Filed 3/1/13

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL WESTMORELAND,

Defendant and Appellant.

A127394

(Contra Costa County Super. Ct. No. 05-051785-4)

ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on February 5, 2013, be modified as follows:

At the end first sentence of the first full paragraph on page 18, which sentence ends "those convictions must be reversed," add as footnote 10, the following footnote, which will require renumbering of all subsequent footnotes:

> **10** In a petition for rehearing, respondent for the first time brings to this court's attention a letter sent by appellant to Gadberry while he was incarcerated prior to trial. The letter, which contains incriminating statements by appellant, was admitted into evidence at trial as People's exhibit 54A and relied upon by the prosecutor in her closing argument to the jury. Respondent argues the letter shows that admission of appellant's confession was harmless beyond a reasonable doubt and requests that this court reconsider its ruling on the issue. But "it is 'too late to urge a point for the first time in a

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> petition for rehearing, after the case ha[s] been fully considered and decided by the court upon the points presented in the original briefs.' [Citations.]" (*People v. Holford* (2012) 203 Cal.App.4th 155, 159.) Respondent apologizes for not bringing this evidence to our attention earlier, but cites no authority supporting its request that this court reconsider its ruling in light of the letter. Even assuming we have discretion to do so, we decline to exercise that discretion. Respondent has not shown good cause for its failure to bring the letter to the court's attention in a timely fashion. We note that the exhibit was not in the record on appeal provided to us. Respondent briefed the harmless error issue in relation to admission of the confession in both its brief on appeal and in a supplemental letter brief regarding the voluntariness of the confession, but it failed to make any reference to appellant's letter. Respondent also failed to bring the letter to this court's attention at oral argument.

There is no change in the judgment.

Respondent's petition for rehearing is denied.

Dated:_____ _____, P.J.

Filed 2/5/13 (unmodified version)

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **PAUL WESTMORELAND,** **Defendant and Appellant.**	**A127394** **(Contra Costa County Super. Ct. No. 05-051785-4)**

Defendant and appellant Paul Westmoreland (appellant) was convicted by a jury of first degree felony murder, second degree robbery, and second degree burglary. On appeal, appellant contends the trial court erred in admitting his confession and the confession of a codefendant, erred in admitting an autopsy report authored by a nontestifying forensic pathologist, abused its discretion in discharging a juror, and abused its discretion in excluding certain impeachment evidence.

We reverse the convictions for murder and robbery. In the published portion of this opinion, we address two issues. First, we conclude appellant's confession was involuntary because it was motivated by an interrogating detective's false assertion appellant would not receive a life sentence if he admitted to an unpremeditated killing during a robbery. Admission of the confession at trial was not harmless beyond a reasonable doubt. Second, to assist the trial court in the event of a retrial, we determine

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admission of the autopsy *report* did not violate appellant's confrontation rights under the California Supreme Court's recent decisions in *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*) and *People v. Lopez* (2012) 55 Cal.4th 569 (*Lopez*).

In the unpublished portion of this opinion, we reject appellant's other claims of error.

PROCEDURAL BACKGROUND

Appellant was charged by information filed December 2005 with murder (Pen. Code, § 187)[1] (count 1), second degree robbery (§§ 211, 212.5, subd. (c)) (count 2), and second degree burglary (§§ 459, 460, subd. (b)) (count 3). The information alleged an enhancement for use of a deadly weapon (§ 12022, subd. (b)(1)) in counts 1 and 2 and alleged a felony murder special circumstance in count 1 (§ 190.2, subd. (a)(17)).[2]

In July 2009, a jury found appellant guilty as charged and found true the enhancement allegations. In November 2009, the trial court sentenced appellant to life without the possibility of parole. This appeal followed.

FACTUAL BACKGROUND

On the evening of August 19, 2005, a Friday, the victim Francisco Sanchez went to a bar with his friends Andres Jiminez and Gregorio Zuniga. They spent several hours drinking before going to another bar called El Rodeo at around 11:30 p.m.

A female, later identified as Erica Gadberry, approached the men. According to Gadberry's trial testimony,[3] she had gone to El Rodeo that night with a plan to pose as a prostitute and lure a customer to a vacant apartment, where the victim would be robbed by appellant, her boyfriend. Earlier on the evening of August 19, 2005, Gadberry and appellant had entered a vacant apartment in their housing complex by breaking a window.

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1 All undesignated section references are to the Penal Code.

2 Erica Gadberry was named as a codefendant in the information. (See *infra*, fn. 3.)

3 Gadberry told the jury she was testifying pursuant to an agreement under which she pled no contest to voluntary manslaughter, second degree robbery, and second degree burglary, and received a prison sentence of 12 years 8 months.

They left the front door unlocked so that Gadberry would be able to reenter the apartment for the robbery. Appellant had a steak knife to scare the victim.

Gadberry and appellant lived with appellant's mother and his sister, Laquita Richardson, in an apartment complex on Weldon Lane in Bay Point (apartment complex). On August 19, 2005, Gadberry arrived at El Rodeo with appellant and Richardson. Gadberry had told Richardson about the plan and Richardson agreed to go to El Rodeo with her.[4] Appellant went inside the bar but did not sit with or talk to Gadberry. Gadberry spent about an hour in El Rodeo before she spoke to Sanchez. Gadberry asked Sanchez, "Want to have a fiesta?" She wanted him to think she was going to have sex with him. She and Sanchez left the bar to go to the vacant apartment; Gadberry saw appellant drive by as she and Sanchez walked to the apartment complex.

Gadberry took Sanchez to a back room in the vacant apartment, where she helped him remove his pants. He was drunk. Gadberry left the room, saying she was going to get a condom and come back. Gadberry encountered appellant near the living room and said, "He's in the back." Appellant had the steak knife with him.

