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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JARED THOMAS ALGER, Defendant and Appellant.	A126581 (Contra Costa County Super. Ct. No. 050714543)

Jared Thomas Alger appeals from convictions of voluntary manslaughter, felony false imprisonment and misdemeanor assault. He contends his constitutional right of confrontation was violated because the pathologist who performed the victim's autopsy did not testify at trial; the court erred in admitting some of the statements he made to the police; the trial court abused its discretion in denying his request for a continuance to allow retained counsel to replace the public defender; and the evidence was insufficient to support the manslaughter conviction. We agree with the first of appellant's contention and, accordingly, reverse the convictions.

STATEMENT OF THE CASE

Appellant was charged by information filed on September 19, 2007, with the murder of Steven Goodmason (Pen. Code, § 187)[1] (count 1); kidnapping of Angela Cattoor (§ 207, subd. (a)) (count 2); and assault of Angela Cattoor with a deadly weapon and force likely to produce great bodily injury (§ 245, subd. (a)(1)) (count 3). It

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

was alleged in connection with all three counts that appellant personally used a rifle. (§ 12022.5, subd. (a).) It was additionally alleged that in the commission of count 1 appellant intentionally and personally discharged a rifle, causing great bodily injury and death (§ 12022.53, subd. (b), (c), (d)); that in the commission of count 2 he personally used a rifle (§ 12022.53, subd. (b)); and that in the commission of counts 2 and 3 he personally inflicted great bodily injury upon the victim. (§ 12022.7, subd. (a)).)

In late March 2009, with trial set for April 13, 2009, the court denied appellant's requests to substitute retained counsel for the public defender who had been representing him since his arrest. Appellant moved to suppress his statements to the police. After a hearing, the motion was granted in part and denied in part.

Presentation of the case to the jury began on April 27. On May 27, the jury returned verdicts finding appellant guilty of voluntary manslaughter, with personal use of a firearm, of false imprisonment and of misdemeanor assault. The jury found appellant not guilty of murder, kidnapping or attempted kidnapping, and found not true the allegations that appellant personally used a firearm and inflicted great bodily injury in committing the false imprisonment.

On September 4, appellant was sentenced to a total prison term of 16 years and eight months, consisting of the middle term of six years for the manslaughter, a consecutive 10 years for the firearm use enhancement, and a consecutive one-third middle term of eight months for the false imprisonment. Sentence on the assault conviction was stayed.

Appellant filed a timely notice of appeal on September 4, 2009.

STATEMENT OF FACTS

In August 2006, Louis Aguilar was living at 55 Bixler Road with his girlfriend, Heather Scott, and a friend, Doug Coyle; his nine-year-old son, Blake, was with him every other weekend. On the night of August 26, Aguilar invited some friends to the house, including appellant and Steve Goodmanson. Goodmanson brought his sister, Andrea, and his girlfriend, Anna Cattoor. Cattoor and Goodmanson had been friends for many years and romantically involved for about three years, exclusively for about three

months. Cattoor testified that she had been romantically involved with appellant before she became involved with Goodmanson, but she did not think Goodmanson knew this, then acknowledged having told sheriff's officers that Goodmanson initially "had a problem" with her having been involved with appellant. She testified that appellant still had feelings for her after she started seeing Goodmanson, but she told him she did not return them. According to Cattoor, there was "a little bit" of friction between the two men over her, but "it wasn't much friction." Aguilar testified that appellant continued to have feelings for Cattoor but he never got the feeling appellant was jealous of Goodmanson, nor did he observe friction between appellant and Goodmanson that went beyond what he would expect in a friendship between guys. On August 26, Cattoor, Goodmanson and appellant appeared to Aguilar to be under the influence of drugs; Aguilar did not see them consume drugs at his house but on the telephone Goodmanson had mentioned using drugs earlier in the afternoon. Cattoor testified that she and Goodmanson had consumed beers and some cocaine at a friend's house before going to Aguilar's.

Aguilar testified that shortly after Goodmanson arrived at the house, he went across the street with Blake to see the frogs in the pond. Blake had a .22 rifle and Goodmanson had a pellet gun. They went to the pond a second time with Cattoor and appellant. Then, with Aguilar joining them, the group went out in Goodmanson's truck to "shoot at frogs and whatnot." They took the two guns Blake and Goodmanson had previously taken, as well as a .22 rifle belonging to appellant that had been left at Aguilar's house. They stopped along the levee road and appellant, Goodmanson and Blake walked off looking for a rabbit the group had seen, while Aguilar and Cattoor stayed at the truck. Appellant had his .22 rifle; the other remained in the truck. After five or ten minutes, Blake came back to the truck. Cattoor had walked off toward appellant and Goodmanson meanwhile, then returned 10 or 20 minutes later. Blake told Aguilar that appellant and Goodmanson had been arguing a little bit. Aguilar had initially heard shots fired "in the rabbit area," then heard some more gunshots.

About 15 minutes after the last set of shots, Aguilar heard a single gun shot and a minute later saw appellant running toward the truck carrying a gun. Appellant said, "it went down" or "it's going down." Aguilar took this to mean appellant and Goodmanson had gotten into a fight. He had not heard anything that sounded like a fight, only loud, boisterous voices that were not unusual with appellant and Goodmanson. Aguilar asked where Goodmanson was and appellant said "he went fishing." Aguilar understood this to mean there had been a fight "and there was only one winner." Appellant was pacing around and seemed agitated, surprised, and scared. Appellant started to grab the rifle he had put down on the bed of the truck and Aguilar told him to leave the rifle if he and Goodmanson were fighting. Appellant left the gun and ran back down the road. When appellant reached a distance of about 150 yards, Aguilar could no longer see him in the darkness but heard what sounded like something rolling off the levee into the water. Aguilar felt, based on his hunting experience, that his ability to estimate distance was fairly accurate.

Appellant returned to the truck with a pair of boots. This led Aguilar to think Goodmanson was "no longer awake." In the area where Aguilar and appellant grew up, if one person took another's boots, it meant the first person had beaten the other in a fight. Aguilar did not think Goodmanson would lose a fight to appellant, who was smaller, and therefore thought whatever had happened was "farther than just a fistfight." Concerned for his and his son's safety, Aguilar walked away with Blake, taking his rifle. Cattoor remained with the truck.

Aguilar heard Cattoor scream and saw the truck move in reverse down the levee road. Then, as he and Blake walked home through a field, Aguilar saw the truck drive forward and make a right turn on Bixler. The truck slowed down briefly as it passed Aguilar's house and continued north on Bixler. At the house, Aguilar found Scott and Goodmanson's sister tending to Cattoor, who was lying on the floor bleeding. Scott had the sheriff's department on the phone and handed the phone to Aguilar, who said there had been a fight and he thought someone had been shot.

Aguilar then saw the truck pull into his driveway. Telling the others to stay in the house, he loaded his deer rifle, barricaded the doors with chairs and stepped to the back of the house. Appellant got out of the truck and Aguilar yelled to him; appellant did not have anything in his hands and Aguilar did not feel alarmed, so he put down his rifle. Appellant was doing pull ups from a tree branch. Aguilar tried to find out what had happened. Appellant asked what he should do, said he was going to go to Steve's, and told Aguilar to tell the truth, then got in the truck and drove back toward the levee road. Appellant did not, at the house or earlier at the levee, say he had accidentally shot Goodmanson.

Cattoor testified that at the levee, while the others were out looking for frogs, she got back into the cab of the truck, turned on the radio and dozed on and off. Aguilar and Blake joined her, then she went to tell appellant and Goodmanson she wanted to go home, but they were talking and did not listen to her; it seemed like a normal conversation about "guy stuff," but Goodmanson gave her a look she knew meant not to bother him, so she returned to the truck. Goodmanson had his .22 rifle. Back in the truck, Cattoor dozed again and was not aware anything unusual had happened when Aguilar and Blake left to walk home.

