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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.

ERNEST PAUL CASSIDY III,

Defendant and Appellant.

A131029

(Sonoma County
Super. Ct. No. SCR554417)

I. INTRODUCTION

Ernest Paul Cassidy III was tried by jury and found guilty of all four counts of a second amended information charging: (1) first degree murder (Pen. Code, § 187, subd. (a)), (2) home-invasion robbery in concert with others (*id.*, § 211, 213, subd. (a)(1)(A)), (3) first degree residential burglary (*id.*, § 459), and (4) being a felon in possession of a firearm (*id.*, § 12021, subd. (a)(1)). The victim in counts 1 through 3 was Jody Reynolds, and for special allegations on those counts, the jury found true firearm use by a principal (*id.*, § 12022, subd. (a)(1)) but not personal use of a firearm or personal infliction of great bodily injury. The court found true an alleged prison-term prior. (*Id.*, § 667.5, subd. (b).)

Sentenced to an undisputed aggregate calculation of five years plus 25 years to life, defendant appeals the judgment, claiming prejudicial error in the exclusion of third party culpability (TPC) evidence. We affirm, finding no such error.

II. BACKGROUND

A. Summary Overview

In broad overview, this case involved a killing during the taking of money and drugs from Reynolds, a 43-year-old known dealer of marijuana and methamphetamine (hereafter meth) who lived and conducted his business at a trailer on his parents' property just outside Santa Rosa. All five of the perpetrators were themselves meth users and/or dealers, and the deed was done after dark on the evening of January 20, 2009. Using information from Eric Duran as to Reynolds's location and trailer layout, defendant and Nathan McGill, William Hammack, and Felix Alvarado drove to the trailer armed with at least three firearms. They robbed Reynolds, inflicted blunt force trauma to his face, and killed him with two shots. One, from a handgun, was not immediately fatal but serious, entering his left buttocks and exiting at the right thigh. The second bullet, from a rifle, did massive internal damage to the organs of his lower torso, severed his spine, and was the cause of death. The four made off with meth, two safes, and cash. They divided the meth five ways (with Duran), right afterward at Hammack's residence.

Defendant was implicated in various ways, including an unfired rifle cartridge found outside the trailer that bore his palm print, but key evidence came from Duran, and from defendant's girlfriend, Brandy Wood. Duran was initially charged in all four counts, like the other four perpetrators. But in a cooperation agreement with the prosecutor, he testified in return for his pleas of guilty to home invasion robbery and being a felon in possession, with an anticipated prison term of no more than six years. Wood testified after getting financial help from the California Witness Relocation and Assistance Program, for herself and a young child (not defendant's), plus dismissal of unrelated misdemeanor charges.

The current trial was a joint one for defendant and Hammack, but with separate juries due to *Aranda/Bruton* concern that one nontestifying codefendant's extrajudicial statements might incriminate the other (*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123; see generally *People v. Anderson* (1987) 43 Cal.3d 1104, 1118-1122). Hammack and defendant were each convicted on all four counts. The

record also shows, and a recent opinion from our division confirms (*People v. McGill* (A129485, Jan. 19, 2012) [nonpub. opn.]), that McGill was separately tried and convicted on all counts. It appears that, by the time of this appeal by defendant, only Alvarado remained to be tried.

The issue on appeal is whether the court abused its discretion in excluding, in a motion considered near the end of the People’s case-in-chief, evidence that Dennis Silva may have been responsible for the homicide. Exactly how Silva’s presence at the crime scene would be exculpatory for defendant was unclear from the motion papers, but when the court pressed defense counsel to explain, the theory that emerged was that Silva could have shown up at the trailer after the four robbers left, found Reynolds shot once with a handgun but still alive, and finished him off with a rifle, also taking a ring and a knife in the process.¹ Defendant endorses that theory on appeal but asks variously, and ambiguously, for reversal of his “conviction” or his “convictions.” It appears that, since takings of the ring and knife were not contemplated within the burglary or robbery charges against defendant, the proffered evidence had potential exculpatory value only as to the murder charge.

B. *Victim’s Home and Habits*

Reynolds’s girlfriend Deanna Braddi, ex-girlfriend Heidi Schlecht, long-time friend Morris Mason, and recent friend Dave Ortega, testified that Reynolds sold large amounts of meth from his trailer, had many buyers in and out each day, used his bedroom to transact the sales, and kept money and drugs in one of two safes in the bedroom. The second safe, recently obtained from Mason, was not used because its door did not open. Schlecht was also the mother of Reynolds’s two children, ages three and seven. Since her breakup with him 18 months earlier, she was at the trailer almost daily, usually with

¹ Much discussion on the motion veered into whether there might have been a *Brady* violation (*Brady v. Maryland* (1963) 373 U.S. 83) for prosecutorial failure to disclose exculpatory information about Silva. The court ruled that there was no *Brady* violation, but defendant raises no claim of error in that regard. We focus on the TPC ruling.

the children, who had their own bedroom there. Schlecht testified under a grant of immunity.

