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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RAVON BAYLOR, Defendant and Appellant.	B172506 (Los Angeles County Super. Ct. No. TA067081)

APPEAL from a judgment of the Superior Court of Los Angeles County. Victoria Chavez, Judge. Affirmed.

Mark L. Christiansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Joseph P. Lee and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III. and IV. of discussion.

The jury found defendant guilty of the first degree murder of Mark Hall on October 17, 2002 (Pen. Code, § 187, subd. (a)),[1] specifically finding that defendant personally and intentionally fired a handgun to kill Hall (§ 12022.53, subds. (b)-(d)). The jury also found him guilty of attempting to murder Farrell Landry on that same date (§§ 664, 187, subd. (a)), specifically finding that the attempt was willful, deliberate, and premeditated (§ 664, subd. (a)), and that he inflicted great bodily injury on Landry by personally and intentionally firing a handgun (§ 12022.53, subds. (b)-(d)). Finally, the jury found defendant guilty of attempting to murder Oscar Gallegos on October 11, 2002 (§§ 664, 187, subd. (a)), specifically finding that he did so willfully, deliberately, and with premeditation (§ 664, subd. (a)), and that he personally and intentionally fired a handgun to cause great bodily injury to Gallegos (§ 12022.53, subds. (b)-(d)).[2] As to all counts, the jury found that defendant committed the crimes to promote a criminal street gang (§ 186.22, subd. (b)(1)).

Defendant was sentenced to 110 years to life in state prison—four consecutive terms of 25 years to life for the first degree murder of Hall and for the firearm enhancements under section 12022.53, subdivision (d), as to Hall, Landry, and Gallegos, plus a consecutive term of 10 years for the criminal street gang enhancement. In addition, the trial court imposed two life terms for the attempted first degree murders of Landry and Gallegos. The firearm enhancements under section 12022.53, subdivisions (b) and (c), as to all three victims were stayed under section 654.

Defendant timely appealed from the judgment, alleging: (1) Detective Barling's testimony as to Landry's statement identifying defendant as the person who shot Hall violated his federal constitutional right to confront witnesses and was improper under this state's prior identification hearsay exception; (2) the trial court prejudicially erred in admitting an audiotape of defendant's jailhouse telephone conversation with a person named Devon "Del Dog" Turner, in which defendant arguably admitted killing Hall and compounded that error by

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[1] All further statutory citations are to the Penal Code, unless stated otherwise.

[2] The jury also found true analogous firearm allegations regarding a principal under section 12022.53, subdivisions (b)-(e)(1).

instructing the jury to defer to the prosecution prepared transcript; (3) the trial court violated defendant's federal constitutional right to confront witnesses, prejudicially erred in admitting evidence of Gallegos's fear of testifying, defendant's efforts to intimidate witnesses, and the efforts by the police to relocate Gallegos and his family; and (4) the trial court violated defendant's due process rights under the state and federal Constitutions by denying defendant's motions for a mistrial and a new trial, based on the prosecution's failure to secure the presence of defense witness Bruce Lemon.

We reject each of these claims. As to the first, defendant forfeited his Confrontation Clause argument by failing to object on that ground below. It also fails on the merits because Landry, the hearsay declarant, was available for cross-examination. In any event, the factual premise underlying defendant's argument is false: In the challenged statement, Landry did not say that he saw defendant actually shoot Hall. Rather, consistent with his trial testimony, Landry stated that he saw defendant "shoot at" Hall. As to the second claim, the audiotape was properly admitted as an admission and was relevant to show defendant's consciousness of guilt. Also, it is clear that the trial court merely misspoke, and there is no reasonable possibility that the jury would have thought otherwise. Defendant forfeited the constitutional component of his third claim by failing to raise it below. Nor did the trial court abuse its discretion by admitting the evidence, which was relevant to Gallegos's credibility, as well as to defendant's consciousness of guilt. Finally, the trial court was well within its discretion in denying the motions for mistrial and new trial. There was no due process violation, as there was no evidence of prosecution interference and no reason to think that the witness's presence could be secured at any time.

STATEMENT OF FACTS

The Gallegos Crimes

Gallegos and his cousin Juan Ramirez drove to 115th Street in the Nickerson Gardens housing projects on October 11, 2002, at approximately 8:30 p.m., to meet their friend Tony Rodriguez. Defendant approached them and threatened, "Don't be coming around my hood,"

and began to walk away. Gallegos replied that he "just came to pick up a friend." Defendant turned around and walked to a nearby parking lot. Gallegos picked up Rodriguez and drove around the corner to a nearby residence to retrieve a hat for Rodriguez.

Defendant reappeared with codefendant Cedric Lamonte Sanchez,[3] and walked in front of Gallegos's car. They walked past Gallegos and his friends, staring at them angrily. The initials "BH" were tattooed on defendant's face. Gallegos drove his friends toward the street corner. Defendant and Sanchez walked up to the car from behind. When Gallegos turned around, he saw that Sanchez was pointing a handgun at him. Defendant pulled out his own gun and both of them began firing, hitting Gallegos approximately eight times as he tried to drive away. He managed to drive a few blocks before his injuries overwhelmed him. Ramirez took over and drove Gallegos to the hospital, where he stayed for about three weeks, having suffered a broken left arm and right hand, a collapsed lung and cracked sternum—gunshot injuries that had not entirely healed by the time of trial.

A search of the crime scene disclosed six .9-millimeter shell casings scattered along the street. Gallegos's car had numerous bullet holes on the driver's side door and rear panel, as well as window damage. Prior to trial, but after having the six shell casings booked into evidence and analyzed, the police destroyed the evidence. Under police policies, such materials generally are not destroyed until a case is over and they lose their evidentiary value. Investigating Officer Christian Mrakich of the Los Angeles Police Department did not authorize or find out about the destruction until after it happened, because somebody "dropped the ball." Los Angeles Police Department firearms examiner Starr Sachs found that the six casings had been fired from the handgun later discovered in defendant's apartment.

Officer Mrakich interviewed Gallegos while he was recuperating from his gunshot injuries at home. Gallegos identified defendant from a "six-pack" photographic lineup as the person who shot him. After the shooting, the police had Gallegos move residences. At trial, he testified while in fear of his life.

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3 Sanchez was separately tried and convicted. (*People v. Sanchez* (Oct. 13, 2004, B171864) [nonpub. opn.].)

Ramirez also identified defendant from the photo spread as the shooter. He and his family were relocated from Nickerson Gardens after the shooting, because he was afraid to live there. Sanchez lived near Nickerson Gardens at the time of the shooting.

Officer Victor Ross of the Los Angeles Police Department, an expert in criminal street gangs, testified that defendant and Sanchez were active members of the Bounty Hunter Bloods, which considered the Nickerson Garden housing projects to be its "stronghold." Members of the Bounty Hunter Bloods committed various crimes, including murder and attempted murder, for the gang's benefit. The initials "BH" are a gang identifier. Typically, an unknown Hispanic in Bounty Hunter Bloods territory would be challenged by a gang member. Terrorizing such Hispanics benefitted the Bounty Hunter Bloods. Sanchez was known as defendant's crime partner.

