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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.

KEVIN CARADINE, JR.,

Defendant and Appellant.

A121968

(City and County of San Francisco  
Super. Ct. Nos. 196416, 200050)

Appellant Kevin Caradine, Jr., was convicted, following a jury trial, of one count of first degree murder, based on a shooting that took place on May 18, 2004, as well as three counts of second degree attempted murder and three counts of assault with a firearm, based on shootings that took place on January 23, 2004. On appeal, he contends (1) the trial court erred when it refused to sever the murder count from the remaining counts; (2) the court erred when it refused to remove a prospective juror for cause; (3) the court improperly refused to allow a defense expert to testify regarding the reliability of fingerprint evidence; (4) the court erred when it permitted the jury to consider the May 18, 2004 murder as evidence of appellant's intent to kill the victims of the January 23, 2004 shootings; and (5) the cumulative effect of the errors raised on appeal requires reversal of the judgment. We shall affirm the judgment.

***PROCEDURAL BACKGROUND***

The present appeal follows the third trial related to the January 23, 2004 shootings and/or the May 18, 2004 murder.

First, on September 14, 2005, appellant was charged by information with four counts of attempted murder (Pen. Code, §§ 664, 187)<sup>1</sup> and four counts of assault with a firearm (§ 245, subd. (a)(2)), all stemming from the January 2004 shootings. The attempted murder counts also included an allegation that appellant personally and intentionally discharged a firearm, pursuant to section 12022.53, subdivisions (c) and (e)(1), and the assault with a firearm counts included an allegation that appellant personally used a firearm, pursuant to section 12022.5, subdivision (a)(1).

Following a jury trial, appellant was convicted of assault with a firearm on security guard Eric Miller, and the jury found true the allegation that he personally used a firearm. The jury was unable to reach a verdict on the remaining counts, and the court declared a mistrial as to those counts. On January 22, 2007, the trial court sentenced appellant to a three-year term for the assault conviction and a four-year term for the gun use enhancement, for a total of seven years in state prison.

Second, on or about October 20, 2006, appellant was charged by information with the murder of Chris Johnson (§ 187) on May 18, 2004, with an allegation that he personally and intentionally used a firearm, pursuant to section 12022.53, subdivision (d). The seven counts from the first information as to which the court had declared a mistrial (all from the shootings in January 2004) were also charged in this information.<sup>2</sup> After the jury advised the court that it was deadlocked as to all counts, the court declared a mistrial on June 12, 2007.

Third, in the present matter, appellant was charged by information with the same eight counts as in the second trial. Following a jury trial, appellant was found not guilty of the attempted murder of security guard Eric Miller and was found guilty on the remaining seven counts. The jury found that the murder was of the first degree, but found no premeditation and deliberation as to the remaining three attempted murder counts. The jury also found the firearm allegations to be true.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The two cases were consolidated by the trial court on December 1, 2006.

On May 28, 2008, the trial court sentenced appellant to the midterm of seven years for the attempted murder of Charles Allen and a consecutive 20-year term for the section 12022.53 firearm use enhancement. The court imposed the same aggregate term on the other two attempted murder counts and both terms were ordered to run concurrent to the term for the attempted murder of Allen. The court imposed terms on the three assault with a firearm counts, but stayed them pursuant to section 654. The court also imposed a 25-years-to-life term on the murder count, and ordered a consecutive 25-years-to-life term for the section 12022.53 firearm use enhancement. The court ordered that the determinate term be served before the indeterminate term. Accordingly, appellant's total sentence was 27 years in state prison, followed by 50 years to life in state prison.

On June 13 and July 2, 2008, appellant filed a notice of appeal.

### ***FACTUAL BACKGROUND***

#### ***Prosecution Case***

##### ***January 23, 2004 Attempted Murders and Assaults***

Rickey Serrell testified that, at about 4:45 p.m. on January 23, 2004, he was a passenger in the car of his brother, Brad; his friend Charles Allen was in the backseat. They were taking his brother Brad to his place of work, at the "UC" hospital on Divisadero Street in San Francisco. They were on Broderick, about one block from the hospital, and making a left turn onto Sutter when Serrell saw two men walking away from the car and looking back at him. As he turned, he saw one of the men point a gun. The man was wearing a black beanie, a black hoodie, and black pants. Someone in the car said, "Someone's shooting," and Serrell heard gunshots. He put his head down and the car crashed. Serrell hopped out and ran down Divisadero. He heard one or two more shots as he ran away. He saw his friend, Charles Allen,<sup>3</sup> behind him, and then saw Brad near the car. None of the three men who had been in the car had a gun.

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<sup>3</sup> Charles Allen, the identified victim of the attempted murder and assault with a firearm charged in counts three and four, did not testify at trial.

Serrell walked back to the car to retrieve his phone and saw someone across the street on the ground. The police then took Serrell to jail as a murder suspect. After administering a gunpowder test, the police said he was not a suspect and let him go.

Brad Brantley testified that, on the date of the shooting, he, Rickey Serrell, and Chuck Allen had been clothes shopping in San Francisco in Brantley's car. He was en route to his job as a senior custodian at U.C.S.F.'s Mount Zion Hospital, located at Divisadero and Sutter Streets. He was early for work, so the men stopped at a store for a beer and drove around the area. After leaving the store, as they turned left, he heard someone say that people were shooting. He lowered his head and crashed his car into a truck. He heard gunshots before getting out of his car. When he got out and saw that no one was shooting at them, he stood in the street and asked his friends why they were running. Brantley did not have any weapons; nor was he around anyone who had weapons.

After the gunshots, Brantley saw some people running around the corner, as if they were scared. He also saw someone throw something that looked like a sock over a gate. He recalled telling a police officer shortly after the shooting that he then saw the man, who was wearing a gray jacket, fall in the street. He did not see the man's face. Brantley's car was damaged and had a bullet hole in the back. As he took his valuables out of his car, the police came, took him and his friends to jail, did a gunpowder test on them, and then let them go.

Eric Miller was working on the afternoon of January 23, 2004 as an armed, licensed security guard at the Westside Housing Projects (Westside Projects) in San Francisco. He was wearing his security guard uniform, including a duty belt with handcuffs, pepper spray, a baton, and his firearm. His jacket had a silver badge and gold security company patches on it. After he got to the security office at the Westside Projects, he realized he had left his bulletproof vest at his morning security jobsite. He therefore left the building, planning to go pick it up.

As Miller walked across the Westside Projects parking lot towards his car, he heard a number of gunshots over five to ten seconds. He immediately unholstered his

weapon, held it behind his leg, and ran towards the sound of gunshots. From the sound, he thought that the gunshots were coming from the area of Sutter and Broderick Streets and that two handguns were being fired. He also heard a boom like a shotgun. When Miller got to Broderick Street, he saw a Black male with a handgun standing in the intersection of Sutter and Broderick Streets, shooting westbound onto Sutter Street. He believed this man was wearing dark pants and a gray jacket. He then saw a second man walking southbound on the sidewalk on Broderick Street. The man was crouched over and was moving rapidly towards Miller. He was dressed in a black shirt, black pants, a black jacket, and a black knit cap. The man had a gun in his hand and was doing something with the gun, either checking the magazine or reloading it.

The man who had been in the intersection ran eastbound on Sutter and disappeared from view. The second man coming toward Miller was laughing a little bit until he finished fumbling with his gun, when he looked up and saw Miller. The man's demeanor immediately changed "from laughing to just instantaneously aggressive," and he started to raise his gun up and point the muzzle in Miller's direction. Miller then brought his gun up from behind his leg, took a stance, and fired at the man. Miller fired first and the man then started firing at him. Miller then fired all seven or eight rounds in his handgun until he ran out of bullets. As Miller turned to go up a driveway, two of the other man's bullets went in front of him and one just missed the back of his head.

