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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMY ALLEN WESSELS,

Defendant and Appellant.

D058021

(Super. Ct. No. SCE284009)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed with directions.

A jury convicted Jeremy Allen Wessels of first degree murder (Pen. Code,¹ § 187, subd. (a)), and found true an enhancement allegation that he was armed with a firearm in the commission of the crime (§ 12022, subd. (a)(1)). The court sentenced Wessels to 25 years to life on the murder conviction, plus one year on the weapons enhancement. It awarded Wessels 670 days credit for actual time served, and zero days of conduct credit.

¹ All statutory references are to the Penal Code unless otherwise stated.

The murder was committed in 1994, but Wessels was not arrested and charged with the offenses until 2008.² Wessels contends (1) the 14-year preaccusation delay denied him his state and federal constitutional rights to due process; (2) the court erroneously refused to admit into evidence a witness's prior statement as past recollection recorded under Evidence Code section 1237; (3) the court refused to permit impeachment of another witness; and (4) the court failed to award him presentence conduct credit. The People correctly concede the latter contention. We remand for the trial court to award Wessels 334 days of presentence custody credits and amend the abstract of judgment accordingly. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The defense filed a pretrial motion to dismiss the murder conviction because of prosecutorial delay. The trial court deferred its ruling until the conclusion of trial so as to better assess prejudice to Wessels based on the trial evidence.³

Murder and 1994 Investigation

On September 16, 1994, a fire captain responded to David Binno's apartment at approximately 10:00 p.m. The apartment door was slightly askew, lights inside the apartment were turned off, and very loud music was playing inside. Binno was lying on

² The first trial on the same charges ended in a mistrial on July 16, 2009, because the jury was unable to reach a verdict. Trial testimony in the present case started on April 27, 2010.

³ It is within the trial court's discretion to rule on a motion to dismiss based on preaccusation delay before, during or after trial. (*People v. Martinez* (2000) 22 Cal.4th 750, 769; *People v. Boysen* (2007) 165 Cal.App.4th 761, 777 (*Boysen*).)

the floor in a large pool of blood, and his brain tissue was visible; therefore the fire captain concluded Binno was deceased.

There was no evidence of a break-in at Binno's apartment. Detectives recovered from the scene two spent casings that came from the same gun. The results of DNA and fingerprint tests at Binno's apartment did not match either Wessels or Franswa Shammam, Wessels's friend. Detectives found no evidence of blood in or on Shammam's pickup truck.

Haitham Marcos testified Binno had helped him repair Marcos's car until approximately 3:45 p.m. that day, when Binno had to go home to take care of a phone bill payment from Wessels. The parties stipulated the distance between Marcos's residence and Binno's residence was 4.1 miles by the most direct route; it would take approximately nine minutes to drive between the two residences directly, barring some unusual event such as an accident or construction.

Kristin Lybarger lived in Binno's apartment complex, and testified that she came home from work at around 4:00 p.m. that day. Binno's car was not in its parking stall, but instead a black pickup truck was parked there. However, at approximately 4:40 p.m., she saw Binno's car in its usual parking stall, and the black pickup truck was next to Binno's.

Kara Walter, who lived in an apartment just below Binno's, told detectives that between 4:15 p.m. and 4:30 p.m. that day, she heard about two or three people talking as they climbed the stairs to Binno's apartment. A few minutes later, the music in Binno's apartment was turned up excessively loud. As Walter was leaving home at

approximately 4:30 that afternoon, she heard two "pops" that sounded like firecrackers come from Binno's apartment. She heard voices talking immediately afterwards. When Walter returned home at approximately 8:30 that night, the lights in Binno's apartment were turned off, and the music was still very loud. She called and complained to the apartment manager.

Detectives interviewed Wessels approximately three days after Binno's murder. He admitted that twice on the afternoon of the murder he went to Binno's apartment to pay his phone bill. Wessels claimed that at about 2:00 p.m., Binno's car was not parked in its usual stall; however, the second time, which was before 5:00 p.m., Binno's car was there. But Binno did not respond to Wessels's knocks on the apartment door either time.

Detectives repeatedly asked Wessel whether Shammam had accompanied him to Binno's apartment that afternoon, but Wessels was evasive: "I don't, I don't want to talk about [Shammam], I don't, I don't talk to [Shammam], I don't, I don't, I don't even want to talk about. It has nothing to do with me and [Binno]. [Shammam] has nothing to do with me and [Binno]. I have, I have no idea." Wessels later responded to the same question by stating, "No, okay, well I don't know, I couldn't tell you, like I say, I couldn't say, I could not say yes, I couldn't say no I don't, you know I don't even know that."