The Hall/Landry Crimes

On October 17, 2002, at approximately 4:30 p.m., Landry and Hall were walking to a liquor store near the corner of Imperial Highway and Avalon in Los Angeles, when defendant, who had a "BH" tattoo on his face, rode toward them on a bicycle and asked Landry, "Where are you from?"—meaning, are you a "gang banger?"[4] Landry replied he was not. He and Hall decided not to go to the store; the confrontation with defendant had frightened them. They walked back toward Avalon, stopped at the light, and began to walk down Imperial.

Defendant rode to a nearby parking lot, circled around, rode back toward Landry and Hall, drew his handgun, and fired it at Landry, hitting him twice in the left arm, twice in the back, and three times in his buttocks and thigh (where one bullet remained). When defendant began firing, Landry ran away across Imperial. Hall was killed at the scene. Sergeant Paul

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[4] The confrontation took place near the border between the Bounty Hunter Bloods and their enemies, the Eleven Eight East Coast Crips. In that context, the challenge "Where are you from?" indicated that the Bounty Hunter Bloods gang member was armed and on a mission to harm a rival gang member. Shooting a rival benefitted to the Bounty Hunter Bloods.

McKechnie of the Los Angeles Police Department responded and found Hall lying face down on the northwest corner of Avalon and Imperial Highway, with gunshot wounds to his chest. Hall had suffered seven gunshot wounds; three of which were fatal, piercing his kidney, heart, and aorta.

Landry spent two days in the hospital after the shooting. At the time of the trial, his wounds still caused pain and limited his mobility. While in the hospital, Detective Christopher Barling of the Los Angeles Police Department showed Landry a "six-pack" photographic lineup. Landry identified defendant's photograph, adding that if a small white dot covering part of the subject's face was a tattoo, he would be 100 percent sure of his identification. In fact, the dot covered defendant's "BH" tattoo. Landry told the detective that the person he identified was the one "who shot at him and his friend."[5]

Detective Barling found a fired bullet, approximately 12 expended casings, and a bullet fragment at the scene. A search of defendant's Nickerson Gardens apartment uncovered a loaded Beretta .9-millimeter handgun hidden in an upstairs bedroom. Firearms examiner Sachs found that the casings and the expended bullet had been fired from the handgun discovered in defendant's apartment

Post-Arrest Activity

While in custody after his arrest, the police monitored some of defendant's communications for witness safety reasons. In one such audiotaped conversation with his girlfriend Tammy Calhoun, defendant gave her the home address of Gallegos and asked her to telephone a person named "Foxy," which was the gang moniker of a member of a subset of the Bounty Hunter Bloods. A search of Calhoun's residence after that conversation disclosed jail visitation passes, along with a handwritten note containing Foxy's name, telephone number, and

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[5] Defendant's counsel cross-examined Detective Barling about the circumstances of the hospital identification and statement, and established that Landry was in pain and that his statements were not recorded.

the word "Mexican"—all consistent with defendant's statements in the taped conversation. In another audiotaped conversation, defendant told Calhoun to do what she could to help him locate the victims to prevent their testifying against him. He also talked about finding "bitches" to help him fashion an alibi.

Officer Mrakich overheard another jailhouse conversation in which defendant told Michael Gordon to copy something down and to swallow it if he got stopped by the authorities. A search of the dresser drawer in Gordon's residence disclosed a handwritten notation of Gallegos's home address on a county jail printout of an inmate's housing location and booking number.

In another audiotaped conversation with Calhoun, defendant told her that someone "snitched" on him—that is, someone identified him as having committed a crime. To be labeled a "snitch" by a gang member would put that person's safety in danger. Concern for the safety of Landry, Gallegos, and Ramirez led to an investigation and court approved wiretap.

Finally, in another audiotaped pretrial telephone conversation, this time with a person called "Del Dog," defendant referred to efforts to prevent Landry from testifying against him. At one point, according to Officer Mrakich and the transcript (which was not admitted into evidence), defendant stated: "The nigger that I killed from East Coast, nigger named [Hall]."[6] During the search of Calhoun's residence, the police found a piece of paper with the handwritten notation, "Colden and Vermont," which was the area where Landry lived.

Defendant's Case

Tandra Nelson was defendant's former girlfriend. Defendant spent the night of October 16, 2002 with Nelson, and she was with him until approximately 4:00 p.m. the next

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6 As discussed in the context of defendant's second appellate contention, the parties disputed the statement—defendant argued that, instead of taking personal responsibility for the killing, defendant had spoken of the person "that got killed." Our independent review of the audiotape shows that, while both interpretations are colorable, it is more likely that defendant said "I" in connection with Hall's killing.

day, when she dropped him off at his mother's house in Nickerson Gardens. When she returned for him an hour later, defendant seemed neither hurried nor disheveled. Nelson was not a member of the Bounty Hunter Bloods; she was an "associate."

Anthony Harbor, incarcerated in state prison at the time for spousal battery, grand theft, commercial burglary, and manufacturing "speed," testified as to his vague memory of the shooting at the corner of Avalon and Imperial Highway on October 17, 2002, at approximately 4:25 p.m. He was returning to his car after buying some donuts and coffee for his wife, when he saw two young African-American males near the liquor store, who looked like they were "up to something." Harbor heard gunshots and "hit the ground." After the shooting, he told police officers that he saw the two males walking towards the corner of Avalon and Imperial, stand there for a few seconds, and walk back towards the liquor store where they had previously used the pay phone. At some point, a Chevrolet Blazer pulled along side of the two males, who shouted "back and forth" with the Blazer's occupants. Harbor did not see anyone approach on a bicycle and fire a gun.

When the police showed Harbor the photo spread containing defendant's photograph shortly after the incident, he could not identify anyone. Nor, at trial, did he recognize defendant as the shooter.

On the day of the Gallegos shooting, Officer Mark Arenas of the Los Angeles Police Department interviewed Ramirez outside the hospital where Gallegos was being treated. Contrary to Ramirez's trial testimony, he never told the officer that the shooter initially looked like he was going to pull a gun from under his shirt, that the assailants crossed in front of his car before the shooting, or that Ramirez and Gallegos saw the assailants on the corner.

When Harbor was interviewed by Officer Arenas after the Hall/Landry shooting, contrary to Harbor's trial testimony, he told the officer that he saw the shooter and described him as an African-American male (but did not mention any tattoo), and that the two African-American males had been trying to conceal themselves behind the pay phone before the shooting. Harbor also said that he saw an African-American male on a bicycle approach the victims, pull out a .9-millimeter handgun, and fire at them. One of the victims fell; the other ran. The shooter rode away and dropped his gun in the street, but rode back and retrieved it.

