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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW MULLEN,

Defendant and Appellant.

C062851

(Super. Ct. No.
NCR73590)

A jury convicted defendant Matthew Mullen of shooting at an inhabited dwelling (Pen. Code, § 246),¹ permitting another to discharge a firearm from a vehicle (§ 12034, subd. (b)), and participating in a criminal street gang (§ 186.22, subd. (a)). The jury also found true the allegations that defendant committed the first two offenses for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(A) & (4)(B).) The

¹ Undesignated statutory reference are to the Penal Code.

offenses were committed when defendant was 18 years old. The trial court sentenced defendant to an indeterminate term of 15 years to life.

On appeal, defendant contends (1) the trial court erred in denying his motion to suppress a confession induced by an allegedly improper promise of leniency, (2) the court wrongly excluded expert testimony regarding factors leading to false confessions, (3) the trial court erroneously excluded testimony by a school psychologist regarding defendant's cognitive deficiencies, and (4) evidence of defendant's refusal to consent to a warrantless search of his car and bedroom was improperly introduced. The Attorney General additionally argues that the trial court erred in failing to impose a mandatory court facilities funding assessment as required by Government Code section 70373.

We conclude that defendant's contentions are without merit but that the court facilities funding assessment must be imposed. We therefore modify and affirm.

FACTUAL AND PROCEDURAL HISTORY

The Shooting

In January 2008, Juan and Cristobal Salazar² were living with their mother, Maria de Carmen Flores, in Corning,

² We refer to Juan and Cristobal by first name because of their shared surname. Likewise, we refer to Steven and Michelle Turner by first name.

California. Flores's bedroom was located closest to the street while Cristobal's bedroom was in the back of the house.

On the evening of January 11, 2008, Eric Sandoval and German Chavez were "hanging out" with Juan and Cristobal in the Salazars' kitchen. From the kitchen, they saw a gray Volvo and old brown Buick pull up in front of the house. Ten or eleven people got out of the cars. Juan, Cristobal, Sandoval, and Chavez went outside. Juan had grabbed a "big stick," like an ax handle, on the way out.

The people who had gotten out of the cars were yelling insults such as, "We're gonna fuck you up, you fucking scraps," and displaying gang hand signs. Sandoval recognized some of the people, including Manny Zavala and defendant. Sandoval had previously seen defendant driving the brown car. After five minutes, Zavala, defendant, and the others got back into their two cars and drove away.

About 10 to 30 minutes later, Sandoval left the Salazar house to make a quick trip to a nearby store. When Sandoval returned to his own house, from which he "could see perfect" the Salazar house, he heard gunshots. Sandoval saw defendant's "brown car flying by."

Cristobal was falling asleep in his back bedroom when he heard "[t]hree or more" gunshots. Cristobal noticed "the wall shook a little." Flores heard two or three firecracker noises. She also felt the wall shake in her bedroom. A neighbor testified that he heard a "volley" of five or six gunshots.

Cristobal went outside but did not see any cars in the area. He returned inside and went to the bathroom. In the bathroom, Cristobal saw a hole through the wall as well as a broken shower tile. The shower tile had not previously been broken.

At the time of the shooting, Cristobal was a member of the UBM gang. He testified that UBM stood for "United let's go get high," and is a gang now "dead." Cristobal stated that UBM was not associated with any criminal street gang. Cristobal denied, at the time of trial, that he was a member of the Sureños gang. Juan testified he was not a member of any gang.

Corning Police Officer James White responded to an emergency call about the shooting. He found shell casings from a .45-caliber firearm on the street in front of the Salazar house. Officer White and Officer David Kain found two bullet holes in the wood siding of the house. A detective found a "fired round" on the ground, 15 to 20 feet to the west of the house. Officer White removed one of the damaged shower tiles and recovered a "bullet or slug from a shell."

Defendant's Questioning

The next night, around 10:00 p.m. or 10:30 p.m., Officer Kain went to defendant's residence to speak with him. Defendant was not home. Officer Kain spoke with defendant's stepfather, Steven Turner. Officer Kain told Steven "that his son might be in a lot of trouble," and asked Steven to tell defendant that the police needed to talk with him.

Around 2:45 a.m., Officer Kain received a telephone call informing him that defendant arrived at the police station for a "voluntary interview." About 30 minutes later, Officer Kain arrived to find defendant waiting in an interview room without a lock on the door.

Officer Kain told defendant he was free to leave and explained to defendant how to "get out of the Police Department if he chose to leave." Defendant admitted that he owned a brown Oldsmobile. However, defendant repeatedly denied being present or involved in the shooting of the Salazar house.

During the questioning, Officer Kain told defendant that his mother and sister might be subject to arrest for sending him text messages during an investigation. Officer Kain asked for defendant's consent to search his car and residence. Defendant refused and attempted to leave the interview room.

Officer Kain informed defendant that he was under arrest and moved him to a locked interview room that is subject to constant video surveillance.³ Officer Kain then left defendant to prepare an application for a search warrant. When the search warrant was authorized, Officer Kain had another police officer search defendant's car. The officer found a spent shell casing under the right front passenger seat of the car. Officer Kain showed the casing to defendant and told him to start thinking

³ The entirety of Officer Kain's questioning of defendant, along with defendant's meeting with his parents, was tape recorded. However, a malfunction with the tape recorder rendered both the audio and video unintelligible.

about telling the truth. Officer Kain then went to defendant's house to execute the search warrant.

In defendant's bedroom, Officer Kain found that most of defendant's clothing was red in color or had red highlights. On the witness stand, Officer Kain acknowledged that the Corning High School's team colors are red and black, and that the school mascot is a cardinal. In defendant's bedroom, Officer Kain also found a handwritten poem or lyrics with a gang theme. Defendant's computer was on and showed approximately 20 downloaded songs, some of which had titles related to the Norteño gang or were recorded by artists often favored by gang members. Defendant's computer also yielded gang-related images including: a Mickey Mouse wearing a red bandana with the letter "N" on it and extending his middle finger with "X4" on it, a person wearing a red bandana holding his fingers in a "14" position, and a group of people wearing red with the title "Norte" on the image. A username "Matt" had been created for nearly a dozen Web sites with gang and illicit drug themes.