Appellant went to the back room and then Gadberry heard voices saying "Where's the money?" and "I don't have it." She ran back to the room and told appellant, "His pants are right there." She saw appellant pulling the knife out of Sanchez's chest; Sanchez was grasping his chest and saying, "I'm bleeding." Sanchez did not have a weapon. Gadberry grabbed Sanchez's pants with his wallet inside and ran out of the vacant apartment with appellant following her. Appellant returned to El Rodeo to pick up Richardson.

The next day, August 20, 2005, Sanchez's body, dressed in only underwear and socks, was found laying facedown at the bottom of stairs at the apartment complex. The police found more blood in a vacant apartment approximately 100 yards away from Sanchez; the vacant apartment had a broken window. The police were able to identify

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[4] Richardson testified that appellant took her and Gadberry to El Rodeo, but she denied knowing about the robbery plan.

the body as Sanchez's by his fingerprints. The investigation led to Jiminez, who described the woman he saw leaving El Rodeo with Sanchez. A bouncer at El Rodeo told police he knew someone who matched the woman's description. He said the woman and a female friend were at the bar on occasion, and he had once driven one of them home. He showed the police the building where he dropped her off, which was in the same housing complex where Sanchez died.

A search warrant was obtained for the apartment where Gadberry and appellant lived, and it was served on August 21, 2005, at about 12:50 a.m. Among other persons, officers found Richardson in the apartment and found appellant in bed with Gadberry. Richardson, Gadberry, and appellant were transported to a location where they were interviewed separately. Richardson, who was interviewed first, became hysterical and began crying and ranting. She admitted she saw appellant watching Gadberry talk to a Hispanic male at El Rodeo, and Gadberry left the bar with the Hispanic male.

Gadberry was interviewed next. When shown a photo of Sanchez, Gadberry said she had a drink with him at El Rodeo. She broke down in tears when told Sanchez had been killed. Eventually, she admitted that she and appellant were involved in a plan to commit a robbery in a vacant apartment. Her confession, which was described to the jury by one of the interrogators, largely mirrored her trial testimony.

Appellant's interview began at 3:18 a.m. and ended at 4:00 a.m. He eventually admitted there was a plan to pick up a man and bring him to a place where he would be robbed. Appellant insisted he did not intend to kill Sanchez. The jury saw a videotape of portions of appellant's interview.

Based on information provided by Gadberry, the police found Sanchez's pants behind some bushes at the Walnut Creek BART[5] station. Appellant's and Gadberry's fingerprints were found on or around the broken window in the vacant apartment.

In December 2007, while appellant and Gadberry were in custody, Gadberry received a threatening letter from appellant that referred to her as a "snitch."

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[5] Bay Area Rapid Transit System.

At trial, Dr. Ikechi Ogan, a forensic pathologist with the Forensic Medical Group in Fairfield, testified that the autopsy of Sanchez was performed by Dr. Brian Peterson. The Coroner's Division of the Contra Costa County Sheriff's Department has contracted with the Forensic Medical Group to perform autopsies. Peterson was the managing partner of the Forensic Medical Group before being hired by the Wisconsin Medical Examiner's Office. Ogan reviewed the coroner's report prepared by Peterson and the photos documenting the autopsy. Ogan testified he concurred with Peterson's opinion that the fatal injury was a single stab wound on the left side of the chest. The knife penetrated four inches, going clear through the third rib and puncturing the left lung and the heart. Ogan explained that the third rib is one of the heaviest ribs in the human body and opined it would take a great deal of force to cause a knife to pass entirely through the rib. Sanchez had no illegal drugs in his system and his blood alcohol level was .10 percent. Ogan opined that injuries to Sanchez's face, including bruises and a laceration above the left eyebrow, were inflicted while the victim was still alive. The coroner's report authored by Peterson was admitted into evidence.

An expert pediatric hematologist oncologist testified for the defense that appellant had sickle cell disease and suffered a stroke at the age of two and one-half years. She explained that stroke patients suffer brain damage and have significant intellectual deficits.

DISCUSSION

I. *Admission of Appellant's Involuntary Confession Was Prejudicial Error*

Appellant contends his "confession was inadmissible because it followed an incomplete *Miranda*[6] warning and not even an implicit *Miranda* waiver, and it was involuntary because of the interrogating officers' false statements and inducements." We conclude the warning was adequate and appellant waived his rights, but appellant's confession was involuntary. Because admission of the confession was *not* harmless beyond a reasonable doubt, we must reverse the murder and robbery convictions.

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6 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

"In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda, supra,* 384 U.S. 436, we accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.] Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we ' "give great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence.' [Citations.]" (*People v. Wash* (1993) 6 Cal.4th 215, 235-236 (*Wash*).) The "voluntariness of [a] defendant's waiver and confession must be established by a preponderance of the evidence. [Citation.]" (*Id.* at p. 236.)

A. *The* Miranda *Warnings Were Adequate*[*]

Appellant first contends the *Miranda* warnings given by the police were inadequate because they failed to inform him he was entitled to counsel *during* questioning.

According to a transcript of the questioning at the outset of appellant's police interview, Detective Shawn Pate admonished appellant as follows: "Being an adult and being here with us, you know you do have the right to remain silent. Anything you say can and will be used against you in court. Do you understand that? [¶] . . . [¶] You know you have the right to an attorney. You have to have an attorney prior to any questioning if you desire. If you can't afford to hire one, one will be represent [*sic*] to you free of charge. Do you understand that?" Appellant briefly nodded his head in response to Pate's questions.