DISCUSSION

I. Admission of Detective Barling's Testimony Regarding Landry's Pretrial Identification

Defendant argues the trial court violated his Sixth Amendment right to confront witnesses and misapplied Evidence Code section 1238[7] by admitting over a hearsay objection Detective Barling's testimony that Landry identified defendant from a photo spread as "the person who shot at him and his friend." Defendant's central—and mistaken—premise is that the prosecution used the detective to smuggle into trial improper hearsay testimony by Landry that he witnessed defendant fire the fatal gunshots into Hall, when Landry himself testified that he did not see anything concerning Hall after defendant began shooting. Not only did defendant forfeit his constitutional challenge by failing to object on that ground below, but because Landry was available for cross-examination, no Confrontation Clause violation occurred. In any event, because Landry had already identified defendant as the shooter and testified that he and Hall were standing together at the time defendant began firing, the challenged statement was not only consistent with Landry's trial testimony, but it satisfied the foundational requirements for admission under Evidence Code section 1238.

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[7] Evidence Code section 1238 provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and:

"(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;

"(b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and

"(c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time."

A. The Proceedings Below

At trial, Landry testified that before the shooting, he had an adequate opportunity to observe defendant and note his distinctive features, including defendant's "BH" facial tattoo. Hall was standing next to him when defendant began to shoot, but Landry did not see what happened to his friend after the firestorm began because he was running from the gunshots. Landry not only identified defendant as the shooter, but testified that on the same night as the shooting, he identified defendant from a photo spread shown to him while he was in the hospital, while defendant's "face [was] still fresh in [Landry's] head." Landry was cross-examined on all those points. At the conclusion of his testimony, the trial court granted defendant's request and ordered that Landry remain subject to recall as a witness.

Detective Barling testified next and explained how he prepared the photo spread shown to Landry in the hospital. The prosecutor asked what Landry did when confronted with the six-pack. The detective stated that Landry chose defendant's photograph as being "the person who he saw." Defense counsel interposed a hearsay objection, adding that because Landry had already testified as to the identification, there was "[n]o need for impeachment." The trial court overruled the objection, finding the testimony admissible as a prior identification under Evidence Code section 1238. Detective Barling testified that Landry identified defendant as "the person who shot at him and his friend." Defense counsel cross-examined the detective as to the circumstances of that identification.

B. Waiver

A claim based on a purported violation of the Confrontation Clause must be timely asserted at trial or it is waived on appeal. (Evid. Code, § 353; *People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14; *People v. Alvarez* (1996) 14 Cal.4th 155, 186 [declining review on Confrontation Clause grounds]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1118 (*Rodrigues*); *People v. Garceau* (1993) 6 Cal.4th 140, 173, overruled on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) "Specificity

is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence. [Citations.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 854, superseded by statute on another ground in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.)

Defendant objected solely on state law hearsay grounds. Accordingly, he waived his Sixth Amendment claim. Had a timely and specific objection been made, any possible constitutional defect could have been cured, since both Detective Barling and Landry were available. Of course, it would appear that defense counsel had good reason not to proceed on down that road. Recalling Landry to test whether he made the challenged statement to the detective would not only have re-emphasized the witness's certainty in his prior identification, but would have risked adducing damaging testimony to the effect that when Landry saw defendant "with a gun in his shooting at [him]," the bullets were also flying in the direction of Hall.

Defendant's attempt on appeal to frame the issue in terms of the United States Supreme Court's recent opinion in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) does not save it from forfeiture. Indeed, in *Crawford* itself, the Supreme Court noted that defendant raised a timely objection that admission of his non-testifying wife's prior statements "would violate his federal constitutional right to be 'confronted with the witnesses against him.'" (*Crawford*, *supra*, 541 U.S. at p. 40.) Nothing prevented defendant from doing the same.

This is not a case in which applying the contemporaneous objection rule would be unfair because "the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change." (*People v. Turner* (1990) 50 Cal.3d 668, 703.) At the time of defendant's trial, there was no binding precedent holding that admission of a prior identification under Evidence Code section 1238 was immune from Sixth Amendment challenge under *Ohio v. Roberts* (1980) 448 U.S. 56 (*Roberts*)—the Supreme

Court decision abrogated by *Crawford*.[8] (Compare *People v. Saffold* (2005) 127 Cal.App.4th 979, 984 [no waiver of confrontation challenge to hearsay evidence of a proof of service to establish service of a summons or notice, because "[a]ny objection would have been unavailing under pre-*Crawford* law"]; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2 ["failure to object was excusable, since governing law at the time of the hearing afforded scant grounds for objection"].)

From defendant's perspective at trial, *Roberts* had not so obscured his Confrontation Clause rights that they only became visible in the light of *Crawford*. Rather, if the viability of a confrontation challenge was poor under *Roberts*, it would have been even worse after *Crawford*. Under pre-*Crawford* law, the classic Confrontation Clause scenario involved the contents of an out-of-court statement by an unavailable declarant. (*Idaho v. Wright* (1990) 497 U.S. 805, 813- 814; *California v. Green* (1970) 399 U.S. 149, 157-158; *Rodrigues*, *supra*, 8 Cal.4th at pp. 1118-1119 ["Where the witness is available at trial for cross-examination, the principal danger of admitting hearsay evidence is not present [citation], and neither the federal nor the state constitutional right of confrontation is violated [citations]"].) The *Crawford* court "reiterate[d] that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 9.) Thus, as it cannot be said that *Crawford* opened up new constitutional vistas for defendant, his attempt to raise a confrontation challenge for the first time on appeal must fail.

We reject defendant's assertion that a trial judge with even a modicum of intelligence would have understood that a Confrontation Clause challenge was implicit in the hearsay objection.[9] Our Supreme Court has long recognized that those two types of claims address

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8 *Roberts* held that an unavailable witness's out-of-court statement was admissible if it fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. (*Crawford, supra,* 541 U.S. at p. 42.)

9 Defendant argues: "Besides all of this, one would have to attribute a very low intelligence to the trial judge if she did not realize that an objection under these circumstances also encompassed confrontation consequences."

independent concerns and must be specifically raised. It would be manifestly unfair to chastise the trial court for failing to rule on issues that the parties could have, but failed to, raise. In this case, defendant's Confrontation Clause claim is an appellate afterthought that was forfeited by the failure to object.

C. The Merits

As is clear from the preceding discussion, defendant's Sixth Amendment claim would fare no better on the merits. Defendant argues that Landry was not available for cross-examination as to whether he saw defendant fire at Hall because such a question would have been beyond the scope of direct examination. Even if that were true, the defense had the right to recall Landry and confront him with the statement Detective Barling had attributed to him. Because Landry "apparently was available for recall and cross-examination on this matter had defense counsel so requested, defendant's right of confrontation was not abridged."[10] (*Rodrigues*, *supra*, 8 Cal.4th at p. 1119, fn. omitted.)

