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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO GIL RIVERA, Defendant and Appellant.	G043460 (Super. Ct. No. SWF006720) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Judith C. Clark, Judge. Affirmed as modified.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Fernando Gil Rivera appeals his conviction of two counts of murder (Pen. Code, § 187),[1] for which he was sentenced to two consecutive terms of life without the possibility of parole. Other than modifying the judgment to strike a parole revocation fine, we affirm.

FACTS

Defendant, Shawn Khalifa, and Mark Anthony Gardner, Jr., were charged with the murder of 77-year-old Hubert Love, while engaged in the burglary and robbery of Love's home.[2] Rivera was also charged with the murder of Juan Pena, who also allegedly participated in the murder of Love. Defendant, born in October 1987, turned 16 years old a few months prior to the murders.

Evidence

Defendant, Gardner, and Khalifa were together at approximately 8:00 p.m., on January 27, 2004. Sometime later, Pena arrived at Khalifa's house. Following a conversation about money issues in which defendant suggested robbing Love, the group walked toward Love's residence. Pena and defendant walked toward and entered the front door of Love's home. Khalifa entered the house and looked through the kitchen drawers. Gardner stayed outside. Gardner heard Rivera say (from inside the house), "Shut the fuck up. You're being too loud."

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[1] Unless referenced otherwise, all statutory references are to the Penal Code.

[2] In a prior opinion, we affirmed Khalifa's murder conviction and prison sentence of 25 years to life. (See *People v. Khalifa* (Apr. 7, 2010, G040331) [nonpub. opn.].) As discussed in our prior opinion, Gardner testified during the trial of defendant and Khalifa pursuant to a plea bargain with the prosecutor.

Khalifa and Gardner walked away from the house; defendant and Pena got into Love's car and drove down the street. Defendant drove and Pena sat in the front passenger seat. Khalifa got into the car at the prompting of defendant and Pena, but Gardner declined to do so.

On January 28, 2004, police responded to a citizen's report of a dead body in a canal. It was Pena, who had been shot to death.

On January 29, 2004, police responded to a citizen's report of an abandoned car with blood stains. The police determined the car was owned by Love. Police then discovered Love's dead body in his home.

Police interviewed defendant on January 31, 2004. The prosecution played a recording of the interview for the jury and the transcript was entered into evidence. In the interview, defendant admitted he and the three others went to Love's home to take Love's money. Defendant claimed Pena had a gun and began beating Love as soon as Love opened the door. Defendant admitted he kicked Love three times in the stomach. Defendant attributed the death of Pena to an unidentified Black man, who shot Pena from outside the car and then entered the back seat to force defendant to help hide the dead body of Pena.

The coroner testified that Pena had been shot five times; the bullets entered the left side of his head and body. The coroner testified that, based on the "stippling" on Pena's head, the shooter was closer than two feet to Pena when Pena was shot. According to the coroner, the facts were more consistent with the prosecution's theory (i.e., the shooter was in the driver's seat) than a theory that the shooter was in the back seat. The "medium caliber" bullets recovered from Pena's body "would be consistent with a .9 millimeter or a .380 . . . ."

Gardner had previously seen defendant with a gun, which Gardner thought was a .380 caliber. Police found various guns and ammunition at defendant's residence

and the residence of defendant's brother (including .380 caliber ammunition). Police never found the gun used to shoot Pena.

While in custody awaiting trial, defendant threatened Gardner not to say anything.

Procedural History

By information, defendant was accused of: (1) count 1 — the willful, deliberate, and premeditated murder of Love while engaged in section 190.2, subdivision (a) (17) special circumstances of robbery and burglary; and (2) count 2 — the willful, deliberate, and premeditated murder of Pena, with the special circumstance of two murders in the same proceeding alleged pursuant to section 190.2, subdivision (a)(3). As to count 2, it was alleged that defendant personally and intentionally discharged a firearm pursuant to section 12022.53, subdivision (d).