Sometime between 8:30 a.m. and 9:30 a.m., Steven Turner arrived at the police station to see his stepson. Officer Kain told Steven that defendant was in custody for a shooting and faced a possible 40-year prison sentence. Officer Kain told Steven "that things would go light on [defendant]; that it would help [defendant] out" if defendant cooperated with the police. Steven decided to get his wife to talk with defendant, telling Officer Kain: "'If anybody could get [defendant] to talk, [it]

would be his mother.'" Officer Kain responded that "he thought it was a good idea, and to go for it"

Steven returned to the police station at 10:00 a.m. with defendant's mother, Michelle Turner. Officer Kain named the charges to be filed against defendant and told them that he was facing 40 years in state prison. Officer Kain "said if [defendant] cooperated [the court] may go easy on him." Michelle did not ask Officer Kain what she and her husband could do to help her son.

Defendant's parents then met with him in the interview room while Officer Kain monitored the conversation from another room. Michelle yelled at defendant, telling him that if she had known this would happen she would have thrown him in the river at birth. She told defendant that if he did not cooperate, he would hurt the entire family. Michelle repeatedly told defendant to "say something" to the police. Defendant appeared sad.

After defendant's parents left, Officer Kain advised defendant of his *Miranda*⁴ rights. Defendant appeared to understand his rights and elected to give a statement to Officer Kain. Defendant then stated that he, Manny Zavala, and others went to the Salazar residence because they believed Juan was a member of the Sureño gang. At the residence, they got out of their two vehicles and "call[ed] Juan out." The group yelled

⁴ *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

"Norte," "scrap," and "fourteen." They got back into their cars and drove to Red Bluff to allow things to cool down in case the police were looking for them. The occupants of defendant's vehicle, of which he knew only Zavala, then developed a plan. They decided to cruise through Corning to find a Sureño to beat up and then shoot. Defendant planned to be the shooter because he was a Norteño "recruit" who wanted to "earn his stripes" in the gang. Their next plan was to return to the Salazar residence to shoot Juan. Finally, they decided to shoot at the Salazar residence.

The group decided that defendant would neither be the driver nor the shooter because he was too intoxicated. Instead, Zavala would drive. After the shooting, defendant disassembled the gun "based upon his Norteño training" and discarded the pieces in different locations.

When defendant was booked into jail, he indicated that he was a Norteño but not a member of a gang.

Criminalist Tom Vasquez analyzed the five cartridges from the pavement and the cartridge case recovered from defendant's car. Vasquez concluded that all the cartridges were fired by the same gun.

Officer Kain testified as an expert on criminal street gangs. He described the origins of the rival Norteño and Sureño gangs; gang clothing and signs; how new members join the gangs and rise in the ranks; the importance of respect, retaliation, and reputation to gang members; and the code of silence. Officer Kain explained that the Norteño gang identifies with the

color red, the letter "N," and the number 14. "Norte" is often used as an abbreviation of "Norteño." "Scrap" is "typically a derogatory term use by Norteños toward Sureños."

Officer Kain estimated that there were more than 100 Norteño gang members in Tehama County who engaged in violent crimes such as manslaughter, assaults with a deadly weapon, batteries, robberies, graffiti, and drive-by shootings. He described specific offenses committed by local Norteños, including murder, assault, and a gang drive-by shooting.

Officer Kain discussed items found in defendant's bedroom and car. The predominance of red clothing was consistent with Norteño gang membership. So, too, a music CD bore cover art with a red color theme suggesting it was gang related. Defendant also had a brand of sunglasses commonly favored by gang members. Given a hypothetical based on the facts of the case, Officer Kain opined that the shooting would have been committed for the benefit of the Norteño gang.

The prosecution called Gustavo Gutierrez, Zavala, and Jacob Maldonado as witnesses. However, none provided testimony that shed any light on the events of the shooting.

To impeach Maldonado's claim of inability to remember anything from the night of the shooting, the prosecution introduced testimony as follows: On January 15, 2008, Officer Kain interviewed Maldonado at the police station. Maldonado admitted that he accompanied defendant and Zavala during the evening of the shooting. Maldonado heard defendant yelling "Norte" during the confrontation at the Salazar residence.

During the later shooting, Maldonado was riding in the backseat of defendant's car. Sometime after the interview with Officer Kain, Maldonado told his probation officer that he was in the car with defendant, Zavala, and Gutierrez. Defendant had obtained a firearm prior to the shooting, racked a round into the chamber, and handed the gun to Gutierrez.

Defense

The defense called James Hernandez, a professor of criminal justice, as a witness. The professor had substantial research experience on the topic of criminal street gangs. He testified that, according to the Federal Bureau of Investigation's Web site, the Norteños and Sureños are not criminal street gangs. Instead, the terms refer to "association identities." Hernandez testified that the images of Mickey Mouse and a person displaying a gang sign, which were found on defendant's computer, could be gang related. He also acknowledged that the confrontation in front of the Salazar house on the night of the shooting, as described in the police report, was consistent with gang activity for the benefit of the Norteños. However, he stated that it was also possible that the activity was not gang related and "just blowin' smoke."

Defendant's mother testified that defendant "had difficulty in school from the beginning, first -- or kindergarten, first, and second." After those school years, defendant "had problems still with reading. [His parents] brought it to the attention of the teachers, and they chose to evaluate him and he was eventually placed in special education." Then, "[b]etween the

first -- fourth grade when he was first placed in special education to seventh grade he made a great improvement; and in special education they re-evaluate them every three years, and at that time it was clear that more -- that he'd made great strides in visual and tactile memory, long-term memory, but he had very low scores or very low evaluation in auditory memory skills."

Throughout defendant's teenage years, he had "problems with ability to remember or recall things." His mother explained, "If you give him verbal instructions he doesn't retain them. He has to repeat things. And even then, like if you give him verbal instructions to go do three things, if he gets distracted it doesn't get done, he doesn't remember it."

The defense called Kenneth Killinger, who served as pastor of the Neighborhood Full Gospel Church in Corning. Killinger testified that he had known defendant for seven years. Defendant attended church and youth group outings. He was well behaved and got along with the other teens.

DISCUSSION

I

Claim of Improper Inducement to Falsely Confess

Defendant contends the trial court erred in denying his motion to suppress his confession about his role in the shooting of the Salazar residence. Specifically, defendant argues that Officer Kain improperly induced a false confession by telling

his parents that he might receive lenient treatment by the court if he cooperated with the police. We reject the argument.