Nor did the trial court err on state law evidentiary grounds in admitting Detective Barling's testimony as to Landry's prior statement under Evidence Code section 1238. Under that section's foundational requirements, the statement must identify "a party or another as a person who participated in a crime or other occurrence," be "made at a time when the crime . . . was fresh in the witness' memory," and the evidence of the statement must be "offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time." (Evid. Code, § 1238; *Rodrigues*, *supra*, 8 Cal.4th at p. 1117.)

Here, the challenged statement—"[Landry] identified No. 2 [defendant's photograph] as the person who shot at him and his friend"—fully satisfied those requirements: it identified

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10 For that reason, and because the claim was forfeited, we do not address whether the statement was "testimonial" for Sixth Amendment purposes under *Crawford*, *supra*, 541 U.S. at pages 51-56.

defendant as the shooter in the underlying crime; [11] was made only hours after the shooting, while the event was still fresh in Landry's mind; and was offered by Detective Barling after Landry had testified that he made the photographic identification and that it was accurate.

Defendant does not show anything indicative of error, much less an abuse of discretion, in the trial court's evidentiary ruling. His chief complaint is that, according to Detective Barling, Landry identified defendant as the person who actually shot Hall. In fact, the statement was perfectly consistent with Landry's direct testimony. Landry made it clear that he did not see his friend get shot, but that when he saw defendant begin shooting, he and Hall were standing next to each other. It was, thus, implicit in Landry's testimony that defendant was shooting "at" both victims. Detective Barling's testimony went no further. The jury was, of course, justified in making the reasonable inference that defendant inflicted the fatal gunshot wounds on Hall. (See CALJIC No. 2.00.) Moreover, the prosecution never argued that Landry saw Hall get shot.

Finally, given the strength of Landry's identifications (both in court and from the photo spread), the fact that defense counsel cross-examined him as to the circumstances of those identifications (adducing that Landry made the identification from the hospital emergency room while suffering from the gunshot wounds), and the ballistics evidence's independent corroboration as to defendant's identity as the shooter—not to mention the evidence of gang motive and defendant's efforts to suppress evidence—any error in admitting Detective Barling's statement would have been harmless under any standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

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11 To the extent defendant also contends that the Evidence Code section 1238 hearsay exception does not apply to the challenged statement because it went "beyond" the statutory scope of an identification by specifying that the person identified was the one who "shot at" the victims, he is wholly mistaken. Consistent with Evidence Code section 1238, the challenged statement properly identified defendant as the "person who participated in a crime."

II. Admission of Defendant's Audiotaped Telephone Conversation with "Del Dog"

Defendant raises multiple claims concerning the admission of the audiotape of a post-arrest, wiretapped telephone call with "Del Dog," in which defendant arguably admitted killing Hall and discussed whether Landry would testify against him. However, at trial, defendant objected on a single ground—that admission of the tape was improper under Evidence Code section 352. Accordingly, that is the sole claim preserved for appeal, and we find no abuse of discretion in the trial court's evidentiary ruling. The evidence had significant probative value as an admission and to show consciousness of guilt; its tendency to prejudice defendant within the meaning of Evidence Code section 352 was minimal, as confirmed by our independent review of the tape, which shows the transcript was a fair representation of the conversation and that the jurors could have reasonably found that defendant took responsibility for the Hall killing. Defendant forfeited his other claims, including failure to properly authenticate the tape and his perfunctory constitutional challenges—all of which fail on the merits.

A. Proceedings Below

Prior to the trial court's ruling on whether the "Del Dog" audiotape was admissible, the prosecutor made a detailed offer of proof as to the tape's contents, arguing that defendant—often referring to himself in the third person—discussed the evidence against him and, at one point, took personal responsibility for killing Hall. Defense counsel interjected that she understood defendant as saying the person "that got killed," rather than the person "that I killed," as the prosecutor contended. The trial court preliminarily ruled that the question of which interpretation was correct was for the trier of fact; the question of whether it constituted an admission was for the trial court. Defense counsel interposed an objection under Evidence Code section 352, arguing that the disputed statement regarding responsibility for Hall's killing lacked probative value and was unduly prejudicial.

The trial court found the evidence had probative value as an admission because it tended to show defendant's guilt when considered with other evidence. As to the disputed

interpretation of defendant's statement, the trial court explained that it would instruct the jurors that they were to determine what was actually said and resolve that dispute. The jurors would be further instructed that the transcript, which reflected the prosecution's interpretation, was neither evidence nor dispositive. Rather, it would be provided merely to assist them while listening. The jury would not be allowed to take the transcript into deliberations: "I tell them this [transcript] is just to assist you in listening to the tape, but if you hear it differently, go with that." Defense counsel did not raise any objection as to authentication or on any constitutional ground, but merely requested "a continuing objection," which the trial court granted.

The prosecutor called Officer Mrakich, who testified as to his familiarity and experience with criminal street gangs in general, and with the Bounty Hunter Bloods in particular. He was familiar with defendant's voice, having listened to "countless hours" of monitored custodial conversations between defendant and others. Before the first audiotape was played, the trial court instructed the jurors that the transcript they had been given "may or may not reflect what you hear on the tape." Only the tape would be admitted into evidence as a "proper item for your consideration." The transcript was "provided for the sole purpose of assisting you in listening to the tape" because "sometimes it's hard to hear some of the words . . . . [¶] So the tape is what you're listening to. If you hear something that you see written differently on the paper, *disregard what's on the tape*.[**12**] Your responsibility is to listen to the tape and make a factual determination from that tape." The trial court further instructed that the "transcript is there just to help you out in hearing and understanding." The trial court would collect the transcript after the tape was played, so it would not be available in the jury room. If the jurors wanted to hear the tape during deliberations, it would be played in court under those same circumstances.

Officer Mrakich testified about some foundational and explanatory matters concerning the audiotapes of conversations with Calhoun, and the first Calhoun tape was played. The

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12 For convenience, we have italicized the statement on which defendant relies in his claim.

officer again testified as to explanatory matters concerning the next Calhoun tape. Before playing the second Calhoun tape, the trial court reiterated that, consistent with the prior admonition, the second transcript was "just there to help you listen to the tape." Before playing the "Del Dog" tape, Officer Mrakich testified that a wiretap had been placed on a jail telephone in order to investigate efforts to intimidate witnesses Landry, Gallegos, and Ramirez. As the transcripts to the "Del Dog" tape were distributed to the jurors, the trial court again instructed the jury to remember the prior admonition. Officer Mrakich gave the date and time of the telephone conversation, and stated that the persons involved were defendant and "an individual identified as Del Dog." The tape was played, and the trial court had the jurors return the transcripts.

Officer Mrakich testified that when "Del Dog" referred to Landry as "[t]rying to get down on" defendant, it meant that Landry intended to testify against defendant. According to the transcript, and as confirmed by our review of the tape, defendant expressed his dismay at the possibility that Landry would testify against him because, without Landry, he felt the evidence against him was weak. At one point, in the context of discussing Landry, defendant referred to "[t]he nigger that I killed from East Coast, nigger named [Hall]." Referring to that statement and whether defendant might have said "got killed," rather than "I killed," Officer Mrakich testified that, having heard the telephone call itself and listened to the tape numerous times, he understood defendant to have said, "I killed"—consistent with the transcript.