At this point, appellant got into the driver's seat and said "let's get out of here." Cattoor asked where Goodmanson was and appellant told her to "go see." Cattoor, thinking Goodmanson would not have allowed appellant to drive the truck because it was brand new, walked about 10 or 15 feet behind the truck and saw Goodmanson lying on the ground. She "freaked out," screaming and trying to shake Goodmanson, and appellant tried to restrain her. Appellant was holding the rifle; he pointed it at her and told her to shut up and get into the truck. He forced her into the truck, hitting her with the rifle, and started to drive away; she opened the door, jumped out and tried to run. Appellant followed her and forced her back into the truck by her hair. Cattoor was "terrified," feeling "almost like being with a serial killer." As appellant drove along the dirt road, she jumped from the truck again and ran. She saw appellant coming behind her with something in his hand, then remembered nothing else until she woke up in the

hospital. She had a head injury that required about seven stitches, as well as bad scrapes and a back injury.[2] Appellant never said anything to her about Goodmanson being shot by accident or in self defense.

Blake testified that, at the levee, he walked away with appellant and Goodmanson while his father and Cattoor stayed at the truck. Appellant had the .22 rifle. Appellant and Goodmanson were talking about Cattoor; Goodmanson told appellant to stay away from her and they shook hands. Appellant was "jumpy" and Goodmanson seemed calm. Blake returned to the truck, where his father and Cattoor were talking in the bed of the truck, and sat on the front passenger seat of the cab. Appellant came back to the truck and said Goodmanson "went fishing," then left again. Blake then saw appellant walking toward the truck holding boots, at which point his father told him they needed to leave. As he and his father walked away, Blake looked back and saw appellant grab Cattoor and slam her against the truck; she tried to run away, appellant followed her and said something, and Cattoor burst out crying. Blake then saw appellant drive the truck forward with Cattoor inside. As he and his father walked home through the field, Blake saw the truck turn onto the main road and drive to the house. When the truck was about 25 yards from the house, he saw Cattoor jump or get pushed out and fall on the ground.

At about 1:45 a.m. on August 27, 2006, Contra Costa County Sheriff's Deputy Timothy Houlihan was dispatched to 55 Bixler Road, after a caller reported there had been a shooting and the subject, Jared Alger, had a gun. As he was driving north on Bixler, Houlihan started to pull around a fire truck and saw a pickup truck coming at him at a "fairly high rate of speed." Houlihan stopped; the truck continued to within 20 yards of the officer, then made a sharp left turn onto a dirt road. Houlihan turned onto the dirt road and activated his emergency lights and siren, the truck increased its speed to about 50 miles per hour and Houlihan chased it for about a half mile until it stopped on the

[2] Cattoor acknowledged on cross-examination that she had been promised she would not be prosecuted for anything that came up in her testimony, and that nothing she said would be used against her in proceedings on a petty theft she had admitted committing in 2009, and two other pending misdemeanor cases.

levee road. A large dust cloud from speeding down the road obscured Houlihan's vision of the truck and he stopped and waited about a minute for backup to arrive. The officers then approached the vehicle, guns drawn and flashlights on, but found no one in it. There was blood in the bed and cab of the truck, and a puddle of blood on the road in front of the pickup, along with a "camo" flashlight. There was also a dead rabbit forward of the truck and down the levee.

Houlihan heard yelling from the passenger's side of the truck and looked down the eight-foot embankment to see a man he identified as appellant next to the water, cradling Goodmanson's head. Other deputies were yelling at appellant to come up; they eventually pulled him up because of the steep slope. Appellant had a pocketknife in one pocket and two .22 rounds in another pocket. Asked who he was, he directed the officers to the ID in his wallet. He did not respond when asked if he knew where any weapons were, whether he was injured, or who the other person down the embankment was. When asked whether anyone was with him, appellant said, "maybe you should be looking." Officers immediately began searching the area and continued for several hours, using a dog and a heat-imaging device borrowed from the fire department. The mood was tense because the area was brushy, with many places to hide, and the officers did not know how many people might be involved. No one else was found and no weapons were located.

Once he was put into the patrol vehicle, appellant banged his head twice into the partition "pretty forcefully," and Houlihan told him to stop. He sat in the car with his eyes closed most of the time, and seemed emotional to Houlihan. He made several statements: "Steve was like my father, and I would call that man my father, and I learned a lot from him, and I didn't learn enough because I wasn't able to stop this." After about three and a half hours, Houlihan took appellant to the police station.

Officers who examined the scene on the levee road at about 5:00 a.m. found a fired .22 caliber cartridge case a few feet in front of the pickup truck, with a pool of what appeared to be blood nearby. A .22 rifle was recovered from the water next to the levee, about 15 feet from where Goodmanson's body had been found.

A police officer who interviewed Anna Cattoor after she was released from the hospital in the morning testified that she told him appellant had said, after she saw Goodmanson's body, "this is what you wanted."

Terence Wong, a criminalist who attended the autopsy of Goodmanson, testified that at the beginning of the autopsy, Goodmanson was clothed and had binoculars on his chest and a gun holster around his shoulders, but had only one sock and was not wearing shoes. One of the photographs Wong took showed a laceration on the back of the victim's head with a scale showing that the laceration measured four and a half centimeters (approximately one and a half inches). Other photographs showed a black circular perforation on Goodmanson's right cheek. Wong observed the pathologist, Dr. Peterson, locate and remove a bullet from Goodmanson's brain. He also observed Peterson determine the trajectory of the bullet by placing a metal rod through the perforation on the victim's cheek and the area from which he had removed the bullet. Wong documented this procedure with photographs that were not used at trial. The court told the jury it had seen the photographs but the jury would be spared seeing them and instead would be shown a re-enactment on a mannequin of the procedure used to determine the bullet's trajectory.

Pathologist Gregory Reiber testified as an expert on the manner and cause of death and injury, based on his review of the autopsy report and documentation, including the approximately 150 photographs taken by Wong. As will be discussed in greater detail, Peterson had concluded the cause of Goodmanson's death was a gunshot wound to the head, describing an entrance wound on the cheek, a path through the base of the skull and a resulting injury to the brainstem that Reiber testified would be almost immediately fatal. Reiber testified that the photographs indicated a very close range injury; demonstrated on a Styrofoam mannequin head Peterson's probe showing the path of the bullet; and, with the prosecutor, role played scenarios for a struggle over the gun based on appellant's description of the incident. Reiber testified that it would have been possible for Goodmanson to shoot himself at the angle found in the autopsy but would have required his hand to be in a very awkward position.

Reiber also testified that an injury on the back of Goodmanson's head was inflicted when the victim was alive and could have resulted from a sharp blow with the butt end of a rifle or a fall on a hard surface, possibly falling backward and hitting his head on the packed earth surface of the levee after being shot while he was standing. The gunshot injury would have caused death within five minutes at the most. The autopsy report did not indicate that Goodmanson had defecated or voided his bladder at the time he was killed.

Reiber testified, based on photographs he was shown at trial, that appellant had abrasions and scrapes on his forehead, left wrist, right shin, top of the left shoulder and back of the right shoulder. The injury on his forehead could possibly have resulted from pounding his head against the barrier in a police vehicle but was more consistent with a scratch, as from fingernails or twigs.

