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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TERRY LEE BELL,

Defendant and Appellant.

E063234

(Super.Ct.No. RIF101470)

OPINION

APPEAL from the Superior Court of Riverside County. Patrick F. Magers, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed and remanded with directions.

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

In 2001, defendant Terry Lee Bell, then 17 years old, beat his girlfriend's mother to death.

Wearing brass knuckles, defendant and a 17-year-old male accomplice broke the victim's nose, her upper jaw, her lower jaw, her eye socket, her neck, most of the ribs on her right side, and four ribs on her left side. Scratches and bruises indicated that they also beat her in the back, hip and legs. One of the attackers hit her in the back of the head with a blunt object, which fractured her skull and caused her death.

Defendant's apparent motive was that the victim disapproved of his relationship with her 16-year-old daughter. However, he also took the opportunity to steal her purse, which contained some \$10,000 to \$15,000 in cash, and a couple of guns.

In 2005, defendant was convicted of first degree murder with a lying-in-wait special circumstance and a torture-murder special circumstance and sentenced to life in prison without the possibility of parole. Defendant appealed; we affirmed. (*People v. Bell* (Jun. 8, 2007, E038574) [nonpub. opn.]¹)

In 2014, in response to defendant's habeas petition, the California Supreme Court ordered the trial court to resentence him pursuant to *People v. Gutierrez* (2014) 58 Cal.4th 1354 [listing five factors that must be considered before imposing life without parole for special circumstances murder when committed by a juvenile.] The trial court once again sentenced defendant to life in prison without the possibility of parole.

¹ While this case was in the briefing stage, we granted defendant's request for judicial notice of the record in his prior appeal.

Defendant appeals. We will hold that the trial court erred by refusing to consider evidence — particularly evidence of rehabilitation — postdating defendant’s original sentencing. Accordingly, we must reverse and remand for re-sentencing.

I

FACTUAL BACKGROUND

The trial court listed the materials that it had reviewed in preparation for the resentencing hearing. These included our opinion in defendant’s previous appeal; they did not include the reporter’s transcript of the trial. Accordingly, the following facts are taken exclusively from our previous opinion.

As of April 10, 2001, defendant was 17; Natalie DeMola was 16. Defendant had been dating DeMola since late 2000. DeMola’s mother did not want her to date. DeMola and her mother had frequent arguments about the relationship.

In January 2001, defendant and DeMola sent each other emails and instant messages bemoaning the fact that her mother did not want her to date him or to phone him anymore. In January and February, 2001, defendant also sent DeMola the following emails and/or instant messages:

“If you don’t ever wanna see her again[,] just let me know[,] cuz you already know I[’]ll do n-e-thing for you[.]”

“If n-e-thing was to happen to you, and then sumthin was to happen to me, and sumthin will happen, cuz of the way I’ll be, . . . you’ll be in Heaven, But I’ll pro[bably] be in hell, cuz Murders don’t get to go to Heaven.”

“ . . . I’ll do n-e-thing for you, I mean anything all you have to do is let me know what it is, . . . from lie’n for you, to kill’n for you . [Y]our mom seriously haves problems, and I wouldn[’t h]esitate to help her with her problems, cuz she seriously haves issues. You already know that I’m down for whatever, and I’ll do n-e-thing when it comes to you. Cuz I don’t want n-e-body hurting you I think that you’ll be better off with just you and your Dad, you need to see if it is someway that you can make that happen But I’m bout to call up Chris, cuz I might have something that I might have to do.”

“Chris” referred to Christopher Long, a 17-year-old acquaintance of both defendant and DeMola.

On April 10, 2001, around 6:45 p.m., DeMola was in a traffic accident. A block or two from her home, she ran a stop sign and was broadsided by a pickup truck. Tammy Godinez, who was the passenger in the pickup, saw one Black male passenger in the front seat of DeMola’s car and a second Black male passenger in the back seat. DeMola left the scene of the accident without stopping. Five minutes later, however, she returned, alone. Godinez asked, “Where are the people in your car?” DeMola replied, “I didn’t have anybody else in the car.”