Defense counsel urged the jury to listen to the tape if they were inclined to accept the prosecution's interpretation. Defense counsel insisted that careful listening would prove the transcript in error. Just before deliberations began, the trial court specially instructed the jury that the only items of evidence that would not be available inside the jury room were the handgun and the audiotapes. The jurors were reminded that the tapes could be played back to them in open court, upon their request. The jury listened to the disputed portion of the tape during deliberations.

B. Defendant Waived His Claims of Lack of Authentication and Constitutional Error by Failing to Interpose Timely and Specific Objections; In Any Event, the Claims are Meritless

As shown above, defendant objected to the admission of the "Del Dog" audiotape solely on Evidence Code section 352 grounds. Therefore, he waived his contention that the tape was not properly authenticated under Evidence Code section 1401. (*People v. Williams* (1997) 16 Cal.4th 635, 661-662 (*Williams*), *citing People v. Sims* (1993) 5 Cal.4th 405, 448 [failure to object to introduction of transcript of tape-recorded interview for lack of authentication waives issue on appeal]; *People v. Clark* (1992) 3 Cal.4th 41, 125-126.) His assertion that his Evidence Code section 352 objection implicitly raised the lack of foundation issue is mistaken. Nothing said below would have put the trial court or the prosecution on notice that defendant was challenging the tape's admission on foundational grounds. To permit such a challenge on appeal would be unfair, as it would deprive the prosecution of the opportunity to cure any foundational deficiency. (*People v. Hines* (1997) 15 Cal.4th 997, 1045, fn. 7 ["Had defendant believed this foundation was inadequate, it was incumbent upon him to bring the matter to the attention of the trial court, and he may not raise the issue for the first time on appeal"].)

Indeed, if challenged, the prosecution certainly could have laid the foundation for the tape's admission. Officer Mrakich testified that he was familiar with defendant's voice and had listened to the original telephone call and the tape recording. (*Williams, supra*, 16 Cal.4th at p. 662 ["The prosecution laid the foundation for admission of the tape recording when [the detective] testified that the tape was a record of his conversation with defendant"], citing, inter alia, *People v. Mayfield* (1997) 14 Cal.4th 668, 747 ["a recording is authenticated by evidence that '"it accurately depicts what it purports to show"'"]; *People v. Bowley* (1963) 59 Cal.2d 855, 859 [same].)

These same well-settled principles apply to bar appellate review of the federal constitutional claims—due process and fair trial, lack of confrontation, and use of false evidence—defendant raises for the first time on appeal. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 128-129 [constitutional claims waived by lack of timely and specific objection]; *People v. Mattson*, *supra*, 50 Cal.3d at pp. 853-854 [a judgment will not be reversed on the

ground that evidence has been admitted erroneously, unless "'there appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so *stated as to make clear the specific ground of the objection or motion*'"], quoting Evid. Code, § 353, subd. (a), superseded by statute on another ground in *People v. Jennings, supra,* 53 Cal.3d at p. 387, fn. 13.)

The notion that defendant somehow apprised the trial court of a potential Confrontation Clause violation arising out of the transcript's use because the transcript was based on hearsay statements in the audiotape is fanciful. Not only did defense counsel fail to object on hearsay grounds, but the transcript itself was not admitted into evidence.[13] In any event, there can be no violation of a defendant's confrontation rights where the challenged statement was not admitted for its truth. (See *Tennessee v. Street* (1985) 471 U.S. 409, 413-414.) Similarly, neither the trial court nor the prosecution was ever alerted to the possibility that admission of the tape amounted to the presentation of "false evidence" in violation of the Constitution. To the contrary, defense counsel merely argued that the prosecution and Officer Mrakich misinterpreted defendant's words and that misinterpretation was reflected in the transcript. The trial court and the parties, therefore, never had any reason to consider the question of false evidence.

Finally, to the extent defendant's belated constitutional due process and fair trial claims merely "'restate[], under alternative legal principles,'" his properly preserved Evidence Code section 352 claim, implicating the same facts and a similar legal standard (see *People v. Cole* (2004) 33 Cal.4th 1158, 1195, quoting *People v. Yeoman* (2003) 31 Cal.4th 93, 117), we implicitly consider and reject them in the context of addressing the merits of the latter claim *post*.[14]

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13 To the extent defendant claims the nonadmission of the transcript amounted to some unexplained constitutional violation, we note that defense counsel apparently—and appropriately—sought to ensure that the trial court did *not* admit the transcript.

14 Defendant relied on *People v. Partida* (2004) 121 Cal.App.4th 202 for the proposition that an Evidence Code section 352 objection has been held sufficient to preserve a due process challenge to the admission of the same evidence. The Supreme Court has since granted review

C. The Admission of the Tape Over Defendant's Evidence Code Section 352 Objection Was Well Within the Trial Court's Discretion; Despite the Trial Court's Obvious Misstatement, the Jury Would Have Understood That the Tape—Not the Transcript—Was in Evidence; Any Error was Harmless Under any Standard

Defendant contends the trial court erroneously admitted the "Del Dog" audiotape over defendant's Evidence Code section 352 objection. First, he asserts that the trial court's apparent failure to review the audiotape itself before ruling amounted to an abuse of discretion. He further contends that the disputed portion of the tape in which defendant either took personal responsibility for Hall's killing ("I killed"), or distanced himself somewhat by using the impersonal voice ("got killed"), was crucial to the verdict but nearly impossible to decipher. Therefore, defendant argues, the jury would have deferred to the transcript, reflecting the prosecution's interpretation, in accordance with what defendant acknowledges was a "slip of the tongue" by the trial court. We disagree.

"A finding as to admissibility of evidence under Evidence Code section 352 is left to the sound discretion of the trial court and will not be disturbed unless it manifestly constituted an abuse of discretion." (E.g., *People v. Siripongs* (1988) 45 Cal.3d 548, 574.) "[A] tape recording may be admissible even if substantial portions of it are unintelligible." (*Ibid.*) "[A] partially unintelligible tape is admissible unless the audible portions of the tape are so incomplete the tape's relevance is destroyed." (*People v. Polk* (1996) 47 Cal.App.4th 944, 952 (*Polk*).) Transcripts of admissible tape recordings, even when admitted in evidence, "'are only prejudicial if it is shown they are so inaccurate that the jury might be misled into convicting an innocent man.'" (*Id.* at p. 955, quoting *People v. Brown* (1990) 225 Cal.App.3d 585, 599, citing *People v. Fujita* (1974) 43 Cal.App.3d 454, 472-473.)