Wash is directly on point. There, the defendant was informed, "you have the right to have an attorney present before any questioning if you wish one, if you cannot—if you cannot afford . . . an attorney one will be provided to you at no cost before any questioning begins." (*Wash*, *supra,* 6 Cal.4th at p. 236.) *Wash*'s reasoning is equally applicable here: "*Miranda* holds that a suspect must be apprised, inter alia, that he has

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[*] See footnote, *ante*, page 1.

the right to the presence of an attorney during questioning, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. [Citation.] Although the warning given to [the] defendant here deviated from the standard form in failing to expressly state that [the] defendant had the right to counsel both before and *during* questioning, we are not persuaded—as [the] defendant's argument implies—that the language was so ambiguous or confusing as to lead [the] defendant to believe that counsel would be provided before questioning, and then summarily removed once questioning began. [Citation.] As the high court has observed, the *Miranda* warnings are 'prophylactic' [citation] and need not be presented in any particular formulation or 'talismanic incantation.' [Citation.] The essential inquiry is simply whether the warnings reasonably ' "[c]onvey to [a suspect] his rights as required by *Miranda*." ' [Citation.] We are satisfied that the warnings given [the] defendant here 'reasonably conveyed' his right to have an attorney present during questioning." (*Id.* at pp. 236-237; see also *People v. Valdivia* (1986) 180 Cal.App.3d 657, 662-664.)

The United States Supreme Court recently considered a similar claim in *Florida v. Powell* (2010) 559 U.S. ___ [130 S.Ct. 1195] (*Powell*). There, the defendant was informed he had " 'the right to talk to a lawyer before answering any of [their] questions' " and " 'the right to use any of [his] rights at any time [he] want[ed] during th[e] interview.' " (*Id.* at pp. 1204-1205.) The high court concluded those warnings were adequate. (*Id.* at p. 1205.) Although the second statement made the warnings in *Powell* clearer than the warnings in the present case and in *Wash*, we do not read *Powell* as effectively overruling *Wash*. That is, we do not read *Powell* as requiring that suspects be told they have the right to use any of their rights at any time in order for warnings to be adequate.

In the present case, appellant was informed he had, without any limitation, the "right to an attorney" and, additionally, that he had the right to an attorney "prior to any questioning." Nothing in the detective's words indicated counsel's presence would be restricted after the questioning commenced. Under *Wash*, the warnings given to

appellant reasonably conveyed to him he had the right to an attorney before and during any questioning.

Appellant also contends he was not properly advised an attorney would be provided if he could not afford one because the officer misspoke, stating "If you can't afford to hire one, one will be represent [*sic*] to you free of charge." In context, the warnings reasonably conveyed to appellant that an attorney would be provided to represent him.

B. *The People Established That Appellant Waived His* Miranda *Rights*[*]

Appellant next contends the People failed to show that appellant knowingly and intelligently waived his *Miranda* rights.

"Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived [*Miranda*] rights' " when making the statement. [Citation.] The waiver inquiry 'has two distinct dimensions': waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' [Citation.]" (*Berghuis v. Thompkins* (2010) 560 U.S. ___ [130 S.Ct. 2250, 2260] (*Berghuis*).) "[T]he question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' [Citations.]" (*North Carolina v. Butler* (1979) 441 U.S. 369, 374-375.)

Appellant appears to focus on the second dimension of the waiver inquiry, whether he waived his rights with awareness of the nature of the rights and the consequences of waiver. Appellant contends there was no showing of a knowing and intelligent waiver because he responded to the detective's question as to whether he understood his rights only nonverbally, with "at best" a "slight" nod of his head. He also

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[*] See footnote, *ante*, page 1.

points to testimony presented to the trial court regarding his mental deficiencies. In particular, a pediatric oncologist hematologist testified appellant had sickle cell disease and suffered a stroke when he was under three years of age. The stroke caused permanent neurologic damage; appellant's cognitive impairment was mild to moderate. Moreover, patients with sickle cell disease often show a very poor sense of judgment. A clinical neuropsychologist testified that tests showed appellant had "significant" cognitive impairments; she expected appellant to be slower and have fewer skills. Appellant had an IQ score of 76, which could be considered in the mentally retarded range, although appellant did not appear to have mental retardation. Finally, appellant's mother testified appellant was slower than her other children; he attended school "to the 10th grade" and was in special education classes. On cross-examination, she admitted appellant probably had more than one attorney as a juvenile.

In concluding appellant waived his *Miranda* rights, the trial court reasoned as follows: "In this case the court is fortunate to have the videotaped statements which demonstrate both the demeanor and attitude of the witnesses and the environment in which the statements were made. [¶] Here after . . . Pate provided the warnings and asked [appellant] if he understood, the court viewed [appellant] nodding his head. The nodding of the head coupled with the fact that he proceeded to speak with the detectives and did not ask for an attorney persuades the court that he waived his *Miranda* rights. [¶] . . . [¶] As the videotape clearly shows, [appellant] was prepared to talk to the police. He displayed no emotional weakness. He was not under the influence of alcohol or drugs. He appeared to be streetwise. He did not appear intimidated by the officers or cowed by their presence. [¶] His initial statement that, quote, it wasn't me, unquote, showed that he was willing to speak to the officers. His behavior later in the interview complete with a physical demonstration of the way in which Erica walked back in the master bedroom, as well as the way in which he wielded the knife to stab the victim, further shows his willingness to speak. [¶] . . . [¶] . . . [Appellant's] early stroke and sickle cell anemia did not prevent him from knowingly waiving his rights. And his nonverbal and verbal conduct so demonstrated."

We agree with the trial court's reasoning. The high court recently emphasized that "[t]he prosecution . . . does not need to show that a waiver of *Miranda* rights was express. An 'implicit waiver' of the 'right to remain silent' is sufficient to admit a suspect's statement into evidence. [Citation.] . . . [A] waiver of *Miranda* rights may be implied through 'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.' [Citation.]" (*Berghuis, supra*, 130 S.Ct. at p. 2261.) That standard was met in this case. Appellant received adequate *Miranda* warnings and, in light of his conduct in the interview and the fact he had been represented by attorneys in the past, there is no basis to conclude he did not understand his rights. As in *Berghuis*, "on these facts it follows that [appellant] chose not to invoke or rely on those rights when he did speak." (*Berghuis*, at p. 2262.)

C. *The Confession Was Involuntary, And Its Admission Was Not Harmless*

Finally, appellant contends his confession was involuntary because "the interrogators repeatedly assured appellant that if he confessed he would not be sentenced to life imprisonment."