When the police arrived, DeMola told them that she ran the stop sign because there had been a robbery at her house. She said she saw masked men coming in the house; then she saw her mother lying on the floor. She ran into the garage, got in the car, and drove away. She explained that she had not called the police yet because she was

late to swim practice, but she did plan to call them once she arrived. She said again that she did not have anyone in the car with her.

One officer “challenge[d] [her] account of the events” in “an accusatory fashion.” In response, she asked, “Can I start my story over again?”

DeMola then said that, when she ran into the garage, she found two or three men wearing ski masks. They made her drive them away. After the traffic accident, she dropped them off, then came back to the intersection. She explained that she had lied at first because she was scared and because the masked men had threatened her.

When the police arrived at the DeMola home, they found no sign of forced entry; the front door was locked. DeMola’s mother was on the floor, alive but unconscious. There was “blood everywhere.” Bloody drag marks led from a closet to the body. There was blood inside the closet. Just outside the closet, there was a broken standing lamp. It weighed 15 pounds, because the base was filled with concrete. The underside of the base was “almost completely covered with blood.”

Blood smears, including a bloody handprint, by a sliding glass door in the den indicated that the victim had tried to escape through the door. Likewise, blood smears, including bloody handprints, by a bathroom window, along with damage to the window, indicated that the victim had also tried to escape through the window.

Upstairs, in the master bedroom, there was blood on a gun box and on a jewelry box. A gun that was kept in the gun box was missing; so was a gun that was kept in the garage. Also missing was the victim’s purse, in which she habitually kept \$10,000 to \$15,000 in cash.

The bloody imprint of a fabric pattern, along with the absence of fingerprints, indicated that the killers wore gloves. Shoeprints in the kitchen — some in blood, others in spilled 7-Up — indicated that DeMola and two other people had been present during the killing. Blood was also found outside and inside DeMola's car.

DeMola's mother never recovered consciousness; she died about a week later. There were bruises, cuts and scrapes all over her face. There were also bruises and scrapes on both hands, both legs, her back and her right hip. Some of these injuries had a pattern consistent with brass knuckles. “[M]ost of the ribs on her right side were broken, plus four ribs on her left side.” Her upper jaw was broken, and possibly also her lower jaw; several of her teeth were loose. Her nose was broken in multiple places. Her left eye socket may have been broken. One of her neck vertebrae was cracked.

The cause of death was a skull fracture behind her right ear, along with the resulting brain damage. The fracture would have incapacitated her immediately. It could have been caused by dropping the lamp base onto the back of her head.

Earlier that same day, around 1:00 or 1:30 p.m., defendant had been seen taking walkie-talkies to Long's house. Later, at 6:50 or 7:00 p.m., defendant and Long showed up together at Long's house. They appeared “roughed up a little bit. Like [they] had been fighting.” They were not wearing shoes.

A few weeks after the funeral, defendant and DeMola started seeing each other every day. By July 2001, they were engaged; defendant paid \$1,700 cash to buy DeMola a diamond ring. She bought him a 1993 Honda Civic.

On August 28, 2001, during a traffic stop, the police found two pairs of brass knuckles in defendant's car.

On January 17, 2002, the police arrested defendant. In his apartment, they found one of the guns taken from the DeMola home, \$1,180 in cash, and a walkie-talkie.

According to one Fernando Stevenson, defendant admitted to him that he murdered a woman by smashing a vase over her head.

According to one Earnest Seales, Long admitted to him that he and defendant killed DeMola's mother. Long said that he hit her only once, but defendant hit her an unknown number of times.

Long gave a statement to the police; it was admitted into evidence against him, but not against defendant. He said that defendant and DeMola each came to him separately and asked him to help kill DeMola's mother. After defendant said that DeMola would pay him, Long agreed to act as lookout. Defendant punched and kicked the victim while Long knocked things over to make it look as if there had been a robbery. DeMola ordered Long to "finish her off," and defendant ordered Long to break the victim's neck, but Long refused. Defendant then dropped the lamp on the victim's head.