Our review of the transcript and the audiotape confirms that the trial court was well within its discretion in overruling the defense objection. Listened to in the context of defendant's other statements to "Del Dog" and given his statements to Calhoun, the evidence

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of that decision. Among the issues to be briefed is whether a defendant forfeits his federal due process claim on appeal by failing to object on that ground in the trial court.

was undeniably probative as an admission regardless of which version of the disputed statement is correct. Defendant's statements to "Del Dog" supported the reasonable inference that he was soliciting help to suppress evidence through witness intimidation, which tended to prove his guilt. An admission is any extrajudicial statement, whether inculpatory or exculpatory, tending to prove guilt when considered with the rest of the evidence. (*People v. Garceau, supra,* 6 Cal.4th at p. 183; *People v. Malone* (2003) 112 Cal.App.4th 1241, 1243; CALJIC No. 2.71.) Of course, attempts to suppress evidence are relevant to show consciousness of guilt (*Williams, supra,* 16 Cal.4th at p. 201), as the jury was instructed.

Having listened to the audiotape, we find that there were few unintelligible portions, and that the transcript fairly reflected the conversation. With regard to the disputed statement, the Attorney General interprets defendant as saying, "The nigger that I . . ." before pausing shortly and adding, "the nigger that got killed from East Coast, nigger named [Hall]." That is, the tape was arguably consistent with both the defense and the prosecution's interpretations, but the clear implication is that defendant admitted killing Hall. We agree. Under these circumstances, we find no abuse of discretion. (See *People v. Siripongs*, *supra*, 45 Cal.3d at p. 574; *Polk*, *supra*, 47 Cal.App.4th at pp. 953, 955 [differences between tape and transcript may be "simply a matter of interpretation or a question of the quality of the recording devices used," but the prosecution prepared transcript "was sufficiently accurate in material respects to justify its use by the jury"].)

Nor did the trial court abuse its discretion by apparently choosing not to review the tape itself before ruling. While it is not entirely clear whether the trial court listened to the tape before ruling, under these circumstances, it would not have been unreasonable to accept the representations of counsel that the tape was susceptible to contrary interpretations. *Polk* is not to the contrary. While that court noted the various procedural safeguards for reliability recommended in *United States v. Robinson* (6th Cir. 1982) 707 F.2d 872[15]—including having

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[15] Of course, we are not bound by the decisions of the lower federal courts. (*People v. Smith* (2003) 110 Cal.App.4th 1072, 1077, fn. 4, citing *People v. Cleveland* (2001) 25 Cal.4th 466, 480 and *People v. Avena* (1996) 13 Cal.4th 394, 431.) While the procedural safeguards endorsed in *United States v. Robinson, supra,* 707 F.2d 872 are commendable, the Sixth

the court review the tape, compare it to the transcript, and make express findings—the *Polk* court did not hold that such procedures were necessary in every case. Rather, as we did, the *Polk* court independently reviewed the materials and found the admission of the tape and transcript proper, despite some unintelligible portions in the former and arguable inaccuracies in the latter. (*Polk*, *supra*, 47 Cal.App.4th at pp. 951-956.)

Based on the foregoing, even assuming error, it was harmless under any applicable standard. (*Chapman v. California*, *supra*, 386 U.S. at p. 24 [constitutional error must be harmless beyond reasonable doubt]; *People v. Watson*, *supra*, 46 Cal.2d at p. 836 [state law is harmless unless a reasonably probable result more favorable to defendant would have been reached in absence of error].) Not only did the tape reasonably support the prosecution's interpretation, but the jury could reasonably have found such an admission under the defense interpretation, especially when considered in light of defendant's statements in the other audiotaped conversations. In addition, the jurors were instructed that they were "the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or part," and that "[e]vidence of an oral admission of the defendant not made in court should be viewed with caution." Moreover, given the strong eyewitness testimony, as corroborated by the ballistics evidence, there is no reasonable likelihood that consideration of the "Del Dog" tape substantially affected the verdict.

Further, we reject the contention that the trial court's misstatement regarding the manner in which the jury was to assess the audiotaped evidence had any reasonable likelihood of prejudicing defendant. Read in the context of all the trial court's instructions, we are confident that there was no reasonable possibility that the jurors would have understood the trial court as instructing them to disregard the tape that *was* admitted into evidence and to defer to a transcript that was *not*, in the event they perceived a conflict between them. It would have been irrational to have reached that understanding in light of the trial court's entire admonition, which made it clear that: (1) the transcript might not "reflect what you hear on the tape"; (2)

Circuit has made it clear that the failure to follow those procedures is not prejudicial per se. (*United States v. Jacob* (6th Cir. 2004) 377 F.3d 573, 581-582.)

only the tape would be admitted into evidence as "a proper item for your consideration"; and (3) the transcript was intended only to assist the listening process. Further, the trial court stated: "Your responsibility is to listen to the tape and make a factual determination from that tape."

In addition, the trial court repeatedly informed the jury that the transcripts were not in evidence and that they could only be used in connection with the playing of the tapes, which were. The possibility of misunderstanding was further negated by the trial court's instructions prior to deliberation, in which it instructed the jurors to "determine what facts have been proved from the evidence received in the trial and not from any other source." It also instructed the jurors not to "single out any particular sentence or any individual point or instruction and ignore the others," but rather to "[c]onsider the instructions as a whole and each in light of all the others."

Moreover, neither counsel's argument would have contributed to any possible jury misunderstanding. The prosecutor did not tell the jury to defer to the transcript in derogation of the tape. Defense counsel specifically urged the jury to listen to the tape, insisting that careful listening would prove the transcript wrong. Such an argument would have made no sense if the trial court had already instructed the jury that the transcript was the final word.

As the Supreme Court has made clear, when assessing jury instructions, "[w]e credit jurors with intelligence and common sense [citation] and do not assume that these virtues will abandon them when presented with a court's instructions." (*People v. Coddington* (2000) 23 Cal.4th 529, 594, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) In light of the instructions as a whole and the way in which the trial was conducted (with the trial court consistently ordering the jurors to return the transcripts after the tape was played), no rational juror could have understood the trial court as having instructed them to disregard the tape and defer to the transcript. Any doubt as to this issue is dispelled by the fact that during deliberations the jurors requested to hear the disputed portion of the "Del Dog" tape, eliminating any serious question concerning whether they believed the transcript was determinative. If the jury had labored under such a misunderstanding, there would have been no point in requesting a playback.

Finally, defendant's assertion that defense counsel's failure to object to the trial court's "disregard the tape" misstatement amounted to ineffective assistance of counsel is meritless. For this contention to succeed, defendant must "establish[ ] *both* of the following: (1) that [defense] counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for [defense] counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*Rodrigues, supra,* 8 Cal.4th at p. 1126; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1003 [explaining that first component is established by demonstrating that "[defense] counsel's performance did not meet the standard to be expected of a reasonably competent attorney"]; *In re Avena* (1996) 12 Cal.4th 694, 721 [reasonable probability "'is a probability sufficient to undermine confidence in the outcome'"].) As defense counsel knew the trial court had intended to instruct the jury to disregard the *transcript*, the failure to object was likely attributable to mere inattention. As shown above, in context, it was clear that the trial court meant to say "transcript," and defense counsel most likely either unconsciously substituted that word in place of "tape," or realized that the slip of the tongue was so obvious that no correction was necessary. While pointing out the mistake would have been preferable, we cannot conclude that the failure to do so amounts to deficient performance, much less that it undermines our confidence in the outcome.