Monica Bihouet's 1996 Interview with Detectives

Monica Bihouet Cervantes testified that she and Shammam had been dating since approximately 1991. A few days before September 16, 1994, Bihouet, Shammam and Wessels were together, and Shammam jokingly said they should kill Binno. In 1996, almost two years after Binno's death, Bihouet told detectives that Wessels and Shammam

had joked about killing Binno, and Wessels had said that if Binno's girlfriend were there, she too would be killed. Bihouet also reported to police that around middle or late afternoon on the day of the murder, Shammam and Wessels, who both appeared recently showered, arrived at her house. Shammam told her they had just killed Binno. Shammam asked Bihouet to keep a bag that contained Binno's gold bracelet and necklace. Days later, at Shammam's request, Bihouet took the jewelry to Tijuana, Mexico, and had it melted. On September 27, 1994, Bihouet pawned the gold at a shop in San Ysidro, California.

Shortly after the killing, Shammam explained the circumstances surrounding it to Bihouet. Shammam said Binno had owed Wessels money, and Binno talked too much. Shammam and Wessels went to Binno's apartment, and first wrestled and joked around; later, Wessels grabbed Binno, and Shammam used Wessel's gun to shoot Binno twice in the head. They turned up the music loud so the gunshots would not be heard. Shammam said he had thrown away the gun afterwards.

When Bihouet spoke to detectives in 1996, she had recently ended her relationship with Shammam. She claimed she had not spoken to detectives about Shammam's involvement in the murder earlier because she was afraid he might kill her too. Shammam had once fired a gun in her presence because she had told him she wanted to break up with him.

At trial, during Bihouet's cross-examination, defense counsel asked if she had reported to police that Shammam "was dealing suitcases of cocaine." The prosecutor objected on relevance grounds. The defense attorney countered, "It's not being offered

for the truth of the matter. It's offered to show bias. When a person goes down to the police and starts making lots of allegations that are unfounded, that goes to the person's credibility and bias." The court sustained the objection, finding the statement was prejudicial: "I just see all kinds of problems under [Evidence Code section] 352. It's involving a codefendant. . . . [T]here really is no effective way to cross-examine [Bihouet] on that question once it's out there before the jury." The court later confirmed its ruling and stated, "I find it's irrelevant, and it's also offered for the truth of the matter that, in fact, he was in possession of suitcases of cocaine, and it doesn't deal with her credibility."

Other Evidence of Murder

Deputy medical examiner Mark Super performed an autopsy on Binno's body and concluded the cause of death was two gunshot wounds to the head, and the manner of death was homicide. Binno had no defensive wounds on his body.

Brian Kennedy, a crime scene reconstructionist, testified that Binno was on or just above the floor at the time he was shot both times. Further, based on the placement of Binno's left hand extending beyond his right side, it seemed likely that someone restrained Binno's hand and was pulling it across, thereby holding him down on the floor. Binno's body was not repositioned after he was shot.

Defense Case

William Chisum, a crime scene reconstructionist, disagreed with the People's expert's theory that someone had restrained Binno while another person shot him.

Rather, Chisum testified someone rolled Binno's body onto his right side. Chisum also concluded Binno was on his knees when he was shot execution style.

Charles Merrit Jr., a criminalist employed by the San Diego County Sheriff's Department Regional Crime Laboratory, testified he agreed with Chisum's conclusions that no evidence showed how the victim got to the position where he was shot, and that he could not tell whether Binno was restrained prior to being shot.

Excluded Testimony Regarding James Smith's Declaration

In the days following the murder, Detective Moreno wrote a report stating, "Detective John Cherry and I interviewed James Smith at his residence on September 17, 1994. . . . James Smith said that on September 16, 1994[,] between [7:15 p.m. and 7:30 p.m.], he heard a male and female yelling from the area of [Binno's address]. The unknown male's voice said 'Hey listen, I want to talk to you right now.' The unknown female voice was heard screaming 'No' in an angry voice. Smith said he thought the male half of the couple arguing was the male . . . [who drove the Volkswagen Rabbit and frequently slapped] his girlfriend. Smith told us he heard about the murder from his friend Carl Thomas who lives in [Binno's building]. Smith said he did not see or hear anything else." Other testimony established that Binno drove a Volkswagen Rabbit car. A retired police officer who had investigated the case testified Binno's girlfriend had accused him of domestic violence, but Binno had denied the accusation.

During trial, defense counsel sought admission of the police detective's report containing Smith's statement to mitigate prejudice caused to Wessels because of the preaccusation delay. Specifically, he argued the time of death was critical, and Smith

said he had heard the male shouting with the female between 7:15 p.m. and 7:30 p.m., but that account differed from other witnesses, who testified they had heard voices and gunshots at Binno's apartment at approximately 4:30 p.m. Defense counsel noted he had contacted Smith, who was living in Nevada, and Smith refused to come to California to testify at the trial. Defense counsel argued Smith's statement to two experienced detectives, who could determine if someone was lying, was made at or near the time of the event and bore indicia of truthfulness; therefore, it should be admitted.

The court denied the request to admit Smith's statement, ruling that defense counsel had not shown sufficient due diligence in trying to secure Smith's attendance at trial through an interstate court order, especially in light of the court's previous grant of continuances; further, the statement attributed to Smith lacked sufficient indicia of reliability. The next day, defense counsel revisited the issue, informing the court he had contacted Smith, whose memory of his statement to police had faded: "[Smith] remembers that there was some sort of event back at that time, police investigating. He doesn't recall even that it was a murder, but that there was something, and he doesn't remember anything about that day. He doesn't remember hearing anything or what he did or who he spoke to or what he said. However, he would say that whatever he said to anybody about that day would be truthful, and he can't think of any reason why he would not be truthful." Defense counsel proposed to address Smith's 1994 statement to police in either of two ways: apply for an out of state subpoena to the Nevada court or send an affidavit to Smith for his signature, and seek to admit the affidavit into evidence as past recollection recorded under Evidence Code section 1237.

The trial court reiterated its finding Smith's statement was "speculative at best," adding, "You can't get around the past recollection recorded if [Smith] doesn't even recall speaking to the police, and this affidavit is insufficient. Even if I were to accept all that, the witness would have to be here to personally testify."

Motion Regarding Preaccusation Delay

In his moving papers supporting the pretrial motion to dismiss because of preaccusation delay, Wessels argued he had been prejudiced because detectives had written notes indicating they had held a meeting with Bihouet in October 1996, but neither Bihouet nor the detectives could remember whether that meeting took place or what was discussed. Additionally, in the first trial, other witnesses, including Walter, Smith, Marcos, Binno's sister and other detectives had testified they had forgotten certain details regarding Binno's murder. Further, detectives had not followed up on leads pointing to Binno's involvement in drug sales possibly in association with the Mexican mafia. Wessels argued detectives did not investigate Sal Asker—a possible third-party exculpatory witness—and his girlfriend, Leanna, who possibly knew how Binno was murdered. The defense lacked further information because Asker was murdered in 1997, and Leanna could not be located. Wessels concluded, "[T]he charges against [him] could have been filed in 1996. No new evidence prompted the filing of charges in 2008. Law enforcement sat on the case for 12 years."

During postverdict motion arguments, the parties stipulated the court could rely on the transcript of evidentiary hearings that Judge John Thompson conducted in the case of Shammam, who was tried separately. (*People v. Shammam* (Super. Ct. S.D. County,

2010, No. SCE 286668).) In hearings regarding the preaccusation delay in the Shammam case, defense counsel asked Detective Rowe, "Assuming that David Binno was alive between 7:15 [p.m.] to 7:30 [p.m.], isn't it correct that there's no evidence that connects Franswa Shammam to that killing that occurred after 7:15 [p.m.] or 7:30 [p.m.]?" Detective Rowe replied, "correct." Defense counsel continued, "So that would mean [Shammam] didn't do it, is that right, if [Binno] was killed at 7:30 [p.m.]? As a practical matter, it would mean that Franswa Shammam didn't kill him?" Detective Rowe replied, "I don't know Mr. Shammam's whereabouts at that time frame, that's why it's difficult for me to answer that question."

The People opposed the motion to dismiss and countered Wessels's arguments by pointing out that even if Bihouet had met with detectives a second time in 1996, her trial testimony and her statements in her first interview with detectives were consistent regarding the material question in this case: Shammam and Wessels had killed Binno. The People argued the witnesses whose memories had faded could be impeached with their statements that were memorialized in recordings or written reports earlier in the investigation. Regarding third party culpability, the People argued, "[Wessels] has provided no 'lead' that would result in any evidence placing [his guilt] into doubt. He has presented no evidence directly or circumstantially linking the leads to the crime. He has, at best, provided leads that are based on innuendo and rumor. None of this meets the admissibility standards for third party culpability as set forth in [*People v. Hall* (1986) 41 Cal.3d 826, 833]." Sal Asker was in custody when Binno was killed.

The People argued the preaccusation delay was justified because from the murder until the accusation was filed, the investigation had been ongoing. Specifically, in 1994, detectives concluded Binno's death was a homicide, and Wessels and Shammam were suspects. Thereafter, the investigation went cold until 1996, when Bihouet tipped the investigators about Shammam's and Wessels's specific statements about their involvement in the killing. However, Bihouet's credibility was in doubt because she was considered a possible accessory after the fact. In 2000, Detective Serritella reopened the case and re-interviewed witnesses, but obtained no new evidence; therefore, the deputy district attorney decided more investigation was needed. In 2005, Binno's family insisted on reopening the investigation, and detectives pursued new leads, re-interviewed some individuals, and discussed the case with another deputy district attorney. But again, no new evidence was discovered. In 2007, Detective Scully reviewed the case, re-interviewed witnesses and in 2008 obtained a statement by David Abdala, who contradicted defendants' alibi that they were with him the night of the murder. Shortly after obtaining Abdala's statement, the People filed charges. In sum, the People argued, "Although the case was initially not brought to the District Attorney's Office, and then only informally presented, the investigation never ended. The hope was that new evidence would be discovered to strengthen the case against the two suspects. Witnesses were interviewed and re-interviewed several times. The evidence was reviewed a number of times."

The trial court ruled that although Wessels had demonstrated prejudice because of the witnesses' faded memories, the preaccusation delay was justified by the need to

conduct the investigation, and the delay outweighed any prejudice to Wessels.

Specifically, the trial court ruled: "Defendant Wessels has made a showing that he suffered some prejudice due to the prosecution's delay in filing the felony complaint.

There was sufficient evidence presented during the trial to establish that memories of both civilian and law enforcement witnesses faded due to the lapse of time. [¶]

Specifically, the defense contends that dismissal is warranted based on the inability to effectively cross-examine the victim's neighbor, Mr. Smith, and the fact the police did not fully investigate his statements at the time of the murder." The court clarified, "The statement provided by Mr. Smith to the police was no[t] necessarily exculpatory for the defense. Mr. Smith told the police that he heard argument between a man and a woman around 7:00 p.m. However, there is no evidence that the man Mr. Smith heard arguing was Mr. Binno or that it could have been established to have been Mr. Binno if further investigated at the time Mr. Smith made the statement. Mr. Smith's statement that he thought it was Mr. Binno is speculative."

The court excluded the possibility the preaccusation delay affected the establishment of third party culpability, noting, "[N]o evidence has been presented that third-party culpability was a viable defense in the present case. Further, the defense has not shown that there has been a loss of physical evidence due to the delay."

The court further found the People had acted in good faith in conducting the investigation: "[T]he investigation into Mr. Binno's murder did continue during [the] 14-year delay between the murder in 1994 and the filing of the felony complaint in 2008.

The amount of time spent on the investigation varied during the years, but that does not

establish that the police had determined the investigation into this case had concluded and there was no additional work to be performed. The case was transferred between detectives due to change in assignments. The evidence shows that each detective did work on the investigation and attempted to obtain enough evidence for a criminal prosecution. The case was presented to members of the District Attorney's office in order to determine if the case was ready for prosecution or what other avenues of investigation should be undertaken. The decision to delay the filing of the complaint was made after a good faith evaluation of the evidence by law enforcement personnel and the District Attorney's office."

The court further ruled: "In balancing the prejudice [Wessels] demonstrated during the trial and at the motion hearings against the People's justification for the delay, this court finds that [Wessels's] due process rights have not been violated. The purpose of the delay was not to gain a tactical advantage over [Wessels]. The delay was the result of the prosecution exercising its discretion to delay filing of the charges for investigative purposes. When weighing the prejudice against the People's justification for the delay and then taking into consideration the seriousness of the crime and the public's interest in favor of this type of prosecution, the court finds that no due process violation has been shown."

DISCUSSION

I.

Wessels contends the preaccusation delay prejudiced him because (1) James Smith's exculpatory testimony that he had heard voices coming from the direction of

Binno's apartment at approximately 7:15 p.m. "would have directly supported a not guilty verdict"; (2) he was unable to cross-examine Bihouet regarding inconsistent statements she had made to Detective Rowe; (3) "there was a substantial amount of potential third[-party] culpability evidence that indicated that someone else besides [himself] and Shammam" might have killed Binno, but the police did not pursue those leads; (4) due to the passage of time, many witnesses' memories had faded; (5) the delay was used to the prosecution's tactical advantage and was inexcusable because all witnesses were known to police as of 1996; and (6) even assuming the delay was justified, the prejudice to him outweighed the People's justification.

The California Supreme Court states, "Delay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. [Citations.] A claim based upon the federal Constitution also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant." (*People v. Catlin* (2001) 26 Cal.4th 81, 107, 109 (*Catlin*).) "The statute of limitations is usually considered the primary guarantee against bringing overly stale criminal charges," and there "is no statute of limitations on murder." (*People v. Archerd* (1970) 3 Cal.3d 615, 639, abrogated on another ground in *People v. Nelson* (2008) 43 Cal.4th 1242, 1254 (*Nelson*).)

In *Nelson*, the California Supreme Court concluded that "under California law, negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process." (*Id.* at pp. 1254-1255.) The court observed that "whether the delay was negligent or purposeful is relevant to the balancing process. Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation." (*Id.* at p. 1256.)

Among other things, "[p]rejudice [for due process or speedy trial violation claims] may be shown by loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.'" (*Catlin, supra*, 26 Cal.4th at p. 107.) The overarching theme is that the loss of such evidence, especially where the defendant or victims cannot independently recall details of the crime, makes it difficult or impossible for the defendant to prepare a defense, thus showing prejudice. (See *People v. Pellegrino* (1978) 86 Cal.App.3d 776, 780 (*Pellegrino*).

In balancing the interests, "it is important to remember that prosecutors are under no obligation to file charges as soon as probable cause exists but before they are satisfied that guilt can be proved beyond a reasonable doubt or before the resources are reasonably available to mount an effective prosecution. Any other rule 'would subordinate the goal of orderly expedition to that of mere speed.'" (*Boysen, supra*, 165 Cal.App.4th at p. 777.) On the other hand, "[t]he [prosecutors] cannot simply place gathered evidence of insubstantial crimes on the "back burner" hoping that it will some day simmer into

something more prosecutable.' " (*Pellegrino, supra*, 86 Cal.App.3d at p. 781.) Nor may "[t]he requirement of a legitimate reason for the prosecutorial delay . . . be met simply by showing an absence of deliberate, purposeful or oppressive police conduct. A 'legitimate reason' logically requires something more than the absence of governmental bad faith. Negligence on the part of police officers in gathering evidence or in putting the case together for presentation to the district attorney, or incompetency on the part of the district attorney in evaluating a case for possible prosecution can hardly be considered a valid police purpose justifying a lengthy delay which results in the deprivation of a right to a fair trial." (*Penney v. Superior Court* (1972) 28 Cal.App.3d 941, 953.)

As we noted in *Boysen, supra*, 165 Cal.App.4th 761, "[t]he balancing task is a delicate one, 'a minimal showing of prejudice may require dismissal if the proffered justification for delay is insubstantial. [Likewise], the more reasonable the delay, the more prejudice the defense would have to show to require dismissal.'" (*Id.* at p. 777.)

Whether preaccusation delay is unreasonable and prejudicial to a defendant is a question of fact. (*People v. Dunn-Gonzalez* (1996) 47 Cal. App.4th 899, 911-912.) If the trial court concludes the delay denied the defendant due process or his constitutional speedy trial rights, the remedy is generally dismissal of the charge. (*Id.* at p. 912; *Boysen, supra*, 165 Cal.App.4th at p. 777.) "We review for abuse of discretion a trial court's ruling on a motion to dismiss for prejudicial prearrest delay [citation], and defer to any underlying factual findings if substantial evidence supports them." (*People v. Cowan* (2010) 50 Cal.4th 401, 431.)

Wessels's showing of prejudice is "relatively weak." (See *Nelson, supra*, 43 Cal.4th at p. 1256.) He contends he was prejudiced because detectives failed to re-interview Smith regarding his claim he heard a voice, possibly Binno's, coming from Binno's apartment between approximately 7:15 p.m. and 7:30 p.m., and Smith's subsequent loss of memory regarding that earlier statement. But we conclude the trial court did not err in finding Smith's testimony was speculative at the time it was made in 1994. Smith did not claim to see Binno; he only claimed to hear Binno's voice. At any rate, Smith's testimony does not exclude the possibility that Wessels and Shammam killed Binno; therefore, even if the trial had occurred closer to 1994, it is not reasonably likely Smith's testimony would have been any more helpful to Wessels. Further, other testimony established that earlier in the afternoon, voices were heard at Binno's apartment, the sound of gunshot was heard, and the music was turned up afterwards. The music was still loud when Binno's neighbor returned home approximately four hours later.

