

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DARIOUS ANTOINE MAYS,

Defendant and Appellant.

C057099

(Super. Ct. No. 05F01223)

APPEAL from a judgment of the Superior Court of Sacramento County, Lloyd G. Connelly, Judge. Affirmed as modified.

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

Edmund G. Brown Jr., Attorney General, Dane R. Gillette and Michael P. Farrell, Assistant Attorneys General, Catherine Chatman and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I, II, V, VI, VII and VIII of the DISCUSSION.

In this case, defendant Darious Antoine Mays was being questioned about his involvement in a homicide. Defendant asked to take a polygraph test. The police administered a fake polygraph test during which defendant denied any involvement in the crime. The police showed defendant a fake graph from the fake polygraph machine and told defendant he had not been telling the truth. Defendant then admitted he had been present at the scene of the crime. We hold that defendant's admissions were not involuntary so as to preclude their admission in evidence.

Defendant Mays appeals following his conviction of first-degree murder with a lying-in-wait special circumstance and personal firearm discharge enhancement. (Pen. Code, §§ 187, 190.2, subd. (a)(15), 12022.53, subds. (b)-(d); undesignated statutory references are to the Penal Code.) Defendant contends the trial court erred by (1) denying his *Batson-Wheeler*¹ motion when the prosecutor used a peremptory challenge on a Black prospective juror, (2) admitting into evidence defendant's statements taken by police in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694], (3) admitting into evidence defendant's statements allegedly coerced by police faking a polygraph test, (4) allowing a witness to testify by conditional examination videotaped outside of the presence of

¹ *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

the jury and the public and then played in open court, and (5) denying defendant's motion for new trial. Defendant also challenges a parole revocation fine (§ 1202.45) and a clerical error in the abstract of judgment showing the case as a three strikes case.

In the unpublished portions of the opinion, we explain why we reject defendant's *Batson-Wheeler* and *Miranda* claims and why we shall order modification of the abstract of judgment (1) to strike the parole revocation fine (§ 1202.45) and (2) to delete the reference to the three strikes law. In the published portion of the opinion, we reject defendant's contentions (3) and (4). Thus, although we will modify the abstract of judgment, we will otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A complaint deemed to be an information alleged that on January 24, 2005, defendant committed first-degree murder of Sheppard Scott (§ 187), with a special circumstance of lying-in-wait (§ 190.2, subd. (a)(15)), and an enhancement for personal discharge of a firearm causing death (§ 12022.53, subds. (b)-(d)). Defendant's age (17) precluded the death penalty. (§ 190.5.)

The trial court denied defendant's motion to suppress his statements to police on the ground of a *Miranda* violation, as we discuss *post*. The jury thus heard evidence that defendant admitted to the police that he was at the crime scene at the time of the crime, though he denied being involved.

Evidence adduced at trial included the following:

Yalandria Narcisse testified she was the victim's girlfriend and was with him when he was shot.² Around 4:30 a.m. on January 24, 2005, they were in a car waiting to order food at the Jack In The Box drive-through on Norwood Avenue. Two persons standing outside the adjacent AM/PM asked if the victim had any weed, and he said no. The victim told Narcisse one of the two persons insulted him, calling him a "bitch-ass nigger or something." She said she did not hear that. The victim got out of the car and engaged in an animated conversation with the two persons, during which the victim stated a gang affiliation. As the victim walked back to the car, Narcisse saw one of the persons, dressed in orange (an Orioles jacket), pass something to the other person, who was dressed in a gray hooded sweatshirt. The victim collected the food and drove to the exit. Somebody yelled, "hey, homey," and the victim stopped the car. The gray-clad male came up to the car and said he wanted to apologize. The victim said to forget about it. The person in gray held out his hand to shake. The victim, still seated in the car, held out his hand. The person in gray pulled out a

² Narcisse, who was not the victim's only girlfriend, had misdemeanor convictions for prostitution and loitering with intent to commit prostitution. In a hearing on admissibility of her prior convictions for impeachment, she acknowledged the victim was her pimp.

gun, fired several shots at the victim, and ran off (following the person in the orange jacket).³

Narcisse (and other witnesses) said the shooter fired the gun with his right hand. Defendant (and others) testified defendant is left-handed. Narcisse testified, "The guy in the gray sweater took out his hand, took out his hand to shake, to shake [victim] Sheppard's and then Sheppard stuck out his hand and when the guy pulled out his hand he had a gun and he started shooting." This would only make sense if the shooter had the gun in the hand other than the one he extended to shake hands. Narcisse thought the shooter had gold teeth (defendant does not have and denies ever having worn gold teeth), and from her seated position she thought the shooter stood about 5 feet 1 inch tall (defendant is 5 feet 7 inches tall).

Narcisse and the victim had been drinking alcohol that night. The police did not determine the extent of Narcisse's drinking.

An autopsy revealed the victim, who had a blood alcohol level of .11 percent, was shot six times.

³ The special circumstance of lying in wait applies if the defendant concealed his purpose from the person killed, waited for an opportunity to act, and made a surprise attack on the person killed from a position of advantage, with intent to kill by taking the person by surprise. (*People v. Morales* (1989) 48 Cal.3d 527, 554-556; Judicial Council of Cal. Crim. Jury Instns. (2006-2007) (CALCRIM) No. 728.) Physical concealment is not necessary. (*Morales, supra*, 48 Cal.3d 527, 554.)

Surveillance cameras at AM/PM did not capture images of the shooting but did capture images of the persons wearing gray and orange and shows one of them pointing at the victim's vehicle as it passes through the AM/PM parking lot on its way to Jack In The Box. The images of the suspects are not clear.

Witness Sharla Flores was across the street, heard the shots, looked and saw the male in the gray sweatshirt, whom she had encountered earlier that night, firing a gun at a car. When shown a photo lineup, she indicated defendant's photo could possibly be the shooter. She rated her level of certainty as five out of 10. When shown the AM/PM photo, she said it looked like the shooter (four on a scale of 10) but she could not tell because she could not make out the face in the photo. She believed the shooter used his right hand but was not positive.

Lisa Faupula, who was pumping gas at the AM/PM, saw a young Black male rapidly approach a car, pull out a gun, fire multiple shots with his right hand (defendant testified he is left-handed), and run off. She estimated his height at 5 feet 7 or 8 inches. She "guessed" his weight at 145 or 150 pounds. She said he wore a white "doo-rag" on his head, tied in back with a piece of cloth hanging down, and white trousers. (The pants of the gray-clad male in the AM/PM photo appear to be white or gray.) She admitted her eyesight was not good and she was in shock. She was unsure whether the gray-clad person in the AM/PM photo was the shooter and could not identify anyone.

Edward Kim was pumping gas. He noticed a male wearing an orange jacket walk past him. Kim returned his attention to his task, then heard gunshots, turned, and saw two persons running away -- the male in the orange jacket, and another male wearing dark clothing.

The prosecution sought (over defense objection) to conduct a conditional examination of Tamara Schallenberg, a neighbor who considers defendant like a son, on the ground she had phobias precluding testimony in open court. A psychiatry resident who treated her testified Schallenberg has a panic disorder with agoraphobia, characterized by sudden onset of shortness of breath, chest pain, dizziness, and extreme fear. Schallenberg has reported passing out when a panic attack brought on an asthma attack. The doctor did not believe Schallenberg was faking. The doctor said Schallenberg may be able to testify if she takes a sedative, but the risk was oversedation. The court allowed a conditional examination of Schallenberg in a courtroom, in the presence of the judge, court staff, counsel for both sides, and defendant; the jury and the public were excluded. The conditional examination was videotaped. The court found the witness's infirmity made her unavailable to testify in open court. The videotaped conditional examination was played for the jury in open court.

In her conditional examination, Schallenberg denied making statements to the police, including identification of defendant and his brother as the persons depicted in the AM/PM photos.

She testified that she told the officer the person in the photo might be defendant, but she was not sure. She testified she never saw defendant wear a light gray sweatshirt. She denied ever seeing defendant deal drugs and denied that he ever said he was a gang member. Schallenberg testified she has known defendant since 1999, and he is like a son to her. She admitted that one day in January 2005, she received a phone call from defendant's mother around 5:00 a.m. As a result of the call, Schallenberg went out looking for defendant, but she did not find him. The next day, she saw defendant and asked him what was going on. Defendant said he was with his brother at the AM/PM, and his brother shot somebody. In her conditional examination, Schallenberg said defendant laughed when he told her, but it was a "scared" laugh. Schallenberg also admitted that she and defendant had a telephone conversation while he was in jail, in which he said the investigator said she should testify in court that she made false statements to the police because she was mad at defendant.

Detective Charles Husted testified about his audiotaped interview of Schallenberg. He showed Schallenberg the AM/PM photo, and she stated without hesitation that the person in the gray sweatshirt was defendant. Husted asked how she knew, and she said she knew because she knows him. She also recognized his sweatshirt, which he wore all the time, which had "South

Pole" written on its back.⁴ She also said the person in the orange Orioles hat and jacket was defendant's older brother "Rico" (Deladier Montue). Husted said Schallenberg said defendant laughed like "he thought it was funny" when he told her about his being at the AM/PM when his brother shot someone. Husted said Schallenberg said defendant said he was a gang member, and she had seen him apparently selling drugs.

When shown a book of mug shots, Narcisse focused on a photograph of someone other than defendant and said he looked like the shooter. After the interview with Schallenberg, the police showed Narcisse a photo line-up. Narcisse focused on photo number three (defendant) and said everything about it looked like the shooter, and she believed it was the shooter.

Flores, the witness who stood across the street, also identified photo number three as "possibly" the shooter, expressing her certainty level as five on a scale of one to 10. At trial, Flores said her certainty level was four that the gray-clad person in the AM/PM image was the shooter.

Defendant's girlfriend, Judy Perez, testified she never spoke with defendant about the shooting. She denied telling the police that defendant said his brother was involved. After the prosecutor showed Perez portions of her videotaped conversation

⁴ No lettering is apparent on the sweatshirt in the AM/PM photos. A gray hooded sweatshirt bearing the lettering "South Pole" was seized when defendant was arrested. However, the People acknowledge defendant's South Pole sweatshirt is not the sweatshirt depicted in the AM/PM photos.

with police, she admitted she told them that defendant said his brother was involved (though she did not remember telling them that).

Detective Husted testified he questioned defendant, who initially denied any involvement, denied being present at the shooting, and denied being the gray-clad person in the AM/PM photo. Defendant said the police had no murder weapon. When asked how he knew that, defendant said it was common sense, and they would have locked him up if they had a weapon, and his brother said the police went to his home looking for the weapon. Defendant denied telling Schallenberg about a shooting at the AM/PM.

Defendant repeatedly asked the detective for a lie detector test. Because no polygraph examiner was available, the detective's supervisor authorized a mock polygraph test, i.e., the police placed on his body patches connected to wires, pretended to administer a lie detector test, fabricated written test results, showed defendant the fake results, and told him the results showed he failed the test. The detective suggested that perhaps defendant failed because he was present during the crime and felt some guilt about that. Defendant then admitted he was present at the shooting, and he was the person wearing the gray sweatshirt in the AM/PM photo, but he said he knew nothing about the shooting in advance and did not participate. He said the shooter was the person in orange, whom defendant had just met that day. The day after the shooting, the shooter

found defendant and threatened him. Defendant admitted gang membership. Defendant, who cut his hair after the shooting, first said his brother made him cut it, but he did not remember why. Defendant immediately thereafter said he guessed the reason was because his cousin said the victim's brother mistakenly thought defendant was involved and was hunting for him. The videotaped police interview of defendant was played for the jury.

Defendant testified at trial. He is left-handed. He denied ever wearing jewelry or gold teeth (as some witnesses described the shooter). He denied shooting Sheppard Scott and denied even being present when Scott was shot. He claimed his inconsistent statements to the police were false admissions given only because he felt defeated after the fake lie detector test, which he did not know was fake, and he just said what the police wanted to hear. Defendant admitted prior trips to Juvenile Court for fleeing police officers while driving; none of his prior misconduct involved assault with a gun. He admitted selling drugs and being a member of a street gang.

The defense tried to call as a witness Marcos Adams (also known as Marcus Adams), but he invoked his Fifth Amendment right and refused to answer questions.⁵

⁵ A week before trial started, Adams told a defense investigator that he was the person in the orange jacket, the person in the gray sweatshirt was a "hustler" named Jon Jon and not defendant (whom Adams knew through his friendship with defendant's brother), and Adams left the scene before the shooting. As we

The jury found defendant guilty of first degree murder and found true the lying-in-wait special circumstance and the firearm enhancement.

The trial court denied defendant's motion for new trial. The court sentenced defendant to life in prison without the possibility of parole for the special circumstance murder, plus a consecutive term of 25 years to life for the gun enhancement.

DISCUSSION

I. Jury Selection

Defendant contends the trial court erred in denying his *Batson/Wheeler* motion when the prosecutor used a peremptory challenge to excuse a Black prospective juror. We see no grounds for reversal.

A. Background

Prospective juror, D. S., worked for the Department of Social Services (DSS), in the unit dealing with the Interstate Compact for Placement of Children. Her brother-in-law was a correctional officer. She said she had no problem with peace officer credibility and could be a fair juror. Her hobbies were snowboarding, bowling, and watching basketball games. When questioned by defense counsel, she said she had no problem listening to others and no problem debating others. When questioned by the prosecutor, she said she did not watch television programs about the criminal justice system but was

discuss *post*, Adams was the subject of defendant's motion for new trial.

thinking about starting. She said her judgment would not be affected by expectations from outside the courtroom, and she would have no problem returning a guilty verdict if the evidence warranted it.

D. S.'s questionnaire answers showed she was a 39-year-old female residing in midtown Sacramento. She had worked at DSS for a year and two months and had previously worked for CalTrans for eight years as a toll collector and office technician. She was single and a high school graduate. Her father was a real estate broker; her mother was retired. D. S. did not participate in any political movement, organization, or advocacy group. She did not communicate with any inmates. She had never served on a jury. She would neither believe nor disbelieve a witness until she heard their reasoning. She had no unpleasant past experiences with law enforcement. Her sister was a burglary victim, but that would not affect D. S. as a juror.

When the prosecutor gave advance notice of an intent to exercise his third peremptory challenge to excuse D. S., defendant made a *Batson/Wheeler* motion. The court stated for the record that the venire had included three Black persons, one of whom had been excused for cause (both parties agreed he should be excused due to his stated memory difficulties). That left D. S. and one other person (who was ultimately seated as a juror). The trial court found a prima facie case for the *Batson/Wheeler* motion, without receiving any argument and without explanation.

The prosecutor said he found several "red flags" in D. S.'s questionnaire: She had a social worker type of job, was single, and lived in midtown. Also, she wore a "peace symbol button" (a fact initially unnoticed by the court and defense counsel but subsequently verified). The prosecutor concluded D. S. was "left of center" politically, and he did not want her to sit on the jury.

The court denied the *Batson/Wheeler* motion, stating the prosecutor had displayed honesty in the past, and his explanation "particularly in light of the button is a reasonable explanation. She has a job in a neighborhood [sic] and most notably the button which would lead to an inference that she is on the progressive side of the equation that would not unreasonably cause a prosecutor some concern particularly in a case involving a juvenile tried as an adult."

After excusing D. S., the prosecutor later used a peremptory challenge to excuse a non-Black person who worked as a youth counselor for the Youth Authority.

B. Analysis

The People argue the trial court erred in finding a prima facie case of discrimination, but they acknowledge that issue is moot.

If a prima facie case is made (the first step), the burden shifts to the prosecution to provide a race-neutral explanation for its challenge (the second step). (*Batson, supra*, 476 U.S. at p. 97.) The trial court must determine if the proffered

excuses are credible and supported by the record (the third step). (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241 [162 L.Ed.2d 196]; *People v. Lenix* (2008) 44 Cal.4th 602, 612, 621.) On review, we accord great deference to the trial court's capacity to differentiate between good faith reasons and bogus excuses. (*Lenix, supra*, 44 Cal.4th at pp. 612-614.)

Defendant argues the trial court did not engage in the critical evaluation (third step) but instead gave unquestioning acceptance to the prosecutor's proffered excuse. We disagree.

Defendant argues it is unreasonable to say that persons who live in midtown are to the left of center politically, because a housing choice may be based on price and proximity to work. Defendant claims the residence factor betrays the prosecutor's prejudice that a Black woman living in a metropolitan area would be anti-prosecution. We disagree. While it may be unreasonable to say that persons who live in midtown are liberals, it is reasonable to say that this person who lives in midtown and wears a peace button and works with minors in a social services job, might be sympathetic to a 17-year-old tried as an adult. Thus, for example, in *People v. Watson* (2008) 43 Cal.4th 652, our Supreme Court held, "On this record, the prosecutor's concern about [a prospective juror's] ability to remain objective in light of her background as a social worker was reasonable." (*Id.* at p. 677.) The same is true here.

Defendant argues maybe D. S. wore the peace button as a fashion statement rather than a political statement. He

complains the prosecutor did not question her about her views on politics or war(s), which proves pretext. We disagree. Most people who wear a peace symbol appreciate that it has political significance.

Defendant argues D. S.'s age and single status do not support an inference that she would be an unfavorable juror for the prosecution. However, we need not address these points because the trial court did not cite those reasons. The fact that the prosecutor gave those reasons does not demonstrate pretext. The court stated its past experience with the prosecutor was that he was an honest person. The trial court may rely on its own experiences on the bench. (*Wheeler, supra*, 22 Cal.3d at p. 281.)

Defendant argues D. S. would likely have been a good juror for the prosecution because she used to work for CalTrans, her brother-in-law is a correctional officer, and her sister was a burglary victim. However, defendant's assessment is not binding on the prosecutor.

Defendant wants us to do a comparative analysis with other prospective jurors, though he did not request such an analysis in the trial court. Such analysis can be done for the first time on appeal, but it has inherent limitations, because it is done on a cold record, with no opportunity for the prosecutor to explain. (*Miller-El v. Dretke, supra*, 545 U.S. at p. 241; *Lenix, supra*, 44 Cal.4th at pp. 621-623.) We consider defendant's arguments on this issue.

Defendant says the prosecutor did not excuse juror number one, who expressed opposition to the death penalty, a position which defendant claims is generally considered to indicate a left-of-center political orientation. We question defendant's assumption, but in any event opposition to the death penalty (which was not even at issue in this case) did not render that person similarly situated to D. S., who makes her living providing social services to children. Defendant says the prosecutor did not excuse jurors numbers three, six, seven, and eight, all of whom were unmarried men living in areas that were urban, "fairly urban" (Rancho Cordova), or "fairly densely populated" (Fair Oaks). Again, however, these points do not make these persons similarly situated to D. S. None of them worked as a social worker or wore a peace button to court.

We do not suggest defendant had to show a "cookie cutter" comparison in order to prevail. Defendant quotes from *Miller-El v. Dretke*, *supra*, 545 U.S. at page 247, footnote 6, that the defendant need not show "an exactly identical [W]hite juror," matching "all characteristics" of the challenged juror, in order to prevail in a *Batson* motion. However, in *Miller-El*, the prosecutor excused a Black person (Fields) who expressed unwavering support for the death penalty but also said the possibility of rehabilitation might be relevant. Fields believed anyone could be rehabilitated, but this belief would not stand in the way of his making a decision to impose the death penalty. (*Id.* at pp. 242-243.) When asked to justify the

peremptory challenge, the prosecutor said it was the death penalty matter and mischaracterized the prospective juror's testimony. When defense counsel pointed out the mischaracterization, the prosecutor added as another reason for the strike the fact that Fields's brother had a prior conviction. (*Id.* at p. 246.) In finding *Batson* error, the Supreme Court said, "when we look for nonblack jurors similarly situated to Fields, we find strong similarities as well as some differences. [Fn. omitted.] But the differences seem far from significant" (*Id.* at p. 247.) The fact that the prosecutor's stated reason concerning the death penalty also applied to other panel members, most of them White, none of them struck, was evidence of pretext. (*Id.* at p. 248.) The defendant did not have to show the other panel members had brothers with criminal convictions in order to prevail. (*Id.* at p. 247, fn. 6.)

Defendant fails to show the prosecutor accepted jurors who were similarly situated to the challenged panel member.

We see no grounds for reversal in the trial court's denial of defendant's *Batson/Wheeler* motion.

II. Miranda

Defendant complains the detective violated his *Miranda* rights by failing to honor his request for counsel. We shall conclude there was no *Miranda* violation, but even if there were, it would be harmless beyond a reasonable doubt.

A. Background

Defendant raised this issue in a motion in limine seeking exclusion of statements he made to police.

The videotaped police interview of defendant shows that Detective Husted read the *Miranda* rights and asked defendant if he understood each right. Defendant's responses were affirmative or inaudible. Husted then began asking defendant questions about the case, which he answered. Although Husted did not ask defendant for an express waiver of his *Miranda* rights before beginning the questions, defendant does not assign this as reversible error and does not dispute that waiver can be implied. (*People v. Whitson* (1998) 17 Cal.4th 229, 247.)

Defendant said he understood he was in custody for murder of the victim, but he had nothing to do with it and was not even present. The detective said witnesses had identified him. Defendant denied being the person depicted in the photo from the AM/PM video and said he did not own a similarly-colored gray sweatshirt. The detective left the room, returned with another photo, which defendant admitted was him. The detective said the second photo was merely a photocopy of the first photo, darkened to make the sweatshirt look darker. The detective told defendant to stop lying. Defendant asked for a lie detector test, which he guaranteed he would pass "a hundred percent." The detective expressed doubt. The following ensued:

"[Defendant]: Look. Can I -- can I call my dad so I can have a lawyer come down 'cause I'm -- I'm telling you, I'm --

"DET. HUSTED: Call who?^[6]

"[Defendant]: My -- my step-dad 'cause I'm -- I'm going to tell you I'm going to pass that test a hundred percent.

"DET. HUSTED: Okay. Well, we don't need your step-dad right now.

"[Defendant]: I know. He got my lawyer.

"DET. HUSTED: Who's your lawyer?

"[Defendant]: *My -- my step-dad got a lawyer for me.*

"DET. HUSTED: *Okay. So what do you want to do with him?*

"[Defendant]: *I'm going to -- can -- can you call him and have my lawyer come down here?* [Italics added.]

"DET. HUSTED: (Unintelligible).

"[Defendant]: I'm telling you -- I'm telling you this is not me.

"DET. HUSTED: Well, it -- you've been identified.

"[Defendant]: Can you give me a lie detector test?

"DET. HUSTED: (Unintelligible).

"[Defendant]: I'll guarantee you I'll pass it.

"DET. HUSTED: (Unintelligible).

"[Defendant]: What you all -- and what you all going to say then?

"DET. HUSTED: Well, I don't --

"[Defendant]: What you all going to say when I pass it?

⁶ Our own viewing of the videotape satisfies us that it was reasonable that the detective did not hear this first reference to a lawyer.

"DET. HUSTED: I don't think you'll pass.

"[Defendant]: I guarantee you I'll pass it.

"DET. HUSTED: Well, I don't -- I don't think --

"[Defendant]: Can I get one?

"DET. HUSTED: Yeah. I will.

"[Defendant]: Can I get one?

"DET. HUSTED: Do you want -- do you want to make a statement about what happened?

"[Defendant]: I'm telling you this is not me, sir.

"DET. HUSTED: Okay.

"[Defendant]: I'm not -- I'm not going to sit here and lie to you.

"DET. HUSTED: All right.

"[Defendant]: You can give me a lie detector test, and I'll guarantee you I'll pass it.

"DET. HUSTED: And you weren't out there?

"[Defendant]: I was not up there. I was at Ramone [sic] house. I'm going to tell you the whole night that -- what -- what -- what, ah, the night --

"DET. HUSTED: *Well, it's up to you. I mean, do you want the attorney down before you make the statement or do you want to make a statement and tell me what's going on?*

"[Defendant]: *I want a lie detector test.*

"DET. HUSTED: Okay. I -- it's going to take a minute for me to set that up.

"[Defendant]: Sir.

"DET. HUSTED: Do you want to tell me the story or do you want me to (unintelligible)?

"[Defendant]: I'm telling you -- I'm telling you -- ask Ramon[] where I was the day that the sho [sic] -- that the stuff that happened [sic]. He['s] going to tell you I was at his house sleeping on the couch. I was at his house for two weeks.

"DET. HUSTED: I -- I tri -- I already asked him that. He knows --

"[Defendant]: I was at his house for two weeks straight.

"DET. HUSTED: Okay.

"[Defendant]: And if I'm not there, I'm at -- I'm at my girl auntie house sleep [sic]. I'm telling you, sir, this is not me at all.

"DET. HUSTED: All right. Do you mind answering some questions?

"[Defendant]: Yes, sir. [His body language on the video indicated he meant yes, he would answer questions.]"

Defendant answered various questions, continuing to deny any involvement or presence at the crime scene. The detective left the room, returned, said he may have found someone to administer the polygraph test, *"But I just wanted to clarify and make sure that I'm not violating your Miranda [r]ights or anything like that. Um, do you want to do the polygraph and talk to the person? Answer the questions? Is that what you want to do?"*

"[Defendant]: Yes, sir.

"DET. HUSTED: *Okay. Well, you -- you had mentioned something about your step-dad having an attorney for you and so I said I don't want to violate your Miranda [r]ights and do all that. But it seems like you're being cooperative, so I just want get [sic] a clear idea of where you're coming from.*

"[Defendant]: *Huh?*

"DET. HUSTED: *I was -- (cough) -- excuse me. I was getting some peanuts. I just want to get a clear idea of where you're coming from. Do you want to talk to the polygraph guy? Go through his questions?*

"[Defendant]: *Yeah.*

"DET. HUSTED: *So you're willing to do that?*

"[Defendant]: *Yes, sir."*

The detective left the room, returned, asked more questions, brought in defendant's girlfriend and left the room while they talked. The detective returned. Defendant asked to make a phone call. The detective said he would try to set up a phone, then changed the subject to getting the girlfriend home and left the room with the girl.

An officer entered the room and asked whom defendant wanted to call. He said his mother and his girlfriend. The officer asked what defendant was there for; he said, "They trying to say I murdered somebody." The officer left the room.

Detective Husted returned and asked more questions. Defendant continued to deny any involvement or presence. Defendant said there was no evidence against him and no murder

weapon. The detective asked how defendant knew they did not have the murder weapon. Defendant said his brother said the police went to the brother's house looking for the murder weapon, and it was common sense that if they had found it, defendant would be locked up already.

The detective left the room and returned. Defendant repeated his request to make a phone call. The detective said defendant's mother may be unavailable. Defendant asked, "can I call my grandma at least? I need -- I need to call somebody." The detective said he was trying to get the person to administer the polygraph and could only do one thing at a time.

After the fake polygraph test, the fake examiner showed defendant some fake written results and told him the test showed he was lying about not being involved. When defendant expressed disbelief, the detective suggested maybe defendant saw the crime and felt guilty about lying about his presence.

Defendant then admitted he was present, and he is the person in the gray sweatshirt depicted in the AM/PM surveillance. Defendant said he witnessed the shooting, which was committed by the person wearing orange. Defendant just met him that night while seeking marijuana and did not know his name or his motive. Defendant said he initially withheld the information from the police because the shooter had threatened his life and his family's life. When the detective revealed that witnesses said the shooter was the person dressed in gray, not orange, defendant insisted he did not shoot the victim,

repeatedly asked to talk to his mother, and broke down crying. He said he wanted to say goodbye to his mother and kill himself. He continued to deny the shooting. The interrogation ended when defendant complained of chest pains and said he was born with a hole in his heart.

The trial court denied defendant's motion to exclude the evidence on the ground of *Miranda* violation. The court said defendant unequivocally asked for a lawyer when he asked to call his stepfather and have the lawyer come down to the station. The court said the detective's response was unintelligible, and "he is interrupted immediately before he can get beyond the first word with the defendant's protestation of innocence and his return to a constant theme which is that he wants a lie detector test."

The court continued: "At this point, the defense asked me to find that there's a[n] unequivocal unambiguous invocation of right to counsel in the context of this interview and to make the binary decision that the officer at that point had to terminate the interview and leave the room. This is an argument that is not frivolous.

"It's close in my mind and I memorialize that only because I think I should out of fairness to the defendant, because if this is an appellate issue, I think I is [sic] helpful for the Appellate Court to know that I wrestled with this a bit.

"But after listening to it multiple times, I was unsure and I think a reasonable officer would be unsure as to whether or

not he was asserting his right to have a lawyer come down then for the interview, or whether or not he wanted on his own to continue with the interview and specifically get the lie detector test which he had been demanding.

"It is difficult, because immediately after this statement . . . when Detective Husted, I believe, is starting to seek confirmation or -- and I think a fairer sense of the word clarification that he wants the lawyer then for the interview. [Defendant] immediately starts protesting his innocence and moves directly back to the lie detector demand which is, of course, inconsistent with the invocation by behavior [sic].

"The officer then, I think, in a manner which although not required I think is proper. He within literally five or six lines . . . says, do you want to make a statement about what happened?

"And [defendant] then continues on avoiding the question and just demanding, I guess, would be the proper word a lie detector test and then within five or six lines Detective Husted returns to it.

"Well, it's up to you, he says I mean, do you want the attorney down before you make the statement or do you want to make a statement and tell me what's going on?

"Well, Detective Husted's statement there I think is a proper follow-up inquiry not required by the law, but I believe better procedure and it reflects the same ambiguity and lack of clear invocation of the right given the context in which the

statement is made . . . that the Court had when I listened to it the first time.

"In response to the inquiry . . . , [defendant] returns to his demand for a lie detector test. And Detective Husted again asks him now for what I believe would be the fourth attempt to make sure he understands what [defendant] wants. . . .

"[¶] . . . [¶]

"And, again, [defendant] just keeps on with his story, protesting his innocence By conduct at least seeming to convey to the officer that he wants then to make a statement now

"[¶] . . . [¶]

"So I believe given the totality of the circumstances, the request although in isolation and read separately would probably constitute a proper assertion of the rights.

"Read in context of how it is delivered and the continual assertion of his desire to have a lie detector test and protest his innocence to the point where the officer is having a difficult time seeking the clarification to make sure he wants the attorney now there prior to questioning as opposed to proceeding and doing the lie detector test and having the attorney at some other point; ultimately, the officer after asking for specific questions and attempting actually one more gets an answer to go forward.

"I believe that's an effective waiver, and I so rule. I acknowledge . . . this is not one of those where you have the

kind of certainty that judges, trial judges like to have, but it's my best call and that's my ruling."

B. Analysis

1. Error

Although we ultimately independently review the record to determine whether a *Miranda* violation has occurred (*People v. Weaver* (2001) 26 Cal.4th 876, 918), we agree with the trial court's conclusion: there was no *Miranda* violation.

We apply federal standards in reviewing a defendant's claim that his statements were elicited in violation of *Miranda*.

(Cal. Const., art. I, § 28, subd. (d); *People v. Cunningham* (2001) 25 Cal.4th 926, 993.) Whether the accused has invoked his right to counsel is an objective inquiry. (*Davis v. United States* (1994) 512 U.S. 452, 459 [129 L.Ed.2d 362, 368].)

"Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney."

[Citation.] But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, [the comment does] not require the cessation of questioning. [Citations.]

"[¶] Rather, the suspect must unambiguously request counsel.'" "

(*People v. Simons* (2007) 155 Cal.App.4th 948, 957, quoting *Davis, supra*, 512 U.S. 452.) We must consider the totality of the circumstances, including evaluation of the defendant's age,

experience, education, background, and intelligence. (*People v. Neal* (2003) 31 Cal.4th 63, 84.)

On appeal, defendant argues that he made an unequivocal request for counsel in the following exchange between defendant and detective Husted:

"[Defendant]: My--my step-dad got a lawyer for me.

"DET. HUSTED: Okay. So what do you want to do with him?

"[Defendant]: I'm going to--can--can you call him and have my lawyer come down here?"

In *People v. Roquemore* (2005) 131 Cal.App.4th 11, Division Five of the Court of Appeal for the Second District summarized cases in which a defendant's request for counsel had been held equivocal. (*Id.* at pp. 24-25.) The court in *Roquemore* found the following request by defendant to be an equivocal request for counsel: "Can I call a lawyer or my mom to talk to you?" (*Id.* at p. 25.)

In our view, defendant's question in this case: "[C]an you call [my stepdad] and have my lawyer come down here?" is analytically indistinguishable from the equivocal request for counsel made in *Roquemore*.

However, even assuming that defendant's question could constitute a facially unequivocal request for counsel, the request must be evaluated in the context of the interrogation in which it occurred, as the trial court recognized. In this respect, we have viewed the videotape of the interrogation and have concluded that there is an enormous difference between the

impression of the cold written transcript and the actual interrogation on the videotape. Thus, less than a second occurs between defendant's question ["can you call him and have my lawyer come down here?"] and defendant's statement, "I'm telling you--I'm telling you this is not me." Perhaps another second occurs between that statement of defendant and his next question, "Can you give me a lie detector test?" In other words, this phase of the interrogation occurred in a matter of seconds. The videotape shows that the detective was trying to clarify whether defendant wanted to talk to his lawyer or whether he wanted the lie detector test that he kept demanding. In this respect, the detective asked defendant on two different occasions whether he wanted to talk to his lawyer and on both occasions defendant said that he did not.

Thus, after viewing the videotape, we agree with the trial court, that "in context of how it is delivered and the continual assertion of his desire to have a lie detector test and protest his innocence to the point where the officer is having a difficult time seeking the clarification to make sure he wants the attorney now there prior to questioning as opposed to proceeding and doing the lie detector test and having the attorney at some other point; ultimately, the officer after asking for specific questions and attempting actually one more gets an answer to go forward."

Defendant argues he was young, inexperienced, uneducated and not very intelligent. However, on the videotape, defendant

discloses that he had received *Miranda* warnings in the past and understood them. Moreover, having viewed the videotape, we conclude that defendant is very intelligent, calculating and manipulative. The detective's questioning was at all times conducted politely in an even-toned voice. There was no hint of harassment of defendant. We are confident that, despite his young age, defendant did not want to invoke his *Miranda* rights. Rather, defendant doubtless believed that he could outsmart the police by passing a lie detector test.

Considering all circumstances, we agree with the trial court that there was no *Miranda* violation.

We conclude defendant's *Miranda* rights were not violated.

2. Prejudice

Even assuming for the sake of argument that a *Miranda* violation occurred, it would not require reversal of the judgment.

The erroneous denial of defendant's motion to suppress the evidence is subject to harmless error analysis under the beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]. (*People v. Neal, supra*, 31 Cal.4th 63, 86.) The admission of evidence obtained in violation of *Miranda* does not require reversal of the judgment if the admission of the evidence was harmless beyond a reasonable doubt. (*Cunningham, supra*, 25 Cal.4th at p. 994.)

Defendant acknowledges that, since he testified at trial that he was not even present during the crime, his admission

that he was the person in the gray sweatshirt may have been admissible to impeach him, notwithstanding the *Miranda* violation. (*Harris v. New York* (1971) 401 U.S. 222, 225-226 [28 L.Ed.2d 1] [otherwise trustworthy statements obtained in violation of *Miranda* could properly be used to impeach defendant's credibility, since *Miranda's* shield could not be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances].) A statement taken in violation of the *Sixth Amendment* right to counsel would not be admissible (*People v. Riskin* (2006) 143 Cal.App.4th 234, 243), but defendant's statements to police antedated the initiation of adversary criminal proceedings that would trigger his *Sixth Amendment* rights.

Defendant argues the evidence should not have been admissible for impeachment purposes in this case, because the detective's "apparently intentional refusal to honor appellant's request for counsel may have rendered the ensuing statements by appellant involuntary and so inadmissible even for impeachment." However, "a statement deliberately obtained in violation of *Miranda* safeguards, but otherwise voluntary, is admissible for impeachment under *Harris, supra*, 401 U.S. 222, 224." (*People v. DePriest* (2007) 42 Cal.4th 1, 32-33.) Police misconduct is a factor to be considered in determining whether a defendant's statements are voluntary in light of all surrounding

circumstances. (*Neal, supra*, 31 Cal.4th at p. 68.) Here, we perceive absolutely no police misconduct.

Nor do factors such as defendant's youth lead to a conclusion that his statements were involuntary. During the first two hours of the videotape, defendant continues to deny everything. It is not until after the fake polygraph test that he makes the incriminating statements and, even then, he admits only presence at the crime scene. (We reject, *post*, defendant's argument that the polygraph deception rendered his admissions inadmissible.) Thus, we cannot say any earlier *Miranda* violation made his statements involuntary.

We conclude that defendant's admissions that he was the person in the gray sweatshirt present at the crime scene would have been properly admitted as evidence to impeach his testimony that he was not present. (*DePriest, supra*, 42 Cal.4th at pp. 32-36.) For this reason, any *Miranda* violation is harmless beyond a reasonable doubt.

In any event, even apart from impeachment purposes, we see no prejudice requiring reversal with respect to the prosecution's use of the evidence in its case in chief.

Thus, the evidence obtained from defendant's interrogation was defendant's admissions that he was at the crime scene, wearing the gray sweatshirt, and knew the police had not recovered the weapon.

In attempting to show prejudice, defendant picks apart the evidence from witnesses who were uncertain about their

identification, persons who rated their level of certainty as four or five on a scale of 10, and witness discrepancies in physical description (e.g., height, skin tone, gold teeth or jewelry, and witness testimony that the shooter fired the gun with his right hand, whereas defendant is left-handed). He suggests that, without his statements to the police, there was little basis for his conviction. What defendant glosses over, however, is Tamara Schallenberg's definitive identification of defendant when shown the AM/PM photo by the detective. (We reject *post* defendant's challenge to the use of her conditional examination at trial.) Schallenberg knows defendant well and had no uncertainty in her initial identification. That she later tried to recant the identification when she realized its effect on defendant, whom she considers like a son, does not diminish the impact of her original statement.

People v. Cunningham (2001) 25 Cal.4th 926, found a *Miranda* violation harmless beyond a reasonable doubt, in part because, "The jury may have considered defendant's statements as evidence that he was present at the [crime scene] on the night of the murder, but the jury was able to consider the same evidence in far greater detail through the testimony of several other witnesses." (*Id.* at p. 994.) Here, the other evidence included not only Schallenberg's initial positive identification of the surveillance photo, but also her initial statement to the police that defendant admitted to her that he was present at the crime scene.

Defendant argues prejudice is shown by the prosecutor's opining in closing argument that his statement to police was important evidence. (*People v. Cardenas* (1982) 31 Cal.3d 897, 909; *People v. Cruz* (1964) 61 Cal.2d 861, 868.) However, the question of prejudice is for this court, not the prosecutor, to decide. Moreover, while the prosecutor viewed defendant's statements to police as important, he specified they were important as *corroboration* for the other evidence, including (1) Schallenberg's positive identification of defendant as the gray-shirted person in the AM/PM surveillance photo, and (2) defendant's statements to Schallenberg about his presence at the crime scene.

We reject defendant's argument that prejudice is demonstrated by the fact the jurors deliberated more than 12 hours, indicating this was a close case.

At oral argument in this court, the defense suggested for the first time that the erroneous admission of statements obtained in violation of *Miranda* may have compelled defendant to testify at trial. At oral argument, defense counsel cited *People v. Esqueda* (1993) 17 Cal.App.4th 1450 (*Esqueda*), cited for other points in the appellate briefing. In his appellate briefs, defendant referred to the substance of his own trial testimony (denying presence at the crime scene) as providing evidence that the *Miranda* violation was prejudicial. We shall address *Esqueda* despite its belated assertion.

Esqueda said, after finding a *Miranda* violation prejudicial based on the evidentiary record, "Nor can we assume *Esqueda* would have testified, claiming he attempted to get the gun from Ana to prevent her from committing suicide, had his statements been suppressed. [Citation.] The prosecutor heavily relied upon *Esqueda's* trial testimony and his statements made at the interviews during closing argument to show he fabricated both the intruder story and the story about struggling with the gun." (*Esqueda, supra*, 17 Cal.App.4th at p. 1487, citing *People v. McClary* (1977) 20 Cal.3d 218, 231, which was overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.)

However, the *McClary* case cited in *Esqueda* merely stands for the inapposite proposition that a defendant's incriminating statements during trial testimony will not cure the prejudice from a *Miranda* violation. (See *People v. Boyer* (2006) 38 Cal.4th 412, 463 [explaining a concern arises if the prosecution seeks to circumvent an invalid confession by arguing the defendant provided similar information through live testimony he was forced to give because the confession was introduced against him].) Here, defendant did not make incriminating statements in his trial testimony, and we do not use his trial testimony to cure prejudice from a *Miranda* violation.

Thus, *McClary* said, "The People contend that the prejudicial impact of defendant's admission was lessened by her own trial testimony, which substantially paralleled the events described in the statement We may properly assume,

however, that defendant's testimony was impelled by the prosecutor's introduction of her admission during the People's case in chief. [Citations.] It seems likely that defendant would not have admitted killing [the victim] but for the erroneous introduction of the foregoing evidence." (*McClary, supra*, 20 Cal.3d at p. 231.) *McClary* in turn cited case law which explained that prejudice was not dispelled by the fact that defendants told their stories on the witness stand, because the record failed to dispel the possibility that the defendants' testimony might have been impelled by the erroneous introduction of their out-of-court statements. (*People v. Powell* (1967) 67 Cal.2d 32, 57, fn. 9.) *McClary* also cited *People v. Stockman* (1965) 63 Cal.2d 494, which similarly said the trial testimony did not render harmless the erroneous admission of the defendants' prior statements, particularly because defense counsel stated on the record that defendants were being coerced to testify by the erroneous evidentiary ruling. (*Id.* at p. 502.) *McClary* also cited *People v. Spencer* (1967) 66 Cal.2d 158, which said that if the improper use of the defendant's extrajudicial confession impelled his testimonial admission of guilt, the court could not sustain the conviction on the theory that the confession to police merely duplicated his subsequent confession to the jury. (*Id.* at pp. 163-164.) The two statements would merge and require reversal, even if the record contained overwhelming evidence of guilt apart from the defendant's statements. (*Id.* at p. 164.) However, *Spencer*

involved a confession rather than a mere admission of incriminating facts, and at that time, a confession triggered a higher standard of reversal per se. (*McClary, supra*, 20 Cal.3d at p. 230.) Here, defendant never confessed. He merely admitted to police being present at the scene in a gray sweatshirt. At trial, he denied even being present. In any event, a confession would no longer trigger a standard of reversal per se. (*People v. Cahill, supra*, 5 Cal.4th at pp. 509-510.)

Moreover, we have not used defendant's trial testimony to lessen the prejudicial impact of the *Miranda* violation. We have explained that other evidence rendered the violation nonprejudicial.

We question whether it makes sense to speculate that defendant might not have testified if his interrogation statements had not been admitted. One problem that we see downstream is this: if it is concluded that defendant would not have testified, what use could be made of defendant's trial testimony at a re-trial? If defendant, in his testimony at trial, given under oath, has made damaging admissions, could those admissions be used at a re-trial? If not, how could such a rule be squared with the teaching of *Harris v. New York, supra*, 401 U.S. at pages 225-226 [28 L.Ed.2d 1] that a defendant not be allowed to commit perjury?

In this case, we can leave the answers to these questions for another day. Here, the damaging evidence obtained from

defendant's interrogation--that he was present at the scene wearing a gray sweatshirt--was duplicated by an abundance of independent evidence that we have described above. Thus, we are confident that defendant would have testified even had his interrogation statements not been admitted in evidence, because he had to deny the strong independent evidence linking him and his gray sweatshirt to the crime.

We conclude there was no *Miranda* violation but, even assuming a *Miranda* violation occurred, it was harmless beyond a reasonable doubt.

III. Mock Polygraph

Defendant argues his incriminating statements to police were coerced by the police pretending to conduct a polygraph test and fabricating fake documentary graph results.

Assuming for the sake of argument that the issue is not forfeited by defendant's failure to object on this basis in the trial court, a point disputed by the parties, we see no grounds for reversal.

A confession is involuntary if it is the result of coercive police activity. (*People v. Williams* (1997) 16 Cal.4th 635, 659.) The question is whether defendant's will was overborne. (*People v. Boyette* (2002) 29 Cal.4th 381, 411.)

Police deception during a custodial interrogation may but does not necessarily invalidate incriminating statements. A psychological ploy is prohibited only when, in light of all the circumstances, it is so coercive that it tends to result in a

statement that is both involuntary and unreliable. (*Illinois v. Perkins* (1990) 496 U.S. 292, 297 [110 L.Ed.2d 243] [undercover law enforcement officer posing as fellow inmate was not required to give *Miranda* warnings to suspect]; *People v. Maury* (2003) 30 Cal.4th 342, 411.) We apply de novo review to the undisputed facts. (*People v. Farnam* (2002) 28 Cal.4th 107, 181.)

As summarized in *People v. Chutan* (1999) 72 Cal.App.4th 1276:

"Police trickery that occurs in the process of a criminal interrogation does not, by itself, render a confession involuntary and violate the state or federal due process clause. [Citation.] Why? Because subterfuge is not necessarily coercive in nature. [Citation.] And unless the police engage in conduct which coerces a suspect into confessing, no finding of involuntariness can be made. [Citations.]

"So long as a police officer's misrepresentations or omissions are not of a kind likely to produce a *false* confession, confessions prompted by deception are admissible in evidence. [Citations.] Police officers are thus at liberty to utilize deceptive stratagems to trick a guilty person into confessing. The cases from California and federal courts validating such tactics are legion. (See, e.g., *Frazier v. Cupp* (1969) 394 U.S. 731, 739 [22 L.Ed.2d 684, 693] [officer falsely told the suspect his accomplice had been captured and confessed]; *People v. Jones* [(1998)] 17 Cal.4th [279,] 299 [officer implied he could prove more than he actually could];

People v. Thompson [(1990)] 50 Cal.3d [134,] 167 [officers repeatedly lied, insisting they had evidence linking the suspect to a homicide]; *In re Walker* (1974) 10 Cal.3d 764, 777 [wounded suspect told he might die before he reached the hospital, so he should talk while he still had the chance]; *People v. Parrison* [(1982)] 137 Cal.App.3d [529,] 537 [police falsely told suspect a gun residue test produced a positive result]; *People v. Watkins* (1970) 6 Cal.App.3d 119, 124-125 [officer told suspect his fingerprints had been found on the getaway car, although no prints had been obtained]; and *Amaya-Ruiz v. Stewart* (9th Cir. 1997) 121 F.3d 486, 495 [suspect falsely told he had been identified by an eyewitness].)" (*Chutan, supra*, 72 Cal.App.4th at p. 1280 [defendant's confession to child molestation was not rendered involuntary by officer's failure to reveal he was conducting a criminal investigation and not just asking questions regarding placement of the children]; see generally, Annot., Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud (1965) 99 A.L.R.2d 772; Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?* (2001) 99 Mich. L.Rev. 1168.)

People v. Smith (2007) 40 Cal.4th 483, held it was not impermissibly coercive for a police officer to tell the defendant that a "Neutron Negligence Intelligence Test" (a sham) indicated he had recently fired a gun. (*Id.* at pp. 505-506.) Additionally, the sham did not elicit a full confession, but only incriminating statements.

People v. Farnam, supra, 28 Cal.4th 107, held the defendant's confession to robbery and assault of hotel occupants was voluntary, despite the police having falsely informed the defendant that his fingerprints were found on the victim's wallet. (*Id.* at pp. 130, 182.)

In California, it has been held that if a defendant takes a lie detector test willingly, "neither the fact it was given nor the fact that the defendant was told by the test giver it revealed in his opinion that defendant was not telling the truth, inherently demonstrates coercion. [Citation.]" (*People v. Brown* (1981) 119 Cal.App.3d 116, 127.)

Courts in other states have held defendants' confessions/admissions voluntary where the police told the defendant he or she failed a polygraph test, when no real test was performed, or a real test was given but did not show deception by the defendant, or the police misled the defendant as to the accuracy of the test or its admissibility in court. (E.g., *People v. Serrano* (2005) 14 A.D.3d 874, 788 N.Y.S.2d 272 [confession voluntary despite police (apparent) deception in informing the defendant that he failed a polygraph examination]; *People v. Sobchik* (1996) 228 A.D.2d 800, 644 N.Y.S.2d 370 [confession voluntary where defendant was hooked up to a polygraph, but it was not turned on]; *Contee v. United States* (D.C. 1995) 667 A.2d 103, 104 [affirmed conviction based on confession obtained after the police (perhaps) untruthfully told the 17-year-old defendant that he failed a computer voice stress

analyzer, when in fact the test did not so indicate, or did so unreliably]; *State v. Farley* (W.Va. 1994) 452 S.E.2d 50 [police misrepresentations to defendant concerning performance on polygraph test did not invalidate confession].)

Here, we disagree with defendant's view that the police engaged in shocking and outrageous misconduct. The request for a polygraph examination was initiated by defendant, not by the police. The deception was a mock polygraph. A polygraph is designed to elicit the truth, and the police already had information from other sources that defendant was the shooter (including Shallenberg's identification of defendant as the gray-clad person in the AM/PM photo, and eyewitness statements that the gray-clad person was the shooter). The use of the mock polygraph was not likely to produce a false confession. Although defendant testified he believed polygraphs are 100 percent accurate, that belief was not induced by the police. Moreover, we know the trickery was not particularly coercive because, even after the police showed defendant the fake test results, defendant continued to deny involvement in the crime. He merely admitted being present at the scene wearing a gray sweatshirt. It was other evidence, other than defendant's statements, which gave his admission its weight, i.e., the AM/PM surveillance photo of a gray-clad male, Schallenberg's identification of defendant as the gray-clad male in the photo, and the testimony of eyewitnesses that the gray-clad male was the shooter. (Although the prosecutor used defendant's

admissions in closing argument to the jury, he used them as corroboration for the other evidence.)

We thus agree with the People that defendant's ability to admit being present, while steadfastly denying participation, demonstrates that his will was not overborne by the police ruse.

Defendant claims coercion is established by the police showing him a fake graph (from the fake polygraph) as "supposedly constituting irrefutable scientific proof" that he lied. Having viewed the video and transcript of this exchange, we disagree with defendant's characterization. The police made no representations about scientific accuracy, and the officer posing as a polygraph examiner merely said the graph "showed deception."

Defendant cites case law from other states holding that police fabrication of *tangible* evidence to cause a defendant to confess is coercive per se (e.g., *State v. Cayward* (Fla. 1989) 552 So.2d 971), or is a factor pointing to coercion under a totality of circumstances test (e.g., *Lincoln v. State* (Md. 2005) 882 A.2d 944). First, in our case, defendant did not confess to any criminal involvement, but merely admitted he was at the scene. Second, no one sought to introduce the test graph as evidence of guilt. Third, we are not bound by cases from other states. (*J.C. Penney Casualty Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1027.) Though we may consider decisions of other states, defendant concedes there is no consensus among the other

states, but rather a split as to whether tangible documents are coercive per se or a factor to be considered.

We see no reason to apply a rule that would make the fake graph coercive per se. Defendant's cited authority, *Cayward, supra*, 552 So.2d 971, felt the need for a "bright line" test between verbal and documentary deception, because the Florida court felt a "spontaneous distaste" for the use of fake documents; documents are permanent and facially reliable; and there is a danger their falsity may be forgotten and they may be mistaken for the truth. (*Id.* at pp. 973-974.) We feel confident our courts are capable of deciding voluntariness without a bright line making all documents automatically coercive. While we might view some fake documents as coercive, e.g., a fake search warrant, we see no reason to treat the police misrepresentations differently in this case depending on whether they merely told defendant he failed a polygraph test or told him he failed while showing him a fake graph. Since the graph merely showed squiggly lines with handwritten notations such as "intend to lie" and is useless as evidence without testimony from a certified polygraph examiner, there is no risk of its presence in the record being mistaken for a true polygraph test somewhere down the road.

Considering the tangible graph paper as one of the totality of circumstances, we still conclude defendant's statements were voluntary and not coerced.

Defendant claims the evidence shows his admission about being present at the crime scene was a false admission, because he got some things wrong, i.e., he said the victim's passenger was a male, and he pointed out as the shooting site a location which did not match the location where the expended shells were found. We disagree.

This case is distinguishable from defendant's cited authorities finding confessions involuntary. Thus, *In re Shawn D.* (1993) 20 Cal.App.4th 200, said police deception (telling the minor that witnesses could identify him and that his girlfriend would get in trouble if he did not confess, and misrepresenting that he would be tried as an adult and sent to San Quentin), while "not commendable," might not be enough to demonstrate the defendant's will was overborne, but were enough when added to the police's repeated suggestions that the minor would be treated more leniently if he confessed. (*Id.* at pp. 213-214.) *Esqueda, supra*, 17 Cal.App.4th 1450, found a confession involuntary where the police, besides falsely claiming to have evidence against the defendant (dying declaration of victim, fingerprints, a witness, etc.) questioned the defendant for eight hours with little, if any, respite; ignored his repeated invocations of the right to remain silent; told him what they wanted him to say and that they would not stop until they got what they wanted; and threatened him that his silence would result in greater charges. (*Id.* at pp. 1485-1486.)

We conclude the mock polygraph test and fake test results do not warrant reversal of the judgment. We have no occasion to consider a situation where the police, not the defendant, initiate a demand that defendant take a polygraph.

IV. Conditional Examination of Schallenberg

Defendant argues conditional examinations are statutorily prohibited in cases for which the punishment may be death (§ 1335 et seq.⁷); Schallenberg's condition did not warrant a conditional examination or finding of unavailability to testify at trial (Evid. Code, § 240⁸); and the exclusion of the jurors and the public from the courtroom violated defendant's rights to due process and a public trial. Assuming for the sake of argument that defendant did not forfeit the first point by

⁷ Section 1335, subdivision (a), provides, "When a defendant has been charged with a public offense triable in any court, he or she in all cases, and the people in cases other than those for which the punishment may be death, may, if the defendant has been fully informed of his or her right to counsel as provided by law, have witnesses examined conditionally in his or her or their behalf, as prescribed in this chapter."

Section 1336, subdivision (a), says, "When a material witness for the defendant, or for the people, is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial, . . . the defendant or the people may apply for an order that the witness be examined conditionally."

⁸ Evidence Code section 240, subdivision (a)(3), describes as unavailable a person "unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity."

failing to raise it in the trial court, we see no basis for reversal on any ground.

A. Background

The People moved to conduct a conditional examination of Schallenberg. The trial court held an Evidence Code section 402 hearing, in which a second-year psychiatry resident, Dr. Julie Young, testified Schallenberg has panic disorder and agoraphobia, causing sudden onsets of shortness of breath, chest pain, dizziness, and extreme fear. Her panic attacks can cause asthma attacks and have caused her to pass out in the past. The doctor opined there should be as few people as possible in the room if Schallenberg were to testify. In opposition, defendant put on evidence that Schallenberg had two meetings with the prosecution's investigator at the prosecutor's office, in a windowless room, without suffering a panic attack. She also exhibited no signs of distress or shyness when she was questioned at her home. At one point she fetched what appeared to be an asthma inhaler but did not use it.

Over defense objection that Schallenberg's condition did not warrant a conditional examination, the trial court granted the motion and held a videotaped conditional examination of Schallenberg in a courtroom, in the presence of defendant, counsel, and the judge, and subject to cross-examination by defense counsel, but excluding the jurors and the public from the courtroom.

After the conditional examination, the court found Schallenberg unavailable to testify at trial. The court stated on the record the observations of the court and/or court staff, that Schallenberg was visibly trembling and shaking at various points during the protracted amount of time it took for her to adjust to the room and during the first few minutes of her testimony. (Schallenberg's demeanor while adjusting to the room was not videotaped.) She displayed breathing difficulty and used her inhaler twice, which seemed to help. After awhile, she seemed fine and was even "feisty" in her answers. The court said it had intended to do a "supplementary voir dire" with Schallenberg before beginning her testimony, in order to determine whether or not she could testify in front of the jury, but based on the observations of the witness and the doctor's opinion, the court concluded it was not necessary and may have jeopardized getting the conditional examination. The court said the witness's ability to give "feisty" answers did not change the ruling because the ruling was based on the court's concern that she would suffer an attack and go into rapid breathing and pass out. Her ability to handle the conditional examination was credited in part to the measures the court had taken, such as keeping to a minimum the number of people in the courtroom.

The videotaped testimony of Schallenberg was played for the jury in open court.

B. Analysis

We first dispose of defendant's argument, made for the first time on appeal, that section 1335 (fn. 7, *ante*) prohibits conditional examinations in death penalty cases. The People did not seek the death penalty, and could not have done so because section 190.5, subdivision (a), prohibits the death penalty for persons under age 18 at the time of the crime. Defendant nevertheless argues the allegation of lying-in-wait as a special circumstance made this a death penalty case. We shall consider this legal question despite defendant's failure to raise it in the trial court.

Defendant cites *People v. Jurado* (2006) 38 Cal.4th 72, which construed the statutory scheme as allowing a conditional examination in a death penalty case where the witness's life is in jeopardy. (*Id.* at p. 111.) That holding does not help here.

Defendant cites *People v. Anderson* (2002) 28 Cal.4th 767, which construed section 26, which provides that the defense of duress does not apply to a "crime punishable by death." (*Id.* at pp. 774-780.) *Anderson* held section 26 barred use of the duress defense in any murder case, regardless of whether or not the death penalty was at issue, because section 26 was enacted when all first degree murder was punishable by death, and was a continuation of an 1850 statute, when all murder was punishable by death. (*Ibid.*) Defendant argues that, by parity of reasoning, the restrictions on conditional examinations apply to all murder cases, because the crime of murder is punishable by

death. We disagree and see no parallel between *Anderson* and this case.

More apposite is *People v. Superior Court (Kim)* (1993) 20 Cal.App.4th 936, which held the trial court erred in setting bail for a minor in a first degree murder case with a special circumstance allegation. The law provides for bail except for persons charged with a "capital crime" or an "offense punishable by death," but section 190.5 prohibited imposition of the death penalty on the minor. (*Id.* at pp. 938-940.) The appellate court said the test for bail is the gravity of the offense itself, not the individual characteristics of the specific defendant. (*Ibid.*)

Here, defendant offers no analysis whatsoever, and we see no reason, as to why a conditional examination should be barred where the individual defendant is not subject to the death penalty. Even in death penalty cases, witnesses may be found unavailable to testify at trial under Evidence Code section 240, such that prior examinations under oath are admissible. (E.g., *People v. Williams* (2008) 43 Cal.4th 584, 610-611 [admission of preliminary hearing transcript]; *People v. Smith* (2003) 30 Cal.4th 581, 608-612 [same].) We see no reason to invent a different rule for conditional examinations under section 1335.

We conclude the conditional examination was not statutorily prohibited in this case.

Defendant alternatively argues a conditional examination was not necessary in the circumstances of this case, and the

trial court erred in refusing his request to elicit evidence that Schallenberg managed to overcome her disorder in other respects (such as attending interviews at the District Attorney's office). Defendant claims the prosecutor failed to comply with procedural requirements for conditional examinations (§ 1337 [affidavits required]), but defendant acknowledges he made no objection on this ground in the trial court. Since any such defect (assuming one existed) could have been cured upon timely defense objection, defendant has forfeited any procedural objection.

The trial court has discretion whether to grant a conditional examination. (*Jurado, supra*, 38 Cal.4th at p. 114.) However, the determination whether a witness is unavailable to testify at trial due to mental illness or infirmity that would cause substantial trauma, is a mixed question of law and fact, with factual findings subject to a deferential standard of substantial evidence, and findings of law subject to independent review. (*People v. Winslow* (2004) 123 Cal.App.4th 464, 467, 470-471.) Where the trial court's decision of a mixed question of fact and law implicates the constitutional right to confront a witness at trial, we apply de novo review. (*Id.* at p. 471.) To excuse the witness from live testimony, the infirmity must be sufficiently problematic that it makes live testimony at trial "relatively impossible," not merely inconvenient. (*Id.* at p. 471.) "Relatively impossible" includes "the relative

impossibility of eliciting testimony without risk of inflicting substantial trauma on the witness.” (*Id.* at pp. 471-472.)

Schallenberg’s conditional examination testimony did not, in and of itself, really hurt defendant. Rather, Schallenberg helped defendant by denying her prior statements to the police. Nevertheless, her conditional examination testimony opened the door to admission of her hearsay statements to the detective (identifying defendant in the AM/PM photo and relating his admission that he was there) as prior inconsistent statements, and those hearsay statements did hurt defendant.

Defendant believes there was insufficient evidence of infirmity to relieve Schallenberg from having to testify in front of the jury. However, there was testimony of the infirmity from a doctor who had actually treated Schallenberg. Additionally, the trial judge, who had the opportunity to view Schallenberg in person and observe her demeanor, described her uncontrollable shaking and distress when she entered the courtroom, before the videotaping began. Although the witness eventually settled down, as we observe in our own viewing of the videotape, we defer to the trial court’s observations of the witness before the videotaping began (undisputed by defendant). The fact the witness was able to testify in the presence of several persons does not mean she would have been able to testify if jurors and the public were added to the mix.

We conclude the trial court did not err in finding Schallenberg unavailable and using the conditional examination

in lieu of live testimony. There was no need to permit defendant to engage in voir dire of Schallenberg.

As to defendant's contention that the conditional examination, outside of the presence of the jury and the public, violated his right to a public trial, we disagree. A conditional examination is not part of the trial; rather, it is a deposition taken in cases where a material witness is unavailable to testify in person at trial. (§ 1345;⁹ *People v. Watkins* (1996) 45 Cal.App.4th 485, 488.) The videotaped examination was played for the jury in open court, with no exclusion of the public.

We conclude no reversible error occurred regarding the conditional examination of Schallenberg.

V. Motion for New Trial

Defendant maintains the trial court should have granted his motion for new trial on the grounds of *Brady* error (i.e., the prosecution's failure to disclose evidence favorable to him, as required by *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215]) and newly discovered exculpatory evidence. (§ 1181, subd. (8) [trial court may grant new trial "[w]hen new evidence is discovered material to the defendant, and which he could not,

⁹ Section 1345 provides that if a conditional examination is videotaped, "that video-recording may be shown by either party at the trial if the court finds that the witness is unavailable as a witness within the meaning of Section 240 of the Evidence Code."

with reasonable diligence, have discovered and produced at trial"].) We see no basis for reversal.

A. Background

During jury deliberations, the parties learned that a person in jail, James Clifton, said that his cellmate, Marcos Adams, admitted being the killer in the AM/PM case. The trial court denied defendant's request to re-open the evidentiary phase of trial to present Clifton's testimony. Adams refused to answer questions at defendant's trial.

Defendant's motion for new trial asserted as a statutory basis (§ 1181, subd. (8)) that Clifton's statement was new evidence that could not have been produced earlier. Defendant noted that Adams's asserted statements to Clifton accurately described the shooting location, the events leading up to the shooting, and the fact the victim was killed by multiple gunshots. (Defendant fails to cite anything in the record showing these facts were unknown to the public.)

Defendant's motion further asserted that, even before Clifton's information came to light, the prosecution committed *Brady* error by failing for more than a year to disclose to the defense a taped statement and report of police interviews with another person in jail (now in prison), John Harris, who said Marcos Adams was the AM/PM killer. Harris contacted Detective Higgins in March 2006, claiming knowledge about several murders, including the AM/PM murder. In an interview in April 2006, Harris told the detective that, after the shooting, Adams called

Harris to ask for a ride and said he "had got into it with some 'rickets' [slang for associates of the Crips gang]." ¹⁰ The detective reported the conversation to the prosecutor in Harris's case, but word apparently did not reach the prosecutor in defendant's case. The detective's information was not shared with defendant until July 2007 (after defendant's jury returned its verdict in May 2007) and after the detective conducted a new interview with Harris.

A hearing was held on the new trial motion, with live testimony as follows:

Jail inmate James Clifton testified that he briefly shared a cell with Adams, who confided that he, not defendant, shot and killed the man in the car (though defendant was with him). While drinking jailhouse moonshine, Adams bragged about the incident, "puffing up his chest like a rooster." Clifton passed the information on to the District Attorney's office.

John Harris, now a prison inmate, testified that one night he was hanging out with some friends a few blocks from the Jack In The Box. He heard gunshots and, shortly thereafter, Adams (wearing a black hooded sweatshirt) ran up, breathing hard, accompanied by a Black teen (whom Harris did not know), also wearing a black hooded sweatshirt. Adams said he had just

¹⁰ In his trial testimony, Harris denied initiating the contact. Harris also testified he never told the police that Adams admitting killing the victim or that Adams said he got into it with some rickets.

"handled some business" at "Jack In The Crack" and needed a ride to get away from the area. Harris said no, and Adams and his companion ran off. Harris and Adams never discussed the matter again. Harris's friend "ATL" wore an orange jacket as he hung out with Harris's group that night. Harris testified to his opinion that Adams is not a truthful person.

Police detective Thomas Higgins testified that in March 2006, he received a phone call from John Harris in jail, saying he had information about several murders, including the AM/PM murder. Higgins went to the jail, where Harris said Marcos Adams (the detective initially thought the reference was to Marcus Patterson, but Harris corrected him) killed someone at Jack In The Box. Harris said Adams said he "got into it with some rickets" (a derogatory term for the Crips gang). Higgins reported Harris's statements to the prosecutor who was handling Harris's case.

Defense investigator Lori Brown testified that three months before trial, defendant first told her that his brother Deladier Montue said someone named "Marcus" was involved in the crime. Brown had previously interviewed the brother twice in prison; he said he knew nothing about the crime and was home asleep when it happened. Brown testified she visited Adams in prison twice in April 2007, but he did not confess. Brown's written report about the visits indicated Adams admitted he was the person in the Orioles (orange) jacket in the AM/PM surveillance photo.

After allowing argument by counsel, the trial court denied the motion for new trial and, in recognition of the closeness of the matter, gave detailed reasons. The trial court set forth what it considered to be the most important facts, as follows:

In March 2006, Harris related to Detective Higgins that Adams killed a man and called Harris for a ride. That statement was not disclosed to defendant. In April 2007, Adams told defense investigator Brown that he was the person in the orange jacket, and the other person was Jon Jon, not defendant. (John Harris testified some people on rare occasions call him Jon Jon.) Later in April 2007, Adams invoked the Fifth Amendment on the witness stand. Harris testified about seeing Adams the night of the shooting, and Detective Higgins testified about what Harris said. Clifton testified in court.

The trial court found the prosecution's failure to disclose to defendant the March 2006 police interview with Harris was a *Brady* violation, but it was unintentional and harmless. Defendant already knew about the evidence implicating Adams before trial. Moreover, there was no reasonable likelihood that defendant would have prevailed but for the error. The evidence against defendant was overwhelming. There was no doubt the shooter was the one dressed in gray, not orange. Multiple independent witnesses said the shooter wore gray. Defendant's friend, Tamara Schallenberg, identified defendant as the gray-clad person in the AM/PM surveillance photo. Defendant told his girlfriend and Schallenberg that he was there but was not the

shooter. Defendant admitted to police that he was there and was the gray-clad person in the photo. The court said the statements attributed to Adams all placed defendant at the scene, corroborating defendant's admission to the police that he was there. Adams's statements put himself in the orange jacket. The court concluded Adams's statement would actually have a substantial likelihood of hurting the defendant by merely making Adams the accomplice, while leaving defendant as the actual shooter.

The court added that Clifton's statements about what Adams said presented additional problems as to whether the hearsay was reliable enough to be admissible as a declaration against Adams's penal interest. Adams did not believe his statements to be against his penal interest, because when he bragged about the crime he told Clifton the law had changed and jailhouse conversations were no longer admissible in court. Adams said he was positive and had read it himself in the newspaper, that the "higher court" said the District Attorney could no longer use statements made by inmates. Also, Adams had motive to try to help defendant, because Adams was the best friend of defendant's brother.

The court concluded a more favorable result for defendant was not reasonably probable, and the court denied the motion for new trial.

B. Analysis

We review the denial of the new trial motion under an abuse of discretion standard. (*People v. Davis* (1995) 10 Cal.4th 463, 524.)

On appeal, defendant makes no argument challenging the trial court's conclusion that Clifton's statements about what Adams said were inadmissible because they were not reliable enough to be admitted as statements against Adams's penal interest. We see no abuse of discretion in this ruling, and we therefore disregard Clifton entirely. Thus, the only issue is Harris's statements about what Adams said.

As to defendant's statutory claim of newly discovered evidence, the question is whether the new evidence could raise a reasonable doubt about defendant's guilt if the matter were retried with a new jury and the new evidence. (*People v. Martinez* (1984) 36 Cal.3d 816, 821.)

As to the *Brady* issue, *Brady, supra*, 373 U.S. 83, requires the government to disclose to the defense evidence that is materially favorable to the defendant. *Brady* calls for reversal if there is resulting prejudice to the defendant, i.e., there is a reasonable probability of a different result had the evidence been disclosed to the defense. (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282 [144 L.Ed.2d 286] ["strictly speaking," there is no *Brady* violation unless the nondisclosure was so serious that there is a reasonable probability the suppressed evidence would have produced a different verdict]; *United States v.*

Bagley (1985) 473 U.S. 667, 681-682 [87 L.Ed.2d 481].) The People do not dispute that a *Brady* violation occurs even when the prosecutor is unaware of the information known to police investigators, because the prosecutor has a duty to be informed. (*Youngblood v. West Virginia* (2006) 547 U.S. 867, 869-870.)

Here, even assuming Harris's statements qualify as newly discovered evidence, we see no grounds for reversal. Even if Adams was there, that would not exculpate defendant, given the mountain of evidence from other sources that defendant was there. Indeed, at one point Harris told Detective Higgins that Adams said "Little Rico" (defendant) was with him at the time of the shooting. Although Harris later changed his story and said Adams was accompanied by a person unknown to Harris, the multitude of discrepancies in his ever-changing story do not help defendant's case.

We conclude it is not reasonably probable that defendant would have obtained a better result had Harris's statements been admitted at trial. The trial court properly denied defendant's motion for new trial.

VI. Parole Revocation Fine

The trial court imposed and suspended a \$10,000 parole revocation fine under section 1202.45,¹¹ which applies when a

¹¹ Section 1202.45 provides, "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount

person is convicted of a crime whose sentence includes a period of parole. Although the fine never comes due unless and until defendant is paroled and has parole revoked, he argues the fine must be stricken as unauthorized, because he was sentenced to life in prison without the possibility of parole (though he also received a consecutive 25 years to life sentence for the section 12022.53 enhancement). We shall review the issue despite defendant's failure to object in the trial court. (*People v. Smith* (2001) 24 Cal.4th 849, 853.) We shall conclude the fine must be stricken.

People v. Oganessian (1999) 70 Cal.App.4th 1178 held the trial court did not err in failing to impose a section 1202.45 fine, where the defendant (convicted of first degree and second degree murders) was sentenced to life without possibility of parole, even though parole was remotely possible under the second degree murder conviction. *Oganessian* said, "the present case involves a situation where there are two sentences, both where section 12022.5, subdivision (a) firearm use findings have been imposed. One sentence, for the special circumstance first degree murder conviction with an additional finding of firearm use, is one where there is no parole eligibility. The other sentence of 15 years to life for second degree murder plus the

as that imposed pursuant to subdivision (b) of Section 1202.4. This additional parole revocation restitution fine . . . shall be suspended unless the person's parole is revoked. Parole revocation restitution fine moneys shall be deposited in the Restitution Fund in the State Treasury."

additional section 12022.5, subdivision (a) firearm use term is one where defendant could conceivably be eligible for parole.” (*Id.* at pp. 1183-1184.) *Oganesyan* gave two reasons for concluding the fine was improper. First, the entire statutory scheme concerning fines has as its legislative purpose the recoupment from prisoners and potentially from parolees who violate the conditions of their parole some of the costs of providing restitution to crime victims. (*Id.* 70 Cal.App.4th at p. 1184.) The chances of recoupment of costs resulting from a section 1202.45 fine would be extremely rare from a prisoner serving sentences, one of which prohibits parole and another from which the defendant could ultimately be paroled. (*Ibid.*) *Oganesyan* found no evidence the Legislature intended that its cost recoupment purposes were to apply under such an extremely limited set of circumstances, where the chances of actual recoupment “are almost beyond rational belief.” (*Id.* at p. 1185; accord, *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.)

Oganesyan's second reason for its decision was that the language of section 1202.45 indicated that the defendant's overall sentence was the indicator of whether the additional fine was to be imposed. (*Oganesyan, supra*, 70 Cal.App.4th 1178, 1185.) Section 1202.45 indicates it applies to a “person . . . whose sentence includes a period of parole.” For persons in defendant's position, the sentence at present does not allow for parole. (*Ibid.*)

The People argue *Oganesyan* was wrongly decided and erred in (1) focusing on the fact that the sentence did not allow for parole at the time of the court's review, and (2) speculating as to the probability that the defendant would or would not ever be paroled under his sentence that included a term of life without the possibility of parole, and deciding that possibility was too remote. The People cite *People v. Tye* (2000) 83 Cal.App.4th 1398, which said a section 1202.45 fine could be ordered in a different context, where the court imposed a four-year prison sentence but suspended its execution and placed the defendant on probation. *Tye* said that section 1202.45 contemplates that the conditions for the fine may never materialize. (*Id.* at pp. 1401-1402.) *Tye* said *Oganesyan* was distinguishable because "Tye's sentence does hold the possibility of a period of parole . . . if probation is revoked and the defendant is committed to prison. Here, in fact, when Tye was sentenced to four years in prison, the court advised him that he would be on parole for three years following release from prison. The fact that execution of sentence was suspended does not negate the fact that defendant's sentence, if ultimately executed, includes a period of parole." (*Tye, supra*, 83 Cal.App.4th at p. 1401.) Thus, *Tye* does not conflict with *Oganesyan*.

Though not cited by the parties, *People v. Brasure* (2008) 42 Cal.4th 1037, in upholding the (suspended) imposition of a section 1202.45 fine, said *Oganesyan* was distinguishable as involving no determinate term imposed under section 1170.

(*Brasure, supra*, 42 Cal.4th at p. 1075.) *Brasure* is distinguishable from our case because there the defendant, in addition to a death sentence for murder, was sentenced to a determinate prison term of two years eight months on independent charges for threatening witnesses and unrelated theft and arson. (*Id.* at pp. 1045-1047, 1049.) Here, there was only a 25-year-to-life sentence for a firearm enhancement related to the murder.

We conclude the section 1202.45 fine must be stricken.

VII. Correction of Abstract of Judgment

Defendant argues, and the People concede, the abstract of judgment improperly includes a check mark in the box for three strikes cases (§ 667, subds. (b)-(i); § 1170.12), whereas defendant was not charged, convicted, or sentenced under the three strikes law. We accordingly correct the clerical error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-188.)

VIII. Claim of Cumulative Error

Defendant argues the cumulative effect of trial errors deprived him of due process and a fair trial. Having reviewed all the claimed errors, we see no cumulative prejudice warranting reversal of the judgment.

DISPOSITION

The trial court is directed to correct the abstract of judgment by (1) striking the Penal Code section 1202.45 fine, and (2) deleting the reference to the three strikes law. The trial court shall forward a certified copy of the corrected

abstract of judgment to the Department of Corrections and
Rehabilitation. The judgment is otherwise affirmed.

_____SIMS_____, Acting P. J.

We concur:

_____HULL_____, J.

_____BUTZ_____, J.