A

To determine the admissibility of defendant's confession to Officer Kain, the trial court held a hearing outside the jury's presence. During the hearing, Officer Kain testified that he discussed potential penalties with defendant as follows: "I did not tell [defendant] specifically it was 40 years [in prison]. I told [defendant] that I have investigated cases in the past, and the one that I investigated in the past, the person that was involved and responsible for the shooting received a 40-year-to-life sentence."

Officer Kain also acknowledged informing defendant that his mother and sister faced their own criminal charges if they attempted to interfere with the investigation:

"Q [¶] . . . [¶] Didn't you tell [defendant] that you could arrest his sister and his mother for interfering because they had texted him?

"A [Officer Kain:] I don't recall exactly what was said. But I believe it was furthermore to him -- them assisting him and not coming in, or in the destruction or hiding of any evidence."

The record indicates that Officer Kain did not communicate to *defendant* that the police or court would be lenient with him if he confessed.

At the conclusion of the hearing, the trial court ruled defendant's statements to Officer Kain were not involuntary.

The trial court explained: "The second criteria being whether or not there's a preponderance of evidence indicating that the statements were voluntary, clearly there is always some concern if the Defendant is held for an extended period of time in an interview room. It's not clear from the evidence whether or not he was handcuffed that whole time. There is some evidence indicating he was handcuffed at the point when Mr. Turner came into the room.

"Those circumstances in and of themselves do not indicate that the statements Defendant made were involuntary for admissibility purposes.

"As to the involvement of the Defendant's stepfather and mother, it's not entirely clear to the Court what the argument is. But it does not appear that they were acting as an agent of the police. It was Mrs. Turner that asked to speak with the Defendant. It is not, even if we assume that the officer made some statements about 40 years, it does not -- the evidence doesn't indicate that that was ever conveyed to the Defendant. The Defendant did not make any statements to his mother. There's no indication of coercion that was used by the parents, either on their own behalf or on behalf of the police.

"Certainly the statements about, you know, they may -- what was it? 'They may go easy on him.' Those are kind of standard statements that are made in an interview. They certainly don't arise [*sic*] to the level of a promise of a commitment, and are not statements that suggest involuntariness.

"Given the state of the evidence, the Court finds that for admissibility purposes the statement was not involuntary, and will permit testimony in that regard."

Accordingly, Officer Kain testified at trial about defendant's confession after his mother and stepfather visited him at the police station.

B

In *People v. Neal* (2003) 31 Cal.4th 63, the California Supreme Court explained that "[i]t long has been held that the due process clause of the Fourteenth Amendment to the United States Constitution makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion. [Citations.] A statement is involuntary [citation] when, among other circumstances, it 'was "'extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, however slight. . . .'"' (*Hutto v. Ross* (1976) 429 U.S. 28, 30 [50 L.Ed.2d 194].) Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the 'totality of [the] circumstances.' (*Withrow v. Williams* (1993) 507 U.S. 680, 688-689 [123 L.Ed.2d 407])" (*People v. Neal, supra*, at p. 79.)

At trial, the People bear the burden of proving by a preponderance of the evidence that defendant's statement was made voluntarily. (*People v. Markham* (1989) 49 Cal.3d 63, 71.) "When determining whether a promise of leniency was made, a crucial distinction is drawn between simple police encouragement to tell the truth and the promise of some benefit beyond that

which ordinarily results from being truthful. 'When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible.' (*People v. Hill* (1967) 66 Cal.2d 536, 549.)" (*People v. Vasila* (1995) 38 Cal.App.4th 865, 874.)

Even if the police improperly convey a promise of leniency, that fact by itself does not necessarily render a confession involuntary. Instead, "an improper promise of leniency does not render a statement involuntary unless, given all the circumstances, the promise was a motivating factor in the giving of the statement." (*People v. Vasila, supra*, 38 Cal.App.4th at p. 874.) Consequently, we are called to consider whether defendant confessed as a result of a promise of leniency.

C

Officer Kain did not induce an involuntary confession from defendant with an improper promise of lenient treatment by the court. Officer Kain urged defendant to "start thinking about telling . . . the truth." In doing so, Officer Kain did not link confession to a crime with a guarantee of lenient sentencing or favorable treatment by the court. The requisite

linking of a confession with favorable police or judicial treatment is absent from Officer Kain's interactions with defendant.

True, Officer Kain did mention another investigation in which the suspect eventually received a 40-year prison sentence. However, despite mentioning the punishment for the crimes that Officer Kain was investigating, he did not offer favorable treatment for a confession or admission of criminal culpability. Instead, he merely urged defendant to tell the truth. "A confession elicited by any promise of benefit or leniency, whether express or implied, is involuntary and therefore inadmissible, but merely advising a suspect that it would be better to tell the truth, when unaccompanied by either a threat or a promise, does not render a confession involuntary. [Citation.]" (*People v. Davis* (2009) 46 Cal.4th 539, 600.)

We also do not discern coercion of defendant by Officer Kain's interactions with defendant's parents. Defendant's parents arrived at the police station unbidden. His stepfather showed up unannounced, and he was the one who decided to bring defendant's mother to meet with defendant. Although Officer Kain impressed upon them the seriousness of the crimes being investigated, he did not tell them what they should say to defendant. Officer Kain was not in the room when defendant met with his parents.

Defendant's parents cannot be considered agents of the police because Officer Kain did not control or direct them. Officer Kain's admonishment that it would be best if defendant

cooperated with the police was neither improper nor overbearing. Accordingly, "it is clear that defendant's conversations with his own visitors are not the constitutional equivalent of police interrogation.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 758, quoting *People v. Gallego* (1990) 52 Cal.3d 115, 170.)