1. Legal Background

" 'The Fourteenth Amendment to the federal Constitution and article I, section 15, of the state Constitution bar the prosecution from using a defendant's involuntary confession. [Citation.] [These provisions require] the prosecution to establish, by a preponderance of the evidence, that a defendant's confession was voluntary. . . . [¶] Under both state and federal law, courts apply a "totality of circumstances" test to determine the voluntariness of a confession. . . . On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. [Citations.] In determining whether a confession was voluntary, "[t]he question is whether [the] defendant's choice to confess was not 'essentially free' because his will was overborne." ' [Citation.]" (*People v. Holloway* (2004) 33 Cal.4th 96, 114 (*Holloway*).)

" 'It is well settled that a confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.] However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. . . . Thus, "[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct," the subsequent statement will not be considered involuntarily made. [Citation.] On the other hand, "if . . . 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 . . . ." ' [Citation.]" (*Holloway*, *supra*, 33 Cal.4th at p. 115.)

2. Factual Background

Appellant primarily argues his statements were involuntary because detectives assured him he would not be subject to life imprisonment if he confessed to a "robbery gone wrong."[7] Immediately after informing defendant of his *Miranda* rights, Detective Pate told defendant, "Now I got to tell you this, okay? We came to your house for a reason. We've done our homework. All the evidence has come back. All the fingerprints are back. We're all here. [¶] A lot of times things happen that weren't meant to be, okay? Sometimes people go and they attempt to do one thing, something gets all fucked up and goes wrong and they didn't mean do that. That's the important issue here that we need to work out, because your girl's already told me. [¶] She's very upset. She says that it wasn't supposed to happen that way. I believe her, I truly do. Which means that things aren't quite as bad as we thought they were, okay? [¶] Now, I'm gonna give

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[7] Appellant also argues his confession was involuntary because "the interrogators repeatedly lied to appellant that his fingerprints had been found inside the apartment where the homicide took place, that his sister had inculpated him, and that his girlfriend might be released." We reject that contention because those deceptions were "not of a type reasonably likely to procure an untrue statement." (*People v. Farnam* (2002) 28 Cal.4th 107, 182 (*Farnam*).)

you the opportunity to set your record straight here, okay? 'Cause she's already told the story." Appellant asked, "What did she say?" Pate responded, "What do you think she told me? Basically a robbery went bad, okay? [¶] Now we got all the evidence we need. We came to your house for a reason. The judge has already signed off on all that. Now we need to set the record straight. [¶] Did you all say, 'Hey, fuck it, let's go out and kill somebody tonight' or did something just go bad? And if something went bad, a lot of times there's logical explanations for things. And that's what we're here to work through, okay? [¶] Don't portray yourself as some bad guy that went out to do one thing when you didn't."

After further informing appellant of evidence the police had gathered against him, the following exchange occurred:

"[Pate]: Obviously we know what time it is. Now we're past that. You need to get past that. You're a smart young man. You don't have much criminal history, correct?

"[Appellant]: Check it out, yeah, correct.

"[Pate]: Don't go hemming yourself up on a life case when it doesn't need to be.

"[Appellant]: That's where I'm at.

"Detective Barnes: Let me, let me — let me — explain another thing, too.

"[Appellant]: I'm not going to get life anyway?

"[Pate]: No."

Shortly thereafter, the following exchange occurred:

"[Pate]: So at this juncture, at this point in your life is where honesty is everything. [¶] You have a gentleman that went out to have a good time. He's a business owner with family. Something went bad. Maybe you just wanted to get something. Something went wrong and he's no longer with us. He's dead. [¶] We're homicide detectives, okay? So now we need to figure out how it went bad.

"[Appellant]: Yeah, but check this out. I'm gonna get life for it?

"[Pate]: No, that's not what I said.

"[Appellant]: How you know I'm not gonna get life?

"[Pate]: Well, at this point in the investigation, we're going by what our evidence has and what she says. I'm not even gonna get into what you may or may not get. [¶] . . . [¶] There's all kinds of variables in that. If you just had got up in the morning and said, hey, fuck it, I'm gonna go murder someone because I'm a killer like that, then you might get life. [¶] But if there's logical explanations for some of the actions that happened and there's a reason why, maybe the guy did something else and provoked something or who knows. That's why I'm here to let you set the record straight. [¶] So it's hard for me to tell you what you may or may not get. . . . [¶] Why did this one go bad? I'm not gonna sit here and feed you my entire investigation because I need to know these things from you. That's the only thing that's gonna help you out. And you need to think of this, think this through because this is a huge point in your life. [¶] You're in trouble, I'll be honest with you. But how much trouble you're in it depends on you. It truly does. It depends on is this jury gonna see you as a young man that feels sorry that something went wrong and that's not what intended to happen, or is this jury gonna see a man that says, fuck it, I went out and killed somebody and this is why."

"[Appellant]: I ain't like that.

"[Pate]: There you go. This is your opportunity to tell it. If it went bad it went bad. But you got to lay it out for us. [¶] Your girlfriend's scared. She laid it out. She's very remorseful. She feels sorry for what happened. That is gonna weigh on the decisions that are made. [¶] Is there remorse or is there no remorse?"

Thereafter, appellant asked Pate and Barnes what would happen to Gadberry and he asked them for a cigarette. Pate said appellant could have a cigarette "as soon as we're done talking" and then he started to walk appellant through the events of the evening of the killing, starting with the trip to the bar. Appellant gave brief answers that are unintelligible on the video of the interrogation, and Pate said, "This is getting into the corroboration thing. This is where your honesty is what will help you, okay? So when she says we went straight to this house or that house," appellant interrupted Pate and stated, "I'm gonna get life in prison." Pate responded, "You got to get past that, man,"

and appellant said "Shit don't matter man, I'm gonna get life."[8] Pate responded, "That's not necessarily true, my friend." Shortly thereafter, Pate asked appellant, "Why did it go bad? I mean you've gotten money before without anybody getting hurt. Did this guy attack you? Did he disrespect you? [¶] Give me some logical explanation for what happened here." Appellant then confessed his involvement in the killing for the first time, stating, "Just went bad." Shortly thereafter, he stated, "I didn't mean to kill the man," and explained the victim got stabbed in a struggle.