The trailer was a 45-foot-long double-wide mobile home situated on an acre of property owned by Reynolds's father, and the father and stepmother lived in a house that was over 100 yards away, where they could not hear sounds from the trailer. They knew that physical problems had ended Reynolds's work as a tile setter, but had no idea that he sold drugs. Reynolds played and collected guitars, and kept about 35 of them in the trailer, displayed on walls. The location was far from neighbors. A long dirt-road driveway that started at a gate over 100 feet from the trailer led to Mountain View Avenue at an intersection about a quarter mile east of Santa Rosa Avenue. The area around the trailer was lit by just a porch light, with no street lights. Reynolds had surveillance equipment outside, but it was not hooked up.

C. The Hours Preceding the Killing

Accounts by friends and family who interacted with Reynolds the day he died showed that he must have been killed after 8:19 p.m. Braddi and Schlecht had been at the trailer that morning, each leaving by afternoon. Schlecht returned, with the children, around 4:00 p.m. She smoked meth with Reynolds for the second time that day, left to sell meth to a friend nearby, played soccer with Reynolds and the children for awhile, and then left for home with them by about 5:30 p.m. Reynolds was getting ready to leave, to have dinner with or pick up a guitar from Kenny Gilbert. Reynolds said he would call her when he got back, in case she wanted to come back over. Reynolds also told Braddi, in a call she made to him around 6:00 p.m., that he was going to Forestville to pick up a guitar from Gilbert. Gilbert testified that he and Reynolds liked to play guitars together and that Reynolds was to come over to his place around 5:30 or 6:00 p.m. for dinner and to pick up a guitar Gilbert had had refinished for him. Gilbert called him about half an hour before the arranged time. Reynolds said he was getting dressed but on his way and that he was running late because he was waiting for Schlecht and "Morey" to leave. Reynolds never showed up.

Longtime friend Morris Mason testified that he went over to the trailer that evening around 6:00 p.m. to borrow a shotgun for goose hunting. Only Reynolds was in the trailer, and he was in the shower and planning to go out. While he waited, Mason tried in Reynolds's bedroom to open the safe he had brought him earlier. Reynolds left for his parents house to retrieve a shotgun, while Mason kept working on the safe, but the shotgun Reynolds brought back was not a type suitable for shooting geese. Mason did not borrow it and never got the safe open, but he stayed with Reynolds for quite awhile. While there he saw a large freezer bag containing meth and, on the bed in Reynolds's bedroom, a wad of cash. He left between 7:00 and 7:30 p.m., when it was dark.

The last friendly communications Reynolds had that night were evidently from his parents and Braddi. His stepmother heard him in the house talking with his father before 8:00 p.m., and although she could not see him from the family room, she called out "hi" to him. Braddi texted Reynolds shortly before 8:00 p.m., asking if he would pick her up on the way back from Forestville. He texted her back at 8:19 p.m.: " 'Of course, Babe. I love you.' "

D. Discovery of the Killing

David Ortega had been doing work for Reynolds's parents, using a tractor to grade the dirt road. He was also a friend of Reynolds, had known him about a year and, since his release on parole eight months earlier, had dropped by the trailer regularly, sometimes several times a day. He would hang out, play guitars, and smoke meth that Reynolds usually provided for free. Ortega stayed out of the drug dealing but knew that Reynolds did it the bedroom. He also knew about the safes (having helped move them into the room), and knew Rags, a Jack Russell Terrier at the trailer that always ran up to greet him when he arrived.

On the evening of the killing, Ortega drove up to the property sometime before 9:00 p.m. with two purposes. One was to trade Reynolds a stolen drill for some meth, and the other was to meet with someone he only knew as Dennis (later identified as Dennis Silva) about earning a couple hundred bucks to "kick someone's ass" for Dennis because someone was "giving him problems." Dennis was Reynolds's friend, but while

Ortega had seen and greeted him at the trailer before, he had never really talked with him. Ortega had been called about the meeting at 8:03 p.m., either by Reynolds or Dennis. Ortega was 20 minutes late for the meeting because he was installing a clutch.

Upon parking and then nearing the trailer with the drill, Ortega saw signs that something was amiss. The gate was open; a vintage guitar was outside leaning against Reynolds's car; a sliding glass door to the trailer was wide open; there was no sound; and while the porch light was on and the trailer lit up inside, no one came out, not even Rags. Inside, clothes and things were tossed around. Ortega called out for Rags and eventually heard him whimpering in the back bedroom. He saw Reynolds lying lifeless on his side and Rags huddled between the body and one wall of the room. Both safes were gone, and it looked like a couple of drawers had been emptied. Reynolds had a bloody cut on his forehead, but no other visible injuries.

Ortega went to the parents' house, eventually roused them by knocking on their door, told them what he found, and urged that they call 911 (Ortega lacking a cell phone). The parents being elderly, it took some 20 minutes from the discovery to get them to the trailer. There, the stepmother called 911 on her cordless phone, and Ortega spoke with the 911 operator. Back inside, the three turned Reynolds over and saw blood from his shooting injuries. A paramedic responding to a 9:39 p.m. call arrived four minutes later but was unable to resuscitate Reynolds. The paramedic contacted the Sonoma County Sheriff's Department, and Ortega stayed around to speak with fire department personnel and Deputies Charles Blount and Christopher Vivian. Dennis never showed up.

Surveillance video from cameras at Tower Mart suggested that the killing might have been between 8:40 and 8:50 p.m. The business was located on the corner of Santa Rosa Avenue and Todd Road, nine-tenths of a mile and a 90-second drive from the crime scene. Time-marked video showed, at 8:37 p.m., a gray Dodge Intrepid like Hammack's come east down Todd Road, from the Highway 101 freeway, and turn right (south) onto Santa Rosa Avenue, toward the crime scene. Then at 8:45 p.m., the same or a similar vehicle went the opposite way, back toward the freeway. Then at 9:02 p.m., a truck

consistent with Duran's passed by. Actual times were five minutes later than what the time markings indicated.²

E. Accounts by Duran and Wood

Duran. In January 2009, Duran was a contractor but supported himself by selling meth. He injected the drug daily, lived out of motels, and drove a charcoal gray Dodge truck. He had befriended Heidi Schlecht eight or nine months earlier. They did not have a "dating relationship" but, as Schlecht would corroborate, had been "intimate" several times. Duran came to know that her ex-boyfriend, Reynolds, sold meth, and actually met him just two or three months before he died. The first meeting was brief, when Reynolds came by Schlecht's house in Santa Rosa. The second was at Reynolds's trailer, at Reynolds's invitation. This situation seemed odd enough to Duran that he came armed with a .380 caliber semiautomatic gun, but it turned out that Reynolds wanted him to set up Heidi's boyfriend so that Reynolds could "beat him up, because he had problems with him." The boyfriend would always run off when he saw Reynolds, and since Duran knew the guy, Reynolds wanted him to lure him for a set up. Duran declined, and Reynolds said, "I respect that." There was no discussion of meth to that point.

A week later, at another meeting at the trailer, they did talk about meth. Duran asked if he could do business with Reynolds if his usual source fell through. Reynolds said, "That's fine, Eric. No problem." No sale occurred, but Duran saw that Reynolds had rolls of money in an open safe in his bedroom, and three Ziploc-like bags holding

² Cross-examination revealed that the videos, as displayed to the jury on a laptop screen without image-enhancing equipment, were grainy, with colors "washed out or muted," details obscured, camera angles restricted to side views of the vehicles, and no way to discern occupants of the vehicles. It was also dark out when the images were captured. Thus the testimony was that video images were "consistent" with or similar to the vehicles in question.

To identify what might have been Duran's Dodge pickup truck, for example, the video image was compared with a "reenactment video" made with the actual truck and the surveillance cameras. A door post dividing side windows was visible, thus indicating a four-door model, but things like a rear trailer hitch, prominent muffler, and the make up or brand of a supposed tool box in the truck bed could not be made out.

softball-size amounts worth about \$7,500 each. Then on six occasions over the next month and a half or so, when his usual source had none, Duran got meth at the trailer, always in one-ounce quantities and for \$1,300, which was expensive but worth it because Reynolds had good drugs. Reynolds fronted him the meth each time, and Duran would pay him the next day. The arrangement worked until the last sale, four or five days before Reynolds died. Duran was a couple hundred dollars short the next day, and Reynolds told him not to come by until he had all of it. Duran never saw him again.

Around the time of that last transaction, Duran first met defendant through a mutual friend and, since Duran knew defendant's family and grew up with his uncle, agreed to sell him meth in smaller quantities than usual. The first such sale triggered an almost nonstop barrage of e-mails and texts from defendant and his almost constant companion, Hammack, asking things like what he was doing and where he was. The duo also surprised him by popping up everywhere he went. This onslaught, reaching 30 messages a day at times, gave Duran "a really weird vibe." Given the risks of assault and robbery in the drug business and his having been beaten up several months earlier, he wanted to end the relationship. Still, he sold to defendant six or eight times in all and never cut off the sales.

Defendant started asking Duran where his connection lived, and Duran came to understand that this meant defendant wanted to *rob* his connection. On the day of the killing, Duran relented and showed him where Reynolds lived, thinking that it might rid him of defendant. At 4:30 or 5:00 p.m., Duran met defendant at a Rotten Robbie gas station on Todd Road, near the freeway. Duran left his truck and, it still being light out, got into the backseat of defendant's car, where tinted windows kept him from being seen. He directed defendant to the trailer and pointed it out to him. They drove as far as the gate at the end of the driveway and, without stopping, turned around and drove directly back, taking just four or five minutes in all. In the process, Duran told defendant about the safe, the location of the bedroom, and the large amounts of cash and meth he had seen.

Around the same time, Duran got a call from Schlecht. She told him she was at Reynolds's place and wanted to get high with Duran. Duran had not seen her BMW at the trailer. He drove his truck to her house after making a couple stops in Santa Rosa, getting no calls from defendant or Hammack during that time. He arrived at Schlecht's house sometime between 7:00 and 7:30 p.m., finding her already there. He stayed 45 to 50 minutes, during which they "slammed" (injected) meth and had sex. A call on his cell phone from defendant spurred him to take a quick shower and leave, trying repeatedly to call defendant back. Schlecht's testimony was similar: She had called him from Reynolds's trailer and again when she was nearly home with the children. She and Duran used meth and had sex; and Duran rushed out of the bedroom, panicky, after getting a brief call during which he said things like " 'no,' or 'wait,' or something." He may have taken a shower, too.

Defendant had said he was going to "hit" Duran's "connect," and hung up. Duran understood this to mean defendant would hit his connection—i.e., rob Reynolds. He tried over and over to call defendant back and tell him not to do it, but never got through. Being familiar with Hammack's apartment at the Pinecrest Apartments on Piner Road and feeling that defendant would eventually go there, Duran drove directly there and waited in a parking lot across the street, still trying to phone defendant. (Contrary to what the Dodge truck image on the Tower Mart video might have suggested, Duran testified that his route from Schlecht's house in Bennett Valley to the Pinecrest Apartments did not take him past the Tower Mart and that he never drove by there after about 5:00 p.m. that day.)

After 20 minutes, Hammack's car pulled up outside the apartment and several people jumped out and ran in, one carrying at chest height something large and perhaps wrapped in a blanket. Duran followed (leaving his gun in the truck) and entered through a partly open door. Inside, rushing around, were defendant, Hammack, and two men he did not know but would learn were Alvarado and McGill (called "Uncle" by the others). There were four or five guns, including a sawed-off shotgun, a rifle with a clip in it, and a handgun, and McGill was wiping the guns down.

Defendant stood in the main room wide-eyed, sweating, shaking, and surprised to see Duran. He said, “ ‘Eric, I fucking blasted him,’ ” and told what happened. He said Reynolds kept coming in and out of the room, smoking a pipe, saying “there’s no money here,” that the meth was “picked up this morning,” and, “Get out of my house.” After defendant blasted him, Reynolds was shot again, “ ‘in the ass.’ ” (Duran testified that, although he had told Detective Vivian that defendant used a shotgun, he did not know what kind of gun defendant used, and did not recall seeing a shotgun in Hammack’s apartment.) Defendant had Duran give him the keys to his truck, and then left the apartment for five minutes before returning with them.

Hammack seemed calm, but McGill, who had been on the phone, motioned Duran into a bedroom by pointing with a handgun. Inside the room, he threatened Duran that if he told anyone, he was dead.

Duran saw no cash in the apartment but saw meth, and after McGill threatened him, everyone went into the kitchen to divide it up. Using a digital scale, Duran divided it five ways, taking a share for himself. Each share was worth about \$800. McGill had left the apartment for 30 minutes or so after threatening Duran, but was back by the time the drug was divided.

Duran met with defendant and Hammack the next morning at a gas station and, two days later, at Hammack’s apartment to help them open a safe. He had brought them a cutoff saw, which had not started, so now they drove—Hammack in the truck and defendant following in his own car—to rural Sonoma County, where a friend of Duran’s lived. Defendant removed the safe from his trunk, and Duran set to work on the safe’s heavy hinges with a hammer and bolt. He got the hinge pins loose with little effort but, in starting to open the safe door, looked up to catch defendant trying to shove rifle-looking guns up under the seat of his truck. One gun had a clip, and another was “cut off.” Duran objected, “ ‘What are you doing?’ ” and stopped defendant. Then, nervous when a strange couple pulled up behind them in an SUV, the trio finished the job at a cousin’s property in Cazadero or Guerneville. The safe was empty. Duran and Hammack disposed of it by driving up into the mountains and throwing it off the truck.

Wood. Brandy Wood and her son lived in a house in Bennett Valley. She used meth daily, had known defendant for years, had dated him for six months, and knew Hammack to be a friend of his. Defendant came to her house one day that January with a “big and black” part of a gun, gave it to her, and told her to get rid of it. He also handed her a newspaper article about a man having been killed. She read the article and asked if he had something to do with it, saying, “Is this you?” Defendant said, “Yes.” He told her that he was there, that the man was “shot execution style,” that he died, and that meth and a safe were taken. He also said Eric set it up for him. Wood knew Duran only from once buying meth from him. Defendant did not say who shot the man or whether anyone else was involved.

Unsure what to do with the gun part, Wood first put it under her bed, and then tried to break it apart with a hammer. When that did not work, she “wiped the fingerprints off of it,” wrapped it in newspaper, duck-taped over that, put it in a bag, and taped it again. That night, she put the package under the porch of her house. The packaging was meant to make it difficult to get to the part and keep anyone from knowing it was under the porch.

A couple of days later, defendant texted Wood about wanting the part back, but on January 27, seven days after the shooting, when Wood was visited at home by Deputy Vivian, she wound up showing Vivian where it was. Deputies retrieved it, and information that Wood gave Vivian in a two hour interview later that day “broke th[e] case wide open” for the investigation. The gun part proved to be a magazine clip for an SKS rifle. Until then, the investigation had not focused on such a weapon or any connection to Duran, who was arrested and interviewed the next day. This was also the first time the names of defendant, Hammack, McGill, and Alvarado had come up in the investigation.³

³ Wood and Duran coming forward with their information took suspicion off of David Ortega, who regretted that, while trying to be helpful, he had wound up being the target of constant law enforcement surveillance. In fact, *everyone* treated him differently and with suspicion, even the people at Reynolds’s funeral, which he attended. Reynolds

F. Further Investigation

Duran was fearful but soon began telling deputies what he knew and led them to where the safe was dumped. It was recovered from a creek, its door missing. Soon afterward, the second safe was brought to the sheriff's office by a friend of Duran's.

An autopsy showed that the immediate cause of Reynolds's death was a full metal jacket bullet from a rifle. It lay lodged in the soft tissues of his left back, about even with the height of the entry wound in his right abdomen. It was extraordinarily unlikely that Reynolds could survive the wound, even if he had immediate and optimal care in an emergency room. The other wound was from a lead-nose .45 caliber pistol-type bullet, from a different weapon. It entered his left buttock and passed through his pelvic region and lower scrotum. Since the bullet hit no critical structures and did not enter internal body cavities or bone, it would not have been immediately lethal by itself, but Reynolds would have bled to death if not treated. The autopsy did not reveal which shot was fired first.

In a warrant search of a house in Santa Rosa where Alvarado and McGill lived, sheriff's deputies found a .45 caliber Ruger revolver, a sawed-off 20-gauge shotgun, boxes of ammunition for each weapon, and a high-capacity SKS-style magazine. In a shed-like living unit behind the house was a newspaper article about the killing, and a Halloween-type mask. A cell phone Alvarado carried upon his arrest retained two photos of an SKS rifle taken six days before the killing (both since deleted). Ballistics tests

had told Ortega that Duran owed him some money, but Ortega had no problems with Duran and knew him only from seeing him come over to the trailer. He had seen Schlecht there, too, but deliberately kept his distance and never talked to her. He knew she was "a sore subject" because she had broken up with Reynolds and slept with a close friend of Reynolds's. Ortega did not know defendant, Hammack, or Alvarado at all. He had seen McGill once, two months earlier, but in connection with buying a Corvette from McGill's girlfriend's uncle, and he had not spoken with McGill.

Perhaps a week after the killing, as part of seeking out everyone he could about why he was being hassled by law enforcement and distrusted by everyone, Ortega went to River Rock Casino in search of Duran, "curious to know what was going on." But in the end, he and Duran only passed each other at the doorway and exchanged small talk for less than half a minute.

showed that the revolver bullet recovered during the autopsy was fired either from the Ruger or one of only a couple dozen Ruger barrels manufactured with the identical tooling.

The black steel clip defendant had given to Wood to get rid of was an after-market clip that fit an SKS rifle. The unfired round with defendant's palm print found outside Reynolds's trailer was a 7.62 by 39 millimeter full-metal-jacket cartridge compatible with an SKS rifle, and so were a box of cartridges found in Hammack's vehicle. Hammack and defendant were found seated together in the back seat of the vehicle as it was parked outside Hammack's apartment.

G. The Defense

Defendant did not testify. Since many of the witnesses against him admitted to regular meth use, the defense presented testimony by an expert on the effects of meth addiction and use on human behavior, stressing impaired ability to accurately perceive and recall events.

Defense counsel Joe Stogner used that testimony in summation as part of a broad attack on Duran's and Wood's credibility. He stressed their relationship, drug use, and self interests (Duran in securing a plea agreement and Wood in securing relocation help), and accused investigators and the prosecution of jumping aboard "the Duran Express" by accepting everything Duran said, uncritically and without corroboration.

Stogner also urged jurors to consider whether Dennis Silva had a hand in the killing: "How is [Duran] connected with David Ortega? I've already told you about these sort of odd things that he—he was asked to set up, that he did try to set up, these hurts he's tried to put on people. And now, on the night of this homicide, David Ortega gets a phone call from Dennis to meet him at Jody Reynolds'[s] house because they are going to go beat somebody up. He's supposed to be there at 9:00. David Ortega is late. He pulls up, 9:20 to 9:30. No Dennis, but a decedent l[y]ing on the floor. No Dennis, but a dead man.

"Where is Dennis? Who is Dennis? And did he drop by like he said he was going to, right at the time or right around the time that Jody Reynolds was killed? Why don't

we know that? We may not know that because we decided that the Duran Express was going to run this thing, that everybody was going to get on that.

“But you, as the jury in this case, you have to ask yourself, what happened to Dennis, and did he go over there or not? It’s an interesting question because Ortega knows Dennis.”

Implicitly raising again the specter of Silva’s involvement, Stogner also suggested that the truck captured on video going by the Tower Mart at 9:02 p.m. was not Duran’s, and faulted investigators for assuming that it was or, alternatively, not considering that its appearance there did not jibe with Duran’s account.⁴

⁴ “[I]t’s more than noteworthy that Detective Hanshew did a reenactment with one vehicle, and that was the Duran Dodge truck. Why did he do that? In his initial report about his looking at the surveillance video, he said, ‘I saw a noteworthy vehicle. It was a vehicle that was similar to the Dodge Intrepid of Mr. Hammock.’ That was it. That’s what he told you. That’s a pretty common size and shape of vehicle. You could probably tell from the surveillance video yourself.

“But then he moved on. He moved on and he said there was another vehicle. This one had a couple of distinguishing characteristics. Not incredibly rare, mind you, but there w[ere] specific details about the truck that he observed about 9:02, heading West on Todd Road, 9:02. Remember? Dennis was supposed to be over there at Jody’s place at about 9:00. David Ortega came late. So what happens at 9:02? In spite of Mr. Duran’s testimony that he was nowhere near that intersection between 8 p.m. and 10 p.m. that night, we’ve got this video.

“Maybe it’s a coincidence. Maybe it is. Maybe it’s a coincidence that a truck—that a truck that is darker in color, that has that strange door and windows configuration[]—not strange but at least noteworthy door and window configuration on it and the tool chest on the back, goes by at 9:02.

“And then maybe it’s not really that important that Detective Hanshew and another officer then go out and do a reenactment with the actual Duran truck and they note nothing about how, oh, well, this rules out that that was the Eric Duran truck for sure. To the contrary, it was the only one they did a reenactment with. Apparently nothing was demonstrated in the reenactment which suggested to them that they were wrong in their suspicion.

“If that was Eric Duran’s truck, he was over there within nine-tenths of a mile of the scene of the crime at 9:02 at night. Not somewhere else, having driven away from Heidi[Schlecht]’s place and then on a hunch gone over to Will Hammack’s place.”

III. DISCUSSION

Defendant contends that he was denied his constitutional rights to due process, a fair trial, and present a defense, by the court's exclusion of proffered TPC evidence about Silva. His proffer was based partly on evidence that *was* admitted, mostly Ortega's testimony that he, Silva and Reynolds were to have a meeting that night to discuss luring someone to a beating, and as already noted, defense counsel Stogner *did* in fact exploit that and related evidence (see fns. 2 & 4, *ante*) to suggest that Silva was involved. Thus, this was really a ruling involving *supplemental* TPC evidence.

A. *Standards for Ruling and Appellate Review*

“[T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352.⁵ [Citations.]” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) The right to present such evidence “does ‘not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.’ [Citation.]” (*People v. Sandoval* (1992) 4 Cal.4th 155, 176, quoting *People v. Hall* (1986) 41 Cal.3d 826, 833.)

A trial court's discretion is broad, and we may reverse on appeal only where discretion was exercised in an arbitrary, capricious or patently absurd manner. (*People v. Coddington* (2000) 23 Cal.4th 529, 619.) Mere room for disagreement does not show abuse (*People v. Clair* (1992) 2 Cal.4th 629, 655), and the usual exercise of discretion under section 352 does not violate a defendant's constitutional right to present a defense

⁵ All unstated section references are to the Evidence Code.

(*People v. Babbitt* (1988) 45 Cal.3d 660, 684) or violate constitutional rights where TPC evidence is involved. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) We presume on appeal that a trial court properly applied established law. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913-914.)

B. *The Proffer*

The defense proffer, actually a response to a prosecution motion to exclude TPC evidence, presented essentially six pieces of evidence concerning Silva that were not already in evidence:

1. Sheriff's deputies (alerted by Ortega's information that he was supposed to have met with Silva and Reynolds at the trailer), tried to stop Silva the next morning as he left 2007 Fulton Road, in Santa Rosa, in his white Honda Accord. Silva fled and was stopped only when deputies gave chase and shot out his right rear tire. He was arrested, and his car was impounded.

2. In a post-arrest interview with Detective Vivian that morning, Silva said he had last spoken to Reynolds four days before the homicide, but later admitted he had phoned Reynolds numerous times just before the killing. Silva also denied being in the vicinity of the trailer at the time of the shooting, which was assertedly a lie because:

3. A surveillance video from the Tower Mart showed, at 9:27 p.m., an older model white compact Honda with black side molding on the driver's side, and wheel rims that did not match (a vehicle "similar to" Silva's), come northbound on Santa Rosa Avenue and turn westbound onto Todd Road, toward the freeway. In the proffer, the Tower Mart was ambiguously claimed to be "one ¼ mile" from the trailer, with Stogner orally articulating the distance as "about a quarter mile." Rebuttal testimony from an investigator who measured the distance, however, later put it at nine-tenths of a mile.

4. Results of a polygraph examination administered by Vivian to Silva about "his involvement in this homicide" were " 'inconclusive.' "

5. One sleeve of a sweatshirt Silva wore when arrested was laboratory tested and had what Stogner declared were "highly specific particles of gun shot residue." Stogner did not provide the report or explain the finding. Presumptive tests (not lab tests) for

gunshot residue were positive for the steering wheel and “shifter” in Silva’s car, but again, no further information appears.⁶

6. Silva had a ring and a knife that once belonged to Reynolds. Silva was wearing the ring, and told Vivian that Reynolds had given it to him a few years earlier. Stogner declared, however, that Schlecht told Vivian in an interview that Reynolds would never have given the ring to anyone “because it had too much importance to him.” The knife was a black, four-bladed folding knife found in the trunk of Silva’s car. There is no indication that Schlecht or Silva were ever asked about it, but an investigative report states that a knife box found on a dresser in the trailer’s master bedroom had “a cut-out for a uniquely designed knife” and that the one found in the car appeared to match the design, having a “basic shape” that was “consistent with” the knife box.

C. The Hearing and Ruling

Argument on the motion, apart from the *Brady* issue (fn. 1, *ante*), explored the proffer, potential admissibility problems, threshold relevance for admission (§ 350), and the ultimate issue of probative value versus risks of prejudice (§ 352). New information, both parties agreed, was that Silva denied any participation in the homicide and stood ready to testify should the new TPC evidence be admitted.

The court denied admission of the new evidence with these key remarks: “I don’t see any motive on the part of Mr. Silva. The only thing I see is opportunity. . . . I have nothing putting him at the crime scene.” “[T]he evidence does give an opportunity to Mr. Silva to have committed this crime, it places him in the vicinity of the particular trailer, but it does not place him anywhere upon the actual crime scene itself. I do not see direct or substantial evidence placing him at the crime scene or participating in this particular crime. [¶] I am doing a balancing test concerning the probative value of the circumstantial evidence, Mr. Stogner, and you have proffered [it], but I do find that it

⁶ A sheriff’s deputy also reported a “stain . . . of unknown origin and an unknown substance” on the right cuff of Silva’s sweatshirt, but defendant does not rely on this in his appeal arguments. The deputy sampled it with a blood evidence collection kit, but there is no indication that it turned out to be blood.

would be an undue consumption of time and would confuse the jury. I will deny the motion to have third-party culpability presented.”

D. Analysis

We view the ruling as accepting that the evidence as a whole, especially given what was already admitted, did allow a reasonable inference that Silva went to the trailer that night. Defendant’s briefing seems to assume that the court found otherwise, but this may be due to confusion about what the court meant by evidence of Silva being at “the crime scene.” The crime scene for prosecution purposes, of course, was the trailer *during the foursome’s burglary, robbery and shooting*, while the crime scene under the defense TPC theory was the trailer *after the foursome left*. The court did draw that distinction when it said, for example: “[T]he evidence does give an opportunity to Mr. Silva to have committed this crime, it places him in the vicinity of the particular trailer, but it does not place him anywhere upon the actual crime scene itself. I do not see direct or substantial [*circumstantial likely intended*] evidence placing him at the crime scene or participating in this particular crime.” The word “participating” particularly fortifies our conclusion that the court found no reasonable inference of Silva being part of the *charged* offenses, i.e., what went on while the foursome was there. The ruling does seem to have accepted a reasonable inference that Silva went to the trailer afterward, and therefore was at the “crime scene” as proposed under the defense TPC theory.

The more difficult question for the trial court, and for this court, is whether it was reasonable to infer from the proffer that, if Silva did go to the trailer afterward, he found Reynolds to be still alive and shot him with a rifle, thereby raising a reasonable doubt of whether defendant committed the homicide. The record less clearly illuminates the trial court’s thinking on that point, although one can infer from the court’s resort to a section 352 weighing, of probative value versus prejudice, that the court did find enough relevance to raise a reasonable doubt. In our view, however, the section 352 ruling is a sufficient basis on which to uphold the exclusion of the evidence. Thus, we do not resolve the relevance question and simply assume relevance for sake of argument.

The initial question in the weighing process is *how probative* the evidence was, and we hold that a reasonable judge could find relatively weak probative value. Taking in order the six points of new evidence as enumerated earlier in this opinion (part III.B., *ante*), the court could reason as follows:

1. Silva's flight from deputies trying to stop him in his Honda the next morning did not logically support guilt about a homicide. Yes, depending on the circumstances, departure from a crime scene may suggest consciousness of guilt (*People v. Ray* (1996) 13 Cal.4th 313, 345), as may flight after being accused of a crime (*People v. Jurado* (2006) 38 Cal.4th 72, 126). But this was 5:15 a.m., about eight hours after the homicide, and the record does not show that the address from which Silva was leaving (2007 Fulton Avenue, Santa Rosa) was anywhere near the trailer or that Silva had been accused of the murder. As for other circumstances, Ortega's trial testimony showed that Silva was on parole. As the People aptly observe, "Reynolds and all the other characters that he surrounded himself with were not the model citizens of Santa Rosa. They were all methamphetamine addicts with criminal records. The fact that Silva was on parole and attempted to flee from the police is neither surprising nor does it point to Silva's involvement in the murder"

2. The court could similarly find little probative value in the fact that Silva initially lied to Detective Vivian about recent contacts with Reynolds. He was on parole, and surely understood early on that Vivian was questioning him about a murder. He then admitted his deception in any event, telling Vivian he had contacted the victim multiple times on the fateful day. The other asserted "lie," the court could reason, was not a lie, for it was Silva saying he had not been in the vicinity of the trailer that night. There is no evidence that he was lying in that regard.

3. Nor did the Tower Mart video of a Honda similar to his passing by at 9:27 p.m. make his denial a lie. Assuming it was even his car, this was at a major intersection nine-tenths of a mile away, further than what many people might consider "in the vicinity." The time of the car's passing is also not a logical fit for the defense theory that Silva arrived and shot Reynolds after the other four had left the crime scene. Trial evidence

was that Ortega made the 911 call no later than 9:39 p.m. and made it on a cordless phone Reynolds's stepmother had brought to the trailer from the house after Ortega roused them out and brought them there. Ortega testified that, the father and stepmother being old and infirm, it took him 20 minutes from his discovery of the body to go to the house, get them, and bring them back. The stepmother confirmed that it took awhile to get the couple down to the trailer. Using Ortega's reasonable-sounding estimate of 20 minutes to get back to the trailer, and adding some time for him to show the parents the body before using the phone, the murder could not have occurred later than about 9:15 p.m., even if Ortega arrived immediately afterward. The Tower Mart intersection was only a minute-and-a half drive from the trailer, yet the video image was from 9:27 p.m., at least 17 minutes after the homicide. The timing is even less supportive of the TPC theory if we assume that the 9:27 p.m. time indication on the video was, as with the other video images from that night, five minutes behind actual time.

4. Defendant cites us no authority that “ ‘inconclusive’ ” polygraph examination results are probative of anything, much less admissible to show guilt. The trial court presumably had similar thoughts.

5. The gunshot residue could reasonably be viewed as unremarkable given the apparent prevalence of guns and gun use among this cast of characters. Nor did the proffer afford any basis for determining when the residue came to be there, or whether it bore any similarity to residue, if any, found at the trailer. The proffered phrase “highly distinctive particles of gun shot residue,” in reference to the sweatshirt, is also unhelpful without knowing what Stogner meant by that phrase.

6. Finally, possession of the ring and knife could reasonably be viewed by the court as lacking even slight probative value. Silva, a longtime friend, said he had been given the ring several years earlier, and Schlecht asserted statement that Reynolds would never have given it to anyone was apparently just an opinion, and one of questionable admissibility as well. The knife in the trunk was apparently never discussed with Silva or Schlecht, and there is little reason to think it had value enough to merit killing a longtime

friend. We note that a report in the proffer showed that Reynolds had \$914 in one of his pants pockets, and another \$214 in a pair in the bathroom.

Weighing against that probative value, which could reasonably be assessed as weak even in the aggregate, was a risk of undue time consumption, especially since the record shows that the People would have insisted on calling Silva as a witness. Potential confusion of the issues is patent.

Since no abuse of discretion appears in the ruling, we need not assess prejudice.

IV. DISPOSITION

The judgment is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.