The man then turned and moved away. That was the last Miller saw of him because Miller was focusing on getting around a corner so he could reload his gun. After he reloaded his gun, which took about 10 seconds, he came back out and saw the man's gun on the ground. The man was about one foot away from the gun and was moving towards it. The man picked up the gun and started to bring it up toward Miller, so Miller opened fire on him again. He and the man each fired one round before the man turned and ran up the sidewalk, northbound on Broderick Street. As the man ran, he turned around and fired again at Miller. Miller fired one round back at him. When the man got close to the corner, he turned around and fired at Miller again, and Miller fired one shot

at him. Miller's bullet hit the man in the head or shoulder area and caused a big blood spray.

Just before he saw the blood spray, Miller started feeling other bullets coming at him from the intersection. As soon as he saw the man he had hit turn a corner and go out of sight, Miller turned his attention to where the other bullets were coming from. He saw that the bullets were coming from the man who had been shooting from the intersection earlier. He focused on the man and saw that he was wearing a loose gray jacket with shiny blue sleeves,<sup>4</sup> a light colored T-shirt, and dark pants. Miller fired three shots at the man, who also fired at Miller. It looked like Miller's second shot hit the man because he bent over and half fell to the ground before getting up and running north on Broderick, out of sight into some trees. Miller did not clearly see the face of the man in the intersection and did not recognize appellant at trial as someone he had seen before.

Miller returned to the security office and called 911. When he heard sirens coming up to the intersection, he went back outside where he saw the man in black lying on the curb. There was a crowd outside and a woman pointed Miller out as the shooter. Miller was arrested, handcuffed, taken to the police station, and interviewed.

Miller had worked for 10 years as a security officer at various housing projects and other locations and had never before shot anyone or even fired his gun.

San Francisco Police Officer Michael Regalia testified that he arrived at the scene after 4:00 p.m., where he saw a Black male at the corner of Broderick and Sutter. He was lying on the ground and bleeding from the head. He appeared to be dead. There were about 15 people standing around him. When the paramedics arrived, they rolled the man over and Regalia saw an automatic gun underneath his body. It was stipulated that the deceased, DeAngelo Scott, was wearing a zipperless black hooded sweatshirt, black pants, and a pair of black sneakers.

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<sup>4</sup> At trial, Miller was shown a jacket, which he said looked like the gray and blue jacket the man in the intersection was wearing.

Steven Schwenka testified that, on January 23, 2004, he was 14 years old and lived in an apartment building on Broderick Street at Sutter. Late that afternoon, he was in his room when he heard eight or nine gunshots coming from the intersection of Broderick and Sutter. He immediately called 911. He also ran to the window and saw a person running into the intersection from Broderick Street. The man was African-American, in about his mid-twenties, about 5 feet, 11 inches or 6 feet tall and 200 pounds, and had an average build. He was wearing what looked like a Raiders jacket, with silver sleeves and a black midsection. He also was wearing gray or black pants, and a black beanie. He saw the man run east on Sutter Street. The man had a weapon, which he threw over a gate that was between two houses on Sutter Street. He then saw the man—who was hunched over—holding his stomach and limping, run across Sutter Street and part way up Broderick Street before losing sight of him. A recording of Schwenka’s 911 call was played for the jury at trial.

Nathan Burd testified that, on January 23, 2004, he lived on Sutter Street, just west of the intersection of Sutter and Broderick. Shortly before 5:00 p.m., he heard about four gunshots. Four seconds later, he heard about five more gunshots. Burd went outside to the service alley between his house and the house next door, where he saw a black gun lying on the ground. He covered the gun with a towel and called the police.

San Francisco Police Sergeant Judith Riggle testified that she recovered the gun from the service alleyway. She identified a gun at trial as the one she had recovered, a Glock semiautomatic 9-millimeter pistol.

San Francisco Police Officer Orpheos Tarbox testified that, when he arrived at Sutter and Broderick as backup, a lieutenant asked him to go to the 1600 block of Broderick to collect possible evidence. Tarbox found a black and gray “varsity-type” jacket near a tree on Broderick Street. He identified a jacket at trial as the one he recovered and booked into evidence that day. He did not handle any other piece of evidence from the crime scene at that time.

San Francisco Police Department Crime Laboratory criminalist John Sanchez testified regarding three guns that were ultimately recovered at the scene, including a

Glock model number 17, 9-millimeter pistol, which was found in the alleyway near Nathan Burd's home; a Beretta Model Cougar .45-semiautomatic firearm, which was associated with the security guard, Eric Miller; and a Springfield Armory Model V10 .45 pistol, which was found near DeAngelo Scott's body. Numerous shell casings found at the scene were matched with each gun, including six casings from the Glock firearm found in the alleyway; fourteen casings from Miller's Beretta firearm; and seven casings from Scott's Springfield firearm.

San Francisco Police Inspector Ronan Shouldice, who qualified as an expert in the areas of fingerprint analysis and bullet trajectory evidence, testified as to where the casings from the three guns were found. The casings from Miller's gun were found on Broderick south of Sutter, near the driveway to the housing projects. The casings from Scott's gun were found on the southwest corner of Sutter and Broderick, near where his body was located, except for one casing that was found in the middle of Broderick. The casings from the gun found in the alleyway were all found on the southeast sidewalks of the intersection, including four found on Broderick and two found further east on Sutter.

Inspector Shouldice also testified that two bullet strikes were found on the car in which Serrell, Brantley, and Allen were traveling. One bullet struck the passenger side above the front door and deflected upward. The other bullet entered on the passenger side and exited through the driver's side door.

San Francisco Police Inspector Pamela Hofsass testified that she took swabs from the Glock pistol and performed DNA testing on one of the samples. She found the DNA profiles of two people on the sample, with appellant as the major source of DNA. The probability that a random unrelated individual would possess the same DNA profile was one in 390 billion African-Americans in the United States, with an even higher ratio for other racial groups. DeAngelo Scott was excluded as the secondary contributor to the DNA sample.

Inspector Hofsass also tested six DNA samples taken from bloodstains on the black and gray jacket found near the crime scene. The DNA in all samples matched appellant and one in 390 billion African-Americans in the United States. There was a

very small amount of DNA from a second person on one of the samples, but Scott was excluded as a secondary contributor to that sample.

### ***May 18, 2004 Murder of Chris Johnson***

San Francisco Police Officer William Conley testified that, on May 18, 2004 at about 12:45 p.m., he and his partner were dispatched to the Safeway Shopping Center on Fillmore Street in San Francisco regarding a shooting. When they got to the Safeway parking lot, Conley noticed a large group of people standing around a tan colored car that was in a parking space. The driver's side door was open and a Black male was sitting in the driver's seat. His body was slumped over into the front right passenger seat, he had blood on his shirt, and he appeared to have been shot.

San Francisco Police Sergeant Thomas Walsh testified that he arrived at the crime scene at about 1:45 p.m. He recovered evidence from the scene, including a baseball cap.

Dr. Venus Azar, an assistant medical examiner for the City and County of San Francisco who performed an autopsy on the gunshot victim, Chris Johnson, testified that Johnson had been shot 16 times in various parts of his body, including his chest, abdomen, back, hip, buttocks, and arms. The trajectory of the bullets was from left to right. The cause of death was multiple gunshot wounds.

Gracie Palmer, the grandmother of Chris Johnson, testified that Johnson was the son of one of Palmer's daughters, Doris. Johnson lived with his mother, but also stayed over at Palmer's house every couple of weeks. Palmer lived on Fulton Street in San Francisco, about five blocks away from the Safeway Shopping Center. Johnson stayed overnight with her on May 17, 2004. When she left for work at 6:20 a.m. the following morning, she saw Johnson sleeping on the living room sofa.

As Palmer left, she saw her tan or champagne colored Ford Contour automobile parked on the street outside of her house. Only Palmer and her daughter Tiffany, who lived with her, had keys to the car. Palmer never drove to or left her car in the vicinity of the Westside Housing Development. Palmer had washed her car within eight to ten days before May 18.

Johnson's aunt, Tiffany Van Pelt, testified that she lived with her mother, Gracie Palmer in May 2004. She used her mother's car every day. She had never loaned the car to anyone, including Johnson. She was unaware that Johnson was using the car on May 18, but believed he must have gotten her keys. She never went to the Westside Housing Development and did not know anyone there.

San Francisco Police Inspector Roland Tolosa qualified as an expert in forensic video analysis. On May 18, 2004, he went to the crime scene, where he found a check cashing store that had a closed-circuit video surveillance system, with one of the cameras pointed towards the parking lot. Tolosa searched the video recorder and found a recording of the shooting.

The video was played for the jury and Tolosa testified that, in the video, a person with a baseball hat is at the driver's side of the car with his hand in the vicinity of the car. Because the video was two-dimensional, Tolosa was not professionally permitted to say that the person actually touched the vehicle.

Sergeant Walsh testified that, based on the video evidence collected by Tolosa, he looked for fingerprints on the windshield of the Ford Contour. He lifted a print from the far edge of the driver's side of the windshield, just below halfway down the windshield.

Inspector Shouldice, the expert in fingerprint analysis, testified that he was provided with a fingerprint card from appellant and compared it to the latent print from the windshield. Based on this comparison, he determined, to a 100 percent certainty, that the latent print came from appellant's left index finger. His result was peer reviewed by another technician in the San Francisco Police Department Crime Scenes Unit.

Inspector Hofsass testified that she analyzed three pieces of fabric cut from the baseball cap found at the scene for DNA material, and then compared them with a known DNA reference sample from appellant. She concluded that at least two people's DNA were on the cap, but that appellant was the major source of the DNA on the cap. The probability that a random unrelated individual would possess the same DNA profile was one in 275 billion African-Americans in the United States, with an even higher ratio for other racial groups.

San Francisco Deputy Sheriff Terance Durkan testified that on June 4, 2004, he seized a photograph from appellant's cell at San Francisco County Jail, which depicted appellant wearing a baseball cap with an "A" on it.

San Francisco Police Officer Gregory Mar testified that he found shell casings from numerous rounds, both 9-millimeter and .45-caliber, in the Ford Contour. He concluded that it was most likely that two different firearms were used in the shooting.

San Francisco Police Officer Mark Lundin testified that, on May 22, 2004, he was dispatched to the Westside Gardens Housing Project, to attempt to locate appellant in a white Acura parked in a parking lot there. He did not find appellant there, but found Tiya Christian in the driver's seat of the car. He then saw appellant walking across the parking lot. Lundin pursued appellant and detained him nearby.

### *Defense Case*

Appellant testified that in January 2004 he was 20 years old and living with a cousin in Oakland. He had lived in the Westside Projects in San Francisco as a child and, in January 2004, was going to the Westside Projects almost every day to hang out with friends.

On the evening of January 21, 2004, appellant was with two friends, DeAngelo Scott, who had been a friend since childhood, and Derrick Lindsey. They were on their way back to his cousin's house from Jack London Square in Oakland. As they drove, a car pulled up to the side of their car and the people inside started shooting at them. Appellant was shot in the middle finger of his right hand and his friends dropped him off at Highland Hospital.

After appellant was treated at the hospital, his friends returned and picked him up. They said appellant should have a gun for his safety, and so they went to someone's home at the Westside Projects where appellant was shown various guns. He eventually chose a gun to keep for his protection. He then called his future wife Tiya to pick him up; he never told her he had a gun.

Two days later, on January 23, 2004, appellant had been shopping on Geary Street. Afterwards, he drove towards the Westside Projects, where he was going to meet

a friend before returning to Oakland. After he parked his car and was walking down Broderick Street, he heard gunshots coming from the direction of the Westside Projects. He pulled out his gun and ran down the hill. He saw a security guard shooting at Scott, who was running away. He then saw Scott fall on the ground. He started to go help Scott, but then heard more shots and assumed the security guard was shooting at him. He therefore ran across the street and back up Broderick Street. Appellant did not fire his gun.

Appellant was wearing a gray and black jacket that day. As he ran away, he took off the jacket and threw it down by a tree on Broderick, and then kept running toward Divisadero. He threw his jacket away because he was scared and did not want to be stopped by the police. He later threw his gun in a garbage can on Geary Street.

Appellant acknowledged that when he was interviewed by police in March 2004, he lied and said he was not at the shooting scene on January 23. He did so because he did not trust the police.

On May 18, 2004, the day of the Chris Johnson murder, appellant was at the home of his wife, Tiya, in Park Merced. He stayed there all day and left early the next morning. Tiya left the house once to go to the store. He was not in the Safeway parking lot that day and was not one of the two people shown in the video walking up to a car and killing Chris Johnson. He did, however, have an Atlanta A's hat similar to the hat one of the assailants shown in the video was wearing, which had disappeared the previous March.

Appellant testified that he had never fired a gun. He acknowledged that he was convicted of second degree burglary as a juvenile.

Tiya Christian, appellant's wife and mother of their child, testified that, on May 18, 2004, she was pregnant. She had been "spotting" the night before, and so stayed home from nursing school that day. Appellant came over between 7:00 a.m. and 8:30 a.m. and they watched television. Later that morning, between 11:30 a.m. and 12:00 p.m., Christian saw that she was still spotting and decided to go to the store to get panty liners. Appellant offered to go for her, but she said no because he was unlicensed.

She was gone about 30 to 45 minutes and, when she returned, appellant was in bed watching television. Appellant stayed with her all night, and did not leave until around 4:00 a.m. the next morning. A few days later, on May 22, she and appellant were both arrested and her car was seized. She was released the same day without being questioned.

On cross-examination, Christian acknowledged that, when she was interviewed by police on May 24, she told the inspector that she did not know appellant's first name. She said this because she did not feel a need to cooperate with him after how she had been treated. She also testified that appellant had previously told her that his "partner" had been killed in January by a security guard. He also told her that they found "the thing," although she was not certain what he was talking about.

Nabil Alfakhouri testified that he worked at Stewart's Market at the intersection of Sutter and Broderick Streets in San Francisco. In January 2004, he was at the store when he heard gunshots. He looked outside and saw three Black people running with guns in their hands. He also saw a man who had been shot and was lying on the ground. He knew the man who was lying on the ground from the Westside Projects and did not think he was one of the three men he had seen running.

Jean Denison testified that she lived next door to Stewart's Market on Sutter near Broderick. On January 23, 2004, she heard gunshots, looked out her window, and saw a security guard with a gun in his hand, pointed downward. She then saw an African-American man wearing all black who was running and taking aim with a gun he was holding. Denison ran to her phone and called a friend. She returned to her window after hearing more gunshots and saw a man lying on the ground of the intersection. She then saw another African-American man dressed in black come running around the corner. He looked both ways and then threw a gun into an alleyway. Denison left the window and then heard a car crash.

By agreement of the parties, a January 24, 2004 recording of a 911 call by Suzan Wold was played for the jury. Wold, who lived at the corner of Sutter and Broderick, told the dispatcher that she saw an African-American man run from the

projects and throw a handgun over a wall between two buildings on Sutter before running back towards the projects. The man was wearing a black and gray Raiders jacket.

San Francisco Police Inspector Antonio Casillas testified that, on March 5, 2004, he examined appellant's torso and did not see any bullet wounds.

Alpha Woody testified that he was shooting victim Chris Johnson's cousin and that he knew appellant from the streets. Woody was standing by the car talking to Johnson when Johnson was shot and killed by two Black men who approached with guns. Although he did not really see the men's faces, he was 100 percent sure that appellant was not one of them. He admitted on cross-examination that he told police that he did not look at the men's faces. He testified that, although he only looked at the men for a split second, he could see that they were "two black faces," and that appellant was not one of them. The parties stipulated that Woody had suffered convictions for grand theft, sale of marijuana, sale of cocaine base, and attempted robbery.

Stephen Lamboy testified that, at the time of the Chris Johnson shooting, he was parked in his truck in the Safeway parking lot. He heard a loud noise, like someone hitting two pieces of wood together, and then saw two men running through the middle of the parking lot towards his truck. They got into a vehicle and drove away. The two men were African-American and appeared to be in their late teens or early 20's and about 5 feet, 8 inches to 6 feet tall. He got only a brief look at their faces and could not pick them out of a photo lineup.