Wessels asserts additional discovery he obtained after the first trial—specifically, Detective Rowe's handwritten notes—showed that after Bihouet's August 1996 meeting with detectives, she had another meeting with them in October 1996.⁴ However, neither

⁴ Detective Rowe's notes are sparse. They appear to be dated October 10, 1996, and state: "In our office with [detectives] Gordon Davis Rick Martin Jopes and Rowe. [¶] Wants to meet her at school. Does not want to talk on phone. [¶] They called her outside Yvette's house. [Wessels] and [Shammam] asked her to go outside. [¶] Did not tell about incident then. Just asked to hold something for him. Told the next day about the incident. [¶] A couple of days later said him and [Wessels] did that. [¶] When first told about the murder, was in the truck by themselves. He was nervous and sweet [*sic*]."

Bihouet nor Detective Rowe remembered whether that second meeting took place or what was discussed. Nonetheless, Wessels asserts that one or more meetings took place between Detective Rowe and Bihouet, during which "[Bihouet] at best[, for] the prosecution[,] made inconsistent statements regarding Shammam and [Wessels's] alleged admission to committing the shooting. At worst[, for] the prosecution, [Bihouet] recanted her prior statements in their entirety and sad she made everything up."

Wessels's assertion that a second meeting was held between Bihouet and detectives is speculative. Detective Rowe's scant notes do not conclusively establish that an October 1996 meeting took place, and no one recalled participating in any such meeting. In any event, Bihouet's 1996 statements to Detective Rowe—that she saw Shammam and Wessels the afternoon of Binno's death; Shammam gave her Binno's jewelry to hold; and, Shammam later told her how he and Wessels murdered Binno—were consistent with her trial testimony. We conclude the preaccusation delay did not prejudice Wessels because there is no proof Bihouet had a second meeting in which she gave inconsistent statements from either her August 1996 interview or her trial testimony.

Wessels argued the unavailability of third party culpability witnesses prejudiced him. In particular, early in the investigation, Binno's sister and girlfriend had told Detective Rowe Binno was a drug dealer. Specifically, Detective Rowe was told that three days before his murder, Binno had borrowed money from his mother, and he went

[¶] 1145 attempt about one year ago. At her Apartment. [¶] turned gas on stove. And closed all windows. [¶] Just fed up with everything. [¶] Rosco Pico (friend)—Brenda knows her [¶] 660 5089 [¶] w - 595-1200 [¶] Universal Grocery on Anita St. in Otay. [¶] Called her yesterday about 8 pm."

to Las Vegas with two unknown Mexicans. Binno's sister told Detective Rowe that a friend had said a Mexican man had ordered a hit on Binno, but the friend refused to identify the person who ordered the hit. One of Binno's sisters also told Detective Rowe that a woman named Ophelia knew about Binno's killing, but Ophelia refused to talk about it. Ophelia had forbidden Binno's sister from saying anything about Binno's murder, warning that "[someone will] end up dead." Detective Rowe's notes stated, "Ophelia is in Iowa and said to be involved in Latin Mafia. She sent flowers to Binno at funeral."

Wessels also points out that Detective Rowe's 1994 notes indicate he interviewed a person who had learned that someone walked in and shot Binno in the head. The names of Sal Asker and someone identified only as "Abdula" were written in the notes. In 1996, Binno's sister told Detective Rowe that they had heard that someone named Salwan Asker was involved with Binno's murder and that Asker made his girlfriend, Leanna, hide a gun before Asker went to jail.

Based on the foregoing, Wessels contends: "Due to the passage of time, [he] was unable to effectively investigate and develop this third party culpability evidence fourteen years later. As a result, he was precluded from introducing any third party culpability evidence in support of his defense."

The California Supreme Court held in *People v. Hall, supra*, 41 Cal.3d 826, 833: "To be admissible, . . . third-party [culpability] evidence need not show 'substantial proof of probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do 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." (Accord, *People v. Vines* (2011) 51 Cal.4th 830, 860; *People v. McWhorter* (2009) 47 Cal.4th 318, 367–368.) Further, third party culpability evidence is treated like any other evidence; it is admissible if relevant (Evid. Code, § 350) unless it is excludable pursuant to Evidence Code section 352. (*People v. McWhorter, supra*, 47 Cal.4th at pp. 367–368, 372–373; *People v. Hall, supra*, 41 Cal.3d at p. 834.)

As noted, the trial court summarily rejected third party culpability as a valid defense in this case. We conclude the trial court did not err in that assessment. Wessels's offer of proof failed to link either a member of a Mexican drug gang or Asker to the homicide. Further, Asker was in jail at the time of Binno's death. Any testimony regarding third-party culpability failed to raise a reasonable doubt regarding Wessels's guilt.

Wessels contends he suffered prejudice because he could not effectively cross-examine and confront several witnesses who had forgotten details regarding the events surrounding Binno's death. He points out that Detective Rowe, Walter, Marcos, and Binno's girlfriend at the time of death, Brenda Konja, had said several times during their testimony that they could not remember many things. For that reason, the trial court concluded Wessels "suffered some prejudice due to the prosecution's delay in filing the felony complaint" but clarified, "the defense in this case has not presented 'extensive

evidence' of prejudice." We note that the prejudice to Wessels was mitigated because Detective Rowe's notes were recorded and used to refresh his recollection in many instances. Further, Walter's statement at the time of the incident was admitted as a past recollection recorded. Finally, Marcos's memory regarding the timing and circumstances involving Binno's departure from Marcos's house was substantially intact. Any other testimony from Marcos indicating that his memory had faded did not relate to any significant point of dispute in the case, and therefore it was not overly prejudicial to Wessels.

Our inquiry turns to the People's justification for the delay, to balance whether it outweighed the prejudice. Wessels contends no justification existed for the delay because "[t]here was no DNA or other forensic evidence that eventually disclosed a suspect, there was no additional police investigation that produced a new witness, and there was no evidence presented at trial that was previously unavailable as of at least 1996. All of the prosecution's witnesses in this case were already known to the prosecution in 1994. The only new evidence obtained after 1994 consisted of [Bihouet] coming forward in 1996 on her own and identifying [Wessels] and Shammam." Wessels further contends the prosecution used the delay to its tactical advantage in two ways. First, if the People had filed charges in 1996, they would have had to give Bihouet a plea bargain or immunity in exchange for her testimony because she was subject to criminal liability, at least as an accomplice, for helping to dispose of Binno's jewelry. However, by delaying filing charges until the statute of limitation had run on any charge Bihouet would have faced, the People avoided exposing Bihouet to impeachment on the basis of

favorable treatment from the prosecution. Second, the prosecution took advantage of the delay and insisted on excluding Smith's exculpatory testimony as a past recollection recorded based on strict compliance with Evidence Code section 1237.

"Against defendant's weak showing of prejudice, the prosecution's justification for the delay was strong. The delay was 'investigative delay, nothing else.' [Citation.] Here, as in *Nelson*, although 'the police may have had some basis to suspect defendant of the crime shortly after it was committed . . . law enforcement did not fully solve the case" (*Cowan, supra*, 50 Cal.4th at p. 434) until 2008, when Abdala disputed Shammam's alibi. As the detectives testified, the case was reviewed periodically, witnesses were re-interviewed, and the evidence reevaluated.

The California Supreme Court said in *Nelson*, "A court should not second-guess the prosecution's decision regarding whether sufficient evidence exists to warrant bringing charges. 'The due process clause does not permit courts to abort criminal prosecutions simply because they disagree with the prosecutor's decision as to when to seek an indictment. . . . Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.' " (*Nelson, supra*, 43 Cal.4th at p. 1256.) Indeed, "[a] prosecutor abides by elementary standards of fair play and decency by refusing to seek indictments until he or she is completely satisfied the defendant should be prosecuted and the office of the prosecutor will be able to promptly establish guilt beyond a reasonable doubt.' " (*Nelson, supra*, 43 Cal.4th at p. 1256.)

We conclude Wessels's arguments "amount[] to the very type of Monday morning quarterbacking that [the California Supreme Court] condemned in *Nelson*." (*Cowan, supra*, 50 Cal.4th at p. 436.) Even if the investigation in this case was lacking, we agree with the trial court that no evidence indicated law enforcement or the prosecution deliberately delayed the investigation in order to gain a tactical advantage over Wessels. Balancing Wessels's weak showing of prejudice against the strong justification for the delay, we find no due process violation. Accordingly, the trial court did not abuse its discretion when it denied Wessels's motion to dismiss due to preaccusation delay.

II.

Wessels contends the court committed reversible error by erroneously excluding Smith's prior statement as a past recollection recorded.

Evidence Code section 1237 states: "(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: [¶] (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; [¶] (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an

accurate record of the statement. [¶] (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party."

Here, a proper foundation for the introduction of Smith's 1994 statements as past recollection recorded could not be established because Smith was unable to verify that they were true. (Evid. Code, § 1237.) Both the defense and the prosecutor acknowledged Smith did not remember anything regarding his previous extrajudicial statement. Therefore, he could not testify regarding his previous statement. Accordingly, the trial court did not err in excluding an affidavit regarding Smith's 1994 extrajudicial statement. It would have been error to admit Smith's statements into evidence without a proper foundation: "Statements which have no independent basis of admissibility may not be introduced under the guise of refreshing a witness' memory. If it is necessary to refresh the memory of a witness through the use of a prior recorded statement, that statement should not be read aloud before the jury but should be given to the witness to read or be read by the attorney outside the presence of the jury." (*People v. Parks* (1971) 4 Cal.3d 955, 960.)

We have stated in the context of a case in which an individual suffered from amnesia: "[Evidence Code section] 1237 merely recognizes that time universally erodes human memory, although to a greater or lesser degree depending on circumstances and individual characteristics. The motive behind [Evidence Code] section 1237 is to allow previously recorded statements into evidence where the trustworthiness of the contents of those statements is attested to by the maker, subject to the test of cross-examination, a procedure not meaningfully available here. [Evidence Code section] 1237 makes only a

narrow exception to the hearsay rule consistent with trustworthiness. That it did not intend to eliminate that important requirement is evident from the comment. [¶] In this case, the witness does not recall any event recorded in his prior statement, nor even making it or any circumstance surrounding its preparation. At best he can identify his signature affixed to the bottom of the transcription. Therefore, when he states that to the best of his knowledge he had no reason to lie when the statement was prepared, it is clear he could have stated with equal conviction to the best of his (nonexistent) knowledge he had had ample reason to lie. The fact is, he simply has no knowledge at all. One who has no knowledge as to the truth or falsity of a representation may honestly say it is either true or false to the best of his knowledge with neither rejoinder having any evidentiary value." (*People v. Simmons* (1981) 123 Cal.App.3d 677, 683-684, abrogated on another ground as stated in *People v. Gunder* (2007) 151 Cal.App.4th 412, 417.)

III.

Wessels contends the court committed reversible error by refusing to permit impeachment of Bihouet's testimony with her earlier statement to the effect that when they were dating, Shammam was "dealing suitcases of cocaine."

"Evidence possessing any tendency in reason to prove or disprove any disputed material fact is relevant. [Citation.] Evidence is relevant if it 'tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]' [Citation.] Evidence is irrelevant, however, if it leads only to speculative inferences." (*People v. Morrison* (2004) 34 Cal.4th 698, 711.) "As with all relevant evidence, however, the trial court retains discretion to admit or exclude evidence offered

for impeachment. [Citations.] A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1.) In assessing evidentiary admissions, Evidence Code section 352 gives "the court discretion to 'exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1337.)

Particularly because Shammam was not a defendant in this case, whether he was dealing in drugs would have done nothing to prove or disprove any issue in dispute at Wessels's trial. Instead, it would have likely inflamed the jury. Because of the negligible probative value of the evidence, its risk of unfair prejudice would have substantially outweighed any benefit it provided. Admission of such testimony would likely have required an undue consumption of time and confused the jury as to the real issues in the trial. Accordingly, the trial court did not abuse its discretion in excluding that testimony.

IV.

The People concede, and we agree, that the trial court erred in denying Wessels custody credits. Section 2933.2, which does not permit one convicted of murder to accrue any credits, specifically states in subdivision (d): "This section shall only apply to murder that is committed on or after the date on which this section becomes operative." This section became operative in June 1998, which was after Binno's 1994 murder.

Further, although the trial court purported to rely on section 2933.5 to deny Wessels custody credits, that section applies only to persons who have two or more prior convictions, and therefore it is inapplicable to Wessels. The trial court is directed to award Wessels 334 days of presentence custody credits.

DISPOSITION

The judgment is affirmed. The trial court is directed to amend the abstract of judgment to grant Wessels 334 days of custody credits under Penal Code section 2933.2, and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.