After initially pleading not guilty to all charges, defendant eventually pleaded guilty to count 1 (the Love murder) and admitted the special circumstances (i.e., the murder occurred during a burglary and robbery). A jury found defendant guilty of the Pena murder and found the charged enhancements to be true. The court sentenced defendant to two consecutive terms of life without the possibility of parole, along with a consecutive 25 years to life sentence for the firearm enhancement.

DISCUSSION

Defendant raises eight issues on appeal. We provide additional factual material below as needed to address each of the eight issues.

Jury Selection

Defendant first contends the court erred by denying his two *Batson*/*Wheeler* motions.[3] Defendant asserts the prosecutor improperly utilized his peremptory challenges to systematically remove prospective Hispanic and women jurors. Under *Batson*/*Wheeler* and their progeny, "[a] party may not use peremptory challenges to remove prospective jurors solely on the basis of group bias. Group bias is a presumption that jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." (*People v. Fuentes* (1991) 54 Cal.3d 707, 713 (*Fuentes*).)

Once a *Batson*/*Wheeler* motion is made, trial courts follow a three-step procedure: (1) the moving party has the burden of establishing a prima facie showing of improper use of peremptory challenges; (2) the burden shifts to the opposing party to provide a bias-free explanation for the use of peremptory challenges; and (3) the trial court assesses the credibility of the bias-free explanation and determines whether there was wrongful discrimination. (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*); see also *Fuentes*, *supra*, 54 Cal.3d at p. 714.)

"'Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' [Citation.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her." (*Lenix*, *supra*, 44 Cal.4th at p. 613, fn. omitted.) "In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness,

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[3] See *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), disapproved on a ground not material to this appeal in *Johnson v. California* (2005) 545 U.S. 162, 168, 173.

inattention), making the trial court's first-hand observations of even greater importance." (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477.) One way to weigh the sincerity of proffered reasons for excusing prospective jurors is to compare the empanelled jurors to excluded jurors. (*Lenix*, *supra*, 44 Cal.4th at pp. 621-624.)

Here, it is uncontested that defendant made a prima facie showing jurors were being removed on the basis of group bias. It is also uncontested that the prosecutor offered race and gender-neutral explanations for using peremptory challenges to remove the prospective jurors at issue. Our review of the record indicates "[t]he trial court denied the motions only after observing the relevant voir dire and listening to the prosecutor's reasons supporting each strike and to any defense argument supporting the motions. Nothing in the record suggests that the trial court either was unaware of its duty to evaluate the credibility of the prosecutor's reasons or that it failed to fulfill that duty." (*People v. Lewis* (2008) 43 Cal.4th 415, 471.) Thus, the only question on appeal is whether substantial evidence supports the court's rulings that the prosecutor's use of peremptory challenges was not based on group bias. (*Ibid*.; *Lenix*, *supra*, 44 Cal.4th at p. 613; see also *People v. Williams* (1997) 16 Cal.4th 635, 666 ["We accord great deference to a trial court's determination of the sufficiency of a prosecutor's explanations for exercising peremptory challenges"].)

The venire consisted of 80 prospective jurors, 66 of whom were identified on the record before 12 jurors and three alternates were selected. Ten prospective jurors (out of the 66 identified on the record) were excused for cause or hardship. The prosecutor and defense counsel were each entitled to 20 peremptory challenges. Defendant exercised all 20 of his peremptory challenges, while the prosecutor exercised 18 peremptory challenges. The jury panel consisted of seven females and five males; the alternate jurors included two females and one male.

After the prosecution exercised its 12th peremptory challenge, defendant moved pursuant to *Batson*/*Wheeler*, arguing Hispanic jurors were being improperly

excluded from the jury by the prosecution. Six prospective jurors with "Hispanic surnames" had been excused by the prosecution: Diane T., April R., Ruth T., Rene G., Nancy B., and Elizabeth Y. "[B]ased on the number of those jurors," the court found a prima facie showing of bias.