3. Analysis

In assessing whether there were false promises of leniency that rendered appellant's confession involuntary, the decision in *People v. Cahill* (1994) 22 Cal.App.4th 296 (*Cahill*) is instructive. There, the defendant was convicted of first degree murder with special circumstances that the murder occurred in the course of a burglary, robbery, and rape. (*Id.* at p. 300.) After the defendant was given a "*Miranda* warning," the police told him they had all the physical evidence they needed to place him in the victim's house where the murder occurred. (*Id.* at p. 303.) An officer told the defendant, " 'I'm here really to try to see what I can do for you.' " (*Id.* at p. 305.) The officer provided a "materially deceptive" explanation of the law of murder in California, describing first degree and second degree murder and voluntary manslaughter, but omitting any reference to felony murder. (*Id.* at pp. 306, 315.) The officer told the defendant he could help himself by talking and suggested the defendant could avoid a first degree murder conviction by admitting an unpremeditated role in the killing. (*Id.* at pp. 306-307, 314-315.) *Cahill* found the defendant's subsequent confession was procured by a false promise of leniency—that he could avoid first degree murder by admitting to the killing but stating it was not premeditated. (*Id.* at p. 314; see also *People*

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[8] These last two references by appellant to a potential life sentence are not recorded in the transcript, which indicates appellant's comments are "unintelligible." In its review of the video of the interrogation, this court heard appellant make the statements as indicated herein. We asked the parties to comment on these statements and, in supplemental briefing, neither party disagreed that they were made.

v. Johnson (1969) 70 Cal.2d 469, 479.) Recognizing the case law that deception is permissible unless reasonably likely to procure an untrue statement, *Cahill* found those cases did not apply where the deception was a false promise of leniency. (*Cahill*, at p. 315.)

The People rely on *Holloway* to argue the confession was voluntary. But, the California Supreme Court in *Holloway* implicitly agreed with the reasoning of *Cahill*, stating that the case was "distinguishable factually." (*Holloway*, *supra*, 33 Cal.4th at p. 117.) *Holloway* explained that the detective in *Cahill* "led the defendant to believe he could avoid a first degree murder charge, in a burglary-murder case, by admitting to an unpremeditated role in the killing." (*Holloway*, at p. 117.) In contrast, the detectives in *Holloway* "gave [the] defendant no such misleading assurances. No specific benefit in terms of lesser charges was promised or even discussed, and [a detective's] general assertion that the circumstances of a killing could 'make[] a lot of difference' to the punishment, while perhaps optimistic, was not materially deceptive." (*Ibid.*; see also *id.* at p. 116 ["To the extent [the detective's] remarks implied that giving an account involving blackout or accident might help [the] defendant avoid the death penalty, [the detective] did no more than tell [the] defendant the benefit that might ' "flow [] naturally from a truthful and honest course of conduct" ' . . . ."].)

The present case is more like *Cahill* than *Holloway*. On several occasions, Pate told appellant that his admission to killing the victim during a robbery would not, by itself, trigger a life sentence. Due to the felony-murder rule, this was false. (See §§ 189, 190.2, subd. (a)(17)(A); see also *People v. Chun* (2009) 45 Cal.4th 1172, 1182.)[9] Pate repeatedly asserted appellant *could* avoid a life sentence if appellant provided an explanation for the murder that did not reflect premediatation. For example, Pate stated,

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9 Section 190.2, subd. (a)(17)(A) provides: "The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if . . . : [¶] (17) The murder was committed while the defendant was engaged in . . . the commission of, attempted commission of . . . : [¶] (A) Robbery . . . ."

"If you just had got up in the morning and said, hey, fuck it, I'm gonna go murder someone because I'm a killer like that, then you might get life. [¶] But if there's logical explanations for some of the actions that happened and there's a reason why, maybe the guy did something else and provoked something or who knows. That's why I'm here to let you set the record straight." Similarly, he told defendant "Don't go hemming yourself up on a life case when it doesn't need to be." Pate also repeatedly emphasized that the interrogation was the critical opportunity for appellant to help himself by being honest and showing remorse. In the language of *Holloway*, Pate "led [appellant] to believe he could avoid [a life sentence] by admitting to an unpremeditated role in the killing." (*Holloway*, at p. 117.)

Finally, it is clear that Pate's false promises of leniency caused appellant to confess. (See *Cahill, supra*, 22 Cal.App.4th at p. 316 ["An implied promise of leniency must be 'a motivating cause of the confession.' "].) Appellant repeatedly expressed concern he would be sentenced to life in prison if he admitted to killing the victim, and Pate repeatedly attempted to assuage that concern by telling appellant that whether he would be sentenced to life depended on appellant's explanation of why he killed the victim. Indeed, immediately before appellant confessed his involvement, appellant was expressing concern he would be sentenced to life regardless of what he said, and Pate responded, "That's not necessarily true my friend." No other circumstances undermine the implication that Pate's false promises influenced appellant's decision to confess. We conclude that, under *Cahill*, the defendant's confession was involuntary, obtained in violation of appellant's Fifth Amendment privilege against self-incrimination.

4. Prejudice

Because appellant's confession was obtained in violation of the Fifth Amendment to the United States Constitution, his conviction must be reversed unless the error in admitting his confession was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 295 (*Fulminante*); *Chapman v. California* (1967) 386 U.S. 18, 23; see also *Cahill*, *supra*, 22 Cal.App.4th at p. 318.) We review the record de novo and the People bear the burden of demonstrating that admission of the confession

did not contribute to the conviction. (*Fulminante*, at pp. 295-296.) In conducting our prejudice review, we bear in mind that "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury . . . .' [Citations.] While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision." (*Id.* at p. 296.)

