No. _____

_____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT LARS PAPE, *Petitioner*,

v.

THE STATE OF CALIFORNIA, *Respondent*.

_____

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Michael Laurence
Law Office of Michael Laurence
1770 Post St., No. 123
San Francisco, California 94115
Telephone: (415) 317-5818
E-mail: mlaurence@mlaurence.org

Counsel of record for Petitioner
ROBERT LARS PAPE

No. _____

_____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT LARS PAPE, Petitioner,

v.

THE STATE OF CALIFORNIA, Respondent.

_____

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

_____

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Petitioner ROBERT LARS PAPE, through his counsel, respectfully requests a 60-day extension of time, to and including January 24, 2022, within which to file a petition for a writ of certiorari in this Court.

A.

The final judgment of the Supreme Court of the State of California, denying discretionary review of Mr. Pape's criminal judgment was entered on August 25, 2021. The time for Mr. Pape to file a petition for a writ of certiorari in this Court expires on November 23, 2021. *See* Court Rule 13.1. This application to extend the time to file such a petition is being filed at least 10 days before that date. Court Rule 13.5.

The opinion of the California Court of Appeal for the Fourth Appellate District in *People v. Cristin Conrad Smith and Robert Lars Pape*, Case No. E071156 (Cal. Ct. App. June 10, 2021), is unpublished, but is available at 2021 WL 2374322. The order of the California Supreme Court denying discretionary review in *People v. Cristin Conrad Smith and Robert Lars Pape*, Case No. S269964 (Cal. Aug. 25, 2021), also is unpublished. True copies of the opinion and the order are attached in the Appendix to this Application.

B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Mr. Pape has been convicted and sentenced in violation of the protections guaranteed by the United States Constitution. On September 17, 2006, law enforcement discovered three suspected homicide victims in Riverside County, California. Mr. Pape, who was eighteen years old at the time was questioned about the circumstances of the crime, as were several others. It was not until ten years later, in November 2016, however, that Mr. Pape and his co-defendant, Cristin Conrad Smith, were charged with the crimes. Despite the inordinate delay in prosecution of the case, Mr. Pape sought to develop and present evidence at trial that other persons were responsible for the crimes. In addition to denying Mr. Pape the ability to present such testimony, the trial court permitted the prosecution to elicit highly prejudicial hearsay statements purportedly made by one of the deceased victims. After the jury returned two first-degree murder and one second-degree murder verdicts, the trial court imposed three sentences of life in prison without the possibility of parole.

With the assistance of appointed counsel, Mr. Pape challenged the constitutionality of the trial court's rulings in the California Court of Appeal for the Fourth Appellate District. The central question presented in this case is whether the Court of Appeal, applied this Court's well-established jurisprudence when it affirmed Mr. Pape's convictions.[1]

The federal constitutional issues presented by this case include:

[1] The court of appeal reduced the life-without-possibility-of-parole sentence for the second-degree murder to fifteen years to life.

1. Does the Constitution permit the exclusion of a defendant's presentation of substantial evidence of third-party culpability simply because the court believes the prosecution has presented evidence of the defendant's guilt and when the court refuses to consider the constitutional dimensions of the ruling because it did not "deprive him of a defense altogether or render the trial fundamentally unfair"?

2. Whether the Court of Appeal improperly failed to apply the constitutional standards for resolving Confrontation Clause violations announced in *Crawford v. Washington*, 541 U.S. 36 (2004), when it found the erroneous admission of crucial statements by the deceased victim was not sufficiently "prejudicial" under the less protective state standard announced in *People v. Watson*, 637 P.2d 279 (Cal. 1981)?

These questions, among others, are worthy of careful consideration and should be developed for this Court's plenary review.

C.

Undersigned counsel recently agreed to represent Mr. Pape in proceedings before this Court, but was not counsel for him in any of the state court proceedings. Thus, although I have been diligently gathering and reviewing the voluminous record from the state proceedings, I am unable to complete the petition for a writ of certiorari by the current due date of November 23, 2021. Counsel requests an additional 60 days within which to do so, because of the need to complete a review of the fifteen volumes of the trial record, conduct the necessary research, and draft the petition. In addition to completing the work on behalf of Mr. Pape, I also have continuing obligations in several capital matters that require my attention in the next sixty days.

As Mr. Pape is currently in custody of the California Department of Corrections and Rehabilitation, granting this extension will not prejudice the State of California. On November 9, 2021, I informed California Deputy Attorney General Annie Featherman Fraser, counsel for

Respondent, about this application and the length of the extension requested. She stated that she has no objection to this request.

I further certify that this extension of time is requested in good faith and not for purposes of delay.

Therefore, Robert Lars Pape, through counsel respectfully requests that a sixty-day extension of time be granted within which to file a petition for a writ of certiorari in this Court.

DATED: November 10, 2021.

Respectfully submitted,

Michael Laurence
Law Office of Michael Laurence
1770 Post St., No. 123
San Francisco, California 94115
Telephone: (415) 317-5818
E-mail: mlaurence@mlaurence.org

Counsel of record for Petitioner ROBERT LARS PAPE

Appendix

2021 WL 2374322
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, Fourth District, Division 2, California.

The PEOPLE, Plaintiff and Respondent, v. Cristin Conrad SMITH et al., Defendants and Appellants.

E071156
|
Filed 06/10/2021
|
As Modified on Denial of Rehearing 6/29/2021

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Modified and affirmed with directions. (Super.Ct.No. INF1600755)

Attorneys and Law Firms

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant, Cristin Conrad Smith.

Kimberly J. Grove, under appointment by the Court of Appeal, for Defendant and Appellant, Robert Lars Pape.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

MENETREZ J.

***1** On the night of September 17, 2006, 18-year-old Rebecca Friedli was killed and set on fire. Rebecca's mother, Vicki Friedli, and her mother's partner, John Hayward, were also killed and left to burn.[1] In 2016, the People charged Robert Lars Pape and Cristin Conrad Smith with the murders of the three victims. Pape was Rebecca's ex-boyfriend, and Smith was Pape's best friend. The jury convicted Pape of the second degree murder of Rebecca and the first degree murders of Vicki and Hayward. The jury acquitted Smith of Rebecca's murder but convicted him of the first degree murders of the other victims.

Defendants advance numerous arguments on appeal, and for the most part, each joins in the other's arguments. Between the two of them, they contend: (1) The court erred by denying their motions to dismiss for precharging delay. (2) The court erred by excluding evidence of third party culpability relating to Rebecca's best friend and another ex-boyfriend. (3) The court erred by admitting certain cellular phone evidence. (4) The court erred by excluding certain evidence about Smith's character. (5) The court erred by admitting evidence of an out-of-court statement by Rebecca. (6) The court erred by admitting evidence of a conversation about firearms between Pape and his ex-wife. (7) The court erred by admitting the preliminary hearing testimony of a witness (Smith's coworker) when he became unavailable at trial. (8) The court erred by excluding out-of-court statements by the same witness that were relevant to bias. And (9) even if no one error was prejudicial, the cumulative effect of the errors rendered the trial fundamentally unfair. We conclude that the court erred only with respect to Smith's character evidence and the out-of-court statement by Rebecca, but those errors were not prejudicial either alone or cumulatively.

Defendants also raise several sentencing issues. We agree with Pape that his sentence for second degree murder should be reduced from life without the possibility of parole to 15 years to life in prison. We also agree with Smith that his parole revocation fine should be stricken, but we reject the same claim as to Pape. Finally, we reject defendants' claim of error under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We modify the judgments to reflect the foregoing sentencing changes and otherwise affirm.

BACKGROUND

The victims lived in Pinyon Pines, a mountainous region above the Coachella Valley in Riverside County. First responders found Rebecca's body in a wheelbarrow near her house. Her body was so badly burned that her cause of death could not be determined. Vicki and Hayward were killed by gunshot wounds. The house was set on fire with Vicki's and Hayward's bodies inside.

I. *The Days Leading up to the Killings*
Pape and Smith had been best friends since childhood. Pape and Rebecca were high school classmates and had dated for over a year. They broke up in January 2006 because Rebecca cheated on him.

***2** Javier Garcia was Rebecca's best friend. They talked every day, either in person, on the phone, or by text message. They were also high school classmates and had been friends for about three years. Garcia wanted to be more than friends, but Rebecca did not, so their relationship remained platonic. Garcia lived in Cathedral City, which was on the floor of the Coachella Valley. Rebecca worked the graveyard shift at a restaurant on the valley floor and would spend time with Garcia before or after work. She would often stay with him or other friends on the valley floor because it was inconvenient to drive up to Pinyon Pines and then return to the valley floor for school or work.

Rebecca dated Garcia's cousin, Jacob Santiago, for a short period right before her death. They dated for a month or two and broke up the week before the killings.

A few days before the killings, Rebecca and Garcia were at Garcia's house when Rebecca received a phone call from Pape. Afterward, she told Garcia that she and Pape had made plans to go hiking on a Sunday and that Pape wanted to bring Smith along. Pape's phone records showed that three days before Rebecca's death, she and Pape had a roughly 10-minute phone conversation, and they exchanged a series of text messages later that day.

The Friday night before the killings, Garcia and a friend were at a party in Pinyon Pines, and Rebecca picked them up. Garcia and his friend stayed the night at her house so that they would not drive while intoxicated. Garcia drove home Saturday morning and did not see Rebecca again that day. Garcia had been to Rebecca's house three to five times before that, but they mostly spent time together on the valley floor. Garcia had never been hiking in the area behind her house.

II. *The Day of the Killings and the Crime Scene*
On Sunday, Garcia picked Rebecca up from work in the early morning hours, and they slept at his house for several hours. Later, they ate lunch together on the valley floor in Palm Desert, and Rebecca left at around 4:30 or 5:00 p.m. for Pinyon Pines. Rebecca indicated that she was going home for the hike with Pape. She and Garcia talked by phone several times after she left, and they last spoke at 6:40 p.m. Rebecca said that Pape was "coming up soon" and was "on his way." During their last call, she invited Garcia to her house that night but then immediately rescinded the invitation and said that it would be awkward. Garcia did not go to her house that night. He knew that Rebecca was supposed to work later and called her cellular phone after 11:00 p.m., but he was unable to reach her.

The local fire station started receiving reports of the fire at about 9:40 p.m. Firefighters arrived on the scene at 10:12 p.m. There were flames throughout the house and coming out of every door and window by the time firefighters arrived. The firefighters found Rebecca's body in a wheelbarrow approximately 70 feet from the house. There were still flames on the body when firefighters found it. The house collapsed approximately 15 to 30 minutes after the firefighters arrived. Investigators found Vicki's body and Hayward's body in different areas of the house. The fire investigator determined that the house fire was intentionally set using a flammable liquid and that the fire originated at two different places in the house. He also determined that Rebecca's body was intentionally set on fire using a flammable liquid.

The forensic pathologist could not determine Rebecca's precise cause of death because of the extensive burning to her body. The majority of her body was charred, with the exception of her lower extremities. A forensic anthropologist estimated that her body had burned for 20 to 30 minutes by the time firefighters extinguished the fire. Vicki's and Hayward's bodies also suffered extensive burning, but the pathologist was able to determine that Vicki died from a gunshot wound to the head, and Hayward died from shotgun wounds to the chest. All three victims had died before being set on fire.

***3** Investigators found wheelbarrow tracks and footprints in the wilderness terrain behind Rebecca's house. There were two sets of footprints that followed the same path as the wheelbarrow. One set of footprints was a Vans shoe. The wheelbarrow tracks and footprints started in the hills approximately one-half mile from the house, and the footprints pointed towards the house. One set of footprints was generally in line with the wheelbarrow tracks and overlaid the wheelbarrow tracks at points. The second set of footprints was parallel to the first track.

In the area where the wheelbarrow tracks started, there was a third type of footprint that matched Rebecca's shoes. In that same area, the different sets of footprints went in "all directions," and there was a disturbance in the dirt about 20 yards away that indicated "a lot of activity." An investigator found a crumpled business card on the ground

in the area of the disturbance. The business card was a "Pro-Life Catholic Ministries" card belonging to Marie Widman. Although the investigator could not say how long the business card had been out there, the card was not soiled. Widman visited Catholic parishes in the lower desert region three or four times per year, and she would distribute her business card during workshops there. In 2006, Widman worked with Sacred Heart Church, and Pape's mother was one of the volunteers with whom Widman worked. Widman had never been to Pinyon Pines and did not know any of the Friedli family or the Hayward family, nor did she know Smith.

III. *DNA and Fingerprint Evidence*

A forensic technician detected two latent fingerprints on Widman's business card. In December 2006, a CAL-ID fingerprint analyst examined photographs of the fingerprints and determined that their quality did not permit a CAL-ID computer search, and she labeled them noncomparable. In 2007, a forensic technician with the district attorney's office examined the fingerprints and determined that one was noncomparable and the other did not match either Pape or Smith. Another forensic technician verified those findings. In 2018, a latent print analyst with the California Department of Justice examined the photographs of the fingerprints and determined that they matched Smith but not Pape.

In 2007, a forensic scientist at a private laboratory tested Widman's business card and the wheelbarrow handles for DNA. She detected no DNA on one wheelbarrow handle and only a partial DNA profile on the other handle. She excluded both Pape and Smith as possible contributors to the DNA on the handle.

The scientist found the DNA of at least two individuals on the business card and concluded that Smith was a possible contributor to the DNA. In 2014, the founder of the private laboratory reviewed the scientist's data, and he determined that there was a major contributor and a minor contributor to the DNA on the business card. Smith was a possible contributor to the major DNA profile on the card. Only one in 28 trillion Caucasian males would qualify as a possible contributor to the major DNA profile.[2] The founder excluded both Smith and Pape as possible contributors to the minor DNA profile on the card.

IV. *Garcia's Conversations with Pape and Statements to Law Enforcement*

The morning after the fire, Garcia learned about it from a news report. He tried calling Rebecca several times and could not reach her. He also called Pape and asked whether Pape had seen Rebecca or had gone hiking with her. Pape said that he had canceled the hike.

***4** Garcia and two friends drove to Rebecca's house. Garcia was not able to get up the driveway or see the house because of the perimeter that law enforcement had created around the crime scene. He could only see the garage. But he was there for an hour or two and spoke with an investigator about Rebecca. Garcia told the investigator that Rebecca was supposed to go hiking with Pape and Pape's friend, but Pape had called Rebecca at the last second and canceled the hike. Garcia said that he did not know where or what time they were supposed to hike, nor did he know which friend was supposed to come. Garcia told the investigator that he had last talked to Rebecca the night before at 6:40 p.m., while he was driving through Anza.

Garcia called Pape again after he left Rebecca's house. He told Pape that first responders were at Rebecca's house and that it seemed as though something had occurred there, but he did not tell Pape that he had seen a wheelbarrow at the crime scene. He did not even have that information at that point. According to one of the investigators at the scene, the wheelbarrow was not visible from the street.

Garcia spoke to Pape again the following day and did not recall telling him any details about the crime scene; Garcia still did not know any details, besides the fact that the house had burned down. He did not learn more about the crime scene until he ran into Rebecca's sister three days after the killings; she shared more details, including that a body had been found in a wheelbarrow. Garcia talked to Pape again four days after the killings, and by that time he had the details from Rebecca's relative.

Law enforcement interviewed Garcia three more times over the next month or so. In those later conversations, Garcia told the investigator that Rebecca and Pape were supposed to go hiking at about 7:00 p.m., and Pape was bringing Smith. Garcia also said that during the call when Rebecca and Pape set up the hike, he overheard Pape ask Rebecca whether Vicki and Hayward would be there; Pape did not want them around and thought they might not like him. Garcia did not tell the investigator all of those details at the crime scene because they only came back to him after he had time to process his grief and think back to the days leading up to Rebecca's death. The day that he went to the crime scene and first spoke to the investigator, he was terrified and uncertain what had happened to Rebecca, and

his "mind was all over the place." It was an "extremely difficult" time for him, and he was trying his best to help investigators "connect all the dots."

V. *Defendants' Statements to Law Enforcement*

Law enforcement interviewed Pape twice, once the day after the killings and again the next day. Law enforcement interviewed Smith 11 days after the killings. The interviews focused primarily on the day before Rebecca's death and the day of her death (Saturday and Sunday).

A. *Pape's Interviews*

According to Pape, Rebecca called him frequently after their break-up, but he had tried to stop talking to her. His current girlfriend did not like it, and he felt that Rebecca was trying to make him jealous by often talking about other men. Rebecca and Pape had not talked for a month or two when he saw her on the Saturday before her death. Pape was at Smith's mother's house in Cathedral City, and Rebecca stopped by. She was there for no longer than 10 minutes.

The next day, Rebecca called Pape and wanted to go hiking. He initially agreed to go, but he talked to her later and canceled the hike when she told him that she had invited another man to come along. Pape thought that she was trying to make him jealous again, and he did not want to "get into the drama." Rebecca became emotional when he canceled.

***5** That day, Pape left work at about 6:30 p.m. He went home for 30 to 45 minutes, and his mother urged him to attend the service at Sacred Heart Church. He called the church and discovered that he had missed the last service, so he and Smith went to Smith's father's house. Smith's father was not home. Smith's aunt also lived there, but Pape was not sure whether she saw them. Pape and Smith were there for approximately an hour and then went to play paintball at a nearby school, James Workman Middle School (the Workman school). After that, they stopped at a gas station, and then Smith took Pape home. Pape spent the rest of the night playing video games with his cousin. He said that he never saw Rebecca that day, did not go hiking with her, and did not go to Pinyon Pines. He had not been to Rebecca's house since their breakup. Pape denied killing Rebecca.

Pape said that he had talked to Garcia the morning after the killings. Garcia told Pape that there was a fire at Rebecca's house and three bodies were found, including a 20-year-old female in a wheelbarrow.

B. *Smith's Interview*

After Pape's interview, Pape told Smith that investigators might want to talk to him. The two of them "went over" everything that had happened. According to Smith, Rebecca invited him and Pape to go hiking when she stopped by Smith's mother's house on Saturday. Pape told her that "maybe" they would think about it, but when she left, he told Smith that there was no chance he would go hiking with her. Smith said that they never made plans to go hiking on a definite date.

The next night, Smith picked Pape up at approximately 7:00 p.m. to go to Sacred Heart Church, but Pape called the church on the way there, and the last service had ended. They went to Smith's father's house to play video games and watch television. Smith's father was not home, and Smith did not see his aunt that day. Rebecca called Pape's phone and Smith's phone, and neither one answered. They suspected that she was calling about the hike, and they did not want to go. Smith called her back a few minutes later, but she did not answer, and they never spoke. They then went to play paintball at the Workman school and to the gas station somewhere around 10:00 p.m., and Smith took Pape home at around 10:30 p.m. After that, Smith went home, showered, and went to his girlfriend's house. Smith said that he had never been to Rebecca's house.

After Smith's interview, an investigator tried to get the surveillance video from the gas station, but the gas station recorded over the video every seven days, so it was unavailable.

VI. *Cellular Phone Evidence and Drive Tests*

When a cellular phone places or receives a call, it connects to a network through a cellular tower. The general location of a cellular phone can be traced by looking at the towers to which it connected. If a phone is picking up signals from multiple towers, the phone will typically connect to the closest tower. If a phone connects to a tower that is not the closest one, it is usually because of topography. For instance, a hillside, large building, or some other obstruction may be blocking the signal from the closest tower. The phone may also be at a much higher elevation than the closest tower and connect to a more distant tower to which the phone has "a direct line of sight."

Pape and Smith were both Verizon Wireless subscribers, so their phones were using the same network of towers. Law enforcement's request for their cellular phone records did not specifically request the sector data. The sector data would have identified which side of the tower the phone was on (north, south, east, or west) when it connected to the tower. The sector data was no longer available at the time of trial.

Tower 707 in Cathedral City was the closest tower to Pape's house. Tower 88 in Cathedral City was near Smith's father's house. Tower 705 was in Palm Desert near the beginning of Highway 74. Highway 74 led from the Coachella Valley floor up to Pinyon Pines at a significant elevation. Tower 745 was on Highway 74 at the base of the hill heading up to Pinyon Pines. Tower 523 was in a relatively flat area of Palm Desert roughly five and one-half miles from tower 705 and roughly seven miles from tower 745.

***6** Tower 745 was the closest tower to the crime scene, but it did not provide service in Pinyon Pines. There were no T-Mobile or Verizon Wireless towers in Pinyon Pines, and there was no T-Mobile or Verizon Wireless service at Rebecca's house. Rebecca subscribed to T-Mobile, so she used her landline at home.

On the day of her death, Rebecca's home phone called Pape's cellular phone at 6:14, 6:53, and 6:59 p.m. All three times, his cellular phone connected to the tower closest to his home, tower 707. At 7:01 p.m., Pape's cellular phone called Sacred Heart Church, connecting again to tower 707.

Over the next few minutes, defendants' phones connected to the tower near Highway 74. At 7:04 p.m., Pape's cellular phone made a call and connected to tower 705. A minute later, Smith's cellular phone received a call from Rebecca's home phone and also connected to tower 705. And the next minute, Pape's phone received a call and connected again to tower 705.

Pape's phone next connected to the tower closest to Pinyon Pines. Specifically, at 7:13 p.m., Pape's phone received a call from Rebecca's home phone and connected to tower 745 on Highway 74. But just a few minutes earlier, at 7:09 and 7:10 p.m., Smith's phone exchanged calls with Rebecca's home phone and connected to tower 523. If a phone were in a vehicle moving up in elevation, it would be possible for the phone to connect to tower 523 even if tower 745 were closer. That might happen because the phone established a "line of sight" with tower 523 as the phone traveled up in elevation.

For the next few hours, defendants' phones did not connect to any tower, and their calls went straight to voicemail. That meant that their phones were either powered off, in airplane mode, or in an area with no tower coverage and thus no service. Rebecca's home phone called Pape's phone at 7:27 p.m. and Smith's phone at 7:34 p.m., and both phones failed to connect to a tower. That was the last time Rebecca's home phone called either of them. From then until 9:55 p.m., defendants' phones failed to connect to a tower when others called. Pape's girlfriend at the time, Sara Honaker, was one of those callers. Honaker and Pape dated from January 2006 to 2011, married in 2011, and divorced in 2015. It was unusual that Honaker could not get ahold of him, and she was concerned that something had happened to him. She could not remember any other instance during their relationship when she could not get ahold of him for that length of time.

Pape's phone finally connected to a tower at 10:23 p.m., when the phone checked his voicemail. The phone connected to the tower near Smith's father's house, tower 88. Pape's phone then placed two calls before 11:00 p.m., connecting both times to tower 707 near his house. After the call at 9:55 p.m. when Smith's phone failed to connect to a tower, Smith's phone did not place or receive any more calls that night. His phone next connected to a tower at 11:00 a.m. the following morning.

In April 2018, law enforcement conducted a drive test from the crime scene to a location in Cathedral City about one mile from Smith's father's house. Two cars left the crime scene at 9:40 p.m. and took Highway 74 down to the valley floor. From there, the drivers took different routes to their common destination. Both drivers arrived at their destination in approximately 38 minutes.

***7** Law enforcement retained Gladiator Forensics (Gladiator) to measure the coverage of the pertinent cellular towers in the Coachella Valley and on Highway 74. Gladiator conducted two tests, one in 2015 and the second in 2016. The Gladiator analyst put a radio frequency receiver in a car and drove it around the areas of interest. Every two seconds, the receiver took a reading of the signal levels from the towers in range. The Gladiator analyst used the readings to create maps showing the towers' coverage areas.

The towers' locations, heights, and antenna angles had not changed since 2006. Verizon was using "CDMA" technology in 2006. When Gladiator conducted its tests, "LTE" technology was in use as well. But CDMA technology was still present on all the towers of interest when Gladiator conducted its tests, and Gladiator's

receiver was measuring the CDMA signal. The only change in the towers since 2006 was the maximum range of the antennas—their range was shorter when Gladiator conducted its tests. As a result, the coverage areas for each tower were not exactly the same as they would have been in 2006. The coverage areas had decreased since then but were still close to the 2006 coverage areas.

The Gladiator analyst also did a line-of-sight analysis for tower 523. The line-of-sight analysis showed that as one traveled up in elevation on Highway 74, there was a clear line of sight to tower 523 at one point, with no environmental obstructions. This created an island of coverage by tower 523 on Highway 74. Tower 745 was closer, but there were two environmental obstructions blocking the signal from tower 745. There were also small areas where towers 523 and 745 provided overlapping coverage along Highway 74 heading up to Pinyon Pines.

VII. *Firearm Evidence*

Shotgun wadding recovered from Hayward's body was fired from a 12-gauge shotgun. The bullet recovered from Vicki's body was either a.40-caliber Smith & Wesson or a 10-millimeter bullet. The guns of four manufacturers, including Glock and Heckler & Koch (or H&K), could have fired the bullet that killed Vicki. If a Glock, the firearm would have been a Glock model 20, 22, or 23.

Pape told investigators in September 2006 that he did not own any firearms, and neither did the family members with whom he lived. Pape and Smith worked at a waterpark in the summer of 2006. One of their coworkers there recalled going shooting with them that summer. Pape brought a Glock handgun. There was also a shotgun present, but the coworker could not remember who brought the shotgun, and he did not recall Smith bringing any firearms.

Investigators searched Pape's and Smith's residences in October 2007. In Pape's bedroom, they found a number of guns and related items, including a shotgun, a.40-caliber expended shell casing, a 10-millimeter expended shell casing, a holster for a Glock handgun, and a receipt for the holster dated September 2007. The holster fit a Glock 22, which was a.40-caliber gun, and two other Glock models. Investigators also found a pair of Vans shoes in Pape's bedroom. In Smith's apartment, they found two 12-gauge shotguns.

Honaker and Pape had a recorded telephone conversation in 2014 about guns, and a Glock and an "HK" came up, but Honaker did not remember the substance of the conversation. She did not recall Pape telling her, " 'I would just have the HK, and I would have everything else in the spot where I put them.' "When Pape said, " 'The rest of them should be placed in the location where I had them sent,' "he was referring to either his grandmother's house or his aunt's house. Pape normally stored all of his guns in the gun closet of his house, but when Honaker and Pape had to sell their house, his family took care of his possessions. He never asked Honaker to hide a gun from the police, and he did not hide guns to her knowledge.

VIII. *Smith's Statements to His Coworker, Jeremy Witt*

***8** The Riverside County Sheriff's Department received an anonymous phone call in October 2011 from a man claiming to have information about this case. The caller said that Smith was involved in the Pinyon Pines murders and that Smith had admitted as much to Smith's roommate. The caller had also talked to Smith himself, but the caller did not "want to get into too much detail." The caller did not indicate that he was interested in any reward.

In 2015, law enforcement began investigating the identity of the anonymous caller and determined that it was Jeremy Witt, Smith's former coworker at the waterpark. Investigators interviewed Witt in May 2016. They did not tell Witt that there was a reward in connection with the case. But the governor was offering a reward, and there was a billboard advertising a private reward as well. The rewards amounted to at least $50,000.

At the time of trial, Witt had pending criminal cases. He invoked his Fifth Amendment right against self-incrimination and refused to testify. The court found that he was unavailable as a witness and permitted the People to read his preliminary hearing testimony into the record.

According to his prior testimony, Witt had served in the Marine Corps and was a security supervisor at the waterpark. Smith was a lifeguard at the waterpark. One day in late September 2007, Witt noticed that Smith was not paying attention to the pool that Smith was supposed to be guarding. Smith looked like he was in a daze. That was unusual because he was typically vigilant. Witt asked Smith why he was not paying attention to the water. Smith merely shook his head and stared at the mountain range in the distance where Pinyon Pines was located. Witt said, "You keep staring in that direction. Something's wrong." Smith replied, ' "Something went wrong and we torched the fucking place." ' He was visibly tense, like something was amiss. Witt asked Smith what he meant, and Smith merely shook his head again. In the days following that

conversation, Smith seemed disturbed or stressed. At the time, Witt was unaware of a triple homicide in Pinyon Pines.

Smith's roommate also worked at the waterpark. In early October 2007, the roommate told Witt that officers had searched Smith's house for weapons and that they were looking for Smith's best friend, whose girlfriend had been murdered. Sometime in the following weeks, Witt saw Smith at a party, and they talked about Witt's military service. Witt explained the conversation as follows: "It was along the lines of firing weapons, and I informed him that you don't have to necessarily be a killer just to have served. And the response was, or you could have killed and not served, along those lines."

Witt made the anonymous call in 2011 because he had seen a television program highlighting the Pinyon Pines murders. He talked to his mother about it, and she encouraged him to call the police and tell investigators what he knew. He made the call because "it was the right thing to do." Witt said that he did not hold back any information when he called in 2011.

Witt said that he resigned from the waterpark in April or May 2008 because he did not like the manager. But according to Witt's coworker, in April 2008, Witt threatened to kill the general manager of the waterpark and brought a hatchet to work in the bed of his truck. The waterpark no longer employed Witt after that incident.

Witt's neighbor testified about the contentious relationship between them. In April 2016, Witt flashed a gun at the neighbor from about 35 feet away. The neighbor immediately ran inside and called the police. In March 2016, the neighbor saw Witt loading a gun or rifles into the back of his truck. Also in March 2016, an officer contacted Witt in a parking lot and arrested Witt after finding a handgun on the seat of his car. And in 2001, Witt was convicted of a felony charge of impersonating a peace officer in Kentucky.

***9** James Carter was another of Witt's neighbors. Carter worked with Sam Gayer, who knew Pape and Smith. In February 2018, Carter and Gayer discussed Witt's involvement in this case. Gayer asked Carter whether Carter would be willing to talk to a defense investigator about Witt, and Carter agreed. Carter spoke with the defense investigator briefly and agreed to a later interview, but he never got back to the investigator, and he ignored the investigator's phone calls and text messages for the next few weeks. Carter told Witt that the defense investigator was trying to contact Carter. Carter did not want to be involved and was angry. He told Witt to talk to the defense investigator and gave the investigator's phone number to Witt.

Witt sent a text message to the defense investigator pretending to be Carter. Witt used his own phone to send the message and told the defense investigator that the "other" number was his work number, and he asked the investigator not to use that number anymore. The defense investigator asked for a phone interview, but Witt responded that he would prefer text messaging. Witt proceeded with the interview via text message as if he were Carter. Carter never gave Witt permission to impersonate Carter or make any statements on his behalf.

IX. *Jury Verdict and Sentencing*

The jurors found Pape guilty of the second degree murder of Rebecca and the first degree murders of Vicki and Hayward. They also found Smith guilty of the first degree murders of Vicki and Hayward, but they acquitted him of Rebecca's murder. In addition, the jurors found that both defendants had committed multiple murders within the meaning of section 190.2, subdivision (a)(3). The court sentenced both defendants to life in prison without the possibility of parole.

DISCUSSION

I. *Motions to Dismiss for Delay in Prosecution*

Pape argues that the trial court erred by denying his and Smith's motions to dismiss this case. He contends that the 10-year delay between the crimes and his prosecution deprived him of his federal and state due process rights. Smith joins in the argument. The argument lacks merit.

A. *Additional Background*

The People filed the felony complaint in June 2016. Smith moved to dismiss the case for precomplaint delay in July 2016. The trial court denied the motion to dismiss, finding that Smith had not established actual prejudice from the delay. The court also found that even assuming Smith had established prejudice, the delay was justified.

In March 2017, Smith again moved to dismiss for precomplaint delay. The court also denied that motion, again finding no showing of actual prejudice and, in any event, justification for the delay.

In August 2018, after the jury had convicted defendants, Pape moved to dismiss for precomplaint delay. He relied on Smith's July 2016 motion to dismiss and asked the court to "reconsider" its earlier ruling denying Smith's motion. Smith joined Pape's motion. Once again, the court found no showing of prejudice, and it denied the motion.

B. *Analysis*

A delay between the crime and the prosecution of the defendant "may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay." (*People v. Catlin* (2001) 26 Cal.4th 81, 107 (*Catlin*).) " '[I]f the defendant fails to meet his or her burden of showing prejudice, there is no need to determine whether the delay was justified.' "(*People v. Jones* (2013) 57 Cal.4th 899, 921 (*Jones*).)

"A denial of due process does not result from the mere *possibility* of prejudice attributable to a delay in prosecution; actual prejudice must be shown." (*People v. Price* (1985) 165 Cal.App.3d 536, 542.) The defendant may establish prejudice by showing the " 'dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.' "(*People v. Nelson* (2008) 43 Cal.4th 1242, 1250 (*Nelson*).)

***10** As for justification for the delay, "[p]urposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation." (*Nelson, supra*, 43 Cal.4th at p. 1256.) In assessing the prosecutor's justification, "[a] court should not second-guess the prosecution's decision regarding whether sufficient evidence exists to warrant bringing charges. 'The due process clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment.... Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.' "(*Ibid.*)

We review for substantial evidence the trial court's finding that defendants failed to show prejudice. (*People v. Alexander* (2010) 49 Cal.4th 846, 874 (*Alexander*).) We review the court's ruling on the motion to dismiss, which involves balancing prejudice and justification for the delay, for abuse of discretion. (*People v. Cowan* (2010) 50 Cal.4th 401, 431.)

Pape fails to show an abuse of discretion here. As to prejudice from the delay, his opening brief quotes defense counsel's oral argument in the trial court and then asserts in a conclusory manner that material witnesses and evidence were lost and memories had faded. The arguments of counsel are not evidence (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1173), and Pape's conclusory statements of prejudice are insufficient to carry his burden on appeal. We are not required to search the voluminous record for evidence of prejudice and develop Pape's argument for him. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340 (*Bradford*); *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.) Under the applicable standard of review, Pape must set forth all the evidence that was before the trial court and persuade us that the record does not contain substantial evidence to support the court's finding of no prejudice. (*People v. Battle* (2011) 198 Cal.App.4th 50, 62; *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574.) His failure to do so forfeits his argument. (*Battle, supra*, at p. 62.)

To the extent that Pape identifies specific evidence in his reply brief, those claims do not establish prejudice. When investigators interviewed defendants in 2006, they both said that they were at Smith's father's house on the night of the killings. Pape argues that Smith's great aunt, who had lived with Smith's father and died in 2008, was a potential alibi witness who was lost because of the delay. But Pape told investigators that he was unsure whether the aunt was home, and Smith said that he did not see his aunt that day. Any claim that she saw them and could have provided an alibi was pure speculation and thus did not establish prejudice. (*Jones, supra*, 57 Cal.4th at pp. 922-923 [claims that witnesses might have been helpful to the defendant were speculative]; *Alexander, supra*, 49 Cal.4th at p. 875 [claim that destroyed audiotapes "may have" included helpful statements was "based on speculation, not proof of actual prejudice"]; *People v. Conrad* (2006) 145 Cal.App.4th 1175, 1184 [rejecting the defendant's speculation about the substance of a deceased witness's testimony and "consider[ing] only the facts for which there was at least an offer of proof"].)

Pape's claim that he was prejudiced by the faded memory of Lois Robbins is similarly speculative. According to Pape, Robbins lived with Smith's girlfriend and "would have seen [Smith] the evening of the incident." Pape does

not claim that Robbins would have provided an alibi for the critical time period in which the killings occurred. Indeed, he does not explain at all how she could have benefited the defense, if her memory had been better. Robbins would have seen Smith, if at all, when he went to his girlfriend's house after 10:30 p.m. That was well after first responders had arrived at the crime scene.

***11** Pape also relies on the loss of video game equipment, which defendants said they were playing on the night of the crimes. He claims the equipment "would have recorded the time in use." His sole citation to the record on this point shows that the equipment belonged to Smith's aunt and that it was disposed of after she died in December 2008. Those facts do not establish that the equipment would have recorded the time of use on the night in question. And even if the equipment were capable of that, Pape does not claim that the equipment also would have shown *who* was using it, so it would not have provided an alibi. He thus fails to establish that the loss of the equipment prejudiced him.

Pape further asserts that he was prejudiced by the loss of (1) the surveillance video from the gas station where defendants said they stopped on the night of the killings, and (2) Vicki's archived text messages and voicemails. But the surveillance video was unavailable to the defense almost immediately—the gas station recorded over its videos every seven days. Similarly, Vicki's cellular phone data was unavailable because her daughter had cancelled Vicki's phone account eight days after the crimes. In both cases, no connection exists between the loss of the evidence and the 10-year delay of which Pape complains. The evidence would have been unavailable to defendants even if law enforcement had arrested and charged them mere days after the crimes. Prejudice for purposes of the motion to dismiss means prejudice *arising from* the delay. (*Catlin, supra*, 26 Cal.4th at p. 107.) Harm to a defendant's case that is not caused by the delay fails to establish prejudice. (*Alexander, supra*, 49 Cal.4th at p. 877.)

Pape also claims prejudice from the loss of the sector data in connection with defendants' cellular phone records. As explained at trial, the sector data would have shown which side of the tower defendants' phones were on when they connected to the tower. The data thus could have shown their location more precisely. Pape quotes defense counsel's statement in the trial court that Verizon destroyed the sector data " 'a year after the relevant times here.' "This claim of prejudice fails for reasons already discussed. Assuming that Verizon destroyed the sector data one year after the killings, the sector data was unavailable to defendants starting in September 2007. Pape fails to establish a connection between the loss of the sector data and the 10-year delay in bringing charges.

Finally, Pape argues that the length of the delay alone suggests prejudice and that excessive delay presumptively compromises the reliability of a trial. But "[p]rejudice to a defendant from precharging delay is not presumed." (*Jones, supra*, 57 Cal.4th at p. 921; accord, *Alexander, supra*, 49 Cal.4th at p. 874.)

In sum, Pape fails to show that the court erred by finding no prejudice from the delay. A showing of prejudice was necessary for defendants to prevail on the motions to dismiss, regardless of whether the People justified the delay. (*Jones, supra*, 57 Cal.4th at p. 921.) Consequently, Pape has not shown that the court abused its discretion by denying the motions to dismiss.

II. *Third Party Culpability Evidence*

Smith sought to introduce evidence that implicated Garcia and his cousin, Santiago, who was also Rebecca's ex-boyfriend. Smith argues that the trial court's exclusion of that third party culpability evidence violated his constitutional rights to present a defense and to due process of law. Pape joins in the argument. We conclude that the court did not err, and even assuming it did, any error was not prejudicial.

A. *Additional Background*

In his trial brief and supplemental trial brief, Smith summarized anticipated testimony that would purportedly implicate Garcia and Santiago. He argued that he had the right to present evidence of third party culpability, and Pape joined in the argument. The People moved to exclude the third party culpability evidence. The relevant witnesses included Garcia, Santiago, Megan Lowder, Beau Nash, Nicholas Crum, Austin Alba, and Brandon Kugler-Harrison. Smith anticipated the following pertinent testimony from them:

***12** Garcia: When Garcia went to the crime scene the morning after the killings, an investigator asked to see Garcia's shoes. Garcia told the officer, " 'Oh, yeah, you're going to see my footprints up there.' "Garcia said that he had been in the desert behind Rebecca's house that past Friday, and he may have left footprints that day. The shoes that he was wearing did not match any of the footprints at the crime scene.

Santiago: Santiago and Rebecca dated for a few months

and broke up two days before her death. He did not initially tell investigators about the breakup; after he disclosed it, he said that it was not a "big breakup," and they were still talking. (Boldface omitted.) Santiago repeatedly told investigators that they needed to talk to Garcia, who knew what had happened and was with Rebecca " 'right up until she passed.' "(Boldface omitted.) Santiago also said that he and Garcia "had talked a lot about it." (Italics omitted.) Garcia told Santiago that he had been with Rebecca all day and until the evening on the day of her death. Garcia was supposed to be with her that evening also, but she told him not to come because Pape would be there soon. While Garcia was on the phone with Rebecca that evening, he was driving around Anza in the mountains. Santiago turned his cellular phone off that day because he did not have his charger; he turned it on only long enough to check and send messages a few times.

Lowder: Lowder went to high school with defendants, Rebecca, and Garcia. It was "common knowledge" that Garcia was in love and " 'obsessed' "with Rebecca, but she just wanted to be friends. Rebecca occasionally talked about wanting to get away from Garcia because "he would never leave her alone." A couple of weeks after the crimes, Garcia, Lowder, and others went to the crime scene to pay their respects. Garcia conducted a 45-minute "tour" around the property and explained how the murders had taken place "in detail." He explained that Vicki and Hayward were shot in the living room, and that Rebecca had been dragged out of the house by her hair, shot, placed in a wheelbarrow, and set on fire. He claimed that she likely was still alive when set on fire. He also claimed to have learned the information from police reports that his mother had obtained.

Nash: Nash was good friends with Garcia. Garcia was obsessed with Rebecca; Nash described him as Rebecca's " 'stalker.' "The Friday before Rebecca's death, Rebecca picked up Nash and Garcia from a party, and they spent the night at her house. Nash did not leave Rebecca's house and walk around the property that night. But according to him, Rebecca and Garcia would go into the wilderness behind her house "all the time." Nash said that he believed Garcia " 'fake sobbed' "about Rebecca's death. Two weeks after the crimes, Garcia told Nash that he had been ' "joyriding" ' around Pinyon Pines the night of Rebecca's death.

Crum: Crum was another of Garcia's friends. He thought that Garcia acted strangely in the days after Rebecca's death. Garcia repeatedly returned to the crime scene, took pictures of the scene, and showed off a photo on his phone of the burnt wheelbarrow. A few days after the crimes, Crum saw a gas canister, a roll of plastic bags, and a small shovel in the trunk of Garcia's car. Garcia reportedly totaled his car two weeks later.

Alba: Alba was Santiago's roommate. Alba owned a shotgun and kept it under his bed. Garcia and Santiago both knew about the shotgun.

***13** Kugler-Harrison: Garcia told Kugler-Harrison that on the day of the killings, Garcia and Santiago drove through Pinyon Pines on Highway 74. When they were near Pinyon Pines, Garcia called Rebecca and asked if they could stop by before she went to work. Rebecca said "no" because Pape was on his way to her house to go hiking. When pressed, Kugler-Harrison was unsure whether Garcia had said that Santiago was with him.

During the hearing on this issue, Smith argued that some of the evidence showed Garcia was driving near Pinyon Pines around the time of Rebecca's death. In response, the People introduced two exhibits created by Gladiator, the group that had analyzed the cellular tower coverage for defendants' phones. One exhibit was an analysis of Garcia's cellular phone records, and the other exhibit was an analysis of Santiago's cellular phone records. The People argued that Garcia's exhibit showed that he was driving along Highway 74 in Anza on the night of Rebecca's death, but by 7:45 p.m. and for the rest of the night, his phone connected multiple times to towers in Palm Desert and Cathedral City. The People observed that Santiago's exhibit showed that his phone was either turned off or had no service for large portions of the day (from 12:00 noon to 6:00 p.m. and from 6:20 to 11:00 p.m.).

The court denied defendants' request to admit third party culpability evidence relating to Garcia and Santiago. The court acknowledged that there was evidence of motive but found that at least as to Garcia, the phone evidence showed that he was nowhere near Pinyon Pines at the time of the crimes—he was on the valley floor somewhere in Palm Desert or Cathedral City. The court observed that "the physical evidence doesn't lie" and concluded that the evidence "mitigate[d] against the fact that Mr. Garcia was somehow involved." With respect to Santiago, the court found that there was not much to implicate him, other than his breakup with Rebecca and the fact that his roommate had a shotgun. The court stated that it was not considering the proffered evidence in a vacuum, and it was also considering the evidence linking defendants to the crimes, although it was not determining whether they were guilty or innocent. The court ruled that there was insufficient direct or circumstantial evidence linking Garcia and Santiago to the crimes, and the evidence did not therefore meet the threshold for admission.

B. *Analysis*

"Evidence that raises a reasonable doubt as to a defendant's guilt, including evidence tending to show that another person committed the crime, is relevant." (*People v. Brady* (2010) 50 Cal.4th 547, 558.) "At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability." (*People v. Hall* (1986) 41 Cal.3d 826, 833.) "[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Ibid.*)

In addition, third party culpability evidence is subject to Evidence Code section 352 (unlabeled statutory citations refer to this code), just like any other relevant evidence. (*People v. Robinson* (2005) 37 Cal.4th 592, 625.) Thus, in assessing an offer of proof relating to third party culpability, the court must decide (1) whether the evidence could raise a reasonable doubt as to the defendant's guilt and (2) whether its probative value is substantially outweighed by the risk of undue delay, prejudice, confusion, or misleading the jury under section 352. (*Ibid.*; *Bradford, supra*, 15 Cal.4th at p. 1325.)

***14** We review the trial court's ruling for abuse of discretion. (*Brady, supra*, 50 Cal.4th at p. 558.) Even if the court "did not expressly base its ruling on Evidence Code section 352, we review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm." (*People v. Geier* (2007) 41 Cal.4th 555, 582, overruled on another ground by *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305.)

In this case, Smith argues that the court erred by "overly focus[ing]" on the strength of the evidence against defendants, instead of assessing whether the proffered third party culpability evidence was capable of raising a reasonable doubt as to defendants' guilt. He contends that he proffered sufficient direct and circumstantial evidence linking Garcia and Santiago to the crimes.

First, "as a practical matter, it is unclear how one can assess whether third party culpability evidence can raise a reasonable doubt and the potential for prejudice, delay and confusion without considering the strength of the prosecution's case. It would seem that it would require stronger third party culpability evidence to raise a doubt to an overwhelming prosecution case than to a weak one. Also, the assessment of the capacity of the third party culpability evidence to confuse or delay would be similarly affected by the strength of the prosecution case." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1175.)

Second, even assuming that the court focused too much on the strength of the evidence against defendants, the exclusion of the third party culpability evidence did not constitute an abuse of discretion. Smith does not dispute that much of the proffered evidence amounted to only motive or opportunity evidence: Rebecca did not reciprocate Garcia's romantic feelings, and she and Santiago broke up days before her death. Also, Garcia drove through Pinyon Pines on the night of Rebecca's death, Santiago might have been with him, and both of them had access to Alba's shotgun.

But Smith contends that he proffered further evidence linking Garcia and Santiago to the crimes: Santiago stated that Garcia was with Rebecca " 'right up until she passed' " and that Garcia knew what had happened. Garcia told the investigator that his footprints would be at the crime scene. Garcia gave a tour of the crime scene and claimed to know certain details about the crimes. He also repeatedly visited the crime scene and showed others a photo of the burnt wheelbarrow. Garcia's friend believed that he " 'fake' "sobbed over Rebecca's death. Another friend saw a gas canister, plastic bags, and a shovel in Garcia's trunk. Santiago's cellular phone was not in use the night of the crimes. And Garcia and Santiago talked about the crimes, which Smith characterizes as the two "get[ting] their stories straight."

Smith is correct that the foregoing proffer went beyond motive and opportunity evidence. Nevertheless, the trial court properly excluded the evidence. The evidence would have required a minitrial on Garcia's culpability that would have unduly consumed time and confused the issues. (§ 352; *see Geier, supra*, 41 Cal.4th at pp. 581-582 [court did not err by excluding third party culpability evidence of minimal probative value, in light of evidence that the third party was hospitalized at the time of the murder; minitrial on the third party's whereabouts would have unduly consumed time, confused the issues, and misled the jury].)

***15** Of the witnesses on which Smith relies, only Garcia testified at trial. Thus, the minitrial would have required at least six additional witnesses, not to mention whatever witnesses the People would have called to rebut the evidence. For instance, the People argued at the hearing that there was conflicting evidence about the items Crum saw in a trunk; Crum's girlfriend said that she saw those items in *Alba's* trunk, not Garcia's trunk. That was

consistent with Smith's trial brief—he anticipated testimony from Crum's girlfriend that she saw a shovel, gas canister, and plastic bags in Alba's trunk two or three weeks after the crimes.

All of that evidence implicating Garcia would have had minimal probative value, in light of the evidence exculpating him. As the trial court recognized, Garcia's cellular phone records placed him far from the crime scene during the pertinent time period. The fire station started receiving reports of the fire at around 9:40 p.m., and firefighters arrived at 10:12 p.m. Rebecca's body had been burning for approximately 20 to 30 minutes by the time they extinguished it. Thus, the fire had started close to 9:40 p.m., when the reports of it began.

But Garcia's phone records place him on the valley floor long before that.[3] Like Rebecca, Garcia subscribed to T-Mobile. The records corroborate his statement to law enforcement that he and Rebecca last spoke at 6:40 p.m. while he was driving through Anza. His phone connected to a tower in Anza at 6:46 p.m. His phone next connected to a tower in Palm Desert at 7:45 and 7:47 p.m., and then one in Rancho Mirage at 7:50 and 7:51 p.m. From 8:05 to 9:53 p.m., his phone connected to a tower in Cathedral City seven times—specifically, at 8:05, 8:07, 8:48, 9:24, 9:27, 9:47, and 9:53 p.m. His phone continued to use that Cathedral City tower for the remainder of the night. Palm Desert, Rancho Mirage, and Cathedral City are all on the valley floor. Moreover, given the order in which his phone used those towers, the phone appeared to be traveling away from Highway 74 and Pinyon Pines. In short, when Rebecca's body was set on fire close to 9:40 p.m. in Pinyon Pines, the phone records place Garcia on the valley floor in Cathedral City, which was approximately 40 minutes away from the crime scene. And there was no cellular service at Rebecca's house, yet Garcia's phone was placing and receiving calls frequently from 7:45 p.m. through the remainder of the night.

At the third party culpability hearing, Smith argued that it "ha[d] to be possible" for Garcia's phone to connect to a tower on the valley floor if he was on Highway 74, because the People intended to present such evidence with respect to Smith. But the People had an expert conduct a line-of-sight analysis to show that there were islands of coverage by tower 523 heading up Highway 74. In contrast, Smith's argument was pure speculation. He proffered no evidence that towers as far away as Cathedral City provided coverage on the highway leading up to Pinyon Pines. Moreover, the People's line-of-sight analysis did not establish that there was cellular service all the way to Rebecca's house. Rather, as previously discussed, the evidence showed that there was no coverage at her house at all. That is why it is significant that Garcia was receiving service during the critical time frame (whereas defendants were not). Garcia did not receive service at Rebecca's house.

***16** In light of the evidence placing Garcia far from the crime scene during the critical time period, the evidence on which Smith relies would have necessitated a minitrial on Garcia's culpability that would have unduly consumed time and confused the issues. (§ 352.) And as to Santiago, the evidence against him was only as strong as the evidence against Garcia. Beyond Santiago's possible motive and opportunity, there was no evidence linking Santiago to the crimes without Garcia's participation. The trial court therefore acted well within its discretion by excluding evidence of Garcia's and Santiago's culpability.

In any event, even if the court erred by excluding the third party culpability evidence, any error in excluding it was not prejudicial. Smith argues that the court's ruling violated his federal constitutional rights and urges us to apply the "harmless beyond a reasonable doubt" standard. (*Chapman v. California* (1967) 386 U.S. 18, 24.) But the court's ruling did not deprive him of a defense altogether or render the trial fundamentally unfair—it "merely rejected certain evidence concerning the defense." (*Bradford, supra*, 15 Cal.4th at p. 1325; see also *People v. Bacon* (2010) 50 Cal.4th 1082, 1104, fn. 4 ["[O]nly evidentiary error amounting to a complete preclusion of a defense violates a defendant's federal constitutional right to present a defense"]; *People v. Partida* (2005) 37 Cal.4th 428, 439 (*Partida*) ["But the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*"]; *People v. Cudjo* (1993) 6 Cal.4th 585, 611 [generally, the "mere erroneous exercise of discretion" under the ordinary rules of evidence governing third party culpability "does not implicate the federal Constitution"].) Accordingly, the proper standard is whether it is reasonably probable that defendants would have achieved a more favorable result absent the error. (*Bradford*, at p. 1325; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

There is no such reasonable probability here for reasons already discussed. Smith contends that the third party culpability evidence would have raised a reasonable doubt that defendants committed the crimes by offering an alternate theory as to who might be the killers. But in response to the evidence, the People would have established that Garcia was far from the crime scene during the critical time period, thereby gutting Smith's theory that Garcia was the killer. And without Garcia's participation,

it is not reasonably probable that the jurors would have believed Santiago alone was the killer. The proffered evidence against him alone was particularly weak. He and Rebecca had recently broken up after dating for a short period, his roommate had a shotgun, and his phone was offline for most of the night.

In contrast, the evidence against defendants was much stronger. Pape and Rebecca had dated for over a year and had broken up. They were still talking, even though his current girlfriend did not like it. Pape told law enforcement that he and Rebecca had not talked for a month or two when he saw her the day before her death, but the phone records showed that they had started talking again three days before her death. Pape had plans to go hiking with Rebecca on the night in question. His claim that he had canceled was substantially undercut by the phone records. He told law enforcement that she called him the day of her death and invited him hiking, and he canceled later that day when he talked to her. But the phone records show only one conversation between them that day—her call to him at 6:14 p.m., which lasted for two minutes and 46 seconds. Although she called him four more times after that, the calls went to his voicemail.

***17** Defendants admitted that the two of them were together nearly all night. Smith's DNA and fingerprints were on the crumpled business card found at the crime scene, near the area where the wheelbarrow tracks started and the dirt indicated a great deal of activity. The business card belonged to a woman who worked with Pape's mother at Sacred Heart Church. This was the same church that Pape apparently attended.

Pape's cellular phone connected to tower 745, the closest tower to the crime scene, at around 7:10 p.m. Around the same time, Smith's phone connected to the more distant tower 523, but that tower also provided spots of coverage on Highway 74, the route up to Pinyon Pines. From then until at least 9:55 p.m., their phones were either off, in airplane mode, or in a place with no cellular service. There was no service at the crime scene. Neither of their phones connected to a tower again until 10:23 p.m., when Pape's phone connected to the tower near Smith's father's house. Rebecca's body was set on fire close to 9:40 p.m., and the drive to Smith's father's house took approximately 40 minutes, giving them time to get home by 10:23 p.m.

Hayward was killed by a 12-gauge shotgun. Vicki could have been killed by several types of handguns, including a Glock 20, 22, or 23. Pape had a Glock when he and Smith went shooting that summer. One year later, investigators found two 12-gauge shotguns at Smith's apartment and a holster fitting a Glock 22 in Pape's room. They also found Vans in Pape's bedroom, the same type of shoe that made some of the footprints along the wheelbarrow tracks. Finally, Smith made the incriminating statement to his coworker, Witt, that ' "[s]omething went wrong and we torched the fucking place." '

Considering all of that evidence, it is not reasonably probable that the small amount of motive and opportunity evidence against Santiago would have affected the outcome of the trial. Nor is it reasonably probable that the evidence against Garcia would have affected the outcome of the trial, given the evidence exculpating him.

For all of these reasons, the court did not prejudicially err by excluding the third party culpability evidence against Garcia and Santiago. The evidence was properly excluded because the probability of undue delay and confusion of the issues substantially outweighed its probative value. Further, insofar as the exclusion of the evidence was erroneous, it was also harmless.

III. *Evidence of Cellular Tower Coverage*

Pape argues that the trial court should have excluded the Gladiator analysis of cellular tower coverage. He contends that the analysis constituted unreliable scientific evidence under *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*). Alternatively, he argues that the evidence was too speculative to be relevant and more prejudicial than probative. Smith joins Pape's argument in its entirety. We disagree on all counts.

A. *Additional Background*

In his trial brief, Smith stated that he intended to challenge the cellular tower evidence under *Kelly* because "even if [Gladiator's] technology were acceptable, the [Gladiator] personnel did not follow their own methodology." Pape joined in the argument. The People argued that the *Kelly* test did not apply because the challenged evidence did not represent a new scientific technique.

The court held a hearing on the issue under section 402. Smith offered the testimony of Robert Aguero, an expert in cellular phone forensics and cellular tower data analysis. After reviewing Gladiator's report, Aguero described the Gladiator equipment as "typical drive test equipment." He explained that Gladiator had created maps of "predictive and theoretical coverage" and had used "a fairly standard method." There was "[n]othing wrong with that

necessarily." Aguero noted that Gladiator had analyzed tower 523's coverage in 2016. He opined that Gladiator had accurately analyzed the coverage at that time, and he did not have "any problems with that part." But in his opinion, it was impossible to say whether the tower's coverage would be the same in 2006. Circumstances had changed since 2006. Gladiator's report noted that Verizon had added towers to the area. Additional towers would impact the coverage area for each tower. Generally, the coverage area would be adjusted so that there was not too much overlapping coverage from the towers. Also, cellular phone technology had changed over time. In 2006, cellular phones were using "2-and 3G" technology. Since then, cellular phones had gone to "4G" and "LTE" technology. In short, Aguero did not find it "generally acceptable" in his scientific community to predict the reach of tower 523 in 2006 using the 2016 data.

***18** On cross-examination, Aguero acknowledged that Gladiator did not state that its analysis represented "an exact model of what would have been present in 2006." But Gladiator's report gave him the impression that it was predicting the coverage in 2006.

After Aguero's testimony, Smith argued that Gladiator's analysis was speculative and without foundation insofar as it suggested that Smith was anywhere other than the valley floor at the pertinent time. Pape argued that the *Kelly* test did not permit application of the 2016 data to the 2006 facts. Alternatively, he argued that there was no foundation to apply the 2016 analysis to the 2006 facts, which rendered the Gladiator evidence irrelevant, confusing, and far more prejudicial than probative.

The court ruled that the Gladiator evidence was admissible. It observed that even according to Aguero, Gladiator had used correct scientific procedures to measure the coverage in 2016, so there was no *Kelly* issue. The only issue was whether the coverage would be identical in 2006. The court ruled that issue went to the weight of the evidence, not its admissibility. The court noted that the defense expert could testify "in any way, shape, or form" at trial. Aguero did not testify at trial.

B. *The* Kelly *Test*

Kelly "held that evidence obtained through a new scientific technique may be admitted only after its reliability has been established under a three-pronged test. The first prong requires proof that the technique is generally accepted as reliable in the relevant scientific community. [Citation.] The second prong requires proof that the witness testifying about the technique and its application is a properly qualified expert on the subject. [Citation.] The third prong requires proof that the person performing the test in the particular case used correct scientific procedures." (*People v. Bolden* (2002) 29 Cal.4th 515, 544-545, citing *Kelly, supra*, 17 Cal.3d at p. 30.)

Pape does not argue that Gladiator used a new scientific technique. Instead, he argues that even if the expert uses established scientific techniques, the proponent of the evidence must comply with the third prong of the *Kelly* test. The People argue that the *Kelly* test as a whole applies only to new scientific techniques. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1156 [*Kelly* "only applies to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is *new* to science and, even more so, the law"].) Assuming for the sake of argument that Pape is correct, he still fails to establish that the trial court erred.

"[R]eview of a third-prong determination on the use of correct scientific procedures in the particular case requires deference to the determinations of the trial court." (*People v. Venegas* (1998) 18 Cal.4th 47, 91.) We are "required to accept the trial court's resolutions of credibility, choices of reasonable inferences, and factual determinations from conflicting substantial evidence." (*Ibid.*)

Here, there was no dispute that Gladiator used standard equipment and that its tests accurately analyzed the tower coverage at the time. The defense expert testified to that effect. And Pape does not identify anything about Gladiator's testing that was incorrect. He instead relies on Aguero's testimony that it was not "generally acceptable" in his scientific community to predict the reach of tower 523 in 2006 using the 2016 data. But Aguero admitted that Gladiator did not claim to have an exact model of the 2006 coverage. Aguero's criticism had nothing to do with Gladiator's testing or its method of creating coverage maps. His criticism went to the conclusions that could be drawn from the testing. That is not a *Kelly* issue. The court therefore did not err by rejecting the *Kelly* argument.

C. *Speculation and Relevancy Objection*

***19** Pape alternatively argues that the court should have excluded the Gladiator evidence as speculative and therefore irrelevant, because "opinions as to cell tower coverage in 2006 could not reliably be based upon information collected in 2016." Preliminarily, the People argue that Pape forfeited the argument by not objecting on those grounds at trial. That is incorrect. Defendants raised

such objections at the section 402 hearing. There was no forfeiture.

"[U]nder [sections 801], subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative."[4] (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771-772 (*Sargon*).) Still, "[t]he court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies" or choose "between competing expert opinions." (*Id.* at p. 772.) We review the court's decision on the admissibility of expert testimony for abuse of discretion. (*People v. Lucas* (2014) 60 Cal.4th 153, 226, disapproved on another ground by *People v. Romero* (2015) 62 Cal.4th 1, 53, fn. 19.)

The court did not abuse its discretion by failing to exclude the Gladiator evidence as speculative and unreliable. The record does not include the Gladiator report that Aguero reviewed and criticized. But it is clear that the Gladiator analyst did *not* opine that the cellular tower coverage was exactly the same in 2006 and 2015/2016. At trial, the analyst testified that while the coverage areas were close to those in 2006, the coverage areas for each tower had decreased since then. The analyst proffered a reasonable basis for that opinion. The heights, locations, and antenna angles of the pertinent towers had not changed since 2006. Verizon used CDMA technology back then, and the towers still emitted a CDMA signal. Gladiator's equipment measured the CDMA signal. The maximum range of the towers' antennas was longer in 2006, but that is why the analyst opined that the coverage areas had decreased since then. There was no " 'analytical gap between the data and the opinion proffered.' "(*Sargon, supra*, 55 Cal.4th at p. 771.) The court thus acted well within its discretion by admitting the evidence and ruling that the defense expert could also testify at trial. It was not up to the court to choose between competing expert opinions.

Moreover, the fact that the coverage areas had decreased did not render Gladiator's evidence irrelevant. The People relied on Gladiator's analysis to show that towers 745 and 523 provided coverage on Highway 74 leading up to Pinyon Pines. Those were the last towers to which defendants' phones connected before going offline for several hours. If the coverage areas of those towers were even greater in 2006, there would have been a greater possibility of the towers providing overlapping coverage on Highway 74. Thus, the inference that defendants could have been traveling together up Highway 74 was still reasonable.

D. *Section 352 Objection*

***20** Pape lastly argues that the court should have excluded the Gladiator evidence as more prejudicial than probative under section 352. The People again argue that he forfeited the claim, but he preserved it by objecting on the same ground at the section 402 hearing.

"The prejudice which exclusion of evidence under [section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in [section 352] applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' "(*People v. Karis* (1988) 46 Cal.3d 612, 638.)

Here, Pape does not identify any prejudice within the meaning of section 352. He asserts that potential prejudice inheres in all scientific evidence and quotes *Kelly* for the proposition that " 'scientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury.' "(*Kelly, supra*, 17 Cal.3d at p. 32.) But *Kelly* had nothing to do with prejudice under section 352. The *Kelly* court was merely discussing the need for judicial restraint with respect to evidence based on new, unproven scientific techniques, given the weight that jurors might assign to such evidence. (*Kelly*, at p. 32.) *Kelly* does not stand for the broad proposition that prejudice for purposes of section 352 inheres in all scientific evidence. Pape essentially contends that the Gladiator evidence was prejudicial because it would carry substantial weight with the jury. In other words, the evidence damaged his case because it tended to prove his guilt. That is exactly the type of "prejudice" against which section 352 does not protect. The court therefore did not abuse its discretion by rejecting Pape's section 352 objection.

For all of the foregoing reasons, the court did not err by admitting Gladiator's analysis of the cellular tower coverage. Pape's *Kelly*, relevancy, and section 352 objections all lacked merit.

IV. *Smith's Character Evidence*

Smith argues that the court prejudicially erred by excluding evidence of certain good character traits. (Pape does not join in this argument.) We agree that the court erred, but the error was not prejudicial.

A. *Additional Background*

The People moved to exclude evidence of specific acts of Smith's heroism or his accolades during military service. They argued that evidence of specific acts was not admissible to establish a defendant's good character.

In his trial brief, Smith anticipated testimony by two men with whom he had served in the military, Raymond Haldorson, Jr., and Joshua Carroll. Haldorson would testify to Smith's character for "being a selfless, honorable, and intelligent[ ] man who cared a great deal about the wellbeing of other injured soldiers on the battlefield." Carroll would testify to Smith's character for being a "great leader, inspirational, honorable, intelligent, selfless, and caring." He would also testify that Smith "embodied all the noble characteristics associated with being a Ranger NCO." Smith argued that opinion or reputation evidence of his good character was admissible.

***21** The court ruled that Smith could offer character evidence on only two character traits—honesty and peacefulness, the latter being the opposite of violence. The court explained: "The fact, however, that Mr. Smith may have saved people's lives is obviously a great thing, but it doesn't come under one of those headings. The fact that he may have been a good soldier, so to speak, followed orders, does not necessarily come under those areas as well. So really, the focus when you're talking about character evidence has to be that he is honest or dishonest, violent or peaceful. [¶] ... [T]he fact that he may have saved someone's life in a combat situation certainly doesn't go to peacefulness. It's not that character trait."

In his opening statement, Smith told the jurors that they would be hearing character evidence from Haldorson, Carroll, and a third military associate. Those witnesses would testify about how Smith enlisted in the Army in 2008, deployed four times to Afghanistan and one time to Iraq, and attended special forces sniper school. They would also testify about Smith's reputation for honesty and veracity.

After opening statements, the People noted that defense counsel had used a piece of paper showing Smith's military history and listing several "specific acts." The prosecutor said that he had not objected at the time because he wanted to avoid drawing attention to it, but he argued that the paper violated the court's ruling on character evidence. The court reiterated that the witnesses could testify about Smith's reputation for honesty. They could also testify about how they knew Smith from serving with him, otherwise there would be no foundation for their opinion about his character. But they could not go into detail about specific acts he had performed as a soldier.

Smith ultimately declined to call any witnesses in his case-in-chief, so the character witnesses never testified.

B. *Analysis*

A defendant may offer character evidence "to prove his [or her] conduct in conformity with such character." (§ 1102, subd. (a).) The defendant may offer the character evidence in the form of opinion or reputation evidence. (§ 1102.) Once the defendant opens the door to character evidence, the People may offer evidence of the defendant's bad character in rebuttal. (§ 1102, subd. (b).)

Not all evidence of good character is admissible. The defendant must show that the character trait "is 'relevant to the charge made against him.' "(*People v. McAlpin* (1991) 53 Cal.3d 1289, 1305 (*McAlpin*).) A character trait "is relevant if it is inconsistent with the offense charged—e.g., honesty, when the charge is theft—and hence may support an inference that the defendant is unlikely to have committed the offense." (*Ibid.*) We review the trial court's ruling on the admissibility of character evidence for abuse of discretion. (*People v. Doolin* (2009) 45 Cal.4th 390, 437 (*Doolin*).)

In this case, the court abused its discretion by limiting Smith's character evidence to honesty and peacefulness. It is true that murder is a violent offense, but it does not follow that the *only* relevant character trait is being "peaceful." Murder requires either an (1) unlawful intent to kill or (2) ' "an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." ' (*People v. Blakeley* (2000) 23 Cal.4th 82, 87.) Smith's character witnesses would have testified that he was selfless and caring. Being selfless and caring towards others is inconsistent with deliberately performing an act that endangers the lives of others or acting with

conscious disregard for others' lives. Being selfless and caring is also inconsistent with unlawfully intending to kill another. Accordingly, character evidence of both traits was admissible.

***22** Nevertheless, the error does not require reversal. As was the case with the assumed error regarding third party culpability (discussion section, pt. II.B, *ante*), Smith has not shown that the challenged ruling rose to the level of a constitutional violation. (*Jones, supra*, 57 Cal.4th at p. 957 ["[T]he routine application of provisions of the state Evidence Code law does not implicate a criminal defendant's constitutional rights"].) And it is not reasonably probable that Smith would have obtained a more favorable result absent the error. (*McAlpin, supra*, 53 Cal.3d at pp. 1311-1312 [applying the *Watson* test to the erroneous exclusion of character evidence].) Though circumstantial, the People's case was strong, as set forth in part II.B of the discussion, *ante.* The opinion of Smith's military associates that he was selfless and caring would not have overcome the People's case, particularly the evidence implicating Smith—his DNA and fingerprints on the business card at the crime scene and his incriminating statements to Witt. (*People v. Hempstead* (1983) 148 Cal.App.3d 949, 955 [" 'The probative value of personal opinion or reputation evidence of a defendant's good character traits to prove that he did *not* commit a charged crime or to support his credibility as a witness is slight at best' "].) Additionally, Honaker testified that she steadfastly believed Pape and Smith did not commit the charged murders. She also said that Pape had never been violent with her and did not "have it in him" to be violent. She described him as "one of the best people" she had ever known. The court instructed the jury that evidence of Pape's character for nonviolence could "by itself create a reasonable doubt whether" he committed the charged crimes. If Pape's character evidence did not sway the jury, it is not reasonably probable that Smith's similar evidence would have achieved a better result.

In sum, the court abused its discretion by excluding character evidence that Smith was a selfless and caring person, but the error was not prejudicial.

V. *Rebecca's Out-of-Court Statement Concerning the Hike with Pape*

Garcia testified that, on the night of Rebecca's death, she told him that Pape was on his way for their hike. Pape argues that the court erred by admitting Rebecca's out-of-court statement under the state of mind exception to the hearsay rule. Smith once again joins in the argument. We agree that the court erred but conclude that the error was harmless.

A. *Additional Background*

In his trial brief, Smith moved to exclude Garcia's anticipated testimony about Rebecca's out-of-court statements, arguing that they were inadmissible hearsay. Pape joined in the motion. Smith's brief described the anticipated statements as follows: "[Garcia] told investigators that somewhere between 5:15 and 7:00 [p.m.], on the night of her death, [Rebecca] told [Garcia] that she believed that [Pape] was on his way to her house to go hiking and she believed that he should be there any minute." (Italics omitted.)

The People argued that Rebecca's out-of-court statement was admissible under section 1250, the hearsay exception for "evidence of a statement of the declarant's then existing state of mind." (§ 1250, subd. (a).) The prosecutor stated: "We are dealing with state of mind. We are showing that she wasn't at this point of the call the night of the murder afraid of Mr. Pape. She wasn't unwilling to get together with him. She had a generally favorable view to where she would still make plans to do things with him just before the murder. And based on that state of mind, shows her conduct and in conformance with that state of mind, which is she was going to go on a hike with him. And that is exactly what she did here."

The court ruled that Rebecca's out-of-court statement was admissible to show Rebecca's state of mind. The court observed that "the evidence for state of mind would be limited to she believed that Mr. Pape was going to come up to her house and they were going to go for a hike. It doesn't prove they did go for a hike. All it shows is that she was intending, based on her state of mind, to have that happen."

After Garcia testified, the court instructed the jurors on the limited purpose of the evidence as follows: "[Garcia] testified that [Rebecca] made certain statements to him regarding her expectation that she would be going on a hike on the evening of September 17th, 2006. These statements and any prior statements made to law enforcement will be admitted not for the truth of what is asserted, but for a limited purpose. You may consider these statements only as evidence of [Rebecca's] then existing state of mind." The court gave the instruction again at the conclusion of the evidence, along with all the other jury instructions.

B. *Analysis*

***23** Hearsay is an out-of-court statement "offered to prove the truth of the matter stated" and is inadmissible unless authorized by a recognized exception. (§ 1200, subds. (a), (b).) An out-of-court statement offered for some other purpose is not hearsay and may be admitted for that nonhearsay purpose. (*People v. Ervine* (2009) 47 Cal.4th 745, 775 (*Ervine*).)

There are "two different theories under which statements of a declarant's present state of mind can be admitted: (1) as hearsay under the [section 1250] exception for the declarant's present state of mind, and (2) as nonhearsay circumstantial evidence of a declarant's state of mind." (*People v. Clark* (2016) 63 Cal.4th 522, 590-591, fn. omitted.) Section 1250, subdivision (a)(1), permits the admission of a statement directly declaring the speaker's "then existing state of mind, emotion, or physical sensation." " 'If offered to prove the declarant's state of mind, the statement may be introduced without limitation, subject only to' "section 352. (*People v. Cox* (2003) 30 Cal.4th 916, 962, disapproved on another ground by *Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.)

" 'In contrast, a statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. It is not received for the truth of the matter stated, but rather whether the statement is true or not, the fact such statement was made is relevant to a determination of the declarant's state of mind.' "(*Cox, supra*, 30 Cal.4th at p. 962.) Declarations used as circumstantial evidence of state of mind require a limiting instruction. (*Id.* at pp. 962-963.) The court should instruct the jury that the evidence " 'is not received for the truth of the matter stated and can only be used for the limited purpose for which it is offered.' "(*Id.* at p. 963.)

Whether the evidence is admitted under the state of mind exception or as circumstantial evidence of state of mind, it must be relevant. (*Cox, supra*, 30 Cal.4th at p. 963.) That is, the declarant's state of mind must be at issue in the case. (*Ibid.*) Like the court's other evidentiary rulings, we review this ruling for abuse of discretion. (*Id.* at p. 955.)

As a preliminary matter, Pape presumes that the court admitted Rebecca's out-of-court statement under the hearsay exception for direct evidence of state of mind. But Rebecca's statement was not a direct declaration of her state of mind. According to Garcia's testimony at trial, Rebecca did not say that she *believed* Pape was on his way. Rather, she said that Pape was on his way. The statement was therefore circumstantial evidence that she believed Pape was on his way, requiring a limiting instruction that the jury could use the evidence only for its nonhearsay purpose. The court gave such an instruction, telling the jurors that they could not rely on the evidence for the truth of the matter asserted.

Even so, the court abused its discretion by admitting the evidence for the nonhearsay purpose of showing Rebeca's state of mind. It is unclear why Rebecca's belief that Pape was on his way was relevant, unless it was to show inferentially that he was in fact on his way. In that case, the statement was hearsay and inadmissible for that purpose. The People assert that Rebecca's state of mind was relevant, just like her whereabouts and whom she spoke to were relevant. But that bare assertion does not explain *why* her state of mind was relevant apart from the hearsay purpose of the statement. The People also argue that because Pape said Rebecca became emotional when he canceled the hike, her state of mind was relevant to show that she was not emotional. Again, it is unclear why her emotional state was relevant, unless it was to show by inference that Pape had not canceled the hike and was in fact on his way. That is just another way of saying the statement was relevant for its hearsay purpose.

***24** The People made a different argument in the trial court: They claimed that Rebecca's state of mind showed that she was unafraid of Pape and willing to make plans with him. But there was no dispute about those issues, and they were not relevant to any element of any charge or defense. The nonhearsay purpose of the evidence must be " 'relevant to an issue in dispute.' "(*People v. Riccardi* (2012) 54 Cal.4th 758, 814, disapproved on another ground by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Pape also argues that even if Rebecca's statement was relevant, the court should have excluded it as more prejudicial than probative. The People contend that Pape forfeited this objection by not raising it below. We need not decide either issue, given our conclusion that the evidence was irrelevant and hence inadmissible. (*People v. Noguera* (1992) 4 Cal.4th 599, 622, fn. 5.)

Although the trial court erred by admitting Rebecca's out-of-court statement, the error was harmless. Pape urges us to apply the harmless beyond a reasonable doubt standard, arguing that the erroneous admission of hearsay violated his rights to confront the witnesses against him, due process, equal protection, and a fair trial. First, out-of-court statements that are not admitted for their truth do not violate the confrontation clause (*Ervine, supra*, 47 Cal.4th at pp. 775-776), and the court instructed the jurors twice that Rebecca's statements were not admitted for their truth. "[W]e presume the jury faithfully followed the court's

limiting instruction." (*Id.* at p. 776.) Second, Pape has not shown that admission of the evidence rendered his trial fundamentally unfair to such an extent that his right to due process was violated. (*Partida, supra*, 37 Cal.4th at p. 439.) Third, Pape does not explain how the erroneous admission of evidence violated his right to equal protection of the law. We therefore apply the traditional *Watson* test. (*Ibid.*)

It is not reasonably probable that Pape would have achieved a more favorable result if the court had excluded Rebecca's out-of-court statement. There was no genuine dispute that Pape and Rebecca had plans to go hiking on the day of her death. Pape told law enforcement that they had such plans. The disputed issue was whether he had canceled that day, as he told law enforcement. And as discussed *ante* (discussion section, pt. II.B), Pape's claim that he had canceled was substantially undercut by the phone records. The claim was further undercut by the evidence showing that his cellular phone connected to the tower closest to Pinyon Pines right before going offline for several hours. During that critical period, his phone never connected to the towers near Smith's father's house and the Workman school, which was where he claimed to be. Add to that the other evidence of defendants' guilt—Smith's DNA and fingerprints at the scene, their possession of the type of firearms used to kill Vicki and Hayward, and Smith's incriminating statements to Witt—and there is no reasonable probability that the error affected the result of the trial.

In sum, the court erred by admitting Rebecca's out-of-court statement that Pape was on his way. However, the error was not prejudicial.

VI. *Pape and Honaker's Conversation About Firearms*

Pape argues that the court prejudicially erred by admitting evidence of the recorded conversation between him and Honaker regarding firearms. Smith joins in the argument. We disagree.

A. *Additional Background*

***25** The People moved to admit several recorded jailhouse conversations between Pape and Honaker discussing firearms. The conversations took place in June 2014. The People explained that the two of them discussed guns consistent with those used to kill Vicki and Hayward. Pape argued that the conversations were irrelevant and more prejudicial than probative. Smith argued that the conversations were not admissible against him.

The court ruled that the conversations were admissible and that the People could play the recordings for the jury. The court determined that the conversations were relevant for two reasons: Honaker and Pape seemed to be discussing a hiding spot for their guns, and they talked about having the same types of guns that were used in the commission of the crimes. Both things were circumstantial evidence of guilt.

The court noted that the evidence was somewhat prejudicial within the meaning of section 352 "because of various things that are going on in the world these days, especially in this country with many shootings and marches, et cetera." But the court concluded that the probative value of the evidence outweighed any prejudice.

At trial, the People did not play the recordings of the conversations. However, as described in part VII of the background section, *ante*, the People questioned Honaker about one of the conversations. Some substance of the conversation was thus admitted. The court instructed the jurors that they could consider the evidence of the statements between Honaker and Pape only against Pape and not against Smith.

B. *Analysis*

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) The evidence must tend " ' "logically, naturally, and by reasonable inference" to establish material facts.' "(*People v. Carter* (2005) 36 Cal.4th 1114, 1166 (*Carter*).)

" 'When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon.' "(*Cox, supra*, 30 Cal.4th at p. 956.) Such evidence gives rise to a reasonable inference that the weapon "might have been" the murder weapon. (*Ibid.*) The evidence is ' "thus relevant and admissible as circumstantial evidence that [the defendant] committed the charged offenses." ' (*Ibid.*) We apply the abuse of discretion standard to the trial court's ruling. (*Bacon, supra*, 50 Cal.4th at p. 1103.)

The court did not abuse its discretion by overruling Pape's relevance objection. Pape contends that the guns under discussion had "no connection to the case." (Capitalization

and boldface omitted.) That is incorrect. The gun used to kill Vicki could have been a Glock or an H&K. Pape and Honaker discussed both types of guns, and Pape discussed sending his guns away or putting them in a " 'spot.' "The evidence supported a reasonable inference that Pape possessed the murder weapon and that law enforcement did not find the Glock or the H&K when officers searched Pape's house because he had sent the guns elsewhere. It was thus relevant circumstantial evidence that Pape killed Vicki, particularly in combination with the other evidence that Pape had a Glock at the time—he had a Glock holster, and he went shooting with a Glock in the summer of 2006.

***26** The court also did not abuse its discretion by overruling the section 352 objection. Pape argues that evidence of weapons unrelated to the charges was inherently prejudicial and improper character evidence. But again, he presupposes that the weapons were unrelated. The People had established some relation to the weapon used in the crimes. Besides his assertion that the weapons were unrelated, Pape does not explain why the weapons were more prejudicial than probative. He thus has not shown that any prejudice substantially outweighed the probative value of the evidence.

For all of these reasons, the court did not err by admitting evidence of Pape and Honaker's conversation about firearms.

VII. *Witt's Out-of-Court Statements to Carter*

Smith contends that the trial court prejudicially erred by excluding Witt's out-of-court statements to Carter that Witt had "broken the case wide open" and that Witt knew of or expected a reward. Pape joins in the argument. We conclude that Smith forfeited the particular theory of admissibility on which he relies. Furthermore, his related claim of ineffective assistance lacks merit.

A. *Additional Background*

The court held a hearing under section 402 to consider the admissibility of the impeachment evidence against Witt. Carter, Gayer, and the defense investigator testified.

1. *Carter's Testimony*

Carter and Witt were neighbors for over one year until mid-2016. The two had a friendly relationship. Witt told Carter that he was a witness in this case. Witt said that he had "busted the case open," or words to that effect. He did not indicate that he was interested in a reward, but he said that there was a reward. He was worried that "there was somebody trying to come after him," and he seemed scared. The reward was either $50,000 or $100,000. Witt never said anything about the Federal Bureau of Investigation (FBI) giving him money.

Carter worked with Gayer for roughly one month. Gayer once mentioned to Carter that Pape was on trial for murder in this case. Carter told Gayer that he knew "the guy who [was] solving the case." Gayer said that Witt was "a piece of trash" and was only doing it for the reward, and Carter replied that Witt had mentioned "something about he may be getting a reward." Gayer brought up the idea of a reward first. Carter never mentioned the FBI paying Witt.

2. *Gayer's and the Defense Investigator's Testimony*

Gayer was best friends with Pape and Smith. According to Gayer, Carter said that the FBI had offered Witt $100,000 to testify. Carter first brought up the reward, not Gayer.

During the text message interview in which Witt impersonated Carter, the defense investigator asked whether Carter and Witt had ever "had a conversation that Witt was getting paid $100,000 to testify against [Pape] or [Smith]." Witt (impersonating Carter) responded "no." The investigator also asked whether Carter was sure that in his conversation with Gayer, he did not say that Witt was getting $100,000 to testify. Carter/Witt replied, "He never mentioned money."

3. *Court's Ruling*

Pape argued that the statement relayed by Gayer about "getting paid $100,000" was admissible as impeachment evidence because it was an inconsistent statement. The court reasoned that Gayer's testimony was inconsistent with Carter's testimony, but there was no inconsistency with a statement made by Witt.

Pape also argued that, when Witt was impersonating Carter, Witt said he never mentioned money to Carter. Pape contended that Carter's testimony contradicted Witt, given that Carter said Witt mentioned a reward. The court ruled that to the extent that Witt's statement when he was impersonating Carter was inconsistent with Carter's testimony, the evidence was inadmissible under section

352. The court reasoned that the probative value of the evidence was minimal and outweighed by the undue consumption of time.

***27** After the court ruled, Smith asked to make a comment for the record and argued that the jury would be misled about Witt's bias. Defendants did not have the opportunity to cross-examine Witt about any reward during the preliminary hearing. But the People had argued in opening statements that Witt had not asked for anything in return for his testimony and had nothing to gain by testifying.

Days later, defendants raised the statement about busting the case open and argued that it was admissible to show Witt's bias or interest in the outcome of the case. The court ruled that the statement did not show any bias, prejudice, or motive and excluded it. The court reasoned: "It's merely a statement that I'm an important witness."

B. *Analysis*

In determining the credibility of a witness, the jury may consider "[t]he existence or nonexistence of a bias, interest, or other motive." (§ 780, subd. (f).) And as previously explained, an out-of-court statement that constitutes circumstantial evidence of the declarant's state of mind is admissible for that nonhearsay purpose, so long as the declarant's state of mind is relevant. (*Ervine, supra*, 47 Cal.4th at p. 775; *Cox, supra*, 30 Cal.4th at p. 962.) Evidence that a witness expects a benefit for testifying is relevant to show bias. (*People v. Brown* (2003) 31 Cal.4th 518, 544.)

Smith challenges the exclusion of Witt's statements to Carter that Witt had busted the case open and that there was a $50,000 or $100,000 reward. Smith argues that Witt's out-of-court statements were admissible as circumstantial evidence of Witt's knowledge of a reward and belief that he had solved the case, which in turn gave rise to an inference of bias against defendants. He alternatively argues that the statements fell under the hearsay exception for direct declarations of the speaker's state of mind. (§ 1250, subd. (a)(1).)

We agree that Witt's out-of-court statements were admissible as circumstantial evidence that he knew about a reward, and that his knowledge of the reward was relevant to show bias. But in the trial court, defendants did not argue that Witt's statements were admissible as nonhearsay, circumstantial evidence of state of mind or under the state of mind exception to the hearsay rule. Rather, the arguments focused on whether various statements were admissible as inconsistent statements. (See §§ 1202 [impeachment of a hearsay declarant with an inconsistent statement], 1236 [hearsay exception for prior inconsistent statements of testifying witnesses].) Because defendants did not specifically raise the theories of admissibility on which Smith now relies, he has forfeited the claim of error on appeal. (*People v. Fauber* (1992) 2 Cal.4th 792, 854-855 ["Defendant's trial counsel did not, however, specifically raise this ground of admissibility. In these circumstances he is precluded from complaining on appeal"].)

Moreover, Smith's challenge to the court's section 352 ruling lacks merit. He argues that Witt's knowledge of a reward was highly probative and would not unduly consume time. But the court's section 352 ruling related only to the text message evidence in which Witt told the defense investigator that Witt did not mention reward money when talking to Carter. The court did not rely on section 352 to exclude Witt's statements to Carter suggesting knowledge of the reward.

Finally, Smith argues that if defense counsel forfeited any issue, counsel rendered ineffective assistance. That argument also lacks merit. To prevail on a claim of ineffective assistance, the defendant "must show that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; *and* (2) counsel's deficient performance subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*In re Alvernaz* (1992) 2 Cal.4th 924, 936-937; *see also Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.)

***28** Even if counsel performed deficiently by failing to preserve Smith's present argument for admissibility, it is not reasonably probable that Smith would have obtained a more favorable result absent counsel's error. First, the record discloses evidence from which the jury could have inferred Witt's knowledge of the reward and thus his bias against defendants. Two rewards were being offered when law enforcement interviewed Witt in 2016, and one was advertised on a billboard. Indeed, Pape made use of that evidence by arguing to the jurors that there was no reason to believe Witt was "anything but a dude who is trying to collect a reward." Second, there was already ample evidence impeaching Witt's credibility and character: He was convicted of impersonating a peace officer. He impersonated Carter in conversation with the defense investigator. He said that he resigned from his waterpark job, but the evidence suggested that he was terminated for

threatening the manager's life. He threatened a neighbor with a gun and had an arrest for another firearm offense. And although he claimed to have disclosed everything in his 2011 anonymous call, he did not specifically disclose Smith's incriminating statements until law enforcement located him in 2016. If all of this evidence did not influence the jurors to disbelieve Witt, then it is not reasonably probable that his out-of-court statements to Carter would have tipped the scale.

For all of these reasons, we reject Smith's argument that the court erred by excluding evidence of Witt's out-of-court statements to Carter.

VIII. *Witt's Preliminary Hearing Testimony*

Pape argues that the court prejudicially erred by admitting Witt's preliminary hearing testimony, and Smith joins in the argument. Pape contends that the admission of Witt's prior testimony violated his right of confrontation under the state and federal Constitutions. We disagree.

The defendant's constitutional right to confront the prosecution's witnesses is not absolute. (*People v. Herrera* (2010) 49 Cal.4th 613, 621 (*Herrera*).) "An exception to the confrontation requirement exists where the witness is unavailable, has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant." (*Carter, supra*, 36 Cal.4th at p. 1172.) The exception does not offend the right of confrontation "because the interests of justice are deemed served by a balancing of the defendant's right to effective cross-examination against the public's interest in effective prosecution." (*People v. Zapien* (1993) 4 Cal.4th 929, 975 (*Zapien*).) Under the prior testimony exception, our high court has "routinely allowed admission of the preliminary hearing testimony of an unavailable witness." (*People v. Smith* (2003) 30 Cal.4th 581, 611.)

Section 1291 codifies the prior testimony exception. (*Herrera, supra*, 49 Cal.4th at p. 621.) Section 1291 requires the right and opportunity to cross-examine the unavailable witness "with an interest and motive similar" to those that the defendant would have had at trial. (§ 1291, subd. (a)(2).) If that requirement is met, "admission of former testimony in evidence does not violate a defendant's constitutional right of confrontation." (*Herrera*, at p. 621.) The defendant must have had "an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer." (*Carter, supra*, 36 Cal.4th at p. 1172.) When, as here, the relevant facts are undisputed, we independently review the trial court's ruling admitting the prior testimony. (*People v. Seijas* (2005) 36 Cal.4th 291, 304.)

In the present case, the court did not err by admitting Witt's preliminary hearing testimony. Pape argues that he did not have the opportunity to cross-examine Witt about Witt's conviction for impersonating a peace officer, Witt's impersonation of Carter, and Witt's claimed statements to Carter that he anticipated a $100,000 reward for testifying. All of the parties learned about Witt's conviction after the preliminary hearing. Witt's impersonation of Carter and the conversation between Carter and Gayer about Witt's claimed reward both occurred after the preliminary hearing. According to Pape, because he did not know about those topics, he did not have the opportunity for *effective* cross-examination at the preliminary hearing.

But the later discovery of material that might have proved useful in cross-examination does not render the prior opportunity for cross-examination inadequate, "[a]bsent wrongful failure to timely disclose by the prosecution." (*People v. Jurado* (2006) 38 Cal.4th 72, 116.) The People did not wrongfully fail to disclose any of the material at issue. Moreover, all that was required was the opportunity to cross-examine Witt with a similar interest and motive. Pape's interest and motive in cross-examining Witt at the preliminary hearing were similar to those he would have had at trial: to challenge Witt's credibility and discredit his account of Smith's incriminating statements. (*People v. Harris* (2005) 37 Cal.4th 310, 333.) Indeed, Pape acknowledges that he had a similar motive for cross-examination at the preliminary hearing and trial. His interest and motive were not dissimilar "simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars." (*Ibid.*) The prior testimony exception does not require that the former opportunity to cross-examine the witness be "an exact substitute" for cross-examination at trial. (*Zapien, supra*, 4 Cal.4th at p. 975.)

***29** Pape relies in particular on *People v. Gibbs* (1967) 255 Cal.App.2d 739 (*Gibbs*), but that case is distinguishable. There, the court held that defense counsel did not have a " 'complete and adequate' "opportunity at the preliminary hearing to cross-examine the prosecution's primary witness. (*Id.* at p. 745.) The People had charged the defendant with selling marijuana, and the witness was the police informant who acted as the buyer. (*Id.* at pp. 740-741.) The trial court appointed defense counsel five minutes before the preliminary hearing. (*Id.* at p. 743.) Counsel had only a "partial knowledge" of the facts from representing another drug dealer in a separate prosecution

involving the same informant. (*Id.* at p. 745.) Under those circumstances, the court held that defense counsel could not have adequately prepared for the cross-examination. (*Id.* at pp. 745-746.)

The circumstances in this case are materially different from those in *Gibbs, supra*, 255 Cal.App.2d 739. Defendants' preliminary hearing took place in October 2016. Smith's counsel had been representing him since at least June 2016, and Pape's counsel had been representing him since at least August 2016. Three days before Witt's preliminary hearing testimony, the People produced transcripts of the law enforcement interviews with Witt; the next day, the People produced the recordings of the interviews. Unlike defense counsel in *Gibbs*—who had only five minutes to prepare—defense counsel had an adequate opportunity to prepare for cross-examination of Witt.

For all of these reasons, the court did not err by admitting Witt's preliminary hearing testimony.

IX. *Cumulative Error*

Smith argues that the cumulative effect of the court's evidentiary errors deprived him of his due process right to a fair trial. (Pape does not join in this argument.) We have concluded that the court erred only by excluding Smith's character evidence and admitting Rebecca's out-of-court statement to Garcia. Each error was not prejudicial by itself, and considering them together, we likewise conclude that they do not warrant reversal. (*People v. Brooks* (2017) 3 Cal.5th 1, 82 [whether considered individually or cumulatively, five errors did not warrant reversal].) Defendants have a right to a fair trial, not a perfect one. (*People v. Stewart* (2004) 33 Cal.4th 425, 522; *People v. Cooper* (1991) 53 Cal.3d 771, 839.) The few errors here did not render the trial fundamentally unfair. (*Cox, supra*, 30 Cal.4th at p. 963.)

X. *Pape's Sentence for Second Degree Murder of Rebecca*

The jury convicted Pape of the second degree murder of Rebecca and the first degree murders of Vicki and Hayward. The court imposed sentences of life in prison without the possibility of parole on all three counts. Pape contends, and the People concede, that the court improperly sentenced him to life without the possibility of parole for his second degree murder conviction. Pape is correct.

When the jury finds a multiple murder special circumstance allegation to be true, Penal Code section 190.2 mandates that the penalty for first degree murder is either death or life without the possibility of parole. (Pen. Code, § 190.2, subd. (a)(3).) By its terms, Penal Code section 190.2 applies only to first degree murder convictions.[5] The sentence for second degree murder is 15 years to life in prison, subject to a few exceptions not relevant here. (Pen. Code, § 190, subd. (a).)

***30** In this case, the trial court erroneously determined that the special circumstance finding required a sentence of life without the possibility of parole for both first degree and second degree murder. Accordingly, we vacate Pape's sentence for second degree murder (count 1) and order the sentencing minute order and abstract of judgment amended to reflect a sentence of 15 years to life in prison on that count. (Pen. Code, § 1260; *People v. Rogers* (2009) 46 Cal.4th 1136, 1174.)

XI. *Parole Revocation Fine*

As to both defendants, the court imposed and stayed a parole revocation fine of $10,000. (Pen. Code, § 1202.45, subd. (a).) Defendants argue that we must strike the parole revocation fine because their sentences do not include the possibility of parole. The People concede that we should strike Smith's parole revocation fine but argue that Pape's fine is proper. We agree with the People.

Penal Code section 1202.45 states: "In every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall, at the time of imposing the restitution fine ... , assess an additional parole revocation restitution fine ...." (Pen. Code, § 1202.45, subd. (a).) The court must suspend the parole revocation fine, and the fine becomes payable only if the defendant is released on parole and parole is later revoked. (Pen. Code, § 1202.45, subd. (c); *People v. Brasure* (2008) 42 Cal.4th 1037, 1075 (*Brasure*).)

The court may not impose the parole revocation fine for a term of life in prison without possibility of parole, "as the statute is expressly inapplicable where there is no period of parole." (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.) Smith's sentence does not include a period of parole, so the court erred by imposing the parole revocation fine on him.

Pape's sentence is a different matter. His sentence on remand will consist of two components: life without the possibility of parole, and an indeterminate term of 15 years to life in prison. Indeterminate sentences are imposed

pursuant to Penal Code section 1168, subdivision (b). (*In re Lira* (2014) 58 Cal.4th 573, 579; *People v. Felix* (2000) 22 Cal.4th 651, 655; *People v. McGahuey* (1981) 121 Cal.App.3d 524, 531.) Generally, "[a] sentence resulting in imprisonment in the state prison pursuant to [Penal Code] Section 1168 or 1170 shall include a period of parole supervision ...." (Pen. Code, § 3000, subd. (a)(1).) Inmates serving indeterminate sentences with a maximum term of life imprisonment for first or second degree murder are subject to lifetime parole periods, although they can be discharged from parole earlier under certain circumstances. (Pen. Code, § 3000, subds. (a)(1), (b); *In re Chaudhary* (2009) 172 Cal.App.4th 32, 34.)

Accordingly, indeterminate sentences like Pape's sentence on count 1 "shall include a period of parole supervision." (Pen. Code, § 3000, subd. (a)(1).) Under Penal Code section 1202.45, the parole revocation fine must be imposed whenever a "sentence includes a period of parole." (Pen. Code, § 1202.45, subd. (a).) It follows that the parole revocation fine must be imposed on Pape.

Although the case law on this issue is somewhat unclear, we conclude that our high court's decision in *Brasure* compels this result. There, the court held that the trial court properly imposed the parole revocation fine on a defendant sentenced to death and other determinate prison terms. (*Brasure, supra*, 42 Cal.4th at p. 1075.) The court reasoned that, under Penal Code section 3000, the determinate terms " 'shall include a period of parole.' "(*Ibid.*) "The fine was therefore required" by section 1202.45, even though Brasure's death sentence effectively foreclosed the possibility of parole. (*Ibid.*) The *Brasure* court's reasoning applies with equal force here.

***31** Pape relies on *People v. Oganesyan* (1999) 70 Cal.App.4th 1178 (*Oganesyan*), but that case predated *Brasure*, and *Brasure*'s reasoning conflicts with *Oganesyan*'s. Like Pape, Oganesyan was sentenced to 15 years to life for second degree murder and life without the possibility of parole for first degree murder. (*Oganesyan*, at pp. 1181, 1184.) The People argued that the second degree murder sentence included a period of parole, thereby requiring imposition of the parole revocation fine. (*Id.* at p. 1184.) The *Oganesyan* court rejected that argument and held that "the overall sentence" determined whether to impose the parole revocation fine. (*Id.* at p. 1185.) The court further held that because Oganesyan's overall sentence did not "presently" allow for parole, and there was no evidence that it ever would, the trial court did not err by declining to impose the parole revocation fine. (*Id.* at pp. 1185-1186.)

Brasure did not expressly disapprove *Oganesyan, supra*, 70 Cal.App.4th 1178, but it declined to follow *Oganesyan* by distinguishing the case factually: *Oganesyan* involved an indeterminate term, as opposed to a determinate term like that at issue in Brasure's case. (*Brasure, supra*, 42 Cal.4th at pp. 1075-1076.) However, *Brasure* implicitly rejected *Oganesyan*'s "overall sentence" rationale. If the overall sentence determined whether to impose the parole revocation fine, Brasure's death sentence would have compelled the court to strike the parole revocation fine. *Brasure* did not follow that course and instead held that the determinate sentence included a period of parole "by law and carried with it, also by law, a suspended parole revocation restitution fine." (*Brasure*, at p. 1075.) We therefore are not persuaded by *Oganesyan.*

Pape also cites *People v. McWhorter* (2009) 47 Cal.4th 318 (*McWhorter*) as supporting his position. We are not persuaded by *McWhorter* either. A jury convicted McWhorter of two counts of first degree murder and one count of first degree residential robbery. (*Id.* at p. 324.) He received a death sentence and presumably a determinate sentence on the robbery count, although the decision did not specify his sentence for robbery. (*Ibid.*) McWhorter argued that the high court should strike his parole revocation fine because his sentence did not include a period of parole, and the People conceded the point. (*Id.* at p. 380.) The court held that McWhorter was "correct," citing only *Oganesyan.* (*McWhorter*, at p. 380.) The court did not cite its decision in *Brasure*, and the analysis of the issue consisted of four sentences. (*Ibid.*) To the extent that *McWhorter* conflicts with *Brasure*, we opt to follow the more developed analysis in *Brasure.*

In sum, Smith's parole revocation fine should be stricken because his sentence does not include a period of parole. We decline to strike Pape's parole revocation fine because his sentence includes such a period.

XII. *Ability to Pay Restitution Fine and Fees*

At sentencing, the court imposed court operations and facilities fees of $140 on Smith and $210 on Pape. (Pen. Code, § 1465.8, subd. (a)(1); Gov. Code, § 70373, subd. (a)(1).) The court also imposed a $10,000 restitution fine on each defendant. (Pen. Code, § 1202.4, subd. (b).) Smith argues that if we do not reverse his convictions, we should remand his case for an ability to pay hearing under *Dueñas, supra*, 30 Cal.App.5th 1157. Pape joins in the argument. We conclude that defendants forfeited the argument with respect to the restitution fine and that any error with respect to the fees was harmless.

Dueñas held that defendants have a due process right under the federal and state Constitutions to a hearing on their ability to pay court operations and facilities fees. (*Dueñas, supra*, 30 Cal.App.5th at p. 1164.) In addition, "to avoid serious constitutional questions" raised by the statutory restitution scheme, the trial court must stay execution of the mandatory restitution fine unless the court determines that the defendant has the ability to pay it. (*Id.* at p. 1172.) Defendants bear the burden of showing their inability to pay, and the court "must consider all relevant factors," including "potential prison pay during the period of incarceration to be served by the defendant[s]." (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490.)[6]

A. *Forfeiture*

***32** Even before *Dueñas*, Penal Code section 1202.4 permitted the trial court to consider a defendant's inability to pay the restitution fine when setting the fine above the statutory minimum ($300 for a felony). (Pen. Code, § 1202.4, subds. (b)(1), (c).) In this case, the probation officer recommended that the court impose the maximum $10,000 restitution fine on both defendants. When the court asked whether Smith wanted to be heard regarding the fine, counsel merely replied, "I'll submit." Because the law permitted the court to consider Smith's ability to pay, and Smith failed to raise the issue, he forfeited any such objection to the restitution fine. (*Taylor, supra*, 43 Cal.App.5th at p. 399.)

Smith contends that he did not forfeit the argument because Pape asked the court to reduce the fine to $1,000, and the court declined. He asserts that an ability to pay objection would have been futile in light of the court's rejection of Pape's request. We disagree. Pape's request did not preserve the issue.

The court began the discussion of restitution with the requests for victim restitution. (Pen. Code, § 1202.4, subd. (f).) Rebecca's family had requested $5,202 in victim restitution, Vicki's family had requested $13,000, and Hayward's family had requested $76,000. Both defendants requested a hearing on those amounts. The court then moved to the restitution fine. After Smith submitted without any argument, the court asked Pape if he wished to be heard on the fine. Counsel replied: "Your Honor, I think it's unnecessary in light of the large amounts of restitution that we anticipate will be going to the actual victims' families." The court responded that the restitution fine was mandatory, although the court was not sure whether the law required victim restitution or the fine to be paid first. The court then asked Pape whether he was suggesting a lesser amount for the fine. Counsel suggested $1,000 but said nothing more. The court stated that it was required to consider a number of factors in imposing the restitution fine, and it found that $10,000 was reasonable for both defendants.

Pape argued that the restitution fine was unnecessary because the anticipated victim restitution would compensate the victims. That is different from saying that he could not afford to pay the fine. And when the court pointed out that the fine was mandatory, he did not mention inability to pay, even though he bore the burden of showing inability to pay. (Pen. Code, § 1202.4, subd. (d).) We cannot say that a properly articulated inability to pay argument would have been futile. Pape's bare request for a reduced fine forfeited any ability to pay objection with respect to the restitution fine.

Still, defendants did not forfeit the argument with respect to the court operations and facilities fees. The court imposed those fees pre-*Dueñas*, so a due process objection to them would have been " 'futile or wholly unsupported by substantive law then in existence.' "(*People v. Jones* (2019) 36 Cal.App.5th 1028, 1033.) Moreover, *Dueñas* was unforeseeable. (*Jones, supra*, at p. 1033.) We accordingly decline to find forfeiture. (*Ibid.*; *Taylor, supra*, 43 Cal.App.5th at p. 399.)

B. *Harmless Error*

As to the court operations and facilities fees, any error in imposing those fees was harmless beyond a reasonable doubt. (*People v. Jones, supra*, 36 Cal.App.5th at pp. 1034-1035.)

"[E]very able-bodied" prisoner must work while imprisoned. (Pen. Code, § 2700; see also Cal. Code Regs., tit. 15, § 3040, subd. (k) ["An inmate's assignment to a paid position is a privilege dependent on available funding, job performance, seniority and conduct"].) Prison wages range from $12 to $56 per month. (Cal. Code. Regs., tit. 15, § 3041.2, subd. (a)(1).)

***33** The California Department of Corrections and Rehabilitation (CDCR) is entitled to collect victim restitution and the restitution fine by deducting 50 percent of a prisoner's wages and trust account deposits, plus another 5 percent for the administrative costs of the deduction. (Pen. Code, § 2085.5, subds. (a)-(d); Cal. Code Regs., tit. 15, § 3097, subds. (c), (f).) All such money collected from prisoners will satisfy their victim restitution

debt first, then the restitution fine. (Cal. Const., art. I, § 28(b)(13)(C); Cal. Code. Regs., tit. 15, § 3097, subd. (g).)

Both defendants are in their early 30's. Pape's probation report states that he is in average health, demonstrating that he is able-bodied and capable of earning wages. Smith's probation report states that he is "50% disabled" and identifies his disabilities as "Tinnitus and back." But that does not mean he is incapable of work, especially given the long list of paying positions in prison. (Cal. Dept. of Corrections and Rehabilitation, Operations Manual (Jan. 1, 2020) § 51120.7.) Even the lowest paying category of jobs includes positions whose duties should be compatible with Smith's alleged restrictions, such as shoe shiner, kitchen helper, or server. (*Ibid.*)

Assuming that defendants earn the minimum monthly wage in prison ($12), and assuming that the CDCR collects 55 percent for victim restitution or the restitution fine, they will have $5.40 per month available to pay their fees. At that rate, Smith will pay off his fees ($140) in 26 months, and Pape will pay off his fees ($210) in 39 months. Given their life sentences, they will have time to earn enough money to pay the fees. That forecloses a meritorious inability to pay argument. (*People v. Jones, supra*, 36 Cal.App.5th at p. 1035.)

Smith argues that it will take him much longer to pay off the fees with prison wages. He contends that the entirety of his wages will go to victim restitution and the restitution fine until he pays off both. That is incorrect. As already explained, any money collected from an inmate must go toward restitution debts before anything else, but the CDCR is entitled to collect only 50 percent of an inmate's wages and trust account deposits, plus the administrative fee.

For these reasons, defendants forfeited their ability to pay argument with respect to the restitution fine. They did not forfeit it as to the court operations and facilities fees, but the failure to conduct an ability to pay hearing for those fees was harmless beyond a reasonable doubt.

DISPOSITION

Pape's sentence on count 1 for second degree murder is vacated. The trial court shall prepare an amended sentencing minute order and abstract of judgment for Pape reflecting a prison sentence of 15 years to life on count 1. Smith's parole revocation fine is stricken. The trial court shall prepare an amended sentencing minute order and abstract of judgment for Smith reflecting that change. The trial court is directed to send copies of the amended abstracts of judgment to the Department of Corrections and Rehabilitation. As modified, the judgments are affirmed.

We concur:

RAMIREZ P. J.

McKINSTER J.

All Citations

Not Reported in Cal.Rptr., 2021 WL 2374322

Footnotes

1 We refer to Rebecca and Vicki by their first names because of their shared last name. No disrespect is intended.

2 Smith's probation report lists his race as "White," and his abstract of judgment identifies his race as "Caucasian."

3 Although the record does not include the exhibits that the People used at the third party culpability hearing, Garcia's cellular phone records were entered into evidence at trial. Among other details, the records show the date and time of incoming and outgoing calls, the length of the calls, and the location of the tower to which the phone connected.

4 In relevant part, section 801, subdivision (b), requires an expert to base his or her opinion on matter "that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." Section 802 states: "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter ... upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."

5 The section states in relevant part: "The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: [¶] .... [¶] The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree." (Pen. Code, § 190.2, subd. (a)(3).)

6 The California Supreme Court has granted review of the issues presented by *Dueñas* in *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13, 2019, S257844. "The court will decide whether courts must 'consider a defendant's ability to pay before imposing or executing fines, fees, and assessments,' and if so, 'which party bears the burden of proof regarding defendant's inability to pay.' "(*People v. Taylor* (2019) 43 Cal.App.5th 390, 398 (*Taylor*).)

Court of Appeal, Fourth Appellate District, Division Two - No. E071156

S269964

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

CRISTIN CONRAD SMITH et al., Defendants and Appellants.

The petitions for review are denied.

Cantil-Sakauye, C.J., was absent and did not participate.

KRUGER

Acting Chief Justice