II

PROCEDURAL BACKGROUND

In May 2014, defendant filed a habeas petition in the California Supreme Court. (*In re Bell* (S218786).) In response, the People conceded that he was entitled to a resentencing hearing. Accordingly, in October 2014, the Supreme Court issued an order to show cause returnable before the superior court.

The case was assigned to the same judge who had presided over the trial and the original sentencing hearing. The same attorney was appointed to represent defendant.

The People filed a sentencing brief in which they argued, among other things, that the trial court was “restrict[ed] . . . to considering only those facts which existed at the time of the original sentencing” Defense counsel did not file a sentencing brief.

Before the resentencing hearing, there was an unreported chambers conference; apparently the trial court indicated that its tentative ruling was to reimpose the same sentence.

Once the hearing started, defense counsel said:

“I would . . . like to highlight to the Court that [defendant] was 17 years old at the time. He was attending Centennial High School He was a senior, and I think one of the things that they talk about is the level of maturity. And I don’t think his level of maturity was that high, based on just the information that was provided during the trial. And I think — I think the Court should consider that. And also consider that, at the time of this offense, the Court may recall that his father — he and his father had somewhat of a strained relationship at the time, and I would ask the Court to consider that also in the determination.

“I understand that the circumstances of the offense are pretty egregious So I would submit the matter, your Honor.”

At that point defendant requested permission to represent himself. The trial court granted the request and relieved defense counsel, who left the courtroom.

Defendant then said that he wanted to address the five factors that the trial court was required to consider under *Gutierrez*, specifically including rehabilitation.

The trial court responded, “[W]hen we talk about rehabilitation, we’re talking about . . . what the situation was at the time of sentencing, which was in July of 2005. I will not . . . consider what you’ve been doing in state prison for the last ten years.”

Defendant then proceeded to argue: “. . . I was a minor. I could not think for myself.”

“My mom gave me up custody at the age of two to my grandma. I was physically abused growing up, my whole entire life. . . . I . . . grew up under a roof with gang members, drugs, prostitutes. . . . I have letters to verify everything that I’m telling you.”

“I stayed focus[ed] when I was in Juvenile Hall. . . . I did achieve my high school diploma along with a numerous amount of other certificates while and before trial. [¶] And since then, . . . when I was sent to prison, I was sent to Level Four, Level Four points. I’m currently, I have Level Two points. I’m housed on a positive program facility.”

The trial court interrupted defendant to say, once again, that it would not consider any post-sentencing evidence.

Finally, defendant also argued that he had “had no idea, no knowledge of the justice system whatsoever.”

The trial court stated, “Well, as far as what you did before the sentencing . . . [¶] . . . [¶] . . . I accept what you’re telling me, sir. I have no reason to disbelieve you.”

The trial court then proceeded to address each of the *Gutierrez* factors:

1. Hallmark features of youth: The trial court noted that both defendant and Long were 17 and DeMola was 16. “There were no adults involved in this. It does not appear there was any peer pressure applied to Mr. Bell.” It discussed the considerable evidence of planning, including the fact that defendant “recruited” Long. It concluded, “This was a well thought out, mature plan to kill, which they were successful in and almost pulled it off.”

2. Environmental vulnerabilities: The court repeated that it accepted defendant’s representations regarding his home life.

3. The circumstances of the homicide offense: “Mr. Bell was a direct perpetrator. He was not an aider and abettor. This is not a [f]elony [m]urder situation He entertained the specific intent to kill and the specific intent to torture the victim.” After discussing the extensive injuries inflicted on the victim, it concluded, “The facts and circumstances of the case demonstrate to the court a certain depravity. . . . [T]he facts and circumstances were horrendous”

4. The possibility of being convicted of a lesser offense: The court found that this factor did not apply because defendant was convicted of murder with special circumstances.

5. The possibility of rehabilitation: “Bottom line is, is he a rare juvenile offender whose crime reflects irreparable corruption warranting a sentence of life without possibility of parole. I think the answer to this is yes, based on the totality of the circumstances”

Accordingly, the trial court once again sentenced defendant to life without the possibility of parole.