The prosecutor provided his reasons for excusing each of the six jurors: (1) Diane T. — she watched C.S.I. and did not seem sophisticated (she worked as a phone operator); (2) April R. — her brother was wrongfully accused of murder; (3) Ruth T. — her profession (graphics) and her daughter's profession (massage therapy) seemed liberal (the prosecutor also noted he did not realize Ruth T. was Hispanic based on her appearance); (4) Rene G. — he expressed a discomfort with sitting in judgment of another; (5) Nancy B. — she had an engineering background; and (6) Elizabeth Y. — she had previously sat on a hung jury.

The prosecutor noted he gladly would have empanelled two individuals with Hispanic surnames who were struck by defendant — Elias G. and Rachel G. The prosecutor also noted "there appears to be four additional Hispanics seated in the box which is, I think, a high proportion compared to the numbers that have coming through at this stage that the People have not kicked off." Defense counsel disagreed with the latter point, claiming only Juror No. 6 was Hispanic; the court noted that Juror No. 1 might be Hispanic as well.

The court found a "race neutral reason for the exercise of the challenges" with regard to April R., Rene G., Nancy B., and Elizabeth Y. "With those four jurors having been kicked off for a race neutral reason, the remaining jurors who have been excused, where the court doesn't quite understand the basis of those challenges, they do not establish a pattern of the exercise of improper challenges based on an identified protected class. And for those reasons collectively, the court does not feel that there has been demonstrated a pattern of the exercise of challenges for an improper basis. As such, the *Wheeler* motion would be denied at this point."

Our review of the record leads us to conclude there is substantial evidence supporting the court's denial of the motion. During voir dire, April R. stated her "brother was wrongfully accused of homicide" and the charges were later dropped after he spent a year in custody. "[T]he arrest or conviction of a juror's relative provides a legitimate, group-neutral basis for excluding a juror." (*People v. Turner* (2001) 90 Cal.App.4th 413, 419.) Rene G. expressed reluctance to stand in judgment: "You're talking about somebody's whole life, and I don't know." Nancy B. informed the court she was an engineering technician for a municipality. Elizabeth Y. previously sat on a hung jury, which is a legitimate reason to excuse a juror. (*People v. Turner* (1994) 8 Cal.4th 137, 170, disapproved on a different point in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

And although the court did not understand the prosecutor's reasoning with regard to Diane T. and Ruth T., the court did not find the prosecutor purposefully discriminated against these jurors on the basis of their Hispanic surnames. There is evidence supporting the prosecutor's cited reasons for striking these jurors. Diane T. was an operator and watched crime shows like C.S.I. Ruth T. worked in graphics and her stepdaughter worked as a fashion designer (her son was a massage therapist).

Thus, there is substantial evidence supporting the court's denial of defendant's motion with regard to Hispanic jurors. Defendant tries to find fault with the prosecutor's stated rationales by comparing the excused individuals with (presumably non-Hispanic) jurors (i.e., other jurors also watched crime shows, had arguably "liberal" professions, and had engineering/science backgrounds). This comparative approach is an appropriate way to ferret out the use of pretextual rationales by prosecutors. But the superficial comparisons cited by defendant cannot overcome the trial court's conclusion, after a careful review at the *Batson*/*Wheeler* hearing, that the prosecutor's peremptory challenges were not based on bias toward Hispanics.

Following the denial of defendant's initial motion, the jury selection process continued. After the prosecution exercised its 16th peremptory challenge, defendant moved for the second time pursuant to *Batson*/*Wheeler*, this time citing the fact that 12 of 16 peremptory challenges resulted in females being excused (five of these women also had Hispanic surnames and were discussed above). The court again found a prima facie case of bias had been established (based solely on the numbers) and asked the prosecutor to explain his selections.

The prosecutor presented several general defenses of his selections. First, he correctly noted that he had earlier passed three different juries consisting of, in one instance, equal numbers of females and males and, in two cases, more females (seven) than males (five). Second, he explained that because defendant had utilized nearly all of his peremptory challenges to remove male prospective jurors, the remaining potential jurors were disproportionately female. Indeed, the prosecution had earlier filed its own *Batson*/*Wheeler* motion against defense counsel for utilizing 14 out of 18 peremptory challenges on prospective male jurors. Third, the prosecutor explained with regard to female jurors he had earlier passed on but subsequently struck, these jurors were acceptable as part of a gender-balanced jury, but became the least desirable (from the prosecution's point of view) after defendant continued to strike male jurors and skew the jury toward an unbalanced gender ratio.

The prosecutor also provided specific reasons for striking each of the seven individual prospective female jurors not previously addressed in the prior motion: (1) Diane W. — her best friend's husband was killed in a drug deal and she worked for the United States Post Office; (2) Susan Z. — she was a school psychologist; (3) Jacqueline B. — she was married to a software engineer and was the "least pro-prosecution juror that was available at that stage"; (4) Amanda F. — she was a young, inexperienced full-time student; (5) Julia L. — a self-employed florist who said she could not look at horrific photographs; (6) Dorothy W. — a senior (in her 70's), who might be less

perceptive; and (7) Leanna M. — worked for Department of Public Social Services, a group the prosecutor thought was "very critical of the District Attorney's office and law enforcement."

Based on the totality of the circumstances, the court denied defendant's second *Batson*/*Wheeler* motion. We again conclude that the court's ruling is supported by substantial evidence. For one, the prosecutor's stated reasons for each juror have a basis in the record. We also agree with the prosecutor's lament that because defendant removed so many males from the venire, it was only natural that most of the peremptory challenges utilized by the prosecutor were on prospective female jurors. The composition of the jury (seven females, five males) is a good indication that the prosecutor did not do anything untoward with regard to removing females as a class from the jury.

Defendant's Potential Testimony at Suppression Hearing

Defendant next argues the court erred with regard to a ruling at a hearing regarding the suppression of admissions made by defendant during his postarrest interrogation. Defendant did not actually testify at the suppression hearing, based (apparently) on the court's ruling. The court ultimately denied defendant's suppression motion.

Defendant characterizes the court's ruling as prospectively allowing any statements made by defendant during his suppression hearing testimony to be used in the prosecution's case-in-chief. Were defendant accurately describing the court's ruling, the court would have committed error. "If a defendant testifies at a suppression hearing in superior court, his testimony may not be used against him by the People in their case in chief. [Citations.] However, if a defendant's testimony at a pretrial suppression hearing is inconsistent with his testimony at trial, the People may use such pretrial testimony for impeachment." (*People v. Drews* (1989) 208 Cal.App.3d 1317, 1325; see *Simmons v.*

United States (1968) 390 U.S. 377, 394.) "Permitting the prosecution to use testimony from the suppression hearing at the case-in-chief when defendant did not take the stand would have the impermissible effect of forcing a defendant to choose between the exercise of two constitutional rights; either he gives up his Fourth Amendment privilege by remaining silent at the suppression hearing, or he is denied his Fifth Amendment self-incrimination privilege when his suppression hearing testimony is read into the record at the full trial." (*People v. Douglas* (1977) 66 Cal.App.3d 998, 1004.)

But the court did not actually rule that any testimony by defendant during the suppression hearing could be used in the prosecution's case-in-chief. We describe the background to this dispute in some detail to provide the context for the court's ruling.

According to Detective Robert Spivacke (who conducted the interrogation of defendant), defendant's mother was present at the time of defendant's arrest. Spivacke had no knowledge of defendant's mother requesting counsel for defendant. Defendant was taken to the police station and questioned. Prior to substantive questioning, defendant was provided with warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436.

Defense counsel moved to suppress admissions made by defendant during his postarrest interview. Defense counsel represented that defendant would testify at the suppression hearing to the effect that he had "asked to speak to his mother and father for several minutes while waiting . . . to be transported [to the police station]. And that [defendant] did not see Detective Spivacke until they were introduced to each other at the facility." Defendant, who suffered an injury to his head during his arrest, would testify he was segregated away from his parents and the detaining officers refused to allow him to talk to his parents.

The court raised a concern: "If he takes the stand in this motion . . . and therefore places his credibility [at issue], does that subject him to cross-examination by [the prosecutor] in all regards?" The parties then argued over whether cross-examination

could be limited to the sole issue of what took place at defendant's residence when he was arrested (defendant's position) or if the prosecutor could inquire into all issues pertaining to defendant's credibility, in particular statements made to law enforcement concerning the murder of Love and Pena. Defense counsel argued that under Evidence Code section 352, the court could restrict cross-examination. Defense counsel added: "if the Court tells me that the district attorney is allowed to go into those areas, then I'm telling [defendant] now" not to testify.

At the continued suppression hearing, the issue of defendant testifying was raised again. The court stated its belief that defendant's credibility would be placed in issue and the court indicated it would not "limit cross-examination on the matters that bear upon credibility." The court also stated, "And, therefore, any admissions made in the course of that testimony, under cross, would be admissible against him in a subsequent trial by the prosecution." Defendant's argument on appeal is based on this latter statement, which certainly could be interpreted in isolation to mean what defendant now contends it means on appeal. But nothing in the record suggests the court was actually ruling that anything said by defendant during his suppression hearing cross-examination would be admissible in the prosecution's case-in-chief. This issue had not been raised by the parties or court before the court's statement. Defendant did not object to the court's statement.

Defendant's claim is forfeited for lack of a clear ruling by the court that it would allow defendant's suppression hearing to be used in the prosecution's case-in-chief and a clear objection by defendant to the court's ruling on the constitutional ground raised in this appeal. (See *People v. Partida* (2005) 37 Cal.4th 428, 434-435.) Placed into its proper context, it does not appear the court was really ruling in the manner suggested by defendant in his appellate briefs. We decline defendant's invitation (first raised in his reply brief) to consider whether he received ineffective assistance of counsel with regard to defense counsel's representation at the suppression hearing.

Sufficiency of Evidence Proving Defendant Murdered Pena

Defendant posits there is insufficient evidence in the record to support the jury's guilty verdict with regard to the murder of Pena and the jury's true finding with regard to defendant's personal discharge of a firearm. Defendant notes there is evidence suggesting Khalifa could have been the real killer of Pena. We review the judgment for substantial evidence. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1572-1573.)

Defendant was in the driver's seat of the car when Pena was shot and killed while sitting in the front passenger seat. Pena was shot five times at close range. Bullets recovered from Pena's head were most likely from a .380 caliber or .9 millimeter gun. Several days before Pena was killed, Gardner saw defendant showing off a .380 caliber gun. Defendant had a motive for killing Pena, namely having just participated in a murder with Pena. In sum, there is substantial evidence supporting the jury's findings.

Admission of Evidence of Murder of Love

Defendant also claims the court erred by allowing evidence of the murder of Love to be used against him in his trial for the murder of Pena. After he pleaded guilty to the Love murder, defendant requested that the court exclude details about the Love murder to avoid unduly prejudicing the jury. The court denied the pretrial motion: "the probative value of that evidence outweighs the prejudicial impact of that evidence under a [Evidence Code section] 352 analysis, either on the issue of deliberation, premeditation, and an intent to kill . . . or . . . on the issue of motive, identification, . . . and intent under a theory of felony murder."

During the trial, defendant reiterated his objection with regard to specific evidence of the Love murder — graphic photographs of Love's brutally beaten body. The court overruled defendant's objection to the introduction of this evidence: "[B]e it an issue of intent to kill, be it the question of motive, be it the question of reckless disregard, any of those bases, the evidence of the Love murder would be admissible as

evidence to prove any of those facts for purposes of Count 2. I appreciate the fact that photos are more inflammatory than just the testimony, but the fact is that the credibility of every witness who testifies in any criminal case is an issue for the jury. And that means the credibility of the coroner is at issue as well, and the prosecutor has a right to corroborate the testimony of the coroner by showing pictures that corroborate their assessments of the injuries . . . . [¶] The fact is that the pictures of the injuries . . . do establish a level of proof with regards to intent to kill. . . . [T]hat would go also to the issue of an absence of mistake in that regard."

Defendant concedes on appeal that it was not error for some of the evidence pertaining to Love's murder to have come into evidence. For instance, Gardner's testimony about the burglary suggested defendant may have been angry because of the noise made during the Love murder. This testimony provided a motive for killing Pena, as argued by the prosecutor during closing argument. Defendant claims the court prejudicially erred, however, by admitting the coroner's testimony about Love's death and photos of Love's dead body, which served only to inflame the jury with regard to the brutality of the Love murder.

We review evidentiary rulings under Evidence Code sections 1101 and 352 for an abuse of discretion. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.) """[A] trial court's ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice."""" (*Id*. at pp. 1328-1329.)

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) "Character evidence is not admissible to show conduct on a specific occasion. [Citation.] This type of evidence sometimes is referred to as evidence of criminal disposition or propensity." (*People v. Carter* (2005) 36 Cal.4th 1114, 1147; see also Evid. Code § 1101, subd. (a).) But "[n]othing . . . prohibits the admission of evidence that a person committed a crime, civil wrong, or other act

when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b); see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403 (*Ewoldt*), superseded on other grounds by Evid. Code § 1108.)

The court did not abuse its discretion by admitting testimony and photographs concerning the murder of Love. It can plausibly be argued (as defendant does here) that it was unnecessary to admit all of this evidence. Defendant's admission to the murder of Love and Gardner's testimony (along with evidence that Pena was shot five times at close range) were certainly sufficient for the jury to conclude: (1) defendant had a motive to murder Pena; (2) defendant intended to kill Pena; and (3) defendant did not mistakenly kill Pena. But the trial court was better positioned than this court to draw the precise line of admissibility. As noted by the court, the credibility of all the witnesses was at issue. And the degree to which Love was brutally beaten was relevant to defendant's motive in the Pena murder, as evidence suggests defendant could have been angry with Pena because of Pena's conduct during the Love murder.

Even if we were to conclude the court abused its discretion in this case, any error was harmless. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1195 [error in admitting evidence of prior crimes does not provide basis for reversal if such error was harmless].) Defendant's identity as the shooter of Pena was the key factual issue in this case. It is not reasonably probable that the jury would have reached a different result had the photos/coroner's testimony pertaining to Love been excluded, given the other evidence tending to show defendant's guilt.

Cruel and Unusual Punishment

Defendant next challenges his sentence of life in prison without parole as unconstitutionally cruel and unusual due to his age (16 years old) at the time of his offenses.

Both the United States and California Constitutions prohibit cruel and unusual punishment. "Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496.)

There are some bright line substantive limits on sentences dispensed to juvenile offenders. (See, e.g., § 190.5, subd. (a) ["Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime"]; *Roper v. Simmons* (2005) 543 U.S. 551, 578-579 [death penalty for juveniles is unconstitutional regardless of crime committed]; *People v. Demirdjian* (2006) 144 Cal.App.4th 10, 17 ["For juveniles under 16 who were 14 or 15 when [a special circumstance murder] was committed, a life term without possibility of parole is not permitted [under relevant California statutes], leaving a term of 25 years to life *with* possibility of parole"].)

But California law allows a 16-year-old murderer (at the time of the offense) like defendant to be sentenced to life without the possibility of parole. "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances . . . has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." (§ 190.5, subd. (b).)

Defendant does not point to any binding statute or case authority for his contention that his sentence violates either the United States or California Constitutions. Instead, defendant points to a minority of state jurisdictions that disallow life without parole sentences for juveniles, as well as various international treaties prohibiting sentencing juveniles to life in prison without parole. We reject defendant's contention. (See, e.g., *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1145-1148 [life without parole

as imposed pursuant to § 190.5 is not cruel and unusual punishment for murder committed by 16- or 17-year-old offender].)

There are also proportionality requirements inherent in the constitutional prohibitions of cruel and unusual punishment. (See, e.g., *People v. Dillon* (1983) 34 Cal.3d 441, 487-489 [courts may reduce felony murder to second degree murder if circumstances of case, including age of defendant, suggest the sentence required by a felony murder conviction is excessive and disproportionate]; *In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted [punishment is unconstitutional if it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity"].)

But the trial court in this case did not exercise its discretion to reduce defendant's punishment. As the court explained, the evidence suggested defendant voluntarily entered an elderly man's house with the intent to commit burglary, participated in the burglary, took part in beating the victim to death, stole the victim's automobile, and then shot one of his confederates. The court, having explicitly considered the age of defendant, ultimately concluded the depravity of the acts justified defendant's sentence. We see no basis to disagree with the trial court's view of the evidence.

Exercise of Discretion Under Section 190.5, Subdivision (b)

Nor did the court abuse its discretion under section 190.5, subdivision (b). As discussed above, the court understood the applicable law and carefully considered the facts of the case. After this review, the court decided to sentence defendant to consecutive life terms without parole. We decline to interfere with the court's legitimate exercise of discretion.

Testimony of Coroner and Right to Confront Witnesses

In supplemental briefing, defendant raised the additional question of Sixth Amendment confrontation clause error with regard to the testimony of the coroner. (See *Bullcoming v. New Mexico* (2011) 564 U.S. __ [131 S.Ct. 2705] (*Bullcoming*); *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. __ [129 S.Ct. 2527] (*Melendez-Diaz*).) The coroner providing testimony did not actually perform either the Love autopsy or the Pena autopsy. Instead, he testified after reviewing autopsy reports prepared by two deputy coroners (one for Love, one for Pena), as well as other materials (such as crime scene investigator's reports, autopsy photographs, and drug testing reports). The autopsy reports were not introduced into evidence.

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" (*Crawford v. Washington* (2004) 541 U.S. 36, 42 (*Crawford*).) In *Crawford*, the Supreme Court held that the confrontation clause bars the prosecution's introduction of "testimonial" out-of-court statements against a criminal defendant unless the witness is unavailable at trial and the defendant had a prior opportunity for cross-examination. (*Id.* at p. 68.) Testimonial statements include, but are not limited to: "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations" (*ibid.*); "'*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'" (*id.* at p. 51); "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'" (*id*. at pp. 51-52); and "'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'" (*id.* at p. 52).

Key cases since *Crawford* have focused on the question of whether written reports documenting scientific testing are testimonial. In *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), our Supreme Court rejected the defendant's *Crawford*-based challenge to the testimony of the prosecution's DNA expert, Robin Cotton, who opined that the defendant's DNA matched the victim's DNA based on testing performed by another analyst. (*Geier*, at pp. 594-596, 607.) Cotton was the laboratory director of Cellmark, "a private, for-profit company that performs DNA testing" and "accepts criminal cases from both the prosecution and defense." (*Id.* at p. 594.) As the laboratory director, Cotton oversaw testing and supervised the six analysts who conducted testing for Cellmark. (*Ibid*.) Our Supreme Court concluded that a DNA report is *not* testimonial. (*Id.* at p. 605.)

Two years later, the United States Supreme Court considered whether documents "reporting the results of forensic analysis" were testimonial and therefore subject to the defendant's right to confrontation. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2530.) The trial court, pursuant to Massachusetts law, admitted into evidence (without accompanying testimony) certain "'certificates of analysis' showing the results of the forensic analysis performed on the seized substances." (*Id.* at p. 2531.) The documents at issue "were sworn to before a notary public by analysts" at a state laboratory and reported that the seized evidence contained cocaine. (*Ibid*.) A 5 to 4 majority of the court found the certificates were testimonial because they were "quite plainly affidavits: 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths,'" and that "the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment." (*Id.* at p. 2532.) The court therefore reversed the judgment. (*Id*. at p. 2542.)

More recently, the United States Supreme Court held that the testimony at trial of a "surrogate" laboratory employee does not vindicate the accused's right to confront *the* individual who prepared a testimonial report stating the accused had a blood-

alcohol content of .21 grams per hundred milliliters. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2710.) The report included preliminary information concerning the arrest of the suspect (filled out by a police officer), representations about the chain of custody of the blood sample (made by various individuals), and the blood-alcohol content of the blood sample (certified by the lab analyst). (*Ibid*.) The lab employee who conducted the blood tests (Caylor) had been put on unpaid leave at the time of trial, but was not shown by the prosecutor to be "unavailable." (*Id*. at pp. 2711-2712, 2714.) The trial court admitted the written report as a business record during the testimony of another lab employee, who: (1) did not participate in the testing of the suspect's blood; (2) did not know why Caylor had been put on unpaid leave; and (3) did not have an independent opinion concerning the suspect's blood-alcohol content. (*Id*. at pp. 2712, 2715-2716.) The lab report was testimonial because it was "'made for the purpose of establishing or proving some fact' in a criminal proceeding." (*Id*. at p. 2716.) Although the document was not sworn under oath or notarized, "the formalities attending the 'report of blood alcohol analysis' are more than adequate to qualify [it] as testimonial." (*Id*. at p. 2717.)

Having considered all of the foregoing authorities, we reject defendant's assertion of confrontation clause error. At trial, defendant did not object to the introduction of the evidence at issue. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2541 ["The defendant *always* has the burden of raising his Confrontation Clause objection"].) Because defendant did not object on Sixth Amendment grounds at trial, he has forfeited any challenge on appeal. (*People v. Williams* (1997) 16 Cal.4th 153, 250 [constitutional objections not properly raised at trial are forfeited on appeal].)

Even if we were to ignore defendant's forfeiture and assume the underlying reports were testimonial (a big assumption as there are significant differences between autopsy reports and DNA/drug testing reports completed for the express purpose of testing whether a defendant can be linked to a crime), we would find no error.

An expert witness generally may opine based on his or her review of admissible or inadmissible material (so long as the material "is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates"). (Evid. Code, § 801, subd. (b).) Here, such material would logically include the autopsy reports, autopsy photos, and other evidence pertaining to the circumstances of this case. (See *Bullcoming*, *supra*, 131 S.Ct. at p. 2722 (conc. opn. of Sotomayor, J.) ["[T]his is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence"].)[4] It is clear from our review of the record that the witness was providing, for the most part, his own opinions rather than simply parroting conclusions in the autopsy reports. Thus, it did not violate the confrontation clause for the coroner to testify as an expert witness while utilizing autopsy materials not prepared by him.

We also note it may be acceptable for a supervisor who has taken part in the testing process at issue to testify regarding written results recorded by subordinates. (See *Bullcoming*, *supra*, 131 S.Ct. at p. 2722 (conc. opn. of Sotomayor, J.) ["It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results"].) The testifying coroner was the supervisor of the two examining pathologists and was very familiar with their work. Although the coroner did not directly participate in the autopsies at issue, he testified to the protocols followed by his subordinates in performing autopsies, which include taking photos and detailed notes.

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[4] In this respect, although its testimonial analysis conflicts with subsequent United States Supreme Court cases, the result reached in *Geier*, *supra*, 41 Cal.4th 555, may have been correct. The California Supreme Court has granted review in numerous cases to consider *Melendez-Diaz's* effect on *Geier*. (See, e.g., *People v. Rutterschmidt*, review granted Dec. 2, 2009, S176213.)

Parole Revocation Fine

Finally, defendant contends, and the People agree, that a parole revocation fine of $5,000 was improperly imposed on defendant pursuant to section 1202.45. This fine was imposed in a minute order and the abstract of judgment, not by the court on the record at the pronouncement of judgment. We agree with the parties' view of the issue. Because defendant was sentenced to life in prison without parole on both counts, section 1202.45 is inapplicable to his sentence. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1181-1186.)

DISPOSITION

The judgment is modified to strike the parole revocation fine imposed upon defendant. The trial court is instructed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.