In arguing that Officer Kain improperly employed his parents against him, defendant relies on *People v. Hogan* (1982) 31 Cal.3d 815 (*Hogan*) [overruled on another ground in *People v. Cooper* (1991) 53 Cal.3d 771, 836]. The circumstances presented in *Hogan*, however, distinguish it from this case. In *Hogan*, the police questioned the suspect two times before they allowed him to speak with his wife. (*Id.* at pp. 835-836.) The police employed Hogan's wife against him by priming her with false information that caused her to believe he was probably guilty. (*Id.* at pp. 836-837.) On resumption of the police interview, the defendant confessed to murder amid bouts of crying and emotional distress. (*Id.* at p. 838.) Having attempted to convince the defendant that he was suffering from a mental illness, the police pointedly offered Hogan mental health treatment if he confessed. (*Ibid.*) No more than 10 minutes after the conclusion of the questioning, the police arranged for him to call his wife on the telephone. The call, which Hogan knew to be recorded, constituted a continuation of the interrogation -- and employed Hogan's wife again. (*Id.* at pp. 828, 842, 843.) In sum, "the hand of the police was evident in all of Hogan's conversations with his wife during this time period. Whether wittingly or unwittingly, Hogan's wife acted as

an arm of the police, allowing them to continue to interrogate Hogan by means of questions posed by her." (*People v. Terrell* (2006) 141 Cal.App.4th 1371, 1384.)

By contrast, defendant's parents in this case did not act as agents of the police. Officer Kain neither summoned nor directed them. Officer Kain's interactions with them were brief and not overbearing. The police in this case did not provide false information as a way of indirectly instilling fear in defendant. And, Officer Kain did not offer help or leniency in exchange for a confession of guilt. (But compare *Hogan, supra*, 31 Cal.3d at pp. 838-839.)

The totality of the circumstances indicate that defendant's confession was not coerced by an improper promise of leniency by Officer Kain nor was it the product of the police employing defendant's parents as their agents. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to suppress the confession.

II

Exclusion of Testimony by Expert Witness on

False Confessions and Defendant's School Psychologist

Defendant contends the trial court erred in excluding expert witness testimony regarding what leads suspects to make false confessions during police interrogations. Defendant further contends that the court erroneously precluded defendant's school psychologist from testifying about defendant's deficiencies with memory and information retention.

We conclude that exclusion of this evidence was not prejudicial error.

A

Dr. Leo

The defense filed an in limine motion to introduce the testimony of Dr. Richard A. Leo as an expert on false confessions and police interrogation techniques. Specifically, defendant sought to "present expert testimony regarding the general factors that can lead to a coerced and/or false confession and the phenomenon of false confessions" The motion argued that "[i]ndividually and collectively, especially as the interrogations progressed, these techniques have been shown to unduly influence individuals to make false and/or unreliable statements. This is especially true for individuals who are younger, unsophisticated and who have learning disabilities." The motion noted the extensive literature devoted to the topic of police interrogations: "These sources demonstrate that the proffered expert testimony has gained wide acceptance in the relevant scientific community. The literature further establishes that the information that an expert would convey is beyond the knowledge of the ordinary juror."

The court excluded Dr. Leo's testimony.

Dr. Cassorla

Defense counsel also sought to introduce the testimony of Dr. Irvin Cassorla, the school psychologist who had formulated defendant's special education curriculum in high school.

At the hearing on the admissibility of Dr. Cassorla's testimony, defense counsel further explained: "He's the school psychologist for the Tehama County Department of Education, and has reviewed as part of setting up a special education program for [defendant], being involved in the evaluations of the reports that were submitted to him and formulating an educational program for [defendant]; and he's reviewed reports from the Corning Elementary School, from the high school, and has to do with the psychol [sic] -- education and evaluations. We're not gonna[] talk about psychology of it; we're gonna[] talk about special needs involving -- because of his memory problems and his retention problems." Although Dr. Cassorla did not personally examine defendant, "he was part of . . . the examination program to develop a program for [defendant]."

The prosecutor objected to the testimony on grounds that Dr. Cassorla was not qualified to render an opinion based on the school reports and that the testimony would be irrelevant and confusing to the jury. The prosecutor noted that "the most recent of [the school reports] appears to have been prepared in November 2005, so well over two years before the incident alleged in this case."⁵

⁵ The last report was prepared in 2005. The murder occurred on January 11, 2008, more than two years later. Also, in January 2008, the defendant was interrogated. The defendant's trial took place in April and May of 2009, more than three years after the 2005 report.

The trial court precluded Dr. Cassorla from testifying. The court explained: "The primary problem the Court has with it is that it's 2005, it's four years ago, there is testimony from the Defendant's mother indicating that he has problems, but that there was great improvement. There's testimony that he held two summer jobs at Lassen, he's held a summer job at Les Schwab, he was holding a job at Food Maxx, and the evidence doesn't seem to be pre -- adequately probative of his ability as of the time of this interview, which was January of 2008. I said four years. It really was three years between -- two years? Whatever, January -- from December of 2005 to January of 2008.

"Just -- The time gap for me is too great without some indication that that situation continued at the time of the interview. So at least at this point it would be the Court's ruling that it would not allow the testimony of Dr. or Mr. Cassorla."

B

Admitting expert testimony relating to allegedly false confessions is subject to the trial court's discretion. And we will reverse only if an abuse of discretion is shown. (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1205 (*Ramos*).)

Ramos summarized the law on this subject: "*Crane v. Kentucky* [(1986)] 476 U.S. [683,] 691 [90 L.Ed.2d 636] is the seminal case in this area. In *Crane*, a 16-year-old defendant testified at a pretrial motion to suppress that he had been detained in a windowless room for a protracted period of time, that he had been surrounded by as many as six police officers

during the interrogation, that he had repeatedly requested and been denied permission to telephone his mother, and that he had been badgered into making a false confession. In opening statement, defense counsel told the jury the defense would present evidence regarding the length of the interrogation and the manner in which it had been conducted to demonstrate the statement was unworthy of belief. Prior to the presentation of any evidence, the trial court sustained the prosecutor's objection to the admission of evidence related to the circumstances of the confession. The trial court ruled the defense could inquire into inconsistencies in the confession but could not present any evidence about the duration of the interrogation or the individuals in attendance on the ground such evidence was relevant only to the issue of voluntariness, which was not before the jury.

"*Crane* held the reliability of a confession and its voluntariness are two separate questions, reliability being a factual issue for the jury and voluntariness being a legal issue for the court. *Crane* concluded the 'blanket exclusion' of evidence related to the circumstances of the confession deprived the accused of a fair opportunity to present a defense. (*Crane v. Kentucky, supra*, 476 U.S. at p. 690.)" (*Ramos, supra*, 121 Cal.App.4th at pp. 1205-1206.)

In *Ramos*, the trial court excluded evidence from the defense's expert on police interrogation techniques and false confessions. On appeal, the *Ramos* court distinguished *Crane* on its facts: "We agree with the principles underlying *Crane* but

find the trial court made no similar blanket exclusion in this case. Rather, the record reveals defense counsel cross-examined [the officer] extensively regarding his interrogation techniques used in the interview of Ramos as well as the interrogation techniques used in his questioning of other witnesses. Defense counsel also called witnesses who testified [the officer] threatened them and attempted to coerce statements from them and from Ramos. The jury also was aware of the circumstances of the interrogation based on the videotape of Ramos's statement. Thus, this is not a case like *Crane* where the defense was not permitted to attack the reliability of the defendant's statement." (*Ramos, supra*, 121 Cal.App.4th at p. 1206.)

Here, the circumstances of the questioning were explored in depth during the trial. Officer Kain went to defendant's residence, and defendant later went to the police station for an interview. Defendant admitted facts about his car, but he denied involvement in the crimes. Officer Kain stated that defendant's mother and sister might be subject to arrest for interfering in the investigation. Although, at first, defendant was told he was free to leave, he was later arrested when he refused consent to search his car and home. Officer Kain confronted defendant with the evidence of the shell casing found in his car.

When defendant's parents met with him, he was wearing handcuffs. His mother yelled at him and berated him and told him to talk to the police. After his parents left, defendant waived his *Miranda* rights and gave a responsive and coherent

confession that was consistent with the other evidence in the case. In addition to this evidence of the questioning, defendant's mother testified concerning his learning disability.

Turning first to the evidence defendant sought to elicit from Dr. Cassorla, we conclude it was cumulative and, therefore, its exclusion was not an abuse of discretion. (Evid. Code, § 352.) He never personally examined defendant, and the reports upon which he would have based his opinion were over two years old. As noted, the jury was already aware of defendant's learning disorder from his mother's testimony. Even assuming the exclusion of Dr. Cassorla's testimony was an abuse of discretion, defendant suffered no prejudice, as we explain below with respect to exclusion of Dr. Leo's testimony.

Concerning the evidence defendant sought to elicit from Dr. Leo on the subject of false confessions, we conclude that, even if the exclusion was an abuse of discretion, it was not prejudicial.

Defendant contends the error in excluding Dr. Leo's testimony must be measured under the "harmless beyond a reasonable doubt" standard for federal constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711]. We disagree. The "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.]' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 998.) Thus, the proper test is the state law error standard -- whether it is reasonably probable the jury would

have returned a more favorable verdict had the expert testimony been admitted. (*People v. Cegers* (1992) 7 Cal.App.4th 988, 1001, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) In any event, the asserted error was harmless regardless of whether the state or federal test is applied.

Defendant claims that exclusion of Dr. Leo's testimony "eviscerated [his] defense." The record, however, does not support this claim.

First, the circumstances of the questioning and defendant's confession were fully presented to the jury. As in *Ramos*, there was no blanket exclusion of evidence concerning the questioning. (See *Ramos*, *supra*, 121 Cal.App.4th at p. 1206.)

It was obvious that defendant was under stress when he confessed. And the defense made that point to the jury.

Expert testimony in this regard would not have altered appreciably the jury's perception of the confession. While Dr. Leo would have testified that stress can make a suspect more compliant, his testimony would not have, and could not have, established that the confession was false. On the other hand, the trial court's exclusion of Dr. Leo's testimony did not take away from the jury the possibility of finding the confession was false.

Second, and more importantly, except for defendant's initial denial to Officer Kain, the confession was consistent with the remainder of the evidence. Defendant was with the group that stopped at the Salazar residence about 30 minutes before the shooting. His car was also there. A witness saw

defendant's car immediately after the shooting. Another occupant of defendant's car said that defendant was in the car at the time of the shooting. While defendant attempted to impeach the testimony of these witnesses, the evidence went largely uncontradicted. A shell casing found in defendant's car was consistent with casings found on the pavement at the scene of the shooting. There was no evidence that defendant ever recanted his confession and no credible evidence that defendant was anywhere but in the car when the shooting occurred. Therefore, even if Dr. Leo had testified concerning stress and false confessions, the jury had no factual basis to discount the confession. Taking into account the totality of the circumstances, the proposed expert testimony was little more than speculation and would not have changed the verdict of a reasonable jury.

We therefore conclude that exclusion of Dr. Leo's testimony was harmless, even assuming the trial court should have admitted it.

III

Evidence and Argument Concerning

Refusal to Consent to Search

For the first time on appeal, defendant contends that admission of evidence that he refused to give Officer Kain consent to search his car and home violated his constitutional right to remain silent. This contention was forfeited because no objection was made in the trial court. Defendant further contends that, if we find the contention was forfeited, we must

reverse nonetheless because trial counsel's failure to object to the evidence violated his right to assistance of counsel. We conclude the failure to object did not violate his right to assistance of counsel because there was a possible tactical reason for not objecting to the evidence and, in any event, the evidence of defendant's guilt was overwhelming.

Officer Kain testified that, during questioning, but before defendant was arrested, he asked defendant for consent to search his car and home. Defendant refused, so Officer Kain told him he was detaining defendant while he got a search warrant for defendant's car and home. During closing argument, the prosecutor recounted the questioning. He stated:

"Prior to [defendant's detention, Officer Kain] had asked [defendant], 'Okay, if you're not involved could I take a look in your car?' because [defendant] had admitted to [Officer] Kain that he drove a brown Oldsmobile which is very similar to the vehicle that was seen at the house. Turns out of course it was the same vehicle that was seen at the house.

"When [Officer] Kain asked [defendant] for consent to search his car, [defendant] said, 'No.'

"[Officer] Kain asked him, 'Okay, well, is there anything in your residence? You mind if I take a look in your room?' Again [defendant] said, 'No, you can't look.'

"At that point [Officer] Kain detained [defendant] and wrote a search warrant. This search warrant allowed him to search [defendant's] car, which was the brown Oldsmobile, as well as [defendant's] room."

A prosecutor is forbidden to comment on a defendant's refusal to give consent to a search. (*People v. Keener* (1983) 148 Cal.App.3d 73, 78-79.) Such comment is a violation of the privilege against self-incrimination as secured by the Fifth Amendment to the United States Constitution. (See *Griffin v. California* (1965) 380 U.S. 609, 615 [14 L.Ed.2d 106, 110].) However, the failure to object to the comment forfeited review of the issue on appeal. (*People v. Turner* (2004) 34 Cal.4th 406, 421.)

Anticipating the forfeiture problem, defendant argues that defense counsel's failure to object violated his right to assistance of counsel. We disagree.

""[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when 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.' [Citations.]" [Citation.]" [Citation.]" (*People v. Avena* (1996) 13 Cal.4th 394, 418; fn. omitted.)

""[I]f the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one,

or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Defendant claims, summarily, that trial counsel's representation was deficient for not objecting to the evidence that defendant refused consent to searches of his car and home. He argues only that the law is clear and "[d]efense counsel had no excuse for failing to object to it." The record does not support this argument. If defense counsel had a tactical reason not to object, his performance was not deficient. In fact, here, the defense relied heavily on the evidence that Officer Kain's treatment of defendant was overbearing and heavy-handed. During closing argument, defense counsel argued, in essence, that Officer Kain had been nice to defendant to try to get him to consent to a search. When defendant refused, Officer Kain arrested him and searched the car and home anyway. Defense counsel argued to the jury that Officer Kain arrested defendant "[b]ecause [defendant] wouldn't just roll over and let him go out and search his car." Therefore, there was a tactical reason defense counsel may have decided not to object.⁶ Under these

⁶ The Attorney General states that "the record does not affirmatively suggest any tactical reason for defense counsel's failure to object, though it is nonetheless conceivable that counsel had such a reason." We disagree.

circumstances, defendant has not shown that counsel's representation was deficient.

Since defendant fails to establish deficient representation, we need not discuss possible prejudice. In any event, this was not a close case. Although trial counsel provided a vigorous defense, the evidence, as summarized above, was overwhelming that defendant committed the crimes for which he was convicted.

IV

Court Facilities Funding Assessment

The Attorney General asserts that the trial court imposed an unauthorized sentence because it failed to impose a mandatory facilities funding assessment of \$90 (\$30 for each conviction) pursuant to Government Code section 70373.⁷ Defendant responds that (1) the assessment would violate the ex post facto clause because the statute was enacted after defendant committed his crimes, and (2), if the assessment is imposed, it should be limited to \$30 because two of the counts were stayed pursuant to section 654. Defendant concedes, however, that we have previously rejected these objections to this assessment.

(*People v. Castillo* (2010) 182 Cal.App.4th 1410, 1413-1415 [assessment does not violate ex post facto clause]; *People v.*

⁷ Government Code section 70373, subdivision (a)(1) states: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense The assessment shall be imposed in the amount of thirty dollars (\$30) for each . . . felony"

Crittles (2007) 154 Cal.App.4th 368, 370-371 [fees to be imposed even on stayed counts].)

We therefore modify the sentence by adding a \$90 assessment pursuant to Government Code section 70373.

DISPOSITION

The judgment is modified by imposing a \$90 assessment pursuant to Government Code section 70373. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

NICHOLSON, Acting P. J.

I concur:

MAURO, J.

I concur in parts I, III and IV of the Discussion but respectfully dissent as to part II.

Defendant Matthew Mullen sought to introduce two critical witnesses that constituted a "dynamic duo" for his defense. The first was an expert witness to explain the nature of false confessions and the types of interrogation techniques that can produce such confessions, especially when the confessor is youthful, unsophisticated, and has learning disabilities. The second was a school psychologist who would have testified to defendant's special education requirements due to his cognitive difficulties.

My colleagues conclude that even if the exclusion of expert witness testimony by the expert on false confessions was error, it was not prejudicial. (Maj. opn., *ante*, pp. 19, 24.) They find the exclusion of testimony by defendant's school psychologist was not an abuse of discretion. (Maj. opn., *ante*, p. 24.) I disagree on both points.

In my view, the offered testimony was directly relevant and material to the circumstances of a young defendant with learning disabilities and whether he suffered a unique susceptibility to making a confession, not based on culpability but on an inability to process auditory commands and information.

As my colleagues note, there is no usable audio or videotape of defendant's confession. (Maj. opn., *ante*, p. 5, fn. 3.) This is troublesome to say the least. Defendant's

interview with Officer David Kain began at approximately 3:00 a.m. In the course of police questioning, defendant spent nearly 10 hours in handcuffs in interrogation rooms, without sleep. At the time of the shooting, defendant was 19 years old and he had never been arrested and booked into jail. He had no criminal conviction record. The evidence reflected he was unsophisticated and had had learning disabilities from his earliest school years; in particular, he had difficulty with auditory memory and cognitive processing throughout all 12 grade levels.

I. Dr. Richard A. Leo

A. *Expert Testimony*

As the majority notes (maj. opn., ante, p. 19), the defense motion to introduce the testimony of law professor Richard A. Leo, Ph.D., as an expert on false confessions and police interrogation techniques argued that certain interrogation techniques have been shown to unduly influence individuals to make false and/or unreliable statements: "*This is especially true for individuals who are younger, unsophisticated and who have learning disabilities.*" (Italics added.)

The court precluded Dr. Leo from testifying. The court explained that jurors generally do not need experts to tell them who is lying and observed that Dr. Leo would give merely general information about the reliability and voluntariness of confessions. The court's explanation misses the point here—how defendant's youth, lack of sophistication and learning

disabilities may have made him uniquely susceptible to providing a false or unreliable confession. Furthermore, Dr. Leo's proposed testimony was proposed "in tandem" with that of defendant's school psychologist Dr. Irvin Cassorla: Dr. Leo would have provided the framework of factors that can cause a person to become more compliant during interrogation and Dr. Cassorla would have applied that framework to defendant.

B. Analysis

As the California Supreme Court has explained, "the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law." (*People v. Cunningham* (2001) 25 Cal.4th 926, 999 (*Cunningham*)). This right to due process "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.' *United States v. Cronin* [(1984)] 466 U.S. 648, 656, 80 L.Ed.2d 657[, 666]." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691 [90 L.Ed.2d 636, 645] (*Crane*)).

As the *Crane* court noted, the ability to challenge the reliability of a confession can be an integral part of the defense when a confession appears to conclusively establish

guilt. "Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" (*Crane, supra*, 476 U.S. at p. 689 [90 L.Ed.2d at p. 644].)

As subsequent case law has noted, the *Crane* court "was careful to remind defendants that even in this context trial courts retain "'wide latitude"' to exclude repetitive, marginally relevant, or confusing evidence. (*Crane, supra*, 476 U.S. at p. 689 [90 L.Ed.2d at p. 644].) *On the facts before it*, the [*Crane*] court concluded that 'the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial.' (*Id.* at p. 690 [90 L.Ed.2d at p. 645], italics added.) Thus, in *Crane* it was the 'blanket exclusion' of evidence which deprived the defendant of "'a meaningful opportunity to present a complete defense.'" (*Ibid.*, quoting *California v. Trombetta* (1984) 467 U.S. 479, 485 [81 L.Ed.2d 413, 419].)" (*People v. Page* (1991) 2 Cal.App.4th 161, 185 (*Page*).)

Although addressing the exclusion of eyewitness reliability testimony, I also find instructive the California Supreme Court's decision in *People v. McDonald* (1984) 37 Cal.3d 351 (*McDonald*). In *McDonald*, the high court explained that "the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a

matter within the trial court's discretion." (*Id.* at p. 377.) The *McDonald* court noted that "such evidence will not often be needed" because jurors are capable of evaluating the reliability of such identifications. (*Ibid.*) Nonetheless, the high court held that the trial court abused its discretion by entirely excluding expert testimony on the psychological factors affecting the accuracy of eyewitness identification. (*McDonald*, at p. 376.) The *McDonald* court reasoned that "the body of information now available on these matters is 'sufficiently beyond common experience' that in appropriate cases expert opinion thereon could at least 'assist the trier of fact' (Evid. Code, § 801, subd. (a))." (*Id.* at p. 369.) Thus, the complete preclusion of expert testimony on a subject that is relevant but lies outside the knowledge or experience of a lay jury constitutes error.

The trial court here abused its discretion in completely excluding expert testimony on factors leading to false or unreliable confessions—especially those uniquely arising from cognitive deficiencies such as defendant's. Jurors could have gleaned that defendant was a young adult with some learning disabilities who had worked at jobs typical of teenage years. However, lay jurors were unlikely to be aware of the effect of youth, learning disabilities, and lack of sophistication on answers given during a police interrogation. Learning disabilities by their very definition refer to problems in processing new information and stimuli that lie outside the

norm. The motion to introduce the testimony of Dr. Leo expressly referred to his ability to discuss how learning disabilities might render a confession unreliable.

Although the usual case will not require expert testimony regarding the reliability of a confession during a police interrogation (*Page, supra*, 2 Cal.App.4th at p. 185), indicia of a defendant's unique susceptibility to giving a false or unreliable confession require that the defense be afforded the opportunity to present expert testimony as to such susceptibility. (See *ibid.*; *McDonald, supra*, 37 Cal.3d at p. 376.)

The Attorney General argues that the trial court did not abuse its discretion, and refers to *Page, supra*, 2 Cal.App.4th 161, *People v. Ramos* (2004) 121 Cal.App.4th 1194 (*Ramos*) and *People v. Son* (2000) 79 Cal.App.4th 224 (*Son*). In my view, none of these cases justifies the trial court's categorical exclusion of expert testimony regarding the reliability of the confession; in fact, if anything, they lend support to defendant's position.

In *Page*, the Court of Appeal held that an expert witness had not been improperly restricted from testifying that certain characteristics of an interrogation indicated a confession's unreliability. (*Page, supra*, 2 Cal.App.4th at p. 180.) The *Page* court noted that the expert witness had in fact "outlined the factors which might influence a person to give a false statement or confession during an interrogation. Having been educated concerning those factors, the jurors were as qualified

as the professor to determine if those factors played a role in [the defendant's] confession, and whether, given those factors, his confession was false." (*Page*, at p. 189.) By contrast, this case involved no expert testimony at all on the factors that might have induced a defendant with cognitive disabilities to make a false confession.

In *Ramos*, *supra*, 121 Cal.App.4th 1194, the Court of Appeal affirmed the preclusion of expert testimony regarding whether certain police interrogation techniques tend to elicit unreliable confessions of criminal culpability. (*Id.* at p. 1205.) The *Ramos* court pointed out that the police interrogation in that case did not involve an extended period of time, false statements to the defendant, or any particular complexity—such as the use of a polygraph test. (*Id.* at p. 1207.) Accordingly, the *Ramos* court concluded that the trial court did not abuse its discretion in precluding expert testimony regarding the general principles regarding false or unreliable confessions. (*Ibid.*)

Similarly, *Son* involved the exclusion of expert testimony regarding "police tactics" that had a tendency to yield problematic confessions. (*Son*, *supra*, 79 Cal.App.4th at pp. 240-241.) The *Son* court upheld the trial court's ruling on the basis that "there was no evidence that police engaged in tactics wearing down Son into making false admissions. Hence, the proffered expert testimony on police tactics was irrelevant." (*Id.* at p. 241.) Moreover, Son testified at trial

that he falsely confessed during the police interrogation due to a promise of leniency. (*Son*, at pp. 240-241.) This testimony of the defendant, the *Son* court ruled, was "a matter easily understood by a layperson without expertise." (*Id.* at p. 241.)

In this case, the defense indicated particular factors affecting the ability to respond to questioning—including defendant's learning disabilities—that would not have been within the expected ability of lay jurors to assess in the context of custodial interrogations. Accordingly, the trial court abused its discretion in entirely precluding the testimony of Dr. Leo.

II. Dr. Irvin Cassorla

The majority details the defense motion to introduce the testimony of Dr. Irvin Cassorla, the school psychologist who had formulated defendant's special education curriculum in high school. (Maj. opn., *ante*, pp. 19-21.) The trial court precluded Dr. Cassorla from testifying, relying primarily on the 25-month interval between the most recent school report (December 2005) and the January 2008 shooting.⁸

⁸ The trial court was not entirely clear on the interval between the school report and the police interview. As the majority opinion notes, the court mentions four years, then three and two years as the "time gap." (Maj. opn., *ante*, p. 21.) In its discussion, the majority contends Dr. Cassorla would have based his opinion on reports that were over two years old. (Maj. opn., *ante*, p. 24.)