Sigmund Seigel testified that he was standing in the parking lot on the day of the Chris Johnson shooting when he heard six "pretty loud pops." Within 30 seconds, two men ran past him at full speed. They got into a white car, in which the motor was already running and someone was waiting in the driver's seat. He only got a very quick side view of the two men. One of them was between 6 feet, 1 inch and 6 feet, 2 inches tall and between 200 and 210 pounds. He had a medium length Afro. The other man was approximately 5 feet, 8 inches to 5 feet, 9 inches tall and looked younger than the other man, between 16 and 18 years old. He only saw the two men for "less than a second" and did not get a look at their faces. He could not pick anyone out of a photo lineup

because he did not see the men “face-on.” He did not remember the taller man wearing a hat.

Yvette Miller testified that she was sitting in a car in the Safeway parking lot on the day of the Chris Johnson shooting. She heard gunshots and ducked down. She then jumped out of the car and went inside a nearby Laundromat, where she hid. Just before she heard the shots, a “tall, skinny black, dark guy” walked by. He was wearing a T-shirt with one arm in a sleeve and one arm out. She was curious about how he was dressed and asked if she could ask him a question. He responded very politely, saying “Not right now, ma’am. I’ll be right back.” He then walked away. He was wearing a baseball cap that was turned backwards and to the side. The next thing she heard was eight “pops.” She was shown a photo spread, but did not recognize anyone. Appellant did not look like the person she saw that day in the baseball cap. Although she did not see the person’s face, he was taller and thinner and darker than appellant.

## ***DISCUSSION***

### ***I. Denial of Appellant’s Motion to Sever the Counts***

Appellant contends the trial court erred when it refused to sever the murder count from the remaining counts.

#### ***A. Trial Court Background***

Appellant’s first trial involved only the shootings at the Westside Projects, in which the jury found him guilty of assault with a deadly weapon on security guard Miller, but deadlocked on the remaining counts. Before appellant’s second trial, the trial court (Hon. James J. McBride) granted the prosecution’s motion to consolidate the Chris Johnson murder charge with those related to the Westside Projects shootings. Appellant then filed a petition for a writ of mandate challenging the consolidation order, which this court denied on January 25, 2007. (Case No. A116040.) Before the consolidated trial began, appellant filed a motion to sever, which the trial court (Hon. Ksenia Tsenin) denied.

Before the third and last trial, appellant again filed a motion to sever, which the trial court (Hon. Carol Yaggy) denied. Appellant then filed another petition for a writ of

mandate challenging the consolidation order, which this court again denied on October 4, 2007. (Case No. A119254.) Appellant later was permitted to raise the severance issue again, but the trial court (Hon. Phillip J. Moscone) denied the motion. Finally, appellant again raised the severance issue at the start of the third trial. As appellant acknowledges, the trial court never ruled on that motion, although it did find the Johnson murder admissible on the issue of intent in the Westside Projects case.

## **B. Legal Analysis**

### **1. Abuse of Discretion**

Pursuant to section 954, a single accusatory pleading may charge two or more different offenses if, inter alia, they are of the same class of crimes. “Because it ordinarily promotes efficiency, joinder is the preferred course of action. When the statutory requirements are met, joinder is error only if prejudice is clearly shown.” (*People v. Scott* (2011) 52 Cal.4th 452, 469.)

Specifically, to establish error in a trial court’s denial of a motion to sever properly joined charges, a defendant must make a “ ‘clear showing of prejudice to establish that the trial court *abused its discretion* . . . .’ [Citations.] [¶] A trial court’s denial of a motion for severance of charged offenses amounts to a prejudicial abuse of discretion if the ‘ “trial court’s ruling ‘ “falls outside the bounds of reason.” ’ ’ ’ [Citation.] In making that assessment, we consider the record before the trial court when it made its ruling. . . . ‘The state’s interest in joinder gives the court broader discretion in ruling on a motion for severance than it has in ruling on admissibility of evidence.’ [Citations.]” (*People v. Alcala* (2008) 43 Cal.4th 1205, 1220-1221 (*Alcala*)).

In determining whether a trial court abused its discretion in refusing to sever charges, reviewing courts first consider the cross-admissibility of the evidence in hypothetical separate trials. (*People v. Soper* (2009) 45 Cal.4th 759, 774 (*Soper*)). “If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court’s refusal to sever properly joined charges.” (*Id.* at pp. 774-775.) Even if the evidence would not be cross-admissible, that circumstance would not by itself establish

prejudice or an abuse of discretion. (*Id.* at p. 775; see also § 954.1.)

If the reviewing court determines that the evidence underlying properly joined charges would not be cross-admissible, it then considers “ ‘whether the benefits of joinder were sufficiently substantial to outweigh the possible “spill-over” effect of the “other-crimes” evidence on the jury in its consideration of the evidence of defendant’s guilt of each set of offenses.’ [Citations.]” (*Soper, supra*, 45 Cal.4th at p. 775.) In making that determination, the reviewing court considers three additional factors: “(1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citations.]” (*Ibid.*) The reviewing court then balances “the potential for prejudice to the defendant from a joint trial against the countervailing benefits to the state.” (*Ibid.*, fn. omitted.)

In the present case, appellant does not dispute that the offenses of murder and attempted murder were “of the same class of crimes.” (§ 954.)

As to cross-admissibility, the trial court (Hon. Robert Dondero) found, in deciding the question pursuant to Evidence Code section 1101, subdivision (b), that the evidence from the Johnson murder case was admissible on the issue of intent in the Westside Projects case. After defense counsel conceded that intent was not an issue in the murder of Chris Johnson, the court discussed the points of similarity in the two incidents, including that one incident took place on January 23 and the other on May 18 of the same year. In addition, “[w]e have the incidents occurring in the same neighborhood, the Western Addition. If you go on a map of the two locations, they’re approximately 10 blocks apart from each other, six and then four down. So we’re talking the same neighborhood.

“We’re talking about incidents in which two assailants . . . of a certain age group, confront African American males of a common age group, the same age group. The

victims are from the same age group and the assailants are both African American males in both instances.

“We have two incidents that are close in time, a few months apart, both occurring in the afternoon hours in daylight, and we have people in cars being the victims.

“We have both cases where a 9-millimeter handgun is used by at least one assailant in each case. We have the person who uses the 9-millimeter in the first case escaping, and we have a second incident where the 9-millimeter is used to kill Mr. Johnson[.] [¶] . . . . [¶]

“The events leading up to each incident are not evidence of any other intent. There is no demand for money. There is no demand to take the car from either victim in these two cases. There is a confrontation and then the shooting occurs, according to the state of the record . . . .

“So we don’t have any other motive for either assault based upon the state of this record. There’s not a robbery attempt. There’s not an attempt to kidnap. There’s not an attempt to rape or anything like that.”

The trial court concluded: “I think that there are enough points of similarity that allow for intent evidence and limiting it to that purpose.”

We find that the trial court reasonably found that the many areas of similarity between the two incidents rendered the evidence cross-admissible on the issue of intent. (See *Soper, supra*, 45 Cal.4th at p. 776 [“there exists a continuum concerning the degree of similarity required for cross-admissibility, depending upon the purpose for which introduction of the evidence is sought: ‘*The least degree of similarity . . . is required in order to prove intent*’]; see also pt. IV, *post.*)

Although this conclusion is sufficient to uphold the trial court’s refusal to sever the two matters (*Soper, supra*, 45 Cal.4th at pp. 774-775), applying the two additional factors often considered in evaluating the potential for a spill-over effect in a case such as appellant’s—the likelihood of inflaming the jury against the defendant and the danger of joining a weak case with a strong case—we reach the same result. (See *Soper, supra*,

45 Cal.4th at p. 775; see also pt. IV, *post.*)<sup>5</sup> As the trial court (Hon. Robert Dondero) found, in the context of deciding admissibility of the evidence under Evidence Code section 1101, subdivision (b), neither case was particularly stronger than the other. Previously, the trial court (Hon. Carol Yaggy) had found, in denying a motion to sever,<sup>6</sup> “there isn’t a spillover context that’s happened here. And, frankly, the previous consolidated trial on these counts, if anything, tends to support that this did not result in a conviction based on aggregated evidence. The jury poll cited by the defense, although cited by the defense in support of the motion to sever, actually, I think, can militate the other way, in that it clearly establishes that the jurors obey the instructions to independently consider the merits of each case and that they did not, in fact, aggregate the evidence.”<sup>7</sup>

“In looking at whether the defendant has met the burden of establishing that the charges are inflammatory with respect to each other, it does not appear to the Court that the murder charge is particularly more inflammatory than the other case, because both of these cases involve the same type of offenses, murder and attempted murder with a firearm. The circumstances of both crimes are similar, in terms of approaching individuals in cars, shooting at people in cars. The victims in both cases share common characteristics. None of the victims in either case belong to a particularly vulnerable group such as, for example, children or the elderly, or something like that.

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<sup>5</sup> Because neither matter is a capital case, the third factor for determining whether a court abused its discretion in denying a severance motion is not applicable here. (See *Soper, supra*, 45 Cal.4th at p. 775.)

<sup>6</sup> The court observed that, during the second trial, the trial court (Hon. Ksenia Tsenin) had found that the evidence for the two cases was not cross-admissible under Evidence Code section 1101, subdivision (b).

<sup>7</sup> In appellant’s reply to the prosecution’s opposition to his motion to sever, defense counsel stated that, in the second trial, the jury vote had been eleven to one for guilty on the murder count; nine to three for acquittal on one of the attempted murder counts and six to six on the other three attempted murder counts; and ten to two for guilty on the four assault with a deadly weapon counts. Counsel also stated that the jury in the first trial had voted nine to three for acquittal on the attempted murder counts.

“There was also no disparity in the apparent vulnerability of the victims. So the Court does not find here . . . either that there is a danger of aggregation from a spillover effect and also does not find that there is a potential of the inflammatory impact of one crime on the other.”

We agree with the trial court’s analysis. First, as to whether some of the charges were particularly likely to inflame the jury against him, appellant argues that the “cold-blooded planned assassination” of Chris Johnson was likely to prejudice the jury against him with respect to the other incident, which he describes as “an apparent random act of violence.” We disagree. In both incidents, the shooter targeted victims with common characteristics and shot at them. Moreover, although the shooting of a man sitting in a parked car is plainly a terrible act, shooting at people in a car at a busy public intersection is no less horrifying.

Second, regarding whether a weak case was joined with a strong case so as to affect the outcome as to the weaker case, we do not find much difference in the strength of the two cases. In both cases, there was DNA and/or fingerprint evidence linking appellant to the incidents. In the Chris Johnson murder, appellant’s fingerprint was found on the windshield of the murder victim’s car and his DNA was found in the cap worn by one of the shooters. In the Westside Projects shootings, appellant’s DNA was found both on the jacket worn by one of the shooters and a gun witnesses had seen one of the shooters throw over a wall. Thus, “the proffered evidence was sufficiently strong in both cases” to support cross-admissibility. (See *Soper, supra*, 45 Cal.4th at p. 781.)

In addition, the benefits of joinder were substantial since, “as a general matter, a single trial of properly joined charges promotes important systemic economies. Whenever properly joined charges are severed, the burden on the public court system of processing the charges is substantially increased.” (*Soper, supra*, 45 Cal.4th at p. 782.)

Based on all of the factors previously discussed, we conclude that appellant has “ ‘failed to carry his burden of making the clear showing of prejudice’ ” required to demonstrate that the trial court abused its discretion in refusing to sever the two matters. (*Soper, supra*, 45 Cal.4th at p. 783, quoting *Alcala, supra*, 43 Cal.4th at p. 1227.)

## ***2. Ineffective Assistance of Counsel***

Although the trial court repeatedly denied appellant's motions to sever, appellant nevertheless asserts that defense counsel was ineffective for failing to press for a ruling on the final motion to sever. He points to the fact that, in that final motion, defense counsel noted that 36 percent of the prospective jurors in the jury pool had expressed concerns in their jury questionnaires about their ability to judge the two cases individually.

To prove ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) In addition, the defendant must affirmatively establish prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Id.* at p. 697.)

Here, even assuming counsel's failure to press for a ruling constituted inadequate representation, her ineffective assistance was not prejudicial because appellant has not established that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra*, 466 U.S. at p. 694.) As we have already discussed, appellant did not demonstrate that he was prejudiced by the joinder. The fact that, before trial, a number of prospective jurors expressed theoretical concern about their ability to separately decide the two cases does not change that fact. Indeed, a juror whom appellant observes expressed such misgivings and ultimately sat on the case told counsel during jury voir dire that, after the court had explained the law, "I feel better about it and I think I can do that [i.e., decide each case separately]."

This lack of prejudice from joinder of the two cases is further shown when the benefit of systemic economies achieved is factored in. (See *Soper, supra*, 45 Cal.4th at

p. 782.) Accordingly, we conclude that appellant has failed to show ineffective assistance of counsel because it is not reasonably probable that, had counsel pressed for a ruling on the final motion to sever, the additional argument about the jury pool would have led to a different result. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

### 3. *Due Process*

Our conclusion that there was no abuse of discretion or ineffective assistance of counsel does not, however, end our analysis. Our Supreme Court has held that “ ‘even if a trial court’s ruling on a motion to sever is correct at the time it was made, a reviewing court still must determine whether, in the end, the joinder of counts or defendants for trial resulted in gross unfairness depriving the defendant of due process of law. [Citations.]’ [Citations.]” (*Soper*, *supra*, 45 Cal.4th at p. 783.)

Here, beyond the cross-admissibility on the issue of intent, there was no overlap of evidence, with only a few official witnesses testifying about both incidents. Moreover, the trial court instructed the jury on the prosecution’s “burden of proving each allegation beyond a reasonable doubt” and on the requirement that the jury “consider each count separately and return a separate verdict for each one of those counts.” (See CALCRIM No. 3515.) The court further instructed the jury that some evidence had been received for a limited purpose and that the jury could consider such evidence only for that purpose. (See CALCRIM No. 303.) The prosecutor also reminded the jury during closing argument that it could consider the Chris Johnson shooting with respect to the Westside Projects shootings only for purposes of appellant’s intent. (See *Soper*, *supra*, 45 Cal.4th at p. 784.)

Finally, it is significant that the jury found appellant guilty of first degree murder in the Chris Johnson shooting but, in the Westside Projects shootings, acquitted appellant of attempted murder in the shooting of the security guard and found the other attempted murders to be of the second degree. (See *Soper*, *supra*, 45 Cal.4th at p. 784 [jury’s finding of first degree murder in one case and second degree murder in other case suggested that jury was able to follow instructions and compartmentalize evidence

presented in two joined cases].) These verdicts show that the jury was able to decide each case on its merits.

Hence, the trial process showed that the joinder of the two cases did not result “ ‘in gross unfairness depriving the defendant of due process of law.’ ” (*Soper, supra*, 45 Cal.4th at p. 783.)

## **II. Trial Court’s Refusal to Remove a Juror for Cause**

Appellant contends the trial court erred when it refused to remove a prospective juror for cause.

### **A. Trial Court Background**

During jury voir dire, prospective juror S. responded to questions from defense counsel and the trial court regarding her ability to state her own opinions during deliberations, as follows:

“MS. ISA [Defense counsel]: . . . . [¶] Is there any one of these jurors—I asked this question again to the last jurors—that would have a hard time with the distinction between unanimity and consensus, which with consensus we compromise, we have to give in some of our beliefs to come to a group goal of consensus, versus unanimity which is the expectation when you go into the jury room with your individual opinion? Does any one of the new jurors feels that that would be something that they can’t do, that they can’t make that distinction or that they would have to compromise?”

“(No response.)”

“MS. ISA: How do you feel about this? I see a little hesitation. I’m sorry, we’re talking about Juror Number 14.”

“PROSPECTIVE JUROR [S.]: I do have trouble expressing myself, so . . . .”

“MS. ISA: So how do you think that would affect you in a jury room if, you know, you had an opinion that was different than, you know, 10 other people who are also voicing their opinion? Would you feel comfortable expressing that opinion about something?”

“PROSPECTIVE JUROR [S.]: It would be difficult.”

“MS. ISA: Would it be so difficult to the point that you would maybe continue to remain silent about your opinions on an issue in light of opposing views?”

“PROSPECTIVE JUROR [S.]: I don’t know.

“MS. ISA: It seems like there’s a little bit of an emotional issue for you. I don’t mean to put you on the spot. Would you prefer to talk about this with the judge or—

“PROSPECTIVE JUROR [S.]: No.

“MS. ISA: As you sit here, do you feel like that it’s going to be hard for you to maintain your own opinion and your evaluation of the evidence if others don’t agree with you such that you wouldn’t be able to give Mr. Caradine your individual opinion?”

“PROSPECTIVE JUROR [S.]: It’s possible, yeah.

“MS. ISA: It’s a possibility?”

“PROSPECTIVE JUROR [S.]: (Nods head.)

“MS. ISA: Okay. Thank you for your honesty. [¶] Thank you Your Honor.

“[¶] . . . .

“THE COURT: . . . . Generally speaking, never having been in a jury room before, read about it a lot but never been in one before, there’s all kinds of dynamics that can exist in a jury room. Obviously the preferred process is to have the foreperson be a person who can engage everybody in the jury room to discuss issues.

“I noticed you had no trouble answering the questions when you were inquired of. If you’re in the jury room and you feel yourself as a person that would be—because of the seriousness of what’s involved, would you be able to express yourself if given an opportunity to do so?”

“PROSPECTIVE JUROR [S.]: Yes, I think.

“THE COURT: I mean, this is not an authoritarian type of process. This is a situation where people are expected to be comfortable with each other and to engage in a conversation about the evidence. Do you feel you can do that?”

“PROSPECTIVE JUROR [S.]: I think so.

“THE COURT: I mean, if in any way, at any time in the deliberation you feel yourself being oppressed, then I think it’s important for you to raise that or to discuss it,

and the foreperson hopefully will communicate with the Court about that. Do you understand that?

“PROSPECTIVE JUROR [S.]: Yes.

“THE COURT: Okay. We do have people from all different walks of life that go into the jury room. Usually it’s a process where people feel comfortable. Okay?

“PROSPECTIVE JUROR [S.]: (Nods head.)

“THE COURT: Let us know if you don’t. Is that all right?

“PROSPECTIVE JUROR [S.]: I’m sorry?

“THE COURT: And you’ll let us know if you don’t; is that right?

“PROSPECTIVE JUROR [S.]: Yes.

“THE COURT: Thanks.”

Defense counsel challenged prospective juror S. for cause, which the court denied. Counsel then removed prospective juror S. through the exercise of a peremptory challenge. Later, counsel informed the court there was something she wanted to put on the record: “There’s one cause challenge that I wanted to put on the record. It’s [prospective juror S.]. And I had made a cause challenge because as she was sitting here, we were talking about just her having her own independent opinion, she did start tearing up and I noticed that and I asked her about being emotional and she said yes.

“And I believe that she would not have—I believe that when I finished questioning her, she had pretty much indicated that she does not feel that she would be able to give her opinion and maintain that in the face of adversity.” The court responded: “Okay. The record speaks for itself as to what she said in its totality; and based upon its totality, the Court feels that there was an insufficient basis to excuse her. [¶] Okay. The challenge for cause was denied.”

### ***B. Legal Analysis***

“To preserve an objection to the trial court’s failure to excuse a juror for cause, a defendant must (1) exercise a peremptory challenge against the juror in question, (2) exhaust all peremptories, and (3) express dissatisfaction with the jury as finally

empanelled. [Citations.]” (*People v. Bonilla* (2007) 41 Cal.4th 313, 339 (*Bonilla*); see also *People v. Crittenden* (1994) 9 Cal.4th 83, 121 & fn. 4.)

Here, appellant failed to satisfy the third requirement in that he did not express to the trial court that he was dissatisfied with the jury as finally empanelled.<sup>8</sup> Accordingly, he has not preserved for appeal the correctness of the court’s denial of his challenge for cause of prospective juror S. (See *People v. Mills* (2010) 48 Cal.4th 158, 187.)

Moreover, even had appellant preserved this claim for review, it still would not succeed because appellant has failed to demonstrate that he was prejudiced by the court’s refusal to excuse prospective juror S. (See *Bonilla, supra*, 41 Cal.4th at p. 340.) As our Supreme Court explained in *People v. Yeoman* (2003) 31 Cal.4th 93, 114: “An erroneous ruling that forces a defendant to use a peremptory challenge, and thus leaves him unable to exclude a juror who actually sits on his case, provides grounds for reversal only if the defendant ‘*can actually show that his right to an impartial jury was affected . . .*’ [Citation.] In other words, the loss of a peremptory challenge in this manner ‘“provides grounds for reversal only if the defendant exhausts all peremptory challenges *and an incompetent juror is forced upon him.*” ’ [Citations.] Here, defendant cannot show his right to an impartial jury was affected because he did not challenge for cause any sitting juror. No incompetent juror was forced upon him.”

Similarly, in the present case, appellant did not challenge for cause any juror who ultimately sat on his case. Hence, he cannot show that his right to an impartial jury was affected. (See *Bonilla, supra*, 41 Cal.4th at p. 340; *People v. Yeoman, supra*, 31 Cal.4th at p. 114; see also *People v. Baldwin* (2010) 189 Cal.App.4th 991, 1000-1001.)

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<sup>8</sup> Without citation to the record, appellant claims he ultimately exhausted his peremptory challenges, and was therefore unable to exercise such a challenge a prospective juror he found problematic, resulting in the problematic juror being a member of the jury that convicted him. For purposes of this argument, we will assume that, as appellant states, all of his peremptory challenges were exhausted before voir dire of this problematic juror took place.

### **III. Trial Court's Refusal to Allow a Defense Expert to Testify**

Appellant contends the trial court improperly refused to allow a defense expert to testify regarding the reliability of fingerprint evidence.

#### **A. Trial Court Background**

Before trial, the trial court held a hearing, pursuant to Evidence Code section 402, to determine whether proffered defense expert, Simon Cole, would be permitted to testify at trial about the reliability of fingerprint identification.

Cole testified that he was an associate professor of “criminology[,] law and society” at University of California at Irvine. He had written a book on the history of fingerprinting and criminal identification and had lectured and written numerous journal articles on the subject. The primary focus of his research was on the use of scientific evidence in the courts, and fingerprinting was his main area of study. Cole testified that he was not a latent fingerprint examiner, but rather was a historian and sociologist.

Cole testified that “individualization” is a term in latent fingerprint analysis describing an identification that is based on absolutely certainty by the examiner.<sup>9</sup> Individualization had been criticized because it was too strong a claim, not borne out by any data; it had not been validated; and there were no standardized threshold as to how much consistent detail is needed to reach a conclusion of identification. Cole agreed that all complete fingerprints are unique. However, “uniqueness does not prove accuracy,” and misidentifications can be made. In addition, the claim of latent fingerprint examiners that they “have proven that they can make individualizations is not accepted within the relevant scientific community,” with “relevant scientific community” defined by Cole as some 30 scientists and scholars who had published articles on the topic.

Cole also testified that, based on his research, of the millions of fingerprint matches made over the last 100 years, he had discovered 37 instances of

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<sup>9</sup> Two other possible conclusions that a latent fingerprint examiner could reach are “inconclusive” or “exclusion.”

misidentification. In three of those cases, defense experts had concurred in the erroneous match.

Following the hearing, the trial court expressed its initial view regarding Dr. Cole's proffered testimony, stating: "But the problem is that Dr. Cole has never studied fingerprints. He has no idea what are the shades of gray, so to speak, that exist in the whole process of analysis." It further stated: "I don't see the relevance of anecdotal evidence, and I've never—and I would be amiss, I think, in letting a man testify about a case out of a hundred-year history and having him talk about a case or two or 22 in which out of the history of the process these kinds of corrections have to be made. That would be [Evidence Code section] 352 if I've ever seen it."

Ultimately, the trial court ruled that the evidence would be excluded based on both Dr. Cole's lack of expertise and Evidence Code section 352, as follows: "I see a real 352 problem with Dr. Cole since he doesn't have any training or expertise in the subject matter of fingerprint analysis, but merely is relating a bunch of things he read, which is clearly anecdotal in nature and is essentially not very persuasive to me.

"And I also have to say that based upon hearing him testify and seeing his demeanor on the stand, I have serious question[s] under [Evidence Code section] 352 what he has to say would be—it would be undue consumption of time, and also the probative value is clearly outweighed, substantially outweighed, by the prejudice because I don't see much probative value in his anecdotal information. [¶] . . . .

"But my problem is that I believe that, based upon what I heard in total at the [Evidence Code section] 402 hearing, I found that what he had to say, especially after his discussion in cross-examination and his discussion of these proficiency tests and the depth of his experience, I mean, he really does focus on, like I said, a few anecdotal instances where there may have been notorious instances of questionable identification. The Oregon case stands out most in my mind involving the Madrid bombing matter with Mr. Daoud's print and Mr. Mayfield's print; but other than that, I found most of what he had to say was not really helpful for the jury.

“The other thing that’s significant about fingerprints, is that unlike many other kinds of science where the jury doesn’t have much experience to analyze and observe, the cases all talk about the fact that fingerprint identification is something which the jury can observe and see the process. They can see the various Galton points that are going to be used in this case and they can see all these other factors that are used by the examiner to make his or her identification, and I think that it’s peculiarly information that the jury can sort of walk through the process with the examiner unlike DNA, for example, where the matching the alleles is not something which jurors have much ability on and such information.

“So on the grounds of lack of expertise, on the grounds of 352 of the Evidence Code, I can tell you right now Dr. Cole, I don’t see him being able to testify.”

During trial, prosecution witness Inspector Shouldice testified as an expert in the area of fingerprint analysis. Shouldice had received extensive, ongoing training in fingerprint evidence and examination since 1994. He was certified with the International Association of Identification and also had passed yearly proficiency examinations with the San Francisco Police Department. In the course of his career, Shouldice had made hundreds of thousands of fingerprint comparisons and close to a thousand identifications. All of Shouldice’s identifications were peer reviewed by another examiner. He had never made an error either in his yearly proficiency testing or in his actual comparisons.

Inspector Shouldice testified that fingerprints are unique to an individual. Even identical twins have different prints. In the present case, Shouldice compared appellant’s fingerprint to the latent print from the windshield of the car in which Chris Johnson was found. He determined, to a 100 percent certainty, that the latent print came from appellant’s left index finger. His result was peer reviewed by another technician.

Defense counsel had a full opportunity to cross-examine Shouldice.

### ***B. Legal Analysis***

We review a trial court’s ruling pursuant to Evidence Code section 352 under the deferential abuse of discretion standard. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) We also review a trial court’s determination whether a purported expert is qualified to

offer expert testimony on a particular subject for an abuse of discretion. (*People v. Catlin* (2001) 26 Cal.4th 81, 131.)

In the present case, we find that the trial court's refusal to allow Simon Cole to testify as an expert on the reliability of fingerprint identification was well within its discretion. The court reasonably determined that Cole was not qualified to testify as an expert on this subject on the ground that "he doesn't have any training or expertise in the subject matter of fingerprint analysis, but merely is relating a bunch of things he read." (See Evid. Code, § 720, subd. (a) ["A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates"].) The court's conclusion that Cole, a historian and sociologist who had read and written on the subject of fingerprint analysis but had never himself studied fingerprints, did not qualify as an expert on the reliability of fingerprint analysis as it related to this case was not an abuse of discretion. (See *People v. Catlin, supra*, 26 Cal.4th 131.)

Similarly, the court did not abuse its discretion when it concluded, pursuant to Evidence Code section 352, that the probative value of Cole's testimony was outweighed by its prejudicial effect and that it would necessitate undue consumption of time. (See *People v. Kipp, supra*, 26 Cal.4th at p. 1121.) Cole agreed that every fingerprint is in fact unique, but challenged an analyst's ability to make an identification to a 100 percent certainty. He based this challenge on anecdotal evidence of a small number of erroneous identifications out of millions of correct identifications over the past 100 years. As the court stated, "I would be amiss, I think, in letting a man testify about a case out of a hundred-year history and having him talk about a case or two or 22 in which out of the history of the process these kinds of corrections have to be made." The court also observed that, unlike DNA evidence, "fingerprint identification is something which the

jury can observe and see the process,” and therefore expert testimony was not necessary to aid their understanding of the evidence.<sup>10</sup>

In sum, the court’s conclusion that the minimal probative value of the proffered testimony, along with its undue consumption of time, warranted its exclusion pursuant to Evidence Code section 352 was well within its discretion. (See *People v. Kipp, supra*, 26 Cal.4th at p. 1121.)

**IV. Admission of the Johnson Murder to Prove Intent  
In the Westside Projects Shootings**

Appellant contends the trial court erred when it permitted the jury to consider the May 18, 2004 murder of Chris Johnson as evidence of appellant’s intent to kill the victims of the January 23, 2004 Westside Projects shootings.

**A. Trial Court Background**

As previously discussed, with respect to appellant’s argument regarding the trial court’s denial of appellant’s motion to sever (see pt. I, *ante*), the court found that evidence from the Johnson murder case was admissible in the Westside Projects case on the issue of intent, concluding, “there are enough points of similarity that allow for intent evidence and limiting it to that purpose.” The court stated that it would only allow the issue to be raised by the prosecutor in closing argument and would fully instruct the jury on the limits of the cross-admissibility of the evidence. Finally, the court conducted an analysis pursuant to Evidence Code section 352, again noting that neither case was substantially stronger than the other and concluding that the probative value of the evidence was not outweighed by a danger of undue prejudice.

As we discussed earlier (see pt. I, *ante*), just before closing argument, the trial court instructed the jury, pursuant to CALCRIM No. 3515: “Each of the counts charged in this case is a separate crime. You must consider each count separately and return a

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<sup>10</sup> We also note that defense counsel was given a full opportunity to cross-examine Shouldice on the accuracy of his conclusion that the latent fingerprint on the windshield belonged to appellant.

separate verdict for each one of those counts. The District Attorney has the burden of proving each separate count beyond a reasonable doubt.” The court also instructed the jury that, “[d]uring the trial, certain evidence was received for a limited purpose. You may consider that evidence only for the limited purpose announced and for no other. (See CALCRIM No. 303.)

Then, during his closing argument, the prosecutor discussed this issue, as follows: “Now you have also received evidence of the defendant committing murder. I suggest, and it’s only a suggestion, that you evaluate the murder first and decide, yes, the defendant was the person who killed/murdered Chris Johnson, you can use that evidence to bolster the intent element of the attempted murder.

“Intent, unless someone actually says, ‘I am going to kill you,’ is largely derived from conduct. It is circumstantially arrived at by evaluating the conduct of the perpetrator. It is an element where you have to go into the mind of the defendant to decide from his conduct what his intents were.

“There are two cases together here. I submit to you that by virtue of the fact that the defendant fired towards a car occupied by three people, fired at a security guard where the bullets were coming so close he could feel the air move and hear the bullets buzzing by him, that conduct is conduct alone that proves that the defendant intended to kill with no ambiguity.

“You have the murder case which further bolsters this intent, and, I submit to you, you can only use that murder case in evaluating the attempted murder for intent.

“When it comes to evaluating whether the defendant had the intent to kill those three men in the car, you look at the fact that the defendant committed a cold-blooded, calculated murder four months later. There is no stronger evidence of an intent to kill than unambiguous conduct like that.