Our Supreme Court also has recognized the likelihood of prejudice due to the improper admission of a confession. Although the court held that such an error is not prejudicial per se, it acknowledged that "confessions, 'as a class,' '[a]lmost invariably' will provide persuasive evidence of a defendant's guilt [citation], and that such confessions often operate 'as a kind of evidentiary bombshell which shatters the defense' [citation] . . . ." (*People v. Cahill* (1993) 5 Cal.4th 478, 503.) Consequently, "the improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence, and thus is much more likely to be prejudicial under the traditional harmless-error standard." (*Ibid.*; accord, *People v. Gonzalez* (2012) 210 Cal.App.4th 875, 884.)

Here, the People argue the error was harmless because "[t]he jury heard Gadberry's testimony and watched a video of her police interview. Her account of the events was corroborated by recovery of Sanchez's clothing at the Walnut Creek BART station. Appellant's and Gadberry's fingerprints were found on the broken window in the apartment where Sanchez was stabbed. Richardson confirmed that Gadberry left the bar with Sanchez."

The People have not shown the error in admitting appellant's confession was harmless beyond a reasonable doubt. Absent his confession, an alternate theory was that Gadberry killed Sanchez and she blamed it on appellant in hopes of obtaining a lighter

sentence. (See *Fulminante*, *supra*, 499 U.S. at p. 300 [pointing out that jurors could have believed that critical witness had motives to lie].) The facts that the police found Sanchez's clothes where she said they would be and Richardson confirmed that the victim left the bar with Gadberry were equally consistent with either Gadberry or appellant killing Sanchez. The fact that appellant's fingerprints were on or around the broken window certainly suggested his involvement in the robbery, but it was a reasonable possibility that appellant was in the apartment at some other moment unrelated to the robbery. The People's fingerprint examiner admitted on cross-examination that fingerprints can remain on an object for weeks or more. Furthermore, we cannot foreclose the possibility that the defense would have come up with other theories had appellant's confession not been admitted into evidence. For example, the defense could have suggested that Richardson or another third party was involved in the robbery and murder. Ultimately, absent appellant's confession, the case against appellant depended almost entirely on Gadberry's confession and testimony; because we cannot assume the jury found Gadberry credible, we cannot conclude that the error in admitting appellant's confession was harmless beyond a reasonable doubt.

Because we cannot conclude the error in admitting the involuntary confession did not contribute to the convictions for murder and robbery, those convictions must be reversed. However, in light of the evidence of appellant's fingerprints on or around the broken window in the vacant apartment, we conclude that admission of the confession was harmless beyond a reasonable doubt as relates to the conviction for second degree burglary.

II. *The Trial Court Properly Admitted Gadberry's Statement to the Police*[*]

Appellant contends Gadberry's statement to the police should have been excluded because it was the product of police coercion.[10] The claim is without merit.

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[*] See footnote, *ante*, page 1.

[10] Although appellant discusses Richardson's police interview under the "Factual Summary" in his opening brief, he does not argue that admission of Richardson's testimony violated his due process right to a fair trial.

Although appellant lacked standing to seek to exclude Gadberry's police statement on the ground that it was obtained in violation of her Fifth Amendment privilege against self-incrimination (*People v. Badgett* (1995) 10 Cal.4th 330, 343 (*Badgett*)), he did have standing to challenge the admissibility of the statement on the ground it was obtained by coercion (*People v. Lee* (2002) 95 Cal.App.4th 772, 781 (*Lee*)). (See also *Badgett*, at p. 347 ["the primary purpose of excluding coerced testimony of third parties is to assure the reliability of the trial proceedings"].) "[Where], as here, the facts regarding the alleged coercion are not in dispute, we . . . review the record de novo to determine whether, based on the totality of the circumstances, [Gadberry's] statement was voluntary." (*Lee*, at p. 781, fn. omitted.) Appellant bears the burden of proving coercion. (*Badgett*, at p. 348.)[11]

Defendant's primary argument is the police made implied threats that Gadberry would be subject to the death penalty if she did not make a statement implicating appellant. However, a confession will not be considered involuntary " 'simply because the possibility of a death sentence was discussed beforehand' [citation], but only where the confession results directly from the threat such punishment will be imposed if the suspect is uncooperative, coupled with a 'promise [of] leniency in exchange for the suspect's cooperation' [citation]." (*Holloway*, *supra*, 33 Cal.4th at p. 116.) *Holloway* held that, to the extent the officer's "remarks implied that giving an account involving blackout or accident might help [the] defendant avoid the death penalty, he did no more than tell [the] defendant the benefit that might ' "flow[] naturally from a truthful and honest course of conduct" ' [citation], for such circumstances can reduce the degree of a homicide or, at the least, serve as arguments for mitigation in the penalty decision." (*Ibid.*) Here, at one point, the police stated to Gadberry in describing the robbery-murder, "Do you understand that's a death penalty case?" They also made statements suggesting a jury might view her more favorably if she told the truth and made it clear she did not

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11 To the extent appellant contends Gadberry's *trial testimony* should have been excluded, that claim fails because appellant has not shown the testimony itself was the product of coercion. (*Badgett*, *supra*, 10 Cal.4th at pp. 344, 347-348.)

intend for the victim to be murdered. These statements did not render the statement involuntary under *Holloway*.

Furthermore, contrary to appellant's argument, the police did not promise to Gadberry that she would be released if she confessed. And the deception employed by the detectives during the interrogation was "not of a type reasonably likely to procure an untrue statement." (*Farnam*, *supra*, 28 Cal.4th at p. 182.)

The trial court did not err in refusing to exclude Gadberry's police statement.

III. *Admission of the Autopsy Report Did Not Violate the Confrontation Clause*

Appellant contends he was "denied his federal and state constitutional rights to confrontation and a fair trial by the trial court's admission of the autopsy report and the testimony of a pathologist who was not present at the autopsy of the victim." We address this claim to provide assistance to the trial court in the event of a retrial of the murder charge and reject the claim under the California Supreme Court's recent decisions in *Dungo, supra,* 55 Cal.4th 608 and *Lopez*, *supra*, 55 Cal.4th 569.