In my view, the trial court also abused its discretion by disallowing the defense from calling Dr. Cassorla. The ruling rendered the defense unable to present testimony that defendant had suffered from learning disabilities throughout his elementary and high school years. Defendant's learning disabilities were sufficiently severe that he required a special education curriculum throughout his schooling. Moreover, as defendant's mother testified, special education students are reevaluated only every three years, so defendant's December 2005 evaluation was still relevant at the time of his confession in January 2008.

By excluding Dr. Cassorla, the trial court prevented the defense from showing that defendant's impairments in taking in, processing, and recalling information had been diagnosed at an early age and proved resistant to remedy even by a special curriculum designed specifically for him. This critical evidence, in tandem with Dr. Leo's proposed testimony, comprised defendant's defense. As with the exclusion of Dr. Leo's expert testimony, the trial court erred in precluding defendant's school psychologist from testifying.

As defendant suggests, the facts of this case resemble those presented in *United States v. Vallejo* (9th Cir. 2001) 237 F.3d 1008 [opinion amended on denial of reh'g. (9th Cir. 2001) 246 F.3d 1150] (*Vallejo*). However, decisions of the Ninth Circuit are not binding on this court. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) Nonetheless, I examine them

for their persuasive effect. (See, e.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1305.) In *Vallejo*, the Ninth Circuit reversed a conviction after the trial court excluded testimony by the defendant's school psychologist, who was prepared to testify about "the special problems that former special education students have when attempting to communicate in English in high pressure situations." (*Vallejo, supra*, 237 F.3d at p. 1019.) The *Vallejo* court concluded that "the school psychologist addressed an issue beyond the common knowledge of the average layperson" (*ibid.*), namely, how the defendant "struggled to comprehend and communicate during the interrogation" (*id.* at p. 1020).

The *Vallejo* court emphasized that "[t]here was no dispute that the witness had sufficient expertise, based on his degree in psychology and his current job as the High School's director of special education. The expert witness's opinion was reliable. In preparation for trial, as custodian of the school records, he extensively reviewed ten years of school documentation regarding Vallejo's language skills and his progress in special education classes. . . . Apparently the records would have shown that Vallejo had been in special education classes since kindergarten, but that he had been taken out of those classes in the past couple years." (*Vallejo, supra*, 237 F.3d at p. 1020.)

In this case, Dr. Cassorla had personally been involved in formulating defendant's special education curriculum and had

reviewed the records indicating that defendant had required remedial help since elementary school. Defendant's learning disabilities persisted through all 12 grades of his primary and secondary education. Although his mother testified that defendant had made some improvements in processing visual and tactile information, she noted that defendant still had "very low scores or very low evaluation in auditory memory skills." Thus, the defense was deprived of the critical opportunity to present information that defendant had specific and long-standing difficulties in processing auditory information and dealing with commands.

Indications that defendant's cognitive difficulties persisted through 12 years of primary and secondary school education precluded the conclusion that Dr. Cassorla's testimony related to evaluations that were too remote in time because they relied on 25-month-old reports. Moreover, the trial court erred in relying on mother's testimony that defendant had "gotten better" in recent years.⁹ Mother's testimony indicated that defendant's auditory difficulties had not improved. It is precisely these difficulties that the defense was entitled to

⁹ The only information presented to the jury on this issue was the very brief testimony of defendant's mother. The topic took up a mere two pages of the reporter's transcript. The mother's entire testimony is 16 pages of the reporter's transcript and it focused primarily on Officer Kain's purported promises of leniency and the mother's efforts (by yelling and berating defendant) to persuade her son to give the police "something."

present to the jury in arguing that defendant's confession to Officer Kain was involuntary.

The trial court's rulings prevented the defense from showing the duration and scope of defendant's cognitive deficiencies, and from presenting the jury with expert testimony on how such cognitive deficiencies (combined with other factors such as youth and lack of sophistication) might have yielded a false confession. Accordingly, the trial court erred in excluding the expert testimony of Dr. Leo and Dr. Cassorla. I now turn to the effect of this error.

The "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." (Cunningham, supra, 25 Cal.4th at p. 998.) My colleagues rely on the Watson standard of review; that is, whether it is reasonably probable the jury would have returned a more favorable verdict had the expert testimony been admitted. (People v. Watson (1956) 46 Cal.2d 818, 836.) (Maj. opn., ante, pp. 24-26.) While I agree Watson is the appropriate standard to review whether an exclusion of defense evidence on a minor or subsidiary point was harmless (Cunningham, at p. 999), here the trial court entirely excluded expert testimony on the defense theory and Chapman should apply (Chapman v. California (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711]; see Cunningham, supra, 25 Cal.4th at p. 999 [a "complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law"]). In my

opinion, the trial court's error in excluding Dr. Leo's and Dr. Cassorla's testimony was not harmless beyond a reasonable doubt.¹⁰

I agree with the majority that "the jury had no factual basis to discount the confession." (Maj. opn., ante, p. 26.) It had no factual basis because the trial court precluded not only Dr. Leo but Dr. Cassorla from providing a critical part of that factual basis. With Dr. Leo's and Dr. Cassorla's testimony, had the jurors concluded that defendant's confession was unreliable, it is not a foregone conclusion that they would have convicted defendant based on the remainder of the prosecution's case. No witnesses observed the shooting in question. Thus, the evidence of defendant's role in the shooting on January 11, 2008, derived from: (1) his admissions to Officer Kain during interrogation; (2) one witness (Eric Sandoval) who testified that he saw defendant's car immediately after the shooting (but could not say whether defendant was in the car); (3) a statement by Jacob Maldonado, a fellow gang member and accomplice, to his probation officer that he was in the car with defendant at the time of the shooting;¹¹ and (4) a

¹⁰ Although my colleagues rely on *Watson*, they conclude the exclusion of expert evidence was also harmless under the federal test for prejudice. (Maj. opn., ante, p. 25.)

¹¹ This last statement was made only after Maldonado was arrested and jailed for testing positive for cocaine. Maldonado initially told Officer Kain that he was not in defendant's car at the time of the shooting. At trial, Maldonado refused to answer questions and was held in contempt and taken into

shell casing or cartridge recovered from defendant's car that matched five cartridges recovered from the scene.

I would reverse the judgment.

— BUTZ —, J.

custody. When he returned to the witness stand after a night in jail, he claimed no recollection of the day in question.