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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CONROY JAMES HAYES,

Defendant and Appellant.

F050460

(Super. Ct. No. BF110986A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Lee P. Felice and Richard J. Oberholzer, Judges.*

A. M. Weisman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Lloyd G. Carter, Deputy Attorneys General, for Plaintiff and Respondent.

* Judge Felice heard defendant's *Marsden* motions; Judge Oberholzer was the trial and sentencing judge.

Defendant Conroy James Hayes was convicted of the first degree murder of his girlfriend. He was also convicted of possession of cocaine base for sale. In addition, firearm and prior prison term enhancements were found true. He appeals, raising numerous issues. Except to agree with both parties that the prior prison term enhancements, already imposed on the first count, were improperly imposed on the second count, we affirm the judgment.

Facts

Rochelle M., the homicide victim, lived in an apartment with her 10-year old daughter, T., and her cousin Avanae Eddington. Defendant moved into Rochelle's apartment several weeks before she was murdered. Rochelle would cook, clean, iron, and wash defendant's car for him, even though defendant was not employed. Rochelle also gave defendant money and bought him a white Cadillac.

Eddington testified that defendant would argue with Rochelle and would beat her. On two occasions defendant pulled a gun on Rochelle. On four occasions, Eddington intervened when defendant was beating Rochelle. Defendant had many other girlfriends, and Rochelle and defendant would argue about that. Defendant would lock Rochelle out of their bedroom and would talk on his cellular phone to his other girlfriends. There were occasions when defendant and Rochelle would argue and Rochelle would leave the apartment by jumping out the window in T. and Eddington's room.

According to Eddington, defendant's gun was a .38 revolver. Out of fear, Rochelle asked Eddington to remove the bullets from the gun, but Eddington did not know how. Rochelle also asked her cousin to remove the bullets, but he did not know how either.

Defendant threatened to kill Rochelle many times. Rochelle would often telephone defendant at all hours of the night to find him. He would hang up on her and she would get mad.

In addition to testifying about Rochelle and defendant's abusive relationship, Eddington testified concerning drug sales that occurred in the apartment. She said that people would knock on the apartment door and defendant would tell Rochelle to go get a particular amount of drugs. She would do so and he would sell it to the person at the door. Eddington had seen defendant chop up crack cocaine in the apartment. Defendant had a plate, razor blades and bags to put the drugs in. He prepared the drugs in the room he shared with Rochelle and kept them in one of Rochelle's drawers in that room.

Rochelle was pregnant. Defendant told her she "better have" an abortion because he did not want a baby by her. Rochelle was upset. Two days before she was murdered, Rochelle told defendant to leave.

T. testified that defendant lived with them for several weeks. Defendant failed to help around the house. He treated T.'s mother, Rochelle, poorly. T. saw defendant hit Rochelle on at least 10 occasions. He would hit her with his hand and his fist.

Rochelle would sometimes escape through the window in T.'s room when defendant was hitting her. Rochelle would go to her neighbor's apartment after she fled.

T. said that during one argument between defendant and Rochelle, defendant put bleach in the fish tank water and killed T.'s fish. On another occasion when defendant was fighting with Rochelle, T. grabbed a knife and told defendant not to put a hand on her mother. Defendant told her that if she did not put the knife down he would shoot Rochelle. T. put the knife down.

T. had seen defendant point a gun at Rochelle during arguments. He had a gun in a black bag that he kept in his car. Rochelle tried to hide the gun one time. Defendant had kicked in the bathroom door and the bedroom door on separate occasions when he was fighting with Rochelle.

Rochelle sent T. to her aunt's to stay for a few days, several days before Rochelle was murdered.

On the evening of July 10, 2005 (the night before the murder), Eddington was at home from about 4 p.m. to midnight. Defendant was there for a short time around 8 p.m. T. was staying at her aunt's house. When Eddington left, Rochelle was asleep in her room.

Defendant drove the white Cadillac and a maroon Monte Carlo. Defendant and Rochelle typically parked their cars behind their apartment in an alley. In the early morning hours of July 11, 2005, surveillance cameras at a store on the alley where Rochelle's apartment was located captured pictures of a white Cadillac and a maroon Monte Carlo traveling in the alley. The Cadillac was pictured driving south toward the apartments at 3:42 a.m. The Monte Carlo was then pictured driving north in the alley one minute later. The Monte Carlo was again captured on film driving south in the alley at 4:14 a.m.[1] From 3 a.m. to 5 a.m. there was no other traffic, foot or vehicle, captured on the camera videotaping the alley.

At 4:47 a.m., defendant telephoned 911 requesting an ambulance. The call lasted several minutes. After making his request, defendant could be heard in the background yelling at someone to get up. During part of the call, his voice became fainter, as if he was at a greater distance from the telephone.

Police officer Nathan Anderberg arrived at Rochelle's apartment at 4:51 a.m. The front door was open. He walked into the apartment. Defendant walked out from the hallway. Defendant said to Anderberg that "she shot herself." Defendant walked outside and Anderberg lost sight of him. Anderberg went into the bedroom and found Rochelle lying on the floor on her back. Rochelle had a gunshot wound in the center of her chest and died at the scene.

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[1] The clock on the video monitor was 10 minutes fast; the times listed above are the corrected times taking into account the 10-minute time difference.

Police officer Eric South arrived at the apartment and was told to stand by defendant. Defendant was sitting in the back of a patrol car. He was visibly upset and asked if his girlfriend was okay. Defendant told South that he was in his car in the alley when he heard a loud pop. He was concerned, so he came inside to check on his girlfriend. He found that she had been shot. He thought he heard someone fleeing out the back window. He called 911. Defendant told South that people were out to get him, but he did not believe they would take it that far.

Defendant was transported to the police station. He was placed in a waiting room. He asked to use the bathroom, but his request was refused. He turned on the television and fell asleep. Detective Joseph Aldana arrived about 7 a.m. and asked defendant if he would go downstairs to be fingerprinted. Defendant asked if he could use the bathroom. He was told he could use the bathroom after they were done. Defendant cooperated until he was told they were going to do a gun residue test. He was taken back to the interview room.

After being instructed to sit down in the interview room, defendant sat down, unzipped his pants and stuck his hands into his pants. He was told to remove his hands from his pants. He refused and Officer South pulled his hands from his pants. Defendant had urinated on his right hand. A gunshot residue test was then performed, but no residue was found.

Officers processed the apartment and interviewed neighbors. There was nothing disturbed in the house except that the window in T.'s room was partially opened and the vertical blinds were disturbed. The bathroom door appeared to have been kicked in and the bedroom door was off its hinges.

Defendant's keys, wallet, telephone charger, money, cigarettes, cigarette lighter, baseball hat, and jewelry were on top of the dresser in the bedroom where Rochelle was shot.

Officers found a green plate inside a dresser drawer. The drawer contained items belonging to Rochelle. There were baggies of rock cocaine on top of the plate. No pipes for smoking cocaine base were found in the apartment. Defendant's wallet contained $220, in $10 and $20 bills. It was Officer Freddie Cavillo's opinion that the cocaine base was possessed for sale. He testified that it is not uncommon for individuals who sell drugs to have a firearm available to protect themselves.

Officers searched the apartment and surrounding areas for four hours looking for a firearm, but could find none. The white Cadillac driven by defendant and parked in the alley behind the apartment was searched. It contained a gun holster inside a cellular phone box. There was no gun inside the holster.

Rachel Earl Anderson was Rochelle's neighbor. He arrived home at 3 a.m. He took some pain killers and fell asleep. He woke up to the sound of tires screeching in the alley followed by the slamming of Rochelle's security door. He fell asleep and did not wake up again until police officers knocked on his door. When he was initially interviewed, Anderson said he did not hear anything.

Danielle Barthelme was a nearby neighbor of Rochelle for two weeks before Rochelle died. She knew defendant as a customer from a store where she worked. She had seen defendant at the store at about 2 a.m. that morning. She got off work about 3 a.m. At approximately 5 a.m., she heard a gunshot. Within one to two minutes defendant was pounding on the wall yelling that he needed help. Barthelme eventually went outside and defendant asked her to see if Rochelle was okay. Barthelme did not check on Rochelle and testified that defendant remained within her sight until after officers arrived.

When Barthelme was interviewed by police the morning of the offense, she told police she heard the gunshot 10 to 15 minutes before police arrived and defendant ran up

and banged on her door two or three minutes after the gunshot. Barthelme also told officers that she did not go outside her apartment.

An autopsy was performed on Rochelle. She died from a single gunshot wound to her chest. The wound was not a contact wound or a close wound. She had two abrasions to the left side of her face. She was six to eight weeks pregnant. She tested positive for marijuana but had no other drugs or alcohol in her system.

A bullet projectile was obtained during the autopsy. Criminalist Greg Laskowski testified that the gun that was used to shoot Rochelle was probably fired from several feet away. Her killing was inconsistent with suicide. The bullet that was removed during the autopsy was a .38. A variety of short-barreled .38 guns would fit in the holster removed from defendant's car.

In addition to evidence regarding the crime, the People were allowed to produce evidence of other acts of domestic violence perpetrated by defendant. Walter Wallace, a licensed private investigator, contacted Rochelle on June 23, 2005, to serve her with a subpoena to testify in a burglary trial. He knocked on the door and Rochelle answered. They talked and then defendant came up to the door and asked Wallace why he was there and why he was talking to Rochelle. Wallace told defendant why he was there and defendant responded that the "fucking bitch ain't going to court." Defendant then grabbed Rochelle by the hair and pulled her inside. Wallace told defendant to stop and asked Rochelle if he should call police. Rochelle said no, that defendant would calm down after Wallace was gone.

N. S.testified that she has known defendant for five years and has dated him. He moved in with her for a few months. He was very controlling and monitored everything she did. He threatened to kill her if she left him. He threatened to blow up her grandmother's house if she left him. On one occasion, defendant was angry because his friend had come over and N. had let him use the telephone when defendant was not

home. Defendant came home, stripped N., shoved his finger up her vagina, poured cold water on her, and threatened to pour hot oil on her. In addition, he held a knife to her throat, threw things at her, hit her in the face, and pushed her. She was able to escape because her cousin came over. On another occasion, N. was at her cousin's house and defendant pounded on the door and tried to drag N. outside. She fought and he picked her up and took her outside. Police arrived but she would not say anything to the police.

L. P. had a romantic relationship with defendant and he is the father of her child. She had previously called police and told them that defendant had hit her. She testified at trial that defendant did not hit her, and she lied to police when she told them that he had hit her. She also testified that during an argument with defendant she jumped from the second floor balcony only because she did not want to talk to him anymore, not because she was afraid of him.

K. W. is the mother of three of defendant's children. Her last baby, fathered by defendant, was conceived in June or July of 2005. She knew defendant had another girlfriend at the time. She testified that defendant never hit her or threatened her and she had never seen him with a gun. Her report to police that defendant had threatened her with a gun was not true and she made the report out of anger.

Michael Musacco testified as an expert on the effects of intimate partner battering.[2] He testified that it is common for women who have been battered to not report incidents because the report enrages the perpetrator. In addition, many battered partners report incidents and then recant their reports later.

[2] Intimate partner battering is now the preferred term used in what was formerly called battered women's syndrome.

DISCUSSION

I. Denial of *Marsden* Motions

Defendant made three *Marsden* motions before trial. (*People v.* Marsden (1970) 2 Cal.3d 118.) After conducting lengthy hearings on each occasion, the trial court denied the motions. Defendant claims the court erred in denying his motions because the record demonstrates a breakdown in the attorney-client relationship that constitutes an irreconcilable conflict. In particular, defendant argues that his counsel withheld information from him, had to be prodded into making motions, and admitted to harboring personal animosity towards him. Based on these actions, defendant did not trust his counsel and even filed a formal complaint with the State Bar. Defendant contends that even though his counsel claimed he could represent defendant, the facts establish the existence of an irreconcilable conflict and the trial court erred when it refused to replace defendant's counsel. In addition, defendant contends the record establishes that he was not receiving the effective assistance of counsel and on that basis his counsel should have been discharged.

At the first *Marsden* hearing, on November 28, 2005, defendant complained that his attorney was not communicating with him, had not sent any subpoenas, had not given him any paperwork such as police reports, and had not filed a *Pitchess* (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) motion and a discovery motion. In addition, defendant claimed that he did not think his attorney believed in his innocence. Defendant expressed his dissatisfaction with his attorney's decision to not fight the domestic violence evidence sought to be presented against him. The court listened to all of defendant's complaints and questioned his counsel. Defendant's attorney said he had discussed the case with defendant, he had not yet given defendant all of the paperwork, his investigator had talked to witnesses suggested by defendant, and he found no reason to file a *Pitchess* motion. Based on discussions during the *Marsden* hearing, the attorney

said he would now file a *Pitchess* motion. The attorney said he could continue to represent the defendant. The trial court denied the motion.

At the next hearing, on January 11, 2006, defendant said that he had been arrested without probable cause, he was illegally questioned, and there was not sufficient evidence presented at the preliminary hearing. Defendant argued that his attorney was nonchalant at the preliminary hearing, asked very few questions, did not contest the firearm enhancements, and at one point told him to be quiet.

The attorney said he did not file a motion to suppress because defendant's statements were voluntary. After further questioning of defendant by the court, defendant's attorney said he would file a suppression motion. Counsel said that there was definitely some personal animosity and some communication problems, but he did not think it would affect his representation of defendant, although it was "possible." After conferring with his supervisor, defendant's attorney said it would be no problem for him to represent defendant.

Defendant continued, saying his attorney had lied, acted like he was hiding things, failed to interview witnesses, and had not provided him with all of the reports. Defendant's attorney responded to each of these allegations. The attorney said his investigator had been successful at interviewing some witnesses and was attempting to contact others. He had not provided defendant with district attorney reports because they were consistent with the police reports that defendant had in his possession. The court told defendant's counsel to provide defendant with copies of all transcripts and reports. The court took a recess so counsel could provide all of the reports and transcripts to defendant. At the continued hearing, after defendant had been provided all of the reports and transcripts, the court asked if there was anything defendant wanted to add to his motion. Defendant said he had nothing to add because he was still going over the materials. The court denied the motion without prejudice.

The final *Marsden* motion was heard on April 4, 2006, shortly before trial was to commence. Defendant again contended that his counsel had not contacted all of the witnesses, his counsel did not believe in his innocence, his counsel was not trying to keep out prior domestic violence incidents, and he did not trust his counsel. The court conducted a lengthy hearing and questioned counsel's investigator regarding each witness defendant wished to have called. The investigator detailed all contacts and attempts to contact the witnesses on defendant's witness list. Defense counsel stated that some of the witnesses would not be called because they would not be helpful. Defense counsel explained that defendant did not agree with his approach to the case. Defense counsel intended to try to exclude prior incidents of domestic violence but did not think he would be successful. Defense counsel also stated that he was attacking the evidence of whether defendant urinated on his hands (purportedly to get rid of gunshot residue) from an angle different from what defendant wanted, but was doing so for tactical reasons. Although defense counsel said that the two have become agitated with each other, counsel did not feel that it would affect his representation of defendant. The court denied the motion.

Although defendant cites multiple federal circuit court cases to support his position, we find that California cases are more than sufficient to determine the issue and we further note that we are not bound by federal circuit court opinions. (*People ex. rel. Renne v. Servantes* (2001) 86 Cal.App.4th 1081, 1090.)

"A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Jones* (2003) 29 Cal.4th 1229, 1244-1245.) "After hearing from the defendant, a trial court is within its discretion in denying the motion unless the defendant establishes substantial impairment of his right to counsel. [Citation.] On

appeal we review the denial for an abuse of discretion. [Citation.]" (*People v. Vera* (2004) 122 Cal.App.4th 970, 979.)

Defense counsel is not required to investigate all potential witnesses, and the trial court is not required to accept a defendant's claim of inadequate investigation. (*People v. Vera*, *supra*, 122 Cal.App.4th at pp. 979-980.) The trial court engaged in detailed questioning regarding counsel's investigation and found either that counsel had investigated or had a tactical reason not to investigate further. These conclusions are supported by the record.

When defendant presented new evidence at the *Marsden* hearing that indicated that motions should possibly be filed, defense counsel responded and filed those motions (*Pitchess* and suppression motions).

Defendant did not renew his complaint, after it was first rejected, that his counsel was not meeting with him enough. In any event, "the frequency of meetings is not a reliable indicator of incompetence." (*People v. Vera*, *supra*, 122 Cal.App.4th at p. 980.)

Although defendant and counsel had tactical disagreements and did not always see eye to eye, "'the way in which one relates with his attorney[] does not sufficiently establish incompetence.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1192.)

Over the course of the *Marsden* hearings, counsel responded to defendant's complaints and, except when counsel's determinations regarding tactical decisions collided with defendant's opposing view of tactics, their conflicts were resolved. Counsel at all times indicated that he was able and prepared to defend defendant. "A defendant may not effectively veto an appointment of counsel by claiming a lack of trust in, or inability to get along with, the appointed attorney." (*People v. Smith* (2003) 30 Cal.4th 581, 606.) Nor may a defendant "force the substitution of counsel by his own conduct that manufactures a conflict." (*People v. Smith* (1993) 6 Cal.4th 684, 696.)

"In sum, the record is clear that the trial court provided defendant with repeated opportunities to voice his concerns, and upon considering those concerns reasonably found them to be insufficient to warrant relieving trial counsel. We therefore find no basis for concluding that the trial court … abused its discretion in declining to substitute counsel." (*People v. Hart* (1999) 20 Cal.4th 546, 604.)

II. Admission of 911 Calls

Prior to trial, the People sought to admit tape recordings of five telephone calls to 911. The People argued that the tapes were not hearsay, their admission would not violate *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), and they were spontaneous utterances as defined in Evidence Code section 1240.

Defendant filed papers in opposition to the People's motion and asked that the court exclude the use of any transcript of tape-recorded evidence because the transcripts were hearsay.

A hearing was held on the admission of the 911 tapes and transcripts. Defendant objected to a 911 tape of caller Lillian Martinez, Rochelle's neighbor, on hearsay grounds. The court ruled that the Martinez tape would be admitted as evidence. In addition, defendant objected to the admission of transcripts of all of the calls, claiming they were not accurate. The court asked the parties to try to come up with a transcript that was agreeable and if they could not agree the court would determine the correctness of any transcripts to be given to the jury. Defendant clarified that his objection to transcripts was only to the transcript of the call by defendant to the 911 operator on July 11, 2005.

Numerous 911 tapes were admitted and played as evidence at trial, including three calls made by Rochelle prior to her murder and the Martinez tape. Defendant now claims that the admission of these four 911 tapes violates the confrontation and due process clauses of the United States Constitution. In particular defendant argues that each of the

911 calls constituted testimonial hearsay and the statements were all made after the emergency situation had passed. Next, defendant argues that the improper use of inadmissible hearsay at trial violates the constitutional guarantees of confrontation and due process.

The first tape was a call placed by Rochelle on May 15, 2005, when she reported that defendant had just broken her window out. She described defendant and the car he was leaving in. At the end of the call, she said she did not have any money to fix the window.

The second tape was a call placed 12 minutes after the first call on May 15, 2005. Rochelle said she would like to cancel the previous call. Rochelle was asked by the dispatcher if the matter had been resolved, and Rochelle responded that defendant was going to get the window fixed.

The next tape was a call placed on June 15, 2005 by Martinez. She requested that police respond to the scene where her neighbor (Rochelle) had been beaten up by her boyfriend; Rochelle had escaped the beating by climbing through Martinez's window. The 911 dispatcher asked Martinez if Rochelle needed an ambulance. Martinez said she thought Rochelle needed an ambulance because she was throwing up; but when Martinez asked Rochelle if she needed an ambulance, she said no. The dispatcher asked who the assailant was and where he was located. The dispatcher requested that Martinez ask Rochelle if defendant had any weapons. Rochelle could be heard crying in the background but she said defendant did not have any weapons. The dispatcher asked if defendant had hit Rochelle. Martinez replied that he had.

The fourth 911 call admitted at trial was a call made by Rochelle on June 22, 2005. Rochelle asked that an officer be sent out because she was having "man" problems and wanted defendant out of her house. She said she was tired of going through this and was too young to be going through this. She gave defendant's name and a description of

him. She told the dispatcher that defendant was in her apartment and she was calling from the neighbor's house. Rochelle said defendant got angry because she did not wash his clothes.

In *Crawford*, the United States Supreme Court held that the confrontation clause of the Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford*, *supra*, 541 U.S. at pp. 53-54.)

Two cases discussing the application of *Crawford* are determinative on the question of whether the 911 tapes now in question were properly admitted at trial. First, the three calls made by Rochelle to the 911 operator are admissible under the doctrine of forfeiture by wrongdoing. Under the equitable doctrine of forfeiture by wrongdoing, a defendant is foreclosed from objecting, on confrontation grounds, to the admission of out-of-court statements of a witness when the defendant has caused that witness to be unavailable. (*People v. Giles* (2007) 40 Cal.4th 833.) An intent to silence the witness is not necessary for the doctrine to apply. "[W]rongfully causing one's own inability to cross-examine is what lies at the core of the forfeiture rule." (*Id.* at p. 848.)

In order to apply the forfeiture-by-wrongdoing doctrine, certain things must be shown. "First, the witness should be genuinely unavailable to testify and the unavailability for cross-examination should be caused by the defendant's intentional criminal act. Second, a trial court cannot make a forfeiture finding based solely on the unavailable witness's unconfronted testimony; there must be independent corroborative evidence that supports the forfeiture finding." (*People v. Giles*, *supra*, 40 Cal.4th at p. 854.)

Here Rochelle is obviously unavailable to testify at trial because she is dead. The evidence, as outlined above in the statement of facts and considered without Rochelle's

statements on the 911 tapes, is clearly sufficient to support a finding that defendant committed the homicide that caused Rochelle's unavailability.

Although this doctrine was not raised below, it is still applicable to this case. "If a judgment rests on admissible evidence it will not be reversed because the trial court admitted that evidence upon a different theory, a mistaken theory, or one not raised below." (*People v. Brown* (2004) 33 Cal.4th 892, 901.)

Based on these factors defendant's confrontation clause challenge to Rochelle's 911 calls has been forfeited.

The 911 tape of the call made by Martinez was also admissible. First, statements made by Rochelle and heard in the background as Martinez spoke to the 911 operator are admissible under the forfeiture-by-wrongdoing doctrine. Second, the tape of the call made by Martinez is admissible because it is not testimonial.

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. ___, ____ [126 S.Ct. 2266, 2273-2274].)

More recently, the California Supreme Court observed:

> "We derive several basic principles from *Davis*. First, as noted above, the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the

> primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*People v. Cage* (April 9, 2007, S127344) ___Cal.4th ___ [2007 WL 1053284], fns. omitted.)

Defendant argues that Martinez's call to 911 was not an emergency because the assault had ended and Rochelle did not desire or require medical assistance. In *Davis* the 911 operator received a call that was terminated before anyone spoke. The operator reversed the call and spoke to the victim. She reported that the assailant was "jumpin' on me again." The 911 operator asked if the assailant had any weapons. The caller reported that he was using his fist. The operator asked for the assailant's name. The caller reported that the assailant was now running. The operator continued to ask questions and the victim described the context of the assault and gave more information about her assailant's identity. The United States Supreme Court held that the victim's call was not testimonial. It was a call for help against a bona fide physical threat. The nature of what was elicited was necessary to enable law enforcement to resolve the present emergency, rather than to simply learn what had happened in the past. The facts elicited to identify the defendant were to enable law enforcement officers to know the nature of the person they would be encountering. Furthermore, the answers given were not a tranquil response to questioning but were frantic answers in a situation that was not tranquil. The circumstances objectively indicated that the primary purpose of the questioning was to enable police assistance to meet an ongoing emergency. As such, the 911 call was admissible at trial.

We reject defendant's narrow interpretation of the call by Martinez. The call by Martinez was a call for help made as Rochelle had just climbed through Martinez's window, having been beaten up by defendant. It was a bona fide call for help. Rochelle could be heard throwing up in the background. Rochelle was crying at the time. The questions asked were in the nature of determining the type of emergency and the nature of the person law enforcement would be encountering. The call was not tranquil but was a frantic call for help.

The circumstances of the call made by Martinez objectively indicate that the primary purpose of the questioning was to enable police assistance to meet an ongoing emergency. As such, the call was not subject to the rule of *Crawford.*

Even if the admission of any or all of the calls was erroneous, any error was harmless. T. and Eddington testified to numerous occasions when defendant would beat Rochelle. T. testified that Rochelle would run to Martinez's house when defendant hit her and would exit the apartment via T.'s window. T. testified to a particular incident when her mother jumped out of T.'s window after defendant hit her and T. followed Rochelle out the window. The 911 calls were merely cumulative to very strong evidence of the tumultuous relationship between defendant and Rochelle.

III. CALCRIM No. 852

The jury was instructed pursuant to CALCRIM No. 852 (formerly CALJIC No. 2.50.02) on how it could consider evidence of defendant's uncharged acts of domestic violence that were introduced to demonstrate his disposition to commit such crimes.

Defendant claims that this instruction improperly allowed the jury to infer guilt from predisposition evidence. Defendant acknowledges that the California Supreme Court and this court have rejected similar challenges. Defendant raises the issue to obtain reconsideration in this court, reconsideration in the California Supreme Court, and to preserve the issue for federal review.

We are bound by *People v. Reliford* (2003) 29 Cal.4th 1007 (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455) that rejected this same argument in the context of sexual offenses and therefore reject defendant's claim.

IV. Preponderance Standard of Proof for Disposition Evidence

The jury was instructed that the People had presented evidence that defendant committed domestic violence that was not charged in this case. Domestic violence was defined, and then the instruction told the jury how it could consider this evidence. It stated, "You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

"If the People have not met this burden of proof, you must disregard this evidence entirely.

"If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit the crime charged in Count 1.

"If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with the other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder.

"The People must still prove each element of every charge beyond a reasonable doubt.

"Do not consider this evidence for any other purpose except for the limited purpose described in these instructions." (CALCRIM No. 852.)

Defendant states that evidence of uncharged offenses may be used as circumstantial evidence of guilt. Defendant argues that the above instruction tells the jury that this form of circumstantial evidence is subject to the lesser preponderance standard of proof. Defendant claims that the instruction allows a lower burden of proof to some circumstantial evidence.

Respondent contends that this question was answered in *People v. Reliford*, *supra*, 29 Cal.4th 1007. Defendant counters that *Reliford* did not address the argument now raised.

We agree with respondent that this issue was answered in *Reliford*. In *Reliford* the court discussed the correctness of CALJIC No. 2.50.01, the sexual assault counterpart to CALJIC No. 2.50.02, the instruction involving domestic violence, now contained in CALCRIM No. 852. In *Reliford* the court stated that "[n]othing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense [act of domestic violence]." (*People v. Reliford*, *supra*, 29 Cal.4th at p. 1016.)

The instruction did not improperly apply a preponderance standard to circumstantial evidence of predisposition, intent, and motive.

V. Intimate Partner Battering Evidence

As previously set forth, Dr. Musacco testified on the effects of intimate partner battering. He testified that it is common for the victim to recant previous allegations and also common for the victim to not report incidents.

Defendant asserts that Dr. Musacco's testimony was improper profile evidence and the instructions improperly permitted jurors to use the evidence as criminal profile evidence.

While defendant is correct that profile evidence is generally inadmissible to prove guilt, the evidence presented here is not criminal profile evidence. "A profile is a

collection of conduct and characteristics commonly displayed by those who commit a certain crime. One court has described profile evidence as 'a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity.' [Citation.] Perhaps the most frequently cited example is the drug courier profile, which the United States Supreme Court has defined as 'a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics.' [Citation.]" (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084.)

"Profile evidence is unfairly relied upon to affirmatively prove a defendant's guilt based on his match with the profile. The jury is improperly invited to conclude that, because the defendant manifested some characteristics, he committed a crime." (*People v. Robbie*, *supra*, 92 Cal.App.4th at pp. 1086-1087.)

The expert testimony here was not criminal profile evidence; it was testimony that was used to dispel certain common misconceptions regarding the behavior of victims of intimate partner battering. Musacco testified about intimate partner battering in general and did not express an opinion as to what happened in this case. Expert testimony to dispel common misconceptions about battered partners and to explain why they might not immediately report their abuse or might recant their previous reports is admissible and is not improper profile evidence.[3] (*People v. Morgan* (1997) 58 Cal.App.4th 1210, 1213-1217; see also *People v. McAlpin* (1991) 53 Cal.3d 1289.)

The court did not err in admitting this testimony. The premise underlying defendant's argument, that the evidence is improper profile evidence, is wrong and thus his issue fails.

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[3] Expert testimony regarding intimate partner battering and its effects is admissible under Evidence Code section 1107.

VI. Imposition of Prior Prison Terms

It was found true that defendant suffered two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). At sentencing the court added two years on count one and two years on count two based on the two prior prison term enhancements.

Defendant contends, and respondent concedes, that the prior prison term enhancements may be imposed just once in each case. (*People v. Tassell* (1984) 36 Cal.3d 77, 90.)

The trial court erred in imposing the prior prison term enhancements twice.

VII. Facilitative Nexus Between Arming Enhancement and Drug Offense

In count two defendant was found guilty of possession of cocaine base for sale. In addition, the jury found that he was armed during the commission of this offense pursuant to Penal Code section 12022, subdivision (c).

A plate with separate baggies of cocaine base was found in a drawer in the dresser in the room shared by defendant and Rochelle. No weapon or ammunition was found in the room, although Rochelle was in the room and died from a single gunshot wound that occurred in that room.

Eddington testified that defendant sold drugs every day. Buyers would knock on the door, he would answer the door and then he would tell Rochelle to retrieve the drugs. She would bring the drugs to defendant and he would sell them. He would also take drugs with him and stay out in his car to sell them. Eddinginton had seen defendant in the apartment chopping up his drugs on a plate with a razor blade and then putting the drugs into little bags.

Eddington testified that she saw defendant with a gun on two occasions. On one occasion she walked by Rochelle's bedroom. Rochelle was on the bed and defendant had

the gun pointed at Rochelle. When Eddington walked by, defendant said he was just playing. Eddington did not hear them fighting at the time.

The second time Eddington saw defendant with a gun was when he went to his car and took the gun out of his trunk. He brought the gun into the house and put it in his pants.

Eddington saw the gun in the house on two other occasions when Rochelle asked her and asked Rochelle's cousin to remove the bullets from the gun. Defendant was not home when this occurred.

T. testified that she saw defendant with a gun one time at the apartment where her mother was killed. Defendant was pointing the gun at Rochelle. T. testified that on a different occasion Rochelle asked Eddington to hide the gun in the closet in T.'s room.

A gun bag was found in a box under the passenger seat of the white Cadillac driven by defendant. No gun was in the bag.

Officer Cavillo testified that it is not uncommon for people who sell drugs to have a firearm to protect themselves.

Defendant contends that the People failed to prove the arming enhancement for the drug conviction because there was no facilitative nexus between the drug possession and the arming. Defendant points out that a firearm was not found in the bedroom or anywhere near the drugs, there was no evidence that defendant regularly kept a firearm near the drugs, and the fact that Rochelle was shot in her bedroom does not mean that a firearm was kept in the bedroom for the purpose of facilitating the possession of drugs.

People v. Bland (1995) 10 Cal.4th 991 held that a defendant can be found guilty of an arming enhancement when he possesses both drugs and a gun together, but is not present when the gun and drugs are seized. The Supreme Court set forth a framework to determine when an arming enhancement may be found true. "Possessory drug offenses are continuing crimes that extend throughout a defendant's assertion of dominion and

control over the drugs, even when the drugs are not in the defendant's immediate physical presence. Therefore, when the prosecution has proved a charge of felony drug possession and the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer: (1) that the defendant knew of the firearm's presence; (2) that its presence together with the drugs was not accidental or coincidental; and (3) that, at some point during the period of illegal drug possession, the defendant had the firearm close at hand and thus available for immediate use to aid in the drug offense. These reasonable inferences, if not refuted by defense evidence, are sufficient to warrant a determination that the defendant was 'armed with a firearm in the commission' of a felony within the meaning of section 12022." (*Id.* at p. 995.)

There must be a facilitative nexus between the drugs and the gun. "'[T]he firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement *cannot be the result of accident or coincidence.*' [Citation.]" (*People v. Bland, supra,* 10 Cal.4th at p. 1002.)

Eddington testified that defendant sold drugs every day and kept those drugs in the room he shared with Rochelle. Eddington and T. testified that they had seen defendant in possession of a gun. Having found that defendant murdered Rochelle and that he used a gun to do so, it is clear that defendant had a gun with him in the room where the drugs were located. The circumstantial evidence established that defendant was home more than mere moments when the shooting occurred. His car was seen on the videotape entering the alley towards the apartment at 4:14 a.m. The 911 call did not occur until 4:47 a.m. In addition, defendant's wallet and other personal possessions were on the dresser, circumstantially indicating that he had been home long enough to empty his pockets before he shot Rochelle. The money in defendant's wallet was in denominations consistent with drug sales, supporting an inference that he had recently sold drugs or was

engaged in the ongoing process of selling the drugs. Thus it could be found that he was in the bedroom armed with a gun in proximity to his drugs for a period of time before the event that triggered the shooting of Rochelle and that he had the gun with him in the bedroom when he arrived home for immediate use to aid in the drug offense. It is not necessary that the arming of defendant be exclusively dedicated to narcotics trade and, because it does not appear that the arming of defendant was exclusively dedicated to the murder of Rochelle, the presence of the gun does not appear to be a result of accident or coincidence.

The evidence demonstrated a facilitative nexus between the drug possession and the arming enhancement.

VIII. Sentencing Issues

At sentencing the trial court imposed the upper term for the gun use enhancement linked to the murder, the arming allegation for the drug conviction, and the drug conviction. In addition, the court ordered that the drug conviction run consecutive to the sentence for the murder.

The trial court's statement of reasons was as follows: "The Court finds that there are no circumstances in mitigation.

"In aggravation, the defendant has engaged in violent conduct, which indicates a serious danger to society, as demonstrated by his numerous prior convictions for Penal Code Section 273.5 violations.

"The defendant's prior convictions as an adult and sustained petitions in juvenile delinquency proceedings are numerous.

"The defendant was on parole when the crime was committed. And the defendant's prior performance on juvenile probation, misdemeanor probation, felony probation, and parole was unsatisfactory, in that he violated terms and continued to reoffend.

"…….

"The upper term is warranted in the light of the fact there are no circumstances in mitigation, only those in aggravation.

"Consecutive sentencing as to Count 2 is justified because the crimes and their objectives were predominantly independent of each other."

In *Cunningham v. California* (2007) 549 U.S. ___[127 S.Ct. 856] the United States Supreme Court held that Cunningham's right to trial by jury was denied under California's determinate sentencing law (DSL) because the judge, not the jury, found the facts that resulted in an upper term sentence. Petitioner Cunningham was convicted of continuous sexual abuse of a child. Under California's DSL, Cunningham could be sentenced to the lower term of six years, the mid term of 12 years, or the upper term of 16 years. In order to receive the upper term the judge had to find one or more facts in aggravation. The trial judge found six aggravating factors, including victim vulnerability and that Cunningham was a serious danger to the community based on his violent conduct. Cunningham's lack of a prior record was found as the sole factor in mitigation. The trial court found that the aggravating factors outweighed the one mitigating factor and sentenced Cunningham to the upper term. The appellate court upheld his sentence. The California Supreme Court denied Cunningham's petition for review, having recently decided in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) "that the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence … under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id.* at p. 1244.)

The United States Supreme Court granted review and disagreed with the California Supreme Court's decision in *Black*. "[T]he Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury

or admitted by the defendant." (*Cunningham v. California*, *supra*, 549 U.S. at p. ___ [127 S.Ct. at p. 860].)

Defendant claims the denial of a jury trial on all of the aggravating sentencing factors was a violation of his right to a jury trial and that these sentences must be reduced to the middle term. In addition, he argues that *Cunningham* applies to the imposition of consecutive sentences, and thus the trial court erred in imposing a consecutive sentence on facts not found by a jury beyond a reasonable doubt.

We begin by finding that *Cunningham* does not apply to the imposition of consecutive sentences. In doing so we agree with the analysis in *People v. Hernandez* (2007) 147 Cal.App.4th 1266. *Cunningham* did not address consecutive sentences and did not expressly overrule this portion of *People v. Black, supra,* 35 Cal.4th at page 1262 which held that consecutive sentencing decisions are not affected by the United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington* (2004) 542 U.S. 296.

In addition, unlike the statutory presumption in favor of a middle term, there is no statutory presumption in favor of concurrent rather than consecutive sentences. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) The trial court has an affirmative duty to determine if concurrent or consecutive sentences will be imposed for multiple offenses. (Pen. Code, § 669.) The provision in Penal Code section 669 that imposes concurrent rather than consecutive sentences if the trial court fails to perform its affirmative duty of choosing is a policy of "speedy dispatch and certainty." (*In re Calhoun* (1976) 17 Cal.3d 75, 82.)

Although the trial court is required to state reasons for its decision to impose consecutive sentences, this requirement does not create a presumption or an entitlement to a particular result. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.) "[E]very person who commits multiple crimes knows he or she is risking consecutive sentencing. While

such a person has the right to the exercise of the court's discretion, the person does not have a legal right to concurrent sentencing." (*People v. Hernandez, supra,* 147 Cal.App.4th at p. 1271.) The *Cunningham* line of cases does not apply to consecutive sentences.

Next we turn to the question of whether the aggravated terms were properly imposed. The requirement in *Cunningham* that aggravating factors that are used to increase a sentence beyond the statutory maximum must be found by a jury beyond a reasonable doubt does not apply to the fact of a prior conviction. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 488; *Blakely v. Washington, supra*, 542 U.S. at p. 301; *Cunningham v. California, supra* ,549 U.S. ___ [127 S.Ct. at p. 868.])

Relying on Justice Thomas's concurring opinion in *Apprendi,* calling into question *Almendarez-Torres,* defendant argues that all aggravating factors, including prior convictions, should be tried to a jury and found beyond a reasonable doubt. The *Apprendi* majority did not overrule *Almendarez-Torres.* We decline defendant's invitation to follow the analysis contained in a concurring opinion.

We find that two of the factors relied upon by the trial court in imposing aggravated terms fall within the prior conviction exception to the *Apprendi* rule. The trial court found that "defendant's prior convictions as an adult and sustained petitions in juvenile delinquency proceedings are numerous." This finding was supported by the record. Defendant had two juvenile adjudications in 1995 when he was 17 years old; one for petty theft and one for driving without a license. Defendant's prior convictions included four separate convictions for the willful infliction of corporal injury (Pen. Code, § 273.5) occurring on three separate occasions in 1996 and 1997. Defendant was also convicted of numerous (nine) Vehicle Code violations, including driving under the

influence, driving with a suspended or revoked license, driving while in possession of marijuana, and fleeing the scene of a vehicle accident involving injuries.

The second valid aggravating factor that falls within the prior conviction exception to *Apprendi* is that the defendant was on parole at the time he committed the current offense. The fact that defendant was on parole at the time he committed the current offense can be determined by a review of the court record relating to the prior offense.

Even if we were to take a narrow view of *Apprendi* and find that prior juvenile adjudications cannot be utilized (because juvenile adjudications do not involve a jury trial), that a finding of numerous prior convictions is subjective, and that being on parole encompasses more than just the fact of a prior conviction, we do not find reversible error in failing to submit these factors to a jury.

The failure to submit a sentencing factor to a jury is not structural error requiring reversal per se, but is subject to a harmless beyond a reasonable doubt error analysis under *Chapman* v. *California* (1967) 386 U.S. 18. (*Washington v. Recuenco* (2006) 548 U.S. ___ [126 S.Ct. 2546].) The failure to submit a sentencing fact to a jury is analogous to the failure to instruct on an element of an offense or to otherwise remove an element of an offense from the jury's consideration. "[A] court … asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element [sentencing fact]. If the answer to that question is 'no,' holding the error harmless does not 'reflec[t] a denigration of the constitutional rights involved.' [Citation.]" (*Neder v. United States* (1999) 527 U.S. 1, 19.)

The record does not contain evidence that absent the juvenile adjudications a finding of numerous prior convictions would not have been found. Also, there is nothing in the record, nor is there anything suggested by defendant, that would lead to a contrary finding with respect to the factor that defendant was on parole at the time the crime was committed. In addition, we find that there is nothing in the record that could rationally

lead to a contrary finding on the fact that defendant's prior performance on probation or parole was unsatisfactory. Defendant violated probation and/or parole at least 14 separate times over the course of many years. These are objectively verifiable facts.

We find that the aggravating factor that "defendant has engaged in violent conduct, which indicates a serious danger to society, as demonstrated by his numerous prior convictions for Penal Code Section 273.5 [willful infliction of corporal injury] violations" could not properly be used by the trial court. First, this factor overlaps with the factor that defendant has numerous prior convictions as an adult and, second, it requires subjective findings that are not self-evident from the record before the court.

Thus, three of the four factors used by the trial court in imposing the aggravated terms are valid considerations in determining if defendant should receive the upper term. Any error in utilizing one invalid factor was harmless under either a *Watson* (*People* v. *Watson* (1956) 46 Cal.2d 818, 836) or a *Chapman* (*Chapman* v. *California*¸ *supra*, 386 U.S. 18) standard. The trial court would not have chosen a lesser sentence had it known that one of its reasons was improper. (See *People v. Price* (1991) 1 Cal.4th 324, 492.)

DISPOSITION

The trial court is ordered to strike the two prior prison term enhancements imposed in count 2 (drug possession) and should forward a corrected abstract of judgment to the appropriate authorities. In all other respects, the judgment is affirmed.

_____
VARTABEDIAN, Acting P. J.

WE CONCUR:

_____
HARRIS, J.

_____
LEVY, J.