III. The Admission of Evidence of Victim/Witness Gallegos's Fear of Testifying and His Family's Relocation, Along with Evidence that Defendant Attempted to Intimidate Witnesses

In a multi-part argument, defendant contends the trial court erred in admitting evidence that: (1) Gallegos testified in fear; (2) the police had relocated Gallegos and his family; and (3) defendant attempted to intimidate witnesses from testifying. In addition to arguing that the admission of that evidence was prejudicial, defendant attempts to argue that its admission violated his federal constitutional rights to "due process" and a "fundamentally fair trial." As we explained *ante*, defendant's failure to object on constitutional grounds resulted in a waiver

of those claims. Again, to the extent defendant's belated constitutional claims merely restate, under alternative legal principles, the evidentiary claims he did preserve, we implicitly consider and reject them in the context of addressing the merits of the latter claim. (See *People v. Sanders* (1995) 11 Cal.4th 475, 548, fn. 32 [improper to raise constitutional errors for the first time on appeal; in any event, the belated federal claims fail with the rejection of the state law claim on which they were predicated]; cf., *People v. Cole*, *supra*, 33 Cal.4th at p. 1195.)

As we explain, defendant shows neither an abuse of discretion nor prejudice in admitting the evidence.

A. The Testimony Regarding Gallegos's Fear and Relocation Was Properly Admitted

As defendant concedes, "[e]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible." (*People v. Burgener*, *supra,* 29 Cal.4th at p. 869.) Moreover, "[a]n explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court." (*Ibid.*) However, citing *People v. Green* (1980) 27 Cal.3d 1, 26 (*Green*), overruled on another ground in *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129, defendant argues that evidence of witness intimidation and Gallegos's relocation was improperly admitted under Evidence Code section 352 because of the supposed danger that the jury would consider evidence of defendant's attempt to eliminate Gallegos after the crime as evidence that defendant harbored an intent to kill at the time of the crime itself. The argument fails not only because defendant waived his Evidence Code section 352 challenge, but is meritless because there is no reasonable possibility that the jury would make such an inference.

At trial, Gallegos testified that he was in fear of his life. After the shooting, the police had him and his family move residences. Officer Mrakich testified that he assisted in the relocation effort. The defense had interposed a continuing objection to testimony regarding "relocation" without stating any legal basis. The trial court ruled that Gallegos's testimony concerning his fear and the relocation was admissible as long as it was based on personal

knowledge, rather than hearsay. At one point during Officer Mrakich's testimony, defense raised a relevance objection to testimony regarding whether the wiretap order was signed by a judge.

As stated above, Evidence Code section 353, subdivision (a) requires that the complaining party make a timely and specific objection at trial to preserve an evidentiary issue for appeal. (E.g., *People v. Carrillo* (2004) 119 Cal.App.4th 94, 101.) "The purpose of this rule 'is to encourage a defendant to bring any errors to the trial court's attention so the court may correct or avoid the errors and provide the defendant with a fair trial.'" (*Ibid.*, quoting *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060.) An objection will be deemed sufficient so long as it "fairly apprises the trial court of the issue it is being called upon to decide. [Citations.]" (*People v. Scott* (1978) 21 Cal.3d 284, 290.) The duty to object will be excused when an "objection or request for admonition would have been futile or would not have cured the [alleged] harm . . . ." (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.)

Here, defendant preserved a relevance and hearsay claim, but cannot complain that the trial court abused, or failed to exercise, its discretion under Evidence Code section 352, since the trial court was never given fair notice of such an objection. There is no reason to think that it would have been futile to object on that specific ground, or that an admonition could not have cured a potential prejudice.

In any event, defendant's reliance on *Green* is misplaced. That decision involved the admission of defendant's pre-crime threat to kill his murder victim. As the *Green* court explained, evidence that "defendant threatened his victim prior to committing the crime charged is a particularly sensitive form of evidence of the victim's state of mind." (*Green*, *supra*, 27 Cal.3d at p. 26.) In that situation, it would be very difficult for a juror not to consider such evidence as bearing on the defendant's intent of actually carrying out that threat. (*Ibid.*) Thus, *Green* did not involve post-crime attempts of witness intimidation such as those in this case. Defendant's jury had no reason to infer anything about his intent regarding the underlying crime from his actions after the crime – other than the permissible inference of consciousness of guilt, as the jury was instructed. (See *Williams*, *supra*, 16 Cal.4th at p. 201.) As there was no reasonable possibility that the jury would consider the evidence for anything

other than Gallegos's credibility and defendant's consciousness of guilt, there was no prejudice under any standard. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

In a closely related argument, defendant asserts that evidence Gallegos was actually relocated was irrelevant and unduly prejudicial because it tended to prove the mental state of the police, rather than that of the witness, and it gave official credence to Gallegos's fear. However, it is well settled that not only the witness's fear, but an explanation therefore, is "relevant to her credibility and is well within the discretion of the trial court." (*People v. Burgener*, *supra*, 29 Cal.4th 833 at p. 869.) There was no abuse of that discretion here; nor was there prejudice under any standard. Defendant's admissions to his girlfriend and others gave the jury every reason to believe he was seriously engaged in acts of witness intimidation; confirmation of Gallegos's relocation added little of substance—indeed, the fact that Gallegos had already been relocated would give the jury reason to discount the magnitude of his fear at trial.

B. Defendant's Audiotaped Admissions Concerning His Efforts to Intimidate Witnesses Were Properly Admitted

Defendant next claims that the trial court abused its discretion by admitting his audiotaped statements to Calhoun, arguing that: (1) the evidence was irrelevant as to Gallegos's fear and relocation because those threats were not made directly to him; and (2) the trial court failed to exercise its discretion because it was unaware of its obligation under Evidence Code section 352 to consider potential prejudice in the weighing process. Both arguments fail. As to the first, the trial court properly admitted the evidence as party *admissions*, not to prove that Gallegos was afraid. And, again, the evidence was also admissible to support an inference of consciousness of guilt. (See *Williams*, *supra*, 16 Cal.4th at p. 201.)

The second argument fails because the trial court expressly considered the question of prejudice, and weighed it against the probative value of the admissions. The trial court

reasonably found that the potential for the kinds of prejudice identified by defense counsel was minimal. As the trial court properly found, any prejudice arising out of the fact that the prosecution chose to play only a small percentage of the available tapes was something that could be adduced on cross-examination. The possibility that defendant's statement could possibly be interpreted in an innocent light did not raise a serious specter of prejudice. Rather, such arguments could be developed on cross-examination and argued to the jury—as they were.

The fact that the trial court did not specifically address the question of prejudice in precisely the manner defendant chose to frame the issue on appeal hardly shows a failure to exercise discretion, much less that it was unaware of its responsibilities under Evidence Code section 352. "[A] court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352. [Citations.]" (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.) As our independent review of the record shows that the trial court expressly balanced probative value against potential prejudice, and did so in an intelligent manner, we find that it was well aware of its responsibilities under Evidence Code section 352.

C. Defendant's Admissions To Gordon Concerning His Efforts to Intimidate Witnesses were Properly Admitted

Defendant's claim regarding Officer Mrakich's testimony as to the statements made to Gordon is meritless. According to the police officer, defendant told Gordon to copy something down and to swallow it if he was stopped by the authorities. A search of the dresser drawer in Gordon's residence disclosed a handwritten notation of Gallegos's home address on a county jail printout of an inmate's housing location and booking number. In essence, defendant argues that the statements made to Gordon were entirely vague and ambivalent, but that the prosecution unfairly made them appear to be malicious by "unsupported innuendo," including the testimony of Officer Mrakich as to the meaning of certain phrases, testimony as to gang

membership, and testimony that the police took the threats seriously enough to wiretap defendant's phone and relocate Gallegos. We reject that argument as an attempt to place an entirely self-serving and benign spin on the testimony.

In fact, the statement to Gordon when considered by itself, but especially if considered in conjunction with the statements to Calhoun and "Del Dog," was strong evidence of an attempt to intimidate witnesses. Contrary to defendant's assertion, this evidence did not require "speculation, innuendo, and a leap of faith" to support an inference of consciousness of guilt. Rather, the evidence made such an inference compelling. Among other things, the fact that Gordon had Gallegos's address on a piece of paper that came from the jail after a conversation in which defendant asked him to copy something down and swallow it, if confronted, provided a solid basis for inferring an attempt to intimidate the witness.

In any event, this was not a case that hinged on defendant's posttrial admissions. Our review of the record demonstrates that a reasonable jury would have been convinced of defendant's guilt on the strength of the eyewitness identifications, as corroborated by the ballistics evidence. There was no reasonable likelihood of prejudice under any standard. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

IV. Denial of Motions For Mistrial and New Trial

Defendant contends the trial court erred and violated his state and federal constitutional due process rights by denying his motion for mistrial and for a new trial based on the failure to secure the presence of a potential defense witness named Bruce Lemon.[16] To the contrary, the trial court acted well within its discretion in denying the motions, and—outside the *Brady* context—there is no constitutional right to have the prosecution secure the presence of a

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[16] Defendant does not allege a violation of his Compulsory Process rights, or claim that the prosecution violated its obligations under *Brady v. Maryland* (1963) 373 U.S. 83, or its statutory discovery obligations.

witness who might be favorable to the defense. As defendant can only speculate as to the possibility that Lemon's presence might have ever been obtained, he can show neither prejudice nor a due process violation.

Prior to trial, the defense subpoenaed Lemon, and the trial court issued a warrant for his arrest. On the Friday afternoon after the defense had rested, counsel moved for a mistrial, representing that she had been unable to contact Lemon, despite persistent efforts. She did not believe he had been arrested pursuant to the bench warrant. The trial court denied the motion, but gave the defense the opportunity to call the witness on the following Monday, if they could locate him by then. On Monday, counsel informed the court that Lemon had not been arrested on the warrant, and that the defense had been unable to contact him. Defense counsel attempted to reach him by telephone numerous times, but managed only to speak to his daughter once: "That's the first time anyone has answered the phone, actually, in quite a while." The daughter had no information on Lemon's whereabouts. As defense counsel considered him a necessary witness, she renewed the mistrial motion.

The trial court denied the motion, finding it unwarranted under the circumstances. The trial court had issued the body attachment, but since it was clear to all concerned that the defense was "anxious to have [Lemon] here," the trial court "could only assume that he is avoiding being brought to court because for whatever reason he doesn't wish to give testimony. And that could go on forever." After the jury was discharged, the court asked defense counsel whether she wanted Lemon's bench warrant recalled. Defense counsel reluctantly acquiesced, adding: "We had no reason to believe that he was going to go into hiding."

Defendant's subsequent new trial motion alleged that Lemon would have been a helpful witness because he would have testified that he saw the shooter leave the scene of the Hall/Landry shooting, but did not mention any tattoo in the detailed description he gave to the police. Again, defense counsel argued that Lemon had been properly subpoenaed, but also asserted that "it does not appear that the Sheriff's [*sic*] attempted to pick him up on the body attachment"—and the defense lacked the power to arrest him. The trial court denied the motion for the reasons it had previously given in connection with the new trial motion.

"'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."'" (E.g., *People v. Delgado* (1993) 5 Cal.4th 312, 328.) Similarly, a ruling on a motion for a mistrial is reviewed for abuse of discretion. (*Williams*, *supra*, 16 Cal.4th at p. 210.) Such a motion should be granted only when a defendant's chances of receiving a fair trial have been "irreparably damaged." (*People v. Bolden* (2002) 29 Cal.4th 515, 555.)

Here, there was nothing approaching an abuse of discretion; the trial court had no reason to think its ruling would damage defendant's chance of receiving a fair trial to any appreciable degree, much less to an irreparable degree. As the trial court understood, in light of the defense's utter failure to contact Lemon prior to, during, or after the trial, there was no reasonable possibility that he would suddenly make himself available to the defense, the court, or law enforcement. As late as the hearing on the new trial motion, defense counsel had no information as to Lemon's whereabouts, having previously conceded that she believed he had gone into hiding. The trial court was not obliged to grant the motion on the hope that Lemon's presence would somehow be secured for a new trial. Moreover, even if his presence could be obtained, there is no solid basis for believing that he would ultimately prove a favorable witness. After all, he was willing to become a fugitive, rather than testify for the defense.

Neither *People v. DePrima* (1959) 172 Cal.App.2d 109, 116 nor *People v. Davis* (1973) 31 Cal.App.3d 106, 110 is availing to defendant. Those cases merely recognized that a court may exercise its discretion to order a new trial where, through no fault of the defendant, a material witness fails to appear.

Defendant's assertion that law enforcement "did not even try" to secure Lemon's presence amounts to rank speculation. Except for defense counsel's inference from the fact that Lemon had not been arrested, there is nothing in the record to support that claim. In any event, the California Supreme Court has emphasized that the prosecution has no duty to conduct an investigation to obtain information helpful to the defense. Rather, while discovery obligations require the prosecution to provide "the address of a witness that readily could be obtained through a request of the witness," it "has no *general duty* to seek out, obtain, and

disclose all evidence that might be beneficial to the defense. [Citation.]" (*In re Littlefield* (1993) 5 Cal.4th 122, 135.)

In sum, even if there were error, it was harmless under any standard. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J