III

LEGAL BACKGROUND

The United States Supreme Court has laid out certain Eighth Amendment limitations on imposing a sentence of death or life imprisonment on a person who committed a crime when he or she was under 18 (hereafter juvenile). (*Roper v. Simmons* (2005) 543 U.S. 551, 578 [Eighth Amendment prohibits sentencing juvenile to death]; *Graham v. Florida* (2010) 560 U.S. 48, 82 [Eighth Amendment prohibits sentencing juvenile to life without possibility of parole, except for homicide].)

Most recently, in *Miller v. Alabama* (2012) ___ U.S. ___ [132 S.Ct. 2455], the court held that “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” (*Id.* at p. 2469.) Rather, the sentencing authority must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” (*Ibid.*, fn. omitted.) Its task is to distinguish “between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’ [Citations.]” (*Ibid.*)

In California, when a defendant who was 16 or 17 at the time of the crime is found guilty of first degree murder with a special circumstance, the only authorized sentences are either (1) 25 years to life or (2) life without parole. (Pen. Code, § 190.5, subd. (b).) In *People v. Gutierrez, supra*, 58 Cal.4th 1354, the California Supreme Court read *Miller*

to require that, when choosing between these two options, “a sentencing court [must] admit and consider relevant evidence of the following:

“First, a court must consider a juvenile offender’s ‘chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences.’ [Citations.] . . .

“Second, a sentencing court must consider any evidence or other information in the record regarding ‘the family and home environment that surrounds [the juvenile] — and from which he cannot usually extricate himself — no matter how brutal or dysfunctional.’ [Citation.] Relevant ‘environmental vulnerabilities’ include evidence of childhood abuse or neglect, familial drug or alcohol abuse, lack of adequate parenting or education, prior exposure to violence, and susceptibility to psychological damage or emotional disturbance. [Citation.]

“Third, a court must consider any evidence or other information in the record regarding ‘the circumstances of the homicide offense, including the extent of [the juvenile defendant’s] participation in the conduct and the way familial and peer pressures may have affected him.’ [Citation.] . . .

“Fourth, a court must consider any evidence or other information in the record as to whether the offender ‘might have been charged and convicted of a lesser offense if not for incompetencies associated with youth — for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.]’ [Citation.]

“Finally, a sentencing court must consider any evidence or other information in the record bearing on ‘the possibility of rehabilitation.’ [Citations.]” (*People v. Gutierrez, supra*, 58 Cal.4th at pp. 1388-1389.)

IV

ABUSE OF DISCRETION

Defendant contends that the trial court abused its discretion in a number of respects.

A. *Refusal to Consider Postsentencing Developments.*

Defendant contends the trial court abused its discretion by refusing to consider postsentencing developments.

Recently, *People v. Lozano* (2016) 243 Cal.App.4th 1126 held that, when resentencing a juvenile, a trial court is required to consider evidence of postsentence rehabilitation. (*Id.* at pp. 1137-1138.) It relied on the statement in *Gutierrez* that “‘the trial court must consider all relevant evidence bearing on the “distinctive attributes of youth” . . . and how those attributes . . . “diminish the penological justifications for imposing the harshest sentences on juvenile offenders.” [Citation]’” (*Lozano, supra*, at pp. 1137-1138.) It concluded that “all relevant evidence” includes postsentencing evidence. (*Id.* at p. 1138.)

While the reasoning in *Lozano* is terse, we agree with the court’s conclusion. One of the concerns that lies at the heart of *Miller* is “the great difficulty . . . of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable

corruption.’ [Citations.]” (*Miller v. Alabama, supra*, 132 S.Ct. at p. 2469.) ““[O]nly a relatively small proportion of adolescents”” who engage in illegal activity ““develop entrenched patterns of problem behavior.”” [Citation.]” (*Id.* at p. 2464.) “[A] child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievabl[e] deprav[ity].’ [Citation.]” (*Ibid.*)

““[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds’ — for example, in ‘parts of the brain involved in behavior control.’ [Citation.] . . . [T]hose findings — of transient rashness, proclivity for risk, and inability to assess consequences — both lessen[] a child’s ‘moral culpability’ and enhance[] the prospect that, as the years go by and neurological development occurs, his ““deficiencies will be reformed.”” [Citation.]” (*Id.* at pp. 2464-2465, fn. omitted.)