A. *Factual Background*

As explained previously, Peterson performed the autopsy on Sanchez and prepared an autopsy report, but he was working for the Wisconsin Medical Examiner's Office at the time of trial. When he performed the autopsy, Peterson was the managing partner of the Forensic Medical Group in Fairfield. At trial, the prosecution presented expert testimony regarding the Sanchez autopsy from Dr. Ogan, a forensic pathologist with the Forensic Medical Group. Defense counsel unsuccessfully objected to Ogan's testimony on confrontation clause grounds. Ogan told the jury he had reviewed the autopsy report prepared by Peterson and the photos documenting the autopsy. Based on the report and photographs, Ogan described the condition of Sanchez's body in detail, both externally and internally, including the presence or absence of alcohol and other drugs in his system. He expressed agreement with Peterson's conclusion that the cause of death was a single stab wound to the chest. He also provided his opinion on various matters, including that certain facial injuries were inflicted while Sanchez was still alive and that it would have taken a great deal of force to inflict the knife wound that killed Sanchez. The autopsy

report was admitted into evidence over defense counsel's objection. Following his conviction, appellant moved for new trial on the grounds that Ogan's testimony and the autopsy report should have been excluded. The trial court denied the motion.

B. *Legal Background*[12]

The confrontation clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the high court interpreted this provision to bar "testimonial" hearsay unless the out-of-court declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Id.* at p. 59; see also *Dungo, supra*, 55 Cal.4th at p. 616.) *Crawford* explained that the Sixth Amendment's confrontation right pertains to those who give "testimony," defined as " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " (*Crawford*, at p. 51.) But *Crawford* did not adopt a particular definition of "testimonial." (*Id.* at p. 52; see also *Dungo*, at p. 616.)

In three cases, *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*), *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705] (*Bullcoming*), and *Williams v. Illinois* (2012) 567 U.S. ___ [132 S.Ct. 2221] (*Williams*), the high court has addressed the admissibility under *Crawford* of out-of-court statements contained in forensic analyst reports, when the analyst who prepared the report does not testify. *Williams* is most relevant.

In *Williams*, *supra*, 132 S.Ct. 2221, a woman was kidnapped, robbed, and raped. Vaginal swabs taken from her were sent to a state crime laboratory; semen was found on the swabs, which were then sent to the Cellmark Diagnostic Laboratory. At the defendant's trial, a forensic biologist from the state's laboratory testified that Cellmark analysts had tested the vaginal swabs, derived a DNA profile of the man whose semen was on the swabs, and sent a laboratory report containing that profile. In the expert's

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12 Most of the summary of the United States Supreme Court authority in this background section is taken from the California Supreme Court's decisions in *Dungo* and *Lopez*.

opinion, the Cellmark DNA profile matched the state laboratory's DNA profile, which had been derived from a blood sample taken from the defendant when he was arrested for an unrelated offense. At trial, the Cellmark laboratory report was not introduced into evidence, and no Cellmark analyst testified.

In resolving the confrontation clause question, the high court addressed two separate issues: (1) Were the statements in the Cellmark report, testified to by the expert, admitted for their truth; and, (2) if so, were they testimonial? In the lead opinion, written by Justice Alito, four justices agreed that the answer to each question was "no." Specifically, Justice Alito wrote that the Cellmark report was not testimonial because it was not prepared "for the primary purpose of accusing a targeted individual." (*Id.* at p. 2243 (plur. opn. of Alito, J.).) Indeed, the plurality noted, the defendant was not yet a suspect at the time the report was produced. (*Ibid.*) Four justices dissented in an opinion written by Justice Kagan that answered both questions in the affirmative; the statements were admitted for their truth and the statements were testimonial because the primary purpose of the Cellmark report was to produce evidence for trial. Justice Thomas concurred with the lead opinion's result, while firmly rejecting its reasoning: "no plausible reason [exists] for the introduction of Cellmark's statements other than to establish their truth." (*Williams*, *supra*, 132 S.Ct. at p. 2256 (conc. opn. of Thomas, J.).) Further, the accusatory purpose test, "lacks any grounding in constitutional text, in history, or in logic." (*Id.* at p. 2262 (conc. opn. of Thomas, J.).) He agreed with the result reached by "the plurality that the disclosure of Cellmark's out-of-court statements . . . did not violate the Confrontation Clause . . . solely because Cellmark's statements lacked the requisite 'formality and solemnity' to be considered ' "testimonial" ' for purposes of the Confrontation Clause." (*Id.* at p. 2255 (conc. opn. of Thomas, J.).)

Following *Williams*, in *Dungo* and *Lopez* our Supreme Court attempted to distill guiding principles from the high court's jurisprudence in this area. *Dungo* and *Lopez* concluded that "testimonial out-of-court statements have two critical components. First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion

to a criminal prosecution. The high court justices have not, however, agreed on what the statement's primary purpose must be." (*Dungo*, *supra*, 55 Cal.4th at p. 619; see also *Lopez, supra*, 55 Cal.4th at pp. 581-582.) *Lopez* expanded on the second component as follows: "[A]ll nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be. For instance, in this year's *Williams* decision, Justice Alito's plurality opinion said that the Cellmark laboratory's report at issue was not testimonial because it had not been prepared 'for the primary purpose of *accusing a targeted individual*' [citation]. Justice Thomas's concurring opinion criticized that standard, describing it as lacking 'any grounding in constitutional text, in history, or in logic.' [Citation.] Instead, for Justice Thomas, the pertinent inquiry is whether the statement was 'primarily intend[ed] to establish some fact with the understanding that [the] statement may be used in a criminal prosecution.' [Citation.] And under the *Williams* dissent, the pertinent inquiry is whether the report was prepared 'for the primary purpose of establishing "past events potentially relevant to later criminal prosecution"—in other words, for the purpose of providing evidence.' [Citation.]" (*Lopez*, at p. 582.)