On the evening of August 26, appellant left a voicemail message for his father. Appellant's father testified that appellant had agreed to help him pour a concrete pad and the message said that if appellant did not get to his father's place the next day, his father should look for him at 55 Bixler. Detective Cary Goldberg, who discussed this message with appellant's father, testified based on his report that the message was left at about 11:13 p.m. on August 26. The detective testified that appellant's father contacted him about the message, describing as "odd" a part of the message that said something like "if you don't hear from me tomorrow . . . the answers or the trail will lead you to 55 Bixler Road." He testified that appellant's father told him he thought the message suggested appellant knew there was going to be some kind of trouble that evening, although appellant's father was not aware of any personal problems between appellant and Goodmanson.[3]

[3] Appellant's father denied having told the detective the message seemed odd or indicated appellant expected trouble that night. He testified that at the time of his phone call with the detective, he was very upset about the way the police had conducted a search of his ex-wife's house, and that he had a severe hearing problem that made telephone conversations very difficult for him. The detective testified that he did not

Appellant was interviewed by the police on August 27, several hours after the shooting, and a videotape of the interview was played for the jury. Appellant told the officers, "it's been a long standing issue that me and him hadn't finished each other off in a fight for many people. Many people wanted to see it." He said that Goodmanson "would talk crazy to [him] about wanting to leave this place, he was done," and appellant would argue with him. Appellant said that up to this point, he had not defended himself against Goodmanson, "we hadn't gone that far meaning both had come close multiple times, I guess. And I had always defused the situation." That night, Goodmanson was talking "crazy" about not wanting to be there, on the levee; then he shifted the conversation and talked about "moments of enlightenment." Appellant said Goodmanson would talk in such a way that at first you would not know what he was talking about and "you're trying to understand advice from like a father figure," and as Goodmanson talked about these moments of enlightenment, appellant realized he was "speaking of what . . . death must be like . . . ."

Appellant said the conversation got "volatile," with Goodmanson giving him the option of "pack and run" or "me and him"; appellant was "scared with the crazy ways he's talking" but "looked to him [for] advice and things" and knew Goodmanson would not respect him if he ran. Goodmanson "egged [him] on," saying "you even have the rifle. . . . You got a gun." Appellant ditched the gun and figured he would "face" Goodmanson, and the two "tussled." Appellant said he did not want it to be "deadly" but Goodmanson was "pushing it" and yelled, "Come on! What do you want me to do? Well, do it." Appellant took this to mean "What do I have to do to get you to kill me?" As they were rolling on the ground, Goodmanson grabbed the gun. He lifted the gun at appellant, screaming at him, then appellant was on his back with Goodmanson on top of him, pulling the gun up with one hand. As Goodmanson pulled the gun up, holding the butt and the handle, appellant pushed the barrel or stock. " . . . it veers up, whacks him in

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recall appellant's father expressing anger in that conversation and did not ask if appellant's father had a hearing problem.

the head and ba[n]g . . . he rolls off of me, . . . I'm looking at him and he's, fuckin, sitting there, you know, farting and fucking. You know his shits fuckin coming out of and he's pissing and everything else. And, I mean, at this, at this point I found (unintelligible) I pretty much know he fuckin, pretty fuckin dead, right?" Appellant said he had a lot of respect for Goodmanson and could not watch him suffering, so he shot him again "like a wounded animal." Because of their relative positions, appellant said the first shot "should had been right in here by the right [e]ar."

Appellant said he ran back to the truck where Aguilar and Cattoor were, not knowing "how they're gonna to react because it seemed to me like other people have said, this is planned. This was planned. It seemed like it was planned by a lot of people. By everyone but me. . . . I've been the one that had avoided it several times before." When one of the officers commented, "Almost like that's why you [got] called out there tonight," appellant said, "Oh, he told me that's why. . . . He told me, you know, at first when he was bringing it up like I would accept it or jump on the idea. One of his attempts to talk me into it during that period I was talking about talking. . . . like he had other people he considered for the role of his possible death, you know. . . . But me. . . . He wanted as his. . . . He explained that as me being I got something. I don't know what it is. It's a good thing kinda thing, but then that's also why he explained why he had gotten me out there." Asked about why he took Goodmanson's boots, appellant said he had hoped to "get them to the water for him." He told the officers he had last used methamphetamine in the morning and had a beer just before the shooting. He insisted he never hit Cattoor.

A criminologist tested stains on appellant's clothing and determined that there was blood on his tee shirt and on his shoes.

Defense

Appellant described Goodmanson as a "very close" friend: He did construction work for Goodmanson, spent time with him fishing, camping, shooting, hunting and other activities, and lived with him for periods of time. Goodmanson was older than appellant and something of a father figure to him, but also used appellant as a model for himself.

Appellant had a sexual relationship with Cattoor before she was involved with Goodmanson. Later, appellant slept with her and Goodmanson "kind of laughed about it" but warned appellant, "that's my girl now." Prior to August 26, Goodmanson had made it "official" that he and Cattoor were together. He and appellant had made an agreement that appellant would not respond to Cattoor, who appellant testified was "flirty" and would "throw herself on you," and that Goodmanson would handle whatever Cattoor did. Appellant denied being jealous of Goodmanson.

When appellant arrived at Aguilar's house that night, Cattoor ran to him and jumped on him; he held his arms out, making a point of not hugging her back. Appellant felt uncomfortable because of the situation with Goodmanson and Cattoor. Everyone knew the history and it seemed strange to appellant that they were acting like nothing was going on and did not answer when he asked where Goodmanson was. Appellant felt that Cattoor was flirting with him and that the others thought there was going to be a fight between him and Goodmanson. Appellant was concerned about his relationship with Goodmanson.

Appellant heard gunshots that came from across the street, where Goodmanson and Blake were by the water, and went to join them. He tried to talk to Goodmanson about Cattoor, to say he was keeping to the agreement although Cattoor was being sexually provocative, but Goodmanson avoided the conversation and they returned to the house. Later, appellant, Goodmanson, Cattoor, Aguilar and Blake left in Goodmanson's truck and went to the levee. Appellant got out and went after a rabbit they had seen, taking a .22 rifle that was kept at Aguilar's house and used by "everybody." Goodmanson caught up with him, and appellant tried again to talk to Goodmanson about Cattoor. Goodmanson said, "this isn't going to work like I thought it was then," and picked up his pace, walking ahead of appellant. Eventually, they stopped and agreed on a target to shoot at. Blake caught up with them. Appellant tried to shoot at something and the rifle jammed; Goodmanson tried to take the rifle and appellant "yanked back just out of safety." Appellant was "nervous" because "you don't handle guns that way." The rifle jammed again as appellant tried to clear it, Goodmanson grabbed the rifle

aggressively and appellant let go of it. Appellant asked what Goodmanson meant by "it's not going to work." Goodmanson told Blake to go back to his father, Blake left, and appellant pursued the conversation, but Goodmanson remained evasive, his tone "aggressive and sharp." Appellant backed off the conversation and they started to talk about going after frogs, having heard a gunshot they took to mean Aguilar had shot the rabbit they were looking for. Goodmanson was shooting at frogs appellant could not see. Appellant testified that the "whole situation" that evening did not feel "natural" to him, as though everyone else knew something he did not.

After walking a bit more, Goodmanson began to talk about many problems he had with appellant; as appellant tried to voice his side of things, the conversation escalated and became "volatile." Goodmanson told appellant, "you don't get it, better figure it out, or you're never leaving this place." Appellant did not know whether Goodmanson said this more than once but it was "kind of the theme." At some point, Cattoor came and tried to "butt in." Appellant wanted to hear what she had to say because he felt she was the real problem that Goodmanson was not talking about, but Goodmanson got her to leave.

Goodmanson became aggressive with appellant and the two began to fight, rolling on the ground. At this point, neither was holding the gun. It was not uncommon for them to fight, but it generally did not get serious; while both men carried knives, they had never used them against each other. This time, the fight "wasn't even kind of friendly" and appellant was scared of Goodmanson in a way he had not been before. As they struggled, while Goodmanson was on top of appellant, he grabbed the gun and tried to bring the barrel down on appellant's head. Appellant could not believe the fight had gone "this far" and thought Goodmanson was trying to kill him. As he felt the barrel slide across his head, appellant pushed the gun up, heard a bang and felt Goodmanson "jerking" on top of him. Goodmanson's bowels "loosen[ed]," which appellant took to mean he was dead. He rolled Goodmanson off him. Appellant had seen the video of the interview in which he told the police he shot Goodmanson after rolling his body off, but testified that he did not do this and did not know why he would have said he did.

Appellant's memory of what happened after this was vague. He went back to the truck, finding Aguilar and Cattoor in the back, and thought he heard Aguilar say "I didn't think he had the balls to do it." Appellant was scared and worrying about how he had felt like "the one left out of something" the whole night; something was "odd" from the time he arrived at Aguilar's house. Aguilar asked what happened, but appellant thought he already knew, and Cattoor said "some crazy shit, like, well, both of you just relax, we'll have a beer and we'll talk this out." Appellant went back to Goodmanson. He testified that before watching the video of his police interview, he would not have remembered picking up Goodmanson's boots. He testified that his motivation in taking the boots was to show respect for Goodmanson by taking his boots "where he wanted to be" because Goodmanson had said he did not want to be on the levee and wanted to be shark fishing. When he returned to the truck, Aguilar "had a gun on" him, then left with Blake.

Appellant tried to talk to Cattoor, who was asking him what happened and screaming at him. She went to Goodmanson's body and jumped on him, which seemed "fake" to appellant. He was angry at her and "might have said is this what you wanted? Because the bitch kept throwing herself at me." Appellant pulled her away from Goodmanson and she went back to the truck "pretty much willingly" and got in. Appellant drove back to Aguilar's house, to get to a phone. Cattoor jumped out of the truck and appellant got out, picked her up and put her back in. Cattoor was screaming that she could not go with him because she had a child, but appellant was not trying to take her anywhere. He helped Cattoor to the couch in Aguilar's house and asked Heather to take care of her, then walked through the house and checked the field, looking for Aguilar. He returned to the door he had initially entered but found it locked, walked toward the back and was met by Aguilar pointing his "30.06" at him. Aguilar said something about running, then told appellant he should "get counsel" and then, as the police arrived, that it was too late. Appellant drove back toward Goodmanson with a police car following him; he testified that he was not trying to run from him but to "take everybody." He testified that he went to the levee and this "must have been" when he

threw the gun into the water. He remembered having Goodmanson in his lap and trying to tell the police that if he let him go, Goodmanson would fall into the water.

Appellant testified that he had used a line of methamphetamine at about 10:00 or 11:00 o'clock in the morning on August 26, and had a beer or two at Aguilar's house that night.

Appellant testified that he loved Goodmanson, never wanted what happened to happen and never wanted Goodmanson dead. He loved Cattoor as a friend but would have had a hard time being in a relationship with her because he "knew not to trust her."

Appellant testified that the blood draw during his police interview may have affected his ability to comprehend what was going on, to be honest, and to be influenced by the situation, stating he was hypoglycemic and could faint from having blood drawn.

Goodmanson's blood tested positive for methamphetamine, cocaine, a metabolite of cocaine and ethanol. A defense expert witness testified that methamphetamine, cocaine and alcohol, in adequate doses, are all correlated with violent behavior, so that the combination of these substances could be "explosive." Appellant's blood tested positive for methamphetamine at a lower level than Goodmanson's, and no other substances were detected.

An emergency medical technician (EMT) who spoke with appellant at the Martinez Field Operations building on August 27 testified that appellant complained that he was nervous, stressed and had a headache; he did not recall appellant saying he was dizzy and confused. His partner, after reviewing a tape of the encounter, recalled that appellant said he was dizzy and said something about his speech, but stated that appellant did not actually appear to be dizzy and his speech was clear. Appellant initially said he wanted to go to the hospital, but while the medical personnel went to get a gurney, a sheriff's officer talked to appellant and then told them appellant no longer wanted to go.

DISCUSSION

I.

Appellant contends his constitutional right to confront witnesses against him was violated because Dr. Peterson, the pathologist who performed Goodmanson's autopsy,

did not testify at trial. As indicated above, Dr. Reiber testified about the autopsy and cause of death based on review of the autopsy report and other documentation of the autopsy.

Reiber and Peterson had been part of the same forensic medical group prior to Peterson relocating out of state in 2007, and they had reviewed each other's work from time to time. Reiber testified that, based on the report and photographs, it appeared Peterson had conducted a traditional autopsy that was "consistent with the information he had in front of him at the time." Reiber testified that forensic pathologists tend to follow a "standard routine" in conducting autopsies and that having worked alongside Peterson, he knew that Peterson followed the same sort of procedures Reiber used. Reiber described the general process, including that pathologists usually dictate a description of their actions and observations as they proceed through the autopsy. The recorded dictation would then be transcribed, the transcription reviewed and corrected by the pathologist who performed the autopsy, and the final transcribed report signed by the pathologist. Peterson had signed off on the autopsy report in the present case. Reiber testified this report was the type typically prepared in the ordinary course of business in his medical group and that such reports were prepared concurrently with or just after the actual autopsy. The group worked on a contract basis for Contra Costa County and the reports were kept at the coroner's office. The report of Goodmanson's autopsy was admitted into evidence without objection from the defense.

Reiber explained that the autopsy report and photographs showed a gunshot entrance wound on the victim's right cheek and a wound path through the base of the skull to the brainstem at the bottom of the skull. Peterson described the brain stem as lacerated, or torn, a type of injury that would be almost immediately fatal. The injuries were "pretty clearly" documented by photographs corresponding to Peterson's description. For the actual laceration, Reiber was relying on Peterson's description; the photographs of the injury were not as clear because of the amount of surrounding tissue that had been removed to get to the location of the injury. Reiber was able to see a hole near the bottom of the brain where the bullet passed through and testified that "[t]he

location of the bullet path would pretty clearly involve the brainstem in a way that I would expect to result in a fatal injury also." The report described finding a small caliber projectile near the place where the brainstem connects to the spinal cord.

Reiber reviewed photographs of the probe Peterson used to show the path of the bullet and, based on the information described in the report and the photographs, believed the probe accurately represented the bullet's path. He had tried to recreate this investigation using a Styrofoam mannequin head and demonstrated this recreation at trial. Three of the autopsy photographs in particular showed the angle of the probe from three different angles well enough that Reiber believed his reproduction of what Peterson had done was "very close" to accurate, but the styrofoam material made it hard for him "to get the right-to-left angle quite as steep."

The photographs also provided information about the angle of the bullet's entry in that a dark area of searing and soot indicated that one end of the barrel was tipped slightly closer to the skin than the other. The deposit on the skin indicated a very close range injury, with the barrel probably one to two inches from the skin, depending on the type of weapon used. Reiber testified that if the victim was standing erect, the lower end of the barrel would have been slightly closer to the skin than the upper end, indicating a slight upward angle of entry.

Using the rifle in evidence, the prosecutor and Reiber attempted to demonstrate scenarios based on appellant's description of the incident, in which two combatants struggling for the rifle face-to-face on the ground could have caused the rifle to shoot with the trajectory reflected in the autopsy report. Reiber testified that for Goodmanson to have been shot at that angle, he would have had to have his hands near the trigger and be looking down at his hands, rather than at his opponent, with his head tilted toward the barrel. If Goodmanson initially had control of the gun, as appellant described, it would have been possible for Goodmanson to accidentally shoot himself in the face at the angle found in the autopsy, but it would have required his hand to be in an "extremely awkward position" with his index finger on the trigger, or for him to have had a "reverse grip" on

the gun, with his index finger at the breach end of the gun and his thumb inside the trigger guard.

Reiber also described a series of small bruises and scrapes across Goodmanson's lower forehead, scraped areas on the top of the head that appeared to Reiber to have occurred after death, a laceration from a blunt blow to the lower back of the head, scrapes on the left cheek and right side of the neck, scratches on the chest, bruises on the left upper arm and forearm, and bruises and scrapes on the lower left armpit. A photograph of the injury on the back of the head showed a type of wound that could have resulted from a sharp blow with the butt end of a rifle or a fall on a hard surface, as well as that the wound was inflicted when the victim was alive. Reiber opined that the injury could have resulted from Goodmanson being shot while he was standing, then falling backward and hitting his head on the packed earth surface of the levee. The autopsy report did not indicate that Goodmanson had defecated or voided his bladder at the time he was killed, facts Reiber would expect to find in the report if observed during the autopsy.

Under the Confrontation Clause, testimonial statements of a witness who does not testify at trial are admissible only if the witness is unavailable to testify and the defendant had a prior opportunity for cross examination. (*Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*).) The " 'core class of testimonial statements' " covered by the Confrontation Clause include " '*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " (*Melendez-Diaz v. Massachusetts* (2009) ___U.S.___, [129 S.Ct. 2527, 2531] (*Melendez-Diaz*), quoting *Crawford, supra,* 541 U.S. at pp. 51-52.)

Melendez-Diaz held that certificates reporting the results of forensic analysis of material seized by the police were "affidavits" within the "core class of testimonial statements" described above. (*Melendez-Diaz, supra,* 129 S.Ct. 2527, 2532.) They were made for the sole purpose of establishing that the material was cocaine, the precise testimony the analysts would be expected to provide in live testimony, " ' "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." ' " (129 S.Ct. at p. 2532, quoting *Crawford, supra,* 541 U.S. at p. 52.) The Court rejected the argument that the Confrontation Clause did not apply to testimony concerning the results of " 'neutral scientific testing,' " noting that the methodology used to analyze the substance "requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." (129 S.Ct. at p. 2537.) The Court also concluded the certificates were not admissible as business records: "Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial." (129 S.Ct. at p. 2538.) In sum, *Melendez-Diaz* held that a forensic laboratory report "created specifically to serve as evidence in a criminal proceeding" is "testimonial" evidence that cannot be introduced without "a live witness competent to testify to the truth of the statements made in the report." (*Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705, 2709 (*Bullcoming*).)

Bullcoming involved a forensic laboratory report certifying that the defendant's blood alcohol concentration exceeded the threshold for driving while intoxicated. (*Bullcoming, supra,* 131 S.Ct. at p. 2709.) The analyst who signed the certification was not called as a witness; rather, the prosecution called another analyst who was familiar with the laboratory's procedures but had not participated in or observed the test on the defendant's blood sample. (*Ibid.*) *Bullcoming* found this "surrogate testimony" insufficient to meet the constitutional requirement: "The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable

at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." (*Id.* at p. 2710.)

In reaching this conclusion, *Bullcoming* rejected the view that the analyst who signed the certification merely reported a machine-generated number, explaining that the analysts' statements concerning chain of custody and test protocol followed were "meet for cross-examination." (*Bullcoming, supra,* 131 S.Ct. at p. 2714.) Cross-examination of the certifying analyst could also expose "any lapses or lies" by that analyst, while cross examination of a surrogate could not. (*Id.* at p. 2715.)

Prior to *Melendez-Diaz* and *Bullcoming*, our Supreme Court held that a DNA laboratory report was not testimonial under *Crawford*, primarily because it related the analyst's "contemporaneous recordation of observable events"—documentation of the receipt of samples, preparation for analysis and results of analysis as the tasks were performed—rather than "documentation of past events." (*People v. Geier* (2007) 41 Cal.4th 555, 605-606 (*Geier*).) Also, *Geier* took the view that the laboratory report was not itself accusatory, as the analysis had the power to exculpate as well as inculpate, while the accusatory opinions were delivered through the testifying witness. (*Id.* at p. 607.) Numerous cases concerning the continued viability of *Geier* and the question whether the Confrontation Clause permits expert testimony about the results of a forensic examination to be supplied by an expert who did not personally perform the examination are currently pending before the California Supreme Court.[4]

In our view, *Bullcoming* answers this question in the negative, at least in circumstances of this case. The autopsy on Goodmanson was performed as part of a homicide investigation, to determine the manner and cause of death, and the autopsy

[4] The lead cases are *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620 [sexual assault examination], *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted Dec. 2, 2009, S177046 [blood alcohol analysis], *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886 [autopsy], *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213 [drug analysis].

report was prepared " 'under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial.' " (*Melendez-Diaz, supra,*129 S.Ct. at p. 2531, quoting *Crawford, supra,* 541 U.S. at pp. 51-52.) "A document created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, ranks as testimonial." (*Bullcoming, supra,* 131 S.Ct. at p. 2717.) Even more than the laboratory analyses at issue in *Melendez-Diaz* or *Bullcoming*, the autopsy required individual skill and judgment subject to challenge on cross examination. Accordingly, surrogate testimony by an expert who did not perform or even observe the autopsy was insufficient to meet constitutional requirements. As there was no showing that the pathologist who actually performed the autopsy was unavailable for trial, admission of the report and Reiber's testimony based upon the report was error.

Respondent, whose brief was filed before *Bullcoming* was decided, argues that *Melendez-Diaz* was limited to affidavits falling within the "core" class of testimonial statements subject to the confrontation clause. Respondent urges that the autopsy report and photographs were not affidavits or sworn statements prepared long after the tests were performed; that, unlike the affidavits in *Melendez-Diaz*, the report did not leave appellant without knowledge of what tests were performed or what level of judgment or skill was required to interpret the test results; and that Reiber did not merely reiterate the contents of the report but offered his own conclusions as an expert witness based upon the reported observations. *Bullcoming* rejected the argument that the laboratory report in that case was not testimonial because it was not a sworn statement, finding that the report—which included information about the circumstances of arrest, chain of custody and testing procedures as well as the analyst's signed certification of test results—was sufficiently "formalized" to qualify as testimonial. (131 S.Ct. at pp. 2710-2711, 2717.) As we have stated, *Bullcoming* also rejected the suggestion that surrogate testimony could suffice where the tests at issue involved skill and judgment on the part of the individual performing them. (*Id.* at pp. 2715-716.)

Respondent's argument that appellant forfeited his challenge to Reiber's testimony is not well taken. *Melendez-Diaz* was decided on June 25, 2009, a month after the

verdicts were reached in appellant's trial; *Bullcoming* was not decided until June 23, 2011. Prior to *Melendez-Diaz*, California courts had directly or indirectly rejected Confrontation Clause challenges to autopsy evidence. (*People v. Clark* (1992) 3 Cal.4th 41, 158-159 [pre-*Crawford*, finding expert testimony based on autopsy performed by another admissible under official records exception to hearsay rule]; *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1222, fn. 31 [post-*Crawford*, rejecting challenge to police dispatch tape and noting out-of-state authority finding autopsy evidence non-testimonial].) Under *Geier*, as stated above, a laboratory report documenting an analyst's contemporaneous scientific findings was not "testimonial" even though the author of the report would reasonably have expected it to be used in a criminal prosecution. (*Geier, supra,* 41 Cal.4th at pp. 605-607.) Given the prevailing law at the time of trial, defense counsel could have had no reason to believe a Confrontation Clause challenge to the autopsy evidence would be anything but futile. Failure to raise a challenge in the trial court does not result in forfeiture where the law changes " 'so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change' " or where the challenge would have been futile. (*People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4, quoting *People v. Turner* (1990) 50 Cal.3d 668, 703.)

The remaining question is whether appellant was prejudiced by the erroneous admission of the autopsy report and Reiber's testimony. In assessing the prejudice resulting from a violation of the confrontation clause, we must determine whether the error was harmless beyond a reasonable doubt. (*People v. Cage* (2007) 40 Cal.4th 965, 991-992; *Chapman v. California* (1967) 386 U.S. 18.) Respondent urges that there was "nothing particularly remarkable about the autopsy report or the testimony concerning the autopsy," suggesting that this evidence merely demonstrated that Goodmanson died of a gunshot wound to the head, as well as that certain aspects of the evidence supported the defense. The latter point refers to Reiber's testimony that it would have been difficult but not impossible for the rifle to have fired in the manner appellant described, and that the wound to the back of Goodmanson's head could have resulted from falling backwards onto the dirt road rather than from a blow to the head. This testimony, however,

underscores the relevance of the autopsy evidence to the critical questions in this case—the circumstances in which the gun was fired and intent with which appellant acted. The prosecutor emphasized the pathologist's findings regarding the trajectory of the bullet in order to argue that the shooting was not the accident or act of self defense appellant claimed, having Reiber demonstrate that trajectory on a mannequin and attempt to reenact scenarios in which the gun could have been fired. The clear point of this reenactment was to demonstrate the contortions that would have been required for the rifle to fire with that trajectory during the struggle appellant described, thereby demonstrating the unlikelihood of appellant's defense. Aside from appellant's testimony, the autopsy was the only source of evidence as to how Goodmanson died—not merely the fact that he was shot, but the details that might illuminate the circumstances of the shooting. During Reiber's testimony, several jurors asked questions about what the autopsy showed about these circumstances, including whether injuries to Goodmanson's body could have been caused when the body was dragged up or rolled down the levee, whether blood would be on both people if Goodmanson was on top of another person when he was shot and how close the other person would have to be to be touched by the blood spatter, and whether there was dirt embedded in the wound on the back of Goodmanson's head. These questions demonstrate that jurors were looking to the autopsy evidence to resolve some of the questions about the circumstances in which Goodmanson died. We cannot conclude the introduction of the autopsy evidence without opportunity for cross examination of the pathologist who performed it and authored the report was harmless beyond a reasonable doubt.

II.

Although appellant's conviction must be reversed for the reasons stated above, we address appellant's additional arguments that may bear on a potential retrial. First among these is appellant's contention that the trial court erred in denying his motion to suppress statements he made during his interview by the police, in violation of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 and *Edwards v. Arizona* (1981) 451 U.S. 477.

"In *Miranda, supra*, 384 U.S. 436, recognizing that any statement obtained from a criminal suspect by a law enforcement officer during custodial interrogation is potentially involuntary because such questioning may be coercive, the United States Supreme Court laid down its now familiar rule: '[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination . . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. *If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning*.' " (*People v. Neal* (2003) 31 Cal.4th 63, 79-80.)

"In *Edwards, supra*, 451 U.S. 477, the court announced a related rule designed to prevent the 'badgering' of a criminal suspect by a law enforcement officer in order to get the suspect to waive his or her rights under *Miranda* (*Michigan v. Harvey* (1990) 494 U.S. 344, 350 . . .; accord, e.g., *Davis v. United States* (1994) 512 U.S. 452, 458 . . .: '[A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him' (*Edwards, supra*, 451 U.S. at pp. 484-485; accord, *Arizona v. Roberson* (1988) 486 U.S. 675, 677 . . .) and indeed not until counsel is actually present (*Minnick v. Mississippi* (1990) 498 U.S. 146, 153 . . .), 'unless the accused himself initiates further communication, exchanges, or conversations with the police' (*Edwards, supra*, 451 U.S. at p. 485; accord, e.g., *Minnick v. Mississippi, supra*, 498 U.S. at p. 150; *Arizona v. Roberson, supra*, 486 U.S. at p. 677)." (*People v. Neal, supra*, 31 Cal.4th at p. 80.)

At the hearing on appellant's motion to suppress, Officer Houlihan testified that when the police found appellant and pulled him up to the levee road, he was laid face down on the ground, handcuffed behind his back, with Houlihan kneeling on top of him;

there was concern for officer safety because of the location and appellant's indication that there might be other people around. Appellant did not reply when Houlihan asked if he had any injuries. When Houlihan asked about the person appellant was with at the bottom of the levee, appellant said, "I'll have to plead the Fifth" and then "I'll wait for my lawyer to answer any more questions." Houlihan asked no more questions. He remained in physical contact with appellant, who remained on the ground for about 20 minutes while other officers searched for additional suspects. Paramedics spoke with appellant and Houlihan heard him complain to them of shoulder pain.

Houlihan put appellant into the patrol car and remained next to it for the next several hours. During this time, he observed appellant bang his head twice against the screen in the patrol car. When he opened the door to tell appellant to stop hurting himself, appellant made several spontaneous statements: "Steve was like my father," "I would call that man my father," "I learned a lot from him" and "I didn't learn enough because I wasn't able to stop this." Appellant seemed upset, sitting with his eyes closed most of the time and pausing, trying to control his emotions, while making the statements about Goodmanson. After a number of hours at the scene, Houlihan drove appellant to the field operations bureau in Martinez, arriving at 5:38 a.m., and turned him over to the detectives there. He told the detectives that appellant had invoked his right to counsel.

Detectives Shawn Pate and Chris Simmons interviewed appellant at the Field Operations Bureau on August 27, 2006. The transcript of the interview reflects that at the outset, the officers told appellant they wanted to "clarify" what appellant had said to Houlihan about wanting to speak with a lawyer. Appellant was told he was not free to leave and informed of his rights. The officers said they needed to figure out appellant's side of the story and asked if he was injured or needed medical treatment. Appellant said his head was "foggy" and "groggy" but did not clearly respond when asked whether he needed an ambulance.

As the officers started to ask questions about what had happened leading to the fight with Goodmanson, appellant said, "I'm really scared to talk without a lawyer, you know." The officers told him this was his choice but stressed that this was his

opportunity to say what happened himself rather than leaving it to the others to tell them. Appellant said, "oh, okay," and answered some more questions about what was going on between himself and Goodmanson, emphatically stating that he did not plan or intend what happened. When the officers suggested it seemed like appellant and Goodmanson were trying to work things out and what happened was an accident, pressing appellant to tell his story, appellant said, "too often you hear of it being wise for the guy in my position to seek out a lawyer." One of the officers responded that often times a person does not tell "the truth of what happens" and the situation is made to seem worse than it is. The officers repeated that appellant could talk to a lawyer before talking to them, then noted that Aguilar and Blake had already told their stories and Cattoor would be doing so, that often people "start looking out for their own best interest" and that listening to the others' stories, "one could assume that this whole thing was planned." The officers said they did not want to assume anything, and were giving appellant the benefit of the doubt because he seemed to be going back to the scene to help Goodmanson rather than running and leaving it to the police to catch him. Appellant said, "Wow, this is a hard decision." After more of the same from the officers, appellant said, "I can get advice from a lawyer," and the officers told him he would be "stopping your side of the story from being presented." Shortly thereafter, the officers asked appellant if he meant to murder Goodmanson and appellant said, "I like to ask for a lawyer."

At this point, 48 minutes into the interview, the officers told appellant he was going to be booked for murder; said they would need to take appellant's clothes and asked if the blood on them was his or Goodmanson's; and said they would consider the shooting premeditated "until we hear otherwise" because the evidence against appellant was "overwhelming." Appellant expressed dismay and the officers left the room. Approximately two minutes later, they returned, saying they were not going to ask any more questions about the case because appellant did not want to talk about it, but needed to ask where the rifle was for public safety reasons. Pate testified at the hearing that as far as he knew at the time, the gun had not yet been located. The officers told appellant that what he said could not be used against him in court because he had asked for a

lawyer, only to find the weapon and get it off the street. Appellant asked the officers to sit back down and they asked if he was reinitiating contact and wanting to talk to them. Appellant said he did not and said he had a pounding headache. The officers pressed him to say where the gun was so no one would find it and get killed.

Appellant then said that his friend had advised him to get counsel, but the same people were "testifying" to the police, and said, "I feel like I'd love to talk." The officers reiterated that appellant had a right to reinitiate contact but that they had come back in only to get information about the location of the gun. They told appellant to relax while they got him a Coke and that someone was coming in to take a blood sample. As the blood draw began, appellant said, "Oh, this ain't gonna help my headache. I'll already feeling, whoa. . . . How much you gotta take? You got take all three of those?" The technician said, "four," and appellant said, "Two more! Ah, man . . . 'Cause you're not gonna be putting me in a good state." Asked again whether he had any injuries, appellant said he did not. The officers explained appellant's rights again, asking to clarify his wishes because, aside from public safety questions, they could only talk to him if he reinitiated contact. The officers asked if appellant wanted to talk to them and he replied, "Yeah."

As the officers started to read appellant his rights again, appellant said, "I think that blood draw is hitting me now. Fuck! That didn't help nothing at all!" The officers told him to drink some Coke and take some breaths, saying it probably had less to do with the blood draw than stress. They went through appellant's rights again and appellant said he understood them. When the officers asked to clarify that appellant had just reinitiated contact with them, appellant responded "Uh-huh." Asked if that meant yes, appellant gave an inaudible response, then said, "Um, well, fuck." The officers suggested going back to the safety issues first and asked again where the gun might be, and appellant said, "It's safe. I think you guys got it within your tape. . . . [a]round where [Goodmanson] was found." Appellant talked about his respect for Goodmanson and expressed feeling he was "inadequately prepared" but felt in his heart he was not at fault.

The officers assured appellant they wanted to hear the history and understand what had happened. The interview proceeded, addressing the night's events.

The trial court found that all of appellant's statements were voluntary. It found, however, that appellant's statements during the first 48 minutes of his interview were inadmissible because appellant had invoked his right to an attorney. Further, while the trial court found the officers' public safety questioning permissible, it ruled appellant's statements in response to these questions inadmissible because the officers had assured appellant his responses would be off the record. The court found that at this point in the interview, appellant reinitiated contact with the police with full understanding of his rights in this regard, noting that appellant was advised of his rights three times. Accordingly, the court held appellant's statements from this point forward were admissible, finding the questioning was professional and not coercive and appellant's statements were voluntary. In response to the defense argument that appellant complained of head injuries, the court found that the officers asked twice whether appellant had any injuries and appellant said no, and that appellant declined medical treatment. The court understood that appellant had a headache and was uncomfortable when his blood was taken, but found no authority for this rendering his statements involuntary. Rather, the court found appellant seemed "well-aware of what [was] going on" and did not appear to have had his will overborne or to be under the influence or in pain to a degree that was "truly problematic in him answering these questions."

Appellant contends the trial court erred in failing to exclude all his statements to the police. He urges that after his second invocation of rights during the interview, the officers intentionally failed to refrain from questioning him until a lawyer was present and, instead, asked questions that were the functional equivalent of interrogation, attempted to scare him into making incriminating statements and used public safety questions as a pretext to continue the interrogation. Appellant further argues that he did not willingly reinitiate contact with the officers but only bent to their continued pressure. " 'In reviewing constitutional claims of this nature, it is well established that we accept the trial court's resolution of disputed facts and inferences, and its evaluations of

credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained. [Citations.]' " (*People v. Storm* (2002) 28 Cal.4th 1007, 1022-1023, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 992.)

Appellant first points to the officers' statements immediately after he requested an attorney, in which they asked if the blood on appellant's clothes was his or Goodmanson's and told appellant he was going to be booked for murder. He argues that telling him they would consider the murder premeditated "until we hear otherwise" was the functional equivalent of interrogation that was impermissible in the face of appellant's request for counsel. (*People v. Davis* (2005) 36 Cal.4th 510, 555.) This part of the interview was not admitted at trial, however, and appellant did not make any incriminating statements in response to the officers. Rather, appellant expressed dismay that he would be charged before being allowed to speak with an attorney**.**

The next portion of the interview, also ruled inadmissible, involved questioning that the officers told appellant was directed toward finding the gun used to kill Goodmanson. In *New York v. Quarles* (1984) 467 U.S. 649, 655, 657 (*Quarles*), the United States Supreme Court held there is a " 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence" because "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." In *Quarles*, a woman approached police officers saying she had just been raped and the perpetrator had entered a nearby supermarket carrying a gun. (467 U.S. at pp. 651-652.) At the supermarket, the police saw a man matching the description given by the woman, who ran toward the back of the store. (*Id.* at p. 652.) The suspect was apprehended and found to be wearing an empty gun holster. (*Ibid.*) Asked where the gun was, the suspect indicated some empty cartons, where the police found the gun. (*Ibid.*) The suspect was arrested and read his *Miranda* rights; he agreed to talk and admitted owning the gun. (*Ibid*.)

In these circumstances, *Quarles* held that the police were not required to adhere to *Miranda* requirements before questioning the suspect about the whereabouts of the gun, as there was reason to believe the suspect had discarded it in the supermarket and there was an immediate need to find it in order to prevent further harm. (*Id.* at p. 657.) Whereas the fact that suspects given *Miranda* warnings might be less likely to respond to police questioning was deemed acceptable in *Miranda*, with the cost to society only in fewer convictions of guilty offenders, the cost of a suspect not responding to police questions in a situation such as in *Quarles* could be much greater, creating a direct danger to the public. (*Id.* at pp. 656-657.) Consequently, police officers faced with such a situation should not have to consider, "often in a mater of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them." (*Id.* at pp. 657-658.)

The same reasoning has been held to apply when the police ask public safety questions after an accused has requested counsel, where questioning would otherwise be prohibited by *Edwards*. "Society's need to procure the information about the location of a dangerous weapon is as great after, as it was before, the request for counsel. Moreover, the concern for protecting the accused from police 'badgering' is lessened in the context of a public safety threat. The police officers' questions generally will be motivated by the necessity 'to secure their own safety or the safety of the public' rather than 'to elicit testimonial evidence from a suspect.' [(*Quarles, supra,* [467 U.S.] at p. 659.)] Therefore, the focus should be on whether, under the circumstances, the statements were obtained coercively, disregarding the *Edwards'* prophylactic rule." (*United States v. DeSantis* (9th Cir. 1989) 870 F.2d 536, 541.)

Appellant urges that this public safety exception does not apply here because the police began asking about the location of the gun only after having unsuccessfully attempted to convince him to waive his rights, 48 minutes into the interview at the field

office and hours after he was apprehended at the levee. That there had been no effort to focus on the location of the gun before this, appellant urges, demonstrates the officers' questions were asked not out of a sincere desire to protect the public from the discarded weapon but to elicit testimonial evidence.

While the *Quarles* opinion emphasized the exigencies of the immediate situation (*Quarles, supra,* 467 U.S. at pp. 656-658; see, *People v. Neal, supra,* 31 Cal.4th 63, 91, fn. 1; *People v. Swoboda* (N.Y. City Crim. Ct. 2002) 737 N.Y.S.2d 821, 825), some courts have held that the public safety exception "is not limited to the moments immediately following the commission of a crime or the suspect's arrest . . . [T]here is at least a period of time following the suspect's arrest that an ongoing danger to the public will justify applying the public safety exception." (*Trice v. United States* (D.C. App. 1995) 662 A.2d 891, 896 (*Trice*).) However, "if the police, after becoming aware of a threat to public safety, delay questioning the suspect about that threat for an unreasonable period of time, a court no longer may be able to conclude that the question was prompted by a concern for public safety rather than for factual investigation." (*Id.* at pp. 896-897.)