Miller itself involved two juveniles’ respective appeals from their initial sentencing. (*Miller v. Alabama, supra*, 132 S.Ct. at pp. 2461, 2463.) Thus, the court had no occasion to discuss the admissibility of postsentencing evidence. Nevertheless, it seems clear that, if there had been any way for the sentencing authority to look into the future and to consider the juvenile’s actual, demonstrated capacity for rehabilitation, the *Miller* court would have approved strongly, as this could only enhance the individualization, the proportionality, and the reliability of the resulting sentence.

There is no general bar to considering the defendant’s conduct subsequent to the offense for purposes of sentencing. (*People v. Hovey* (1988) 44 Cal.3d 543, 577-579; *People v. Balderas* (1985) 41 Cal.3d 144, 202.) Likewise, there is no general bar to

considering postsentencing evidence when a defendant must be resentenced. (See *People v. Cooper* (1984) 153 Cal.App.3d 480, 481-484 [trial court erred by failing to obtain new probation report, reflecting defendant’s conduct in prison, before resentencing defendant after reversal on appeal].)

We also find nothing in cases dealing specifically with juveniles that would require the sentencer to ignore postsentencing evidence. It is true that, in *Montgomery v. Louisiana* (2016) ___ U.S. ___ [136 S.Ct. 718], Justice Scalia opined that “[u]nder *Miller*, . . . the inquiry is whether the inmate was seen to be incorrigible when he was sentenced — not whether he has proven corrigible and so can safely be paroled today.” (*Id.* at p. 744 [dis. opn. of Scalia, J.].) However, he did not cite any particular passage in *Miller* that supported this proposition, and we have found none. As the view of only one justice, dissenting, it is interesting but ultimately unpersuasive.

We also note that in *Gutierrez*, the California Supreme Court stated: “Because [defendants] have been convicted of special circumstance murder, each will receive a life sentence. [Citation.] The question is whether each can be deemed, *at the time of sentencing*, to be irreparably corrupt, beyond redemption, and thus unfit ever to reenter society, notwithstanding the ‘diminished culpability and greater prospects for reform’ that ordinarily distinguish juveniles from adults. [Citation.] Because the trial courts here decided that question without proper guidance . . . , we remand both cases for proceedings not inconsistent with this opinion.” (*People v. Gutierrez, supra*, 58 Cal.4th at pp. 1391-1392, italics added.) The italicized language is ambiguous — it could mean at the time of original sentencing, as shown by the statement that “the trial courts here

decided that question” (*id.* at p. 1391), but it could also mean at the time of any future resentencing.

More to the point, the issue of whether a resentencing court can consider postsentencing evidence was not raised in *Gutierrez*; thus, the Supreme Court was not writing with that issue in mind. “It is axiomatic that cases are not authority for propositions not considered.’ [Citation.] ‘The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning.’ [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 684.)

We therefore conclude that the trial court erred by refusing to consider postsentencing evidence.

Defendant was not required to make an offer of proof. (Cf. Evid. Code, § 354, subd. (a).) “Where . . . an entire class of evidence has been declared inadmissible or the trial court has clearly intimated that it will receive no evidence of a particular type or class, or upon a particular issue, an offer of proof is not a prerequisite to arguing on appeal the prejudicial nature of the exclusion of such evidence. [Citations.]” (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 91; see also *People v. Schmies* (1996) 44 Cal.App.4th 38, 54, fn. 9.) Given the nature of the evidence that defendant was trying to introduce, and given the Supreme Court’s observation that it is only the “rare” and “uncommon” juvenile offender who is so “irreparabl[y] corrupt[.]” as to be subject to life without the possibility of parole (*Miller v. Alabama, supra*, 132 S.Ct. at p. 2469), we cannot conclude that the error was harmless.

Accordingly, we must reverse and remand with directions to hold a new resentencing hearing, at which the trial court must admit and consider any otherwise relevant and admissible postsentencing evidence that is offered. By doing so, we do not mean to express any opinion on how it should rule on remand.

Defendant's additional arguments that the trial court abused its discretion are technically moot, in that they can have no effect on the outcome of this appeal. Nevertheless, we discuss them for the guidance of the trial court on remand.

B. *Letting the Facts of the Offense Override the Mitigating Evidence.*

Defendant contends the trial court abused its discretion by letting the facts of the offense override the mitigating evidence.

In *Roper v. Simmons*, *supra*, 543 U.S. 551, the Supreme Court stated that a jury should not be allowed to consider imposing the death penalty on a juvenile, in part because: "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." (*Id.* at p. 573.)

In defendant's view, this means that, even in a noncapital case, the brutality of the crime alone should not be allowed to outweigh mitigating evidence based on youth. He also argues that, to prevent this from happening, the sentencing court must presume that the appropriate penalty is life with the possibility of parole — a presumption that can be overcome *only* by expert testimony that the juvenile is unusually mature, and *never* solely by the brutality of the crime.

This framework, however, cannot be squared with *Miller*. Unlike *Roper*, which prohibited the sentencing authority from even considering the death penalty for a juvenile, *Miller* allowed the sentencing authority to consider and to impose life without parole on a juvenile in a homicide case. *Miller* requires “a sentencer [to] tak[e] account of an offender’s age and the wealth of characteristics and circumstances attendant to it.” (*Miller v. Alabama, supra*, 132 S.Ct. at p. 2467.) However, the sentencing authority also must be free to consider “the circumstances of the homicide offense, including the extent of [the juvenile’s] participation in the conduct” (*Id.* at p. 2468.)

In addition, in *Miller*, the court drew an analogy between juveniles exposed to life without parole and adult defendants exposed to the death penalty. (*Miller v. Alabama, supra*, 132 S.Ct. at p. 2466.) In the case of an adult defendant, however, it is “established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty. [Citation.]” (*Tuilaepa v. California* (1994) 512 U.S. 967, 976.) And “[a] capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.” (*Id.* at p. 979.)

In sum, then, under *Miller*, a juvenile can be sentenced to life without parole based solely on the circumstances of the crime, even if there is some mitigating evidence, and even if there is no expert testimony. This outcome is subject to review for abuse of discretion, but it is not an abuse of discretion per se.

C. *Finding of No Peer Pressure.*

Defendant contends the trial court abused its discretion by finding no peer pressure and by ignoring his claim that he had been unable to think for himself. He argues that

DeMola “clearly was the impetus behind the murder.” The trial court, however, could reasonably find that defendant was no mere follower.

As far as the messages between defendant and DeMola reveal, defendant was the first to suggest killing the victim, when he said, “If you don’t ever wanna see her again just let me know cuz you already know Ill do n-e-thing for you[.]” Their subsequent allusions to the subject seem to be mutual. Indeed, sometimes, defendant seemed to be trying to talk DeMola into the idea, as when he said, “I’ll do n-e-thing for you, I mean anything all you have to do is let me know what it is, . . . from lie’n for you, to kill’n for you I think that you’ll be better off with just you and your Dad, you need to see if it is someway that you can make that happen.” According to Long, defendant and DeMola each contacted him separately and solicited him to help them commit the crime.

Defendant points to the evidence that DeMola did not get along with her mother and believed that her mother stood between her and defendant. We agree that DeMola was defendant’s *motive* for murder. However, that does not mean that she pressured him into committing murder. Again, the impetus was mutual.

Defendant also points to Long’s statement that he wanted to leave, but DeMola said, “[N]o, finish her off.” The fact that DeMola exerted pressure on Long, however, does not prove that she exerted pressure on defendant. Defendant, too, ordered Long to kill the victim, telling him to break her neck.

Thus, the trial court could properly find that defendant did not commit the crime due to peer pressure.

D. *Failure to Consider Defendant's Representations.*

Defendant contends the trial court abused its discretion by failing to consider his representations about his abusive upbringing. The trial court stated, however, that it was accepting his representations as true. Moreover, in discussing and analyzing the *Gutierrez* factors, it expressly took these representations into account.

Defendant complains that the trial court “did not ask [him] to file the letters he had to corroborate his assertions” At that point, however, defendant was representing himself; it was his job to file whatever he wanted to file. The trial court was not required to litigate his case for him. Moreover, we repeat, the trial court said that it was accepting his assertions. Thus, on this record, there is no reason to suppose that filing the letters would have affected the outcome.

E. *Considering Long's Statements to the Police.*

Defendant contends the trial court abused its discretion by considering Long's statements to the police.

The People, in their sentencing brief, relied on Long's statements to the police, including his statements that it was defendant who recruited him and that it was defendant who dropped the lamp on the victim's head. At trial, however, Long's statements had been admitted only against Long; they had not been admitted against defendant.

At sentencing, the trial court stated that it had read the People's sentencing brief. Defense counsel never objected to consideration of Long's statements. The trial court ruled that defendant deserved life without the possibility of parole because, among other

things: (1) he “induced a minor to assist,” and (2) he “issued the final blow” — he used “the lamp . . . to finish off the victim.”

Defendant claims that Long’s statements were “inadmissible.” His trial counsel forfeited this contention, however, by failing to object to them. (Evid. Code, § 353, subd. (a).) The contention cannot be resuscitated by reframing it as a claim of abuse of discretion. It is not an abuse of discretion to consider evidence introduced without objection.

Separately and alternatively, defendant has not shown that these statements were inadmissible. He relies on cases dealing with the confrontation clause. (*Crawford v. Washington* (2004) 541 U.S. 36; *Bruton v. United States* (1968) 391 U.S. 123; *People v. Aranda* (1965) 63 Cal.2d 518.) However, “California courts have repeatedly held that the defendant does not have a Sixth Amendment right of confrontation at the sentencing stage of a criminal prosecution. [Citations.]” (*People v. Cain* (2000) 82 Cal.App.4th 81, 86 [Fourth Dist., Div. Two].)

Even assuming that Long’s statements to the police were inadmissible, there was other evidence of the crucial points. The fact that defendant recruited Long was shown by one of defendant’s emails, in which he indicated that he was willing to help DeMola by killing her mother and then added, “I’m bout to call up Chris, cuz I might have something that I might have to do.” Likewise, the fact that defendant inflicted the fatal blow was shown by other evidence. Fernando Stevenson told the police that defendant said he had murdered a woman by smashing a vase over her head. Also, Long told Seales that he hit the victim only once, with his fist, which necessarily meant that it was

defendant who hit her with the lamp. As we held in the previous appeal, Long's statements to Seales were properly admitted against defendant as well as Long. (*People v. Bell, supra*, at pp. 23-24.) Finally, even aside from whether defendant hit the victim in the head with the lamp, it was clear that he participated actively in beating her to a bloody pulp. Two pairs of brass knuckles were found in defendant's car.

V

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also contends that his defense counsel rendered constitutionally ineffective assistance in a number of respects.

Once again, this contention is moot, in that it cannot affect the outcome of this appeal. Moreover, unlike the asserted instances of abuse of discretion, the asserted instances of ineffective assistance do not seem likely to recur on remand. Accordingly, we see no reason to reach this contention for the guidance of the trial court on remand.

VI

CUSTODY CREDIT

Defendant contends that the trial court erred by failing to award him custody credit for time served.

Because we are reversing and remanding for resentencing, this contention is moot. However, we remind the trial court of its duty to calculate defendant's custody credit. (Pen. Code, § 2900.1; *People v. Buckhalter* (2001) 26 Cal.4th 20, 37.)

VII

DISPOSITION

The judgment with respect to sentencing is reversed. On remand, the trial court shall hold a new resentencing hearing, at which it shall not exclude or refuse to consider any evidence solely on the ground that it relates to postsentencing events.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

CODRINGTON
J.