Dungo addressed the admissibility of specific statements in an autopsy report prepared by a pathologist who did not testify at trial.[13] In *Dungo*, a forensic pathologist testifying for the prosecution at the defendant's murder trial "described to the jury objective facts about the condition of the victim's body as recorded in the autopsy report and accompanying photographs. Based on those facts, the expert gave his independent opinion that the victim had died of strangulation. Neither the autopsy report, which was prepared by another pathologist who did not testify, nor the photographs were introduced into evidence." (*Dungo*, *supra*, 55 Cal.4th at p. 612.)

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[13] *People v. Rutterschmidt* (2012) 55 Cal.4th 650 (*Rutterschmidt*), decided the same day as *Dungo*, also involved a confrontation clause challenge to the admissibility of an autopsy report. In *Rutterschmidt*, the court found that any error in that regard was harmless and did not address the substance of the challenge. (*Id.* at p. 661.)

Regarding the primary purpose component of the inquiry,[14] *Dungo* noted a number of considerations emphasized by the defendant that suggested the autopsy's purpose was to develop evidence for trial. A detective was present during the autopsy, the autopsy was mandated by statute, the pathologist was required by statute to report his findings, a detective disclosed the defendant's confession to the pathologist before the autopsy report was written, and the pathologist was required by statute to notify law enforcement if he determined there were reasonable grounds to suspect the death was a homicide. (*Dungo*, *supra*, 55 Cal.4th at p. 620.) According to *Dungo*, those considerations "pertain" to "the *primary purpose* of the statements in the report." (*Ibid.*) "For example, the presence of a detective at the autopsy and the fact that the detective told the pathologist about [the] defendant's confession . . . do support [the] defendant's argument that the primary purpose of the autopsy was the investigation of a crime. Similarly, the fact that the autopsy was mandated by a statute that required public findings and notification of law enforcement . . . does imply that the primary purpose of the autopsy was forensic." (*Ibid.*)

But *Dungo* rested its conclusion on other factors. It pointed out that autopsies are statutorily mandated in categories of deaths resulting from causes unrelated to criminal activities, and "the scope of the coroner's statutory duty to investigate is the same, regardless of whether the death resulted from criminal activity." (*Dungo*, *supra*, 55

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14 *Dungo* also discussed the formality component, concluding the "statements describing the pathologist's anatomical and physiological observations about the condition of the body" lack the formality required to be testimonial. (55 Cal.4th at p. 619.) In a concurring opinion in which three other justices joined, Justice Werdegar elaborated on the formality issue, stating " 'the objective forensic autopsy with its findings' " "does not resemble the ex parte examinations of historical example or the structured police interrogations of *Crawford*[, *supra*, 541 U.S. 36] and *Davis* [*v. Washington* (2006) 547 U.S. 813]. Though there is a structure to the autopsy examination process, it is largely that of a medical examination, not an interrogation. . . . The process of systematically examining the decedent's body and recording the resulting observations is thus one governed primarily by *medical* standards rather than by legal requirements of formality or solemnity." (*Dungo*, at p. 624 (conc. opn. of Werdegar, J., joined by Cantil-Sakauye, C. J., Baxter & Chin, J. J.).)

Cal.4th at p. 620.) Moreover, "[t]he usefulness of autopsy reports . . . is not limited to criminal investigation and prosecution; such reports serve many other equally important purposes. For example, the decedent's relatives may use an autopsy report in determining whether to file an action for wrongful death. And an insurance company may use an autopsy report in determining whether a particular death is covered by one of its policies. [Citation.] Also, in certain cases an autopsy report may satisfy the public's interest in knowing the cause of death, particularly when . . . the death was reported in the local media. In addition, an autopsy report may provide answers to grieving family members." (*Id.* at p. 621.) *Dungo* concluded, "In short, criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of [the victim's] body; it was only one of several purposes. The presence of a detective at the autopsy and the statutory requirement that suspicious findings be reported to law enforcement do not change that conclusion. The autopsy continued to serve several purposes, only one of which was criminal investigation. The autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial. [Citation.]" (*Ibid.*) "[The] expert's testimony did not give rise to a right by [the] defendant to question the preparer of the autopsy report." (*Id.* at p. 612.)[15]

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[15] Justice Werdegar's concurrence, which represents the views of four justices, points out "that testimonial character depends, to some extent, on the degree to which the statement was produced by or at the behest of government agents for use in a criminal prosecution." (*Dungo*, *supra*, 55 Cal.4th at p. 626 (conc. opn. of Werdegar, J.).) In *Dungo*, the bare facts that a detective was present at the autopsy and informed the pathologist of the defendant's confession were not enough to support a conclusion that the descriptions of objective facts in the autopsy report were testimonial. Nevertheless, Justice Werdegar emphasized, "[t]he record does not show or suggest that [the pathologist] was prompted by prosecutorial agents to make any of the statements at issue, or indeed that he was guided in his conduct and documentation of the autopsy by anything other than professional medical practices and standards." (*Id.*, at p. 627 (conc. opn. of Werdegar, J.); see also *id.* at p. 632 (conc. opn. of Chin, J., joined by Cantil-Sakauye, C. J., Baxter & Werdegar, J. J.).) This implies that suggestive enough circumstances *could* justify a conclusion that particular statements in an autopsy report were recorded for the primary purpose of criminal investigation.

C. *Analysis*

Over objection, Ogan testified to certain statements in the autopsy report prepared by Peterson and referred to Peterson's conclusion on the cause of death. The report was introduced into evidence. We conclude this testimony and the report were introduced for their truth. We also conclude neither the report nor the particular statements in it related by Ogan are testimonial.

1. The Out-of-Court Statements Elicited During Ogan's Direct Testimony Were Admitted for Their Truth Under the Confrontation Clause

A majority of the justices in *Williams*, *Dungo*, and *Lopez* determined that the challenged out-of-court statