want to look at the text of the question. And if needed, I'll tell the jury to disregard the question and answer. But that's what I'm working on. Let me just set that aside for a moment. It really depends on the text of the question.

"I think the answer is not responsive. And the defendant was speaking of his previous admonitions on his previous arrests he knew his words could be used against him, which would not be a problem."

Later, the court ruled there was no *Doyle error*.

"I'm examining the transcript. And though I was concerned about *Doyle* error, that did not happen. Here the defendant was asked about statements before he was Mirandized. He volunteered the *Miranda* admonition and his understanding that anything he said could be used against him. It's actually a good answer.

"It explains under the circumstances why he wouldn't give the answer but does not actually comment on his right to remain silent.

"The courts have not extended *Doyle* to pre-*Miranda* statements. So there was no basis for an objection. And there's no basis for me to instruct the jury.

"But, again, I was concerned about it. That's why I took counsel sidebar [*sic*] and then [the prosecutor] stopped questioning. So that's fine. We have no issue."

Law

In *Doyle*, *supra*, 426 U.S. 610, the United States Supreme Court held that if a defendant has been advised of his constitutional right to remain silent, a prosecutor may not use the defendant's subsequent silence to impeach his exculpatory testimony at trial. (*Id.* at p. 619.) The court's ruling that doing so would violate the defendant's due process rights was based in part on the recognition that it would be unfair to allow the defendant to be impeached by his silence after having received an implicit assurance that a refusal to speak to police could not be held against him. (*Id.* at pp. 614–618.) In *Fletcher v. Weir* (1982) 455 U.S. 603 (*Fletcher*), the court held that a defendant's testimony may, however, be impeached with post-arrest, pre-*Miranda* silence: "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to post-arrest silence when a defendant chooses to take the stand." (*Id.* at p. 607.) Although California courts at one time forbade cross-examination or

comment on a defendant's post-arrest silence whether *Miranda* warnings were given or not, after the passage of Proposition 8 in 1982, California law conformed to federal law in that respect. (*People v. Delgado* (1992) 10 Cal.App.4th 1837, 1841–1842.) Accordingly, it is "clear that where *Miranda* warnings have not been given, the federal rule, as announced in *Fletcher v. Weir*, governs, and *Doyle* error is not committed by questions or commentary concerning a defendant's post-arrest silence." (*Id.* at p. 1842.)

Analysis

Brumfield contends his *Doyle* error claims are preserved for appellate review notwithstanding the fact that he did not object below. Although an objection is normally required, he notes two exceptions: that an objection is not required if the trial court considered and ruled on an issue as if an objection had been made; and that an objection is not required if it would have been futile. Alternatively, Brumfield argues that he was prejudiced by counsel's failure to object.

We agree with the Attorney General that Brumfield forfeited his claims. Counsel did not engage in any discussion on the subject, and instead appeared to accept the trial court's findings that the prosecutor's questions referred to pre-*Miranda* silence, and that Brumfield's testimony was not responsive, referring to his prior knowledge of his rights

rather than to a recent admonition. Where, as here, the trial court has addressed an issue on its own motion despite a lack of objection does not preclude defendant from raising specific concerns, and the issue raised on appeal differs from the issue the court raised at trial, the issue is not preserved for appeal. (*People v. Delgado* (2017) 2 Cal.5th 544, 581–582.) Nevertheless, we address his claims on the merits because he contends that counsel rendered ineffective assistance. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118.)

The trial court did not err. *Doyle* is implicated only after a defendant has been advised of his *Miranda* rights and has expressly invoked his right to remain silent. Brumfield does not claim to have been given *Miranda* warnings at any time within the relevant period. He argues only that Detective Hassanzai's visit to the jail triggered his duty to advise Brumfield of his *Miranda* rights, and that we must therefore presume Detective Hassanzai Mirandized Brumfield as is required prior to a custodial interrogation. The record does not provide a basis to conclude that Brumfield was in fact Mirandized at that time or that Detective Hassanzai had a duty to advise Brumfield of his *Miranda* rights. Although Detective Hassanzai and Brumfield both testified that the detective visited Brumfield in jail, the substance of their interactions was not revealed. Brumfield's testimony did not indicate that he had been Mirandized or that he had affirmatively asserted his right to

remain silent at any point. (*People v. Tom* (2014) 59 Cal.4th 1210, 1223 [the right to remain silent must be invoked].)

To the contrary, Brumfield indicated that there was no discussion of his alleged crimes. He testified that "[Detective Hassanzai] didn't tell me what he wanted to talk about." "[T]hey would not tell me why they were there. And I mean, you know what, it could have been anything. It could have been a lot of things." We will not presume that Detective Hassanzai gave Brumfield *Miranda* warnings or had a duty to do so in the absence of facts sufficient to support the conclusion that an interrogation took place. Without evidence that the prosecutor's questions referred to a time period after Brumfield had been Mirandized, we cannot conclude the trial court erred. It follows that counsel's representation did not fall "below an objective standard of reasonableness" for failing to object to a proper line of questioning. (*Strickland*, *supra*, 466 U.S. at p. 694.)

Section 667.5, Subdivision (b) Enhancements

Brumfield contends that the prior prison term enhancements imposed under section 667.5, subdivision (b) must be reversed because his 2013 felony conviction had been reduced to a misdemeanor before he was sentenced in this case, such that he was not convicted of a felony or in custody for a prior felony within five years of the current conviction/crime.

We agree. As our Supreme Court has recently explained, "imposition of a section 667.5, subdivision (b) enhancement . . . 'requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction.' (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) [¶] With this understanding, the resentencing of a prior underlying felony conviction to a misdemeanor conviction negates an element required to support a section 667.5 one-year enhancement. A successful Proposition 47 petition or application can reach back and reduce a defendant's previous felony conviction to a misdemeanor conviction because the defendant 'would have been guilty of a misdemeanor under' the measure had it 'been in effect at the time of the offense.' (§ 1170.18, subds. (a), (f).) Therefore, if the 'felony conviction that is recalled and resentenced . . . or designated as a misdemeanor' conviction becomes 'a misdemeanor for all purposes,' then it can no longer be said that the defendant 'was previously convicted of a felony' (§ 1170.18, subd. (k); *People v. Tenner*, *supra*, 6 Cal.4th at p. 563), which is a necessary element for imposing the section 667.5, subdivision (b) enhancement. Instead, 'for all purposes,' it can only be said that the defendant was previously convicted of a misdemeanor." (*People v. Buycks* (2018) 5 Cal.5th 857, 889, fn. omitted.)

In a bench trial on Brumfield's prior convictions, the trial court found that he had suffered three prior prison terms for felony offenses within the meaning of section 667.5, subdivision (b), in 2000, 2002, and 2007, respectively. In the case of a fourth conviction that Brumfield suffered in 2013, the court recognized that the conviction had since been reduced from a felony to a misdemeanor, and could not serve as a basis for imposition of an enhancement under section 667.5, subdivision (b).

Because the only felony offense for which Brumfield was convicted and imprisoned within five years prior to his current convictions had been recalled and resentenced as a misdemeanor at the time of sentencing, his three one-year prior prison term enhancements under section 667.5, subdivision (b) must be stricken.

Senate Bill 1393

Senate Bill 1393, signed into law on September 30, 2018, amends Penal Code sections 667 and 1385 to provide the trial court with discretion to strike five-year enhancements pursuant to section 667, subdivision (a), subsection (1), in the interests of justice. The new law took effect on January 1, 2019. The parties agree that the law is applicable to Brumfield if his appeal was not yet final on the law's effective date. The Attorney General argues that remand is unwarranted, however, because the trial court

clearly indicated that it would not have dismissed the enhancement even if it had discretion.

Whether the trial court would dismiss the section 667, subdivision (a), subsection (1) enhancement if granted discretion is not clear from the record. Although the court imposed the high term of four years in count 4 (Veh. Code, § 20001, subd. (b)(2), hit and run driving), and stated that it tried to find a way not to stay the high term of six years (§ 192, subd. (c)(1), gross vehicular manslaughter) and the special enhancement in count 3 pursuant to section 654, it also granted Brumfield's motion to strike his prior strike conviction. The court stressed the importance of both protecting the community by imposing a life sentence and ensuring that justice was "proportionate." Absent a clear indication that the trial court would not exercise its discretion to strike the enhancement, we must remand the matter for the trial court to exercise its discretion in the first instance.

Accordingly, remand this matter for the trial court to consider whether to exercise its discretion to strike the section 667, subdivision (a), subsection (1) enhancement.

DISPOSITION

We modify the judgment to strike the three one-year enhancements imposed under section 667.5, subdivision (b), and remand to the trial court to consider exercising its discretion to strike the five-year section 667, subdivision (a) enhancement under Senate Bill 1393. In all other respects, the judgment is affirmed.

MOOR, Acting P.J.

We concur:

KIM, J.

SEIGLE, J.*

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