Trice found the public safety exception applicable where the suspect was questioned about the location four days after commission of the crime and more than an hour after his arrest. This did not exceed the bounds of the exception because the police only learned of the danger that prompted the questioning at the time of arrest, when they found children at the suspect's house, where there was reason to believe the gun was located. (*Trice, supra,* 662 A.2d at pp. 896-897.) *Trice* distinguished another case, *United States v. Mobley* (4th Cir. 1994) 40 F.3d 688, in which the public safety exception did not permit questioning about a weapon as the arrested suspect was being led out of his apartment, in which he lived alone and agents had already determined no one else was present. (*Trice, supra,* 662 A.2d at p. 897.)

In the present case, at the time the officers questioned appellant about the location of the gun, they knew it had not yet been found despite ongoing efforts to search the area of the shooting. That area was a public location; Aguilar's nine-year-old son lived nearby, and there were other houses and a resort in the vicinity. There was reason to

believe the unsecured weapon posed a danger to the public. The test for applicability of the public safety exception is objective; it "does not depend upon the motivation of the individual officers involved." (*Quarles, supra*, 467 U.S. at p. 656.) But the officers' conduct during this portion of the interview supports the trial court's conclusion that their reliance upon the public safety exception was not pretextual, as the only subject of discussion was the location of the gun and need to protect innocent people from harm and the officers repeatedly reminded appellant that they could not talk to him about any other subject and that his responses to these questions could not be used against him.

In any case, appellant did not respond to this questioning with any incriminating statements, and the trial court ruled this portion of appellant's interview inadmissible. The portion it admitted was that following appellant's reinitiation of discussion with the detectives. As described above, after the officers' efforts to convince appellant to disclose the location of the gun, appellant commented that except for the fact his friend had advised him not to talk to the police without a lawyer, he felt like he would "love to talk." The officers reiterated appellant's right to reinitiate contact, and repeated that they were presently only trying to find the gun. After appellant's blood was drawn, he was given a Coke and a snack, and the officers asked to clarify his wishes, repeating that they could not ask him about anything other than the location of the gun unless he reinitiated contact. Asked if he wanted to talk, appellant said, "Yeah." The officers went through the *Miranda* rights again, appellant said he understood them, the officers asked to clarify that appellant had just reinitiated contact and appellant said, "uh-huh." When appellant complained that the blood draw was affecting him negatively, the officers suggested he was more likely suffering from stress, had him drink some Coke and returned to questions about the location of the gun; appellant told them it was "safe" within the police tape at the scene, and went on to discuss the background and the shooting.

The recording of appellant's interview does not support his claim that he did not voluntarily reinitiate contact but his will to resist was worn down by the officers' continued interrogation. The recording demonstrates that appellant was struggling throughout the first portion of the interview with competing considerations about whether

to talk to the police, stating a desire to talk and recognition that not talking could "look bad" but also a concern that it would be smarter to wait until he could speak with a lawyer. After he clearly stated that he wanted counsel, the questioning ceased; when it resumed with the public safety questions, the officers repeatedly stressed the limitation to information about the location of the gun, the fact that nothing appellant said could be used against him, and their inability to discuss anything other than this issue unless appellant chose to reinitiate broader discussion. Although appellant's demeanor clearly reflected his stress and emotion, especially in periods when he was left alone in the interview room, when speaking with the officers appellant was engaged and displayed no difficulty understanding the discussion. He carefully refrained from making any incriminating statements and emphatically stated that he had not wanted what happened. Such resistance, " 'far from reflecting a will overborne by official coercion, suggests instead a still operative ability to calculate his self-interest in choosing whether to disclose or withhold information.' " (*People v. Jablonski* (2006) 37 Cal.4th 774, 815, quoting *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 58.) Appellant subsequently stated he wanted to discuss the situation, after multiple reiterations and explanations by the officers that it was his choice whether to do so. We have no question that appellant's reinitiation of contact was voluntary and not coerced.

Violations of *Miranda* or *Edwards* do not render inadmissible statements made later after proper admonishments. " '[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.' " (*People v. Storm, supra,* 28 Cal.4th at pp. 1030-1031, quoting *Oregon v. Elstad* (1985) 470 U.S. 298, 314.) The same is true when prior statements are obtained in violation of *Edwards*. (*People v. Storm, supra*, 28 Cal.4th at pp. 1031-1032; *People v. Bradford*

(1997) 14 Cal.4th 1005, 1039-1040.) If the initial statement was voluntary, even a violation "resulting in the defendant's letting 'the cat out of the bag'—does not 'so taint[] the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.' " (*People v. Williams* (2010) 49 Cal.4th 405, 448, quoting *Oregon v. Elstad*, *supra*, 470 U.S. at p. 318.) Here, in the portions of the interview obtained in violation of *Edwards* and pursuant to the officers' promise that appellant's statements would not be used against him, appellant in fact made no incriminating statements. It was only after he reinitiated contact with the officers that he disclosed the location of the gun and discussed the shooting.

III.

Appellant's additional contentions are that the trial court erred in denying his request for a continuance to allow retained counsel to replace appointed counsel, and that the evidence was insufficient to prove he intended to kill Goodmanson, as required for the voluntary manslaughter conviction. In light of our reversal of this conviction due to the Confrontation Clause violation discussed above, it is not necessary for us to consider the first of these contentions.[5]

We address the insufficiency of the evidence claim because if it were meritorious, reversal on that basis would preclude retrial. (*Lockhart v. Nelson* (1988) 488 U.S. 33, 39; *Burks v. United States* (1978) 437 U.S. 1, 18.) In considering this claim, we consider " 'all of the evidence admitted by the trial court,' regardless whether that evidence was

[5] In late March, with trial scheduled for April, retained counsel sought to come into the case with a continuance until September to allow him to prepare for trial. After the court denied the substitution motion, appellant said he had a *Marsden* motion based on a serious conflict with his public defender; the court heard and denied this motion. (*People v. Marsden* (1970) 2 Cal.3d 118.) The next day, a different attorney from the retained law firm represented that she could be ready for trial in May. After discussion of the district attorney's concern there would be further delays, while the public defender was ready to proceed as scheduled, the court denied the motion based on the length of time the case had been pending and brevity of time remaining before the trial date.

admitted erroneously." (*McDaniel v. Brown* (2010) 130 S.Ct. 665, 672, quoting *Lockhart, supra,* 488 U.S. at p. 41.)

"When a defendant challenges the sufficiency of the evidence, ' "[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 509 . . ., quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578 . . . .) 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]' (*In re Michael D.* (2002) 100 Cal.App.4th 115, 126.) We ' " 'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " [Citation.]' (*People v. Davis, supra,* at p. 509.)" (*People v. Clark* (2011) 52 Cal.4th 856, 942-943.)

Here, Goodmanson was shot in the head while alone with appellant at the levee. The autopsy evidence indicated that it was highly unlikely the shot was fired in the course of the struggle appellant described. There was evidence of a controversy between appellant and Goodmanson over Cattoor, and evidence that Cattoor told the police appellant said to her at the scene, "This is what you wanted." Aguilar testified that he understood appellant's comment, "he went fishing," to mean there had been a fight with "only one winner" and that appellant's taking Goodmanson's boots, in the neighborhood where he and appellant grew up, signified that appellant was the winner of a fight. Aguilar did not hear sounds of a fight before he heard the single gunshot and appellant returned to the truck. Appellant did not tell Cattoor or Aguilar that there had been an accident or that he had acted in self defense, and he attempted to hide the gun by throwing it into the water. In sum, the evidence, viewed in the light most favorable to the judgment, supported the jury's conclusion that appellant intended to kill Goodmanson.

The judgment is reversed.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Lambden, J.