“There is the additional allegation, which you have to decide: Was, in the commission of the attempted murder, was it committed willfully with premeditation and deliberation? I submit you simply find that element or that allegation true because when you look at the definition for these three, ‘willfully’ means he simply intended to kill

when he acted. When you take his conduct on January 23rd in conjunction with his conduct, the murder, on May 18th and you evaluate his intent, it is clear that he intends to kill when he acts.

“Premeditation simply requires that he intended to kill before acting and ‘deliberation’ means that he carefully weighed the considerations.

“In the shooting on January 23rd, 2004, there was no provocation. The defendant was with his best friend and partner, DeAngelo Scott. They were armed with loaded guns, loaded semiautomatic guns. They see three men just driving in the area, legitimately there, to drop Brad Brantley off to work at Mount Zion Hospital.

“Nothing provoked the defendant and DeAngelo Scott to open fire. They knew what they were doing. They had the time to decide whether or not to fire, and they fired nonetheless. [¶] We’re not talking about a situation where they’re just running into circumstances that take over and they’re firing in reaction.”

During her closing argument, defense counsel responded to the prosecutor’s argument, as follows: “As the judge instructed you at the beginning of this case, we have two cases, two completely separate incidents on completely separate dates, and the District Attorney has the burden of proving each of those to you beyond a reasonable doubt.

“Throughout the District Attorney’s entire argument there was a mixing back and forth, talking about a little piece of this case and a little piece of this case; and the thing that you have to do as jurors, that you’ve been instructed to do, is to look at these cases individually.

“The District Attorney joined these cases together. We don’t know why. We can’t comment on why, but the one thing you cannot do is use them for propensity evidence.

“What does that mean? You cannot look at one case and say, ‘There’s weaknesses here,’ and then look at another one and say, ‘There’s weaknesses here. Individually if they were separate cases on separate days that I was looking at this, I wouldn’t find enough evidence to convict; but they’re together in the same trial and where there’s

smoke there's fire.' That would be a violation of the duty that you all took, the oath you took when we started this case and you were sworn in as jurors.

“And each case deserves to be independent, not a mixing, a mixing and matching. You won't find any law in the instructions the judge read or in the instructions that you will take back in there when you have a chance to reread them that allows for this mixing back and forth.”

### **B. Legal Analysis**

“Generally, the prosecution may not use a defendant's prior criminal act as evidence of a disposition to commit a charged criminal act. (Evid. Code, § 1101, subd. (a).) But evidence is admissible ‘when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge . . . ) other than his or her disposition to commit such an act.’ (Evid. Code, § 1101, subd. (b).) [¶] . . . .

“Because evidence of other crimes may be highly inflammatory, the admission of such evidence ‘ ‘ ‘must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.’ ’ ’ [Citations.] Under Evidence Code section 352, the probative value of a defendant's prior acts must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citations.] ‘We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.’ [Citation.]” (*People v. Davis* (2009) 46 Cal.4th 539, 603.)

“ ‘The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] . . . In order to be admissible to prove intent, the uncharged conduct must be sufficiently similar to support the inference that the defendant ‘ ‘ ‘probably harbor[ed] the same intent in each instance.’ [Citations.]’ [Citation.]’ ” (*People v. Foster* (2010) 50 Cal.4th 1301, 1328, quoting *People v. Ewoldt* (1994) 7 Cal.4th 380, 402, superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.)

In *People v. Jones* (2011) 51 Cal.4th 346, 371, for example, our Supreme Court found an otherwise dissimilar offense nonetheless relevant in proving intent in the offense for which the defendant was on trial. As the court explained: “The Vernon robbery and the Florville home invasion were not particularly similar, but they contained one crucial point of similarity—the intent to steal from victims whom defendant selected. Evidence that defendant intended to rob the Vernon victims tended to show that he intended to rob when he participated in the Florville crimes. This made the evidence relevant on that specific issue, which is all that the court admitted it for.”

Here, as the trial court stated, there were many similarities between the two shooting incidents. They took place less than four months apart, in the afternoon hours, in the Western Addition area of San Francisco. In each case the victims were all in cars, the assailants were of the same age group and race as the victims, and, in each case, one of the assailants used a 9-millimeter handgun.<sup>11</sup> Finally, there was no evidence of any intent other than murder in either case. The two incidents differed in that Chris Johnson was killed at close range while sitting in his car while the Westside Projects incident involved shootings into a car from a distance. This dissimilarity, however, pales next to the stated similarities, which support the inference that appellant harbored the same intent when, a mere few months after murdering Johnson, at the same time of day and in the same neighborhood, he shot into the car of other young African-American men of a similar age to Johnson. (See *People v. Foster, supra*, 50 Cal.4th at p. 1328.) Thus, the court reasonably found that evidence of the Johnson murder was relevant to showing that appellant had the same intent when he shot at the victims in the Westside Projects incident. (See *People v. Davis, supra*, 46 Cal.4th at p. 602; *People v. Kipp* (1998) 18 Cal.4th 349, 371; compare *People v. Jones, supra*, 51 Cal.4th at p. 371.)

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<sup>11</sup> Although many of these factors do not apply to security guard Miller, the evidence showed that Miller was not the original target of the Westside Projects shootings and, indeed, the jury found appellant not guilty of attempted murder as to Miller.

In addition, the trial court reasonably found that the probative value of the Johnson murder was not outweighed by the danger of undue prejudice. (See Evid. Code, § 352.) As already discussed, there were many similarities between the two crimes, which created an inference that appellant acted with the same intent during each incident and, in addition, there was no overlap of evidence, with only a few official witnesses testifying about both incidents, and neither incident was particularly more inflammatory than the other. (See pt. I, *ante*.) Moreover, given that he was on trial for both offenses, appellant had not escaped punishment for the Johnson murder. Finally, the two incidents occurred close in time. (See *People v. Sullivan* (2007) 151 Cal.App.4th 524, 559 [discussing the factors for determining the admissibility of other crimes evidence under Evid. Code, § 352, as set forth in *People v. Ewoldt, supra*, 7 Cal.4th at pp. 404-405].)

In addition, the trial court's instructions clearly told the jury that it must consider each count separately and that evidence received for a limited purpose could only be used for that purpose. (See CALCRIM Nos. 303, 3515.) We presume the jury followed these instructions. (See *People v. Jones, supra*, 51 Cal.4th at p 371.)

The prosecutor's argument also informed the jury that it could use the Johnson shooting only if the jury found that appellant committed murder in that case, and then solely to discern appellant's intent in the Westside Projects shootings. As the prosecutor told the jury, "I submit to you, you can only use that murder case in evaluating the attempted murder for intent." Thus, the prosecutor stayed within the strict parameters set by the court regarding the use of the murder case in determining appellant's guilt in the Westside Projects shootings. Defense counsel's argument further reinforced the instruction that each case had to be decided separately.

Finally, the jury's verdicts reflect that it followed the court's instruction to decide each case individually. The jury ultimately convicted appellant of first degree murder of Chris Johnson but found him guilty of non-premeditated attempted murder of the three victims in the car and not guilty of attempted murder of security guard Miller in the Westside Projects case. (See *Soper, supra*, 45 Cal.4th at p. 784.)

For all of these reasons, the trial court did not abuse its discretion when it admitted the May 18, 2004 Chris Johnson murder as evidence of appellant’s intent to kill the victims of the January 23, 2004 Westside Projects shootings. (See *People v. Davis, supra*, 46 Cal.4th at p. 602.)<sup>12</sup>

**V. Cumulative Error**

Finally, appellant contends the cumulative effect of the errors raised on appeal requires reversal of the judgment.

Because we have rejected all of appellant’s claims of error, his cumulative error argument cannot succeed.

**DISPOSITION**

The judgment is affirmed.

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Kline, P.J.

We concur:

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Lambden, J.

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Richman, J.

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<sup>12</sup> Appellant further asserts that the alleged errors also amounted to constitutional violations. “Because we find no error, we necessarily also find no constitutional violation.” (*People v. Jones, supra*, 51 Cal.4th at pp. 369-370, fn. 3.) Hence, we will not engage in a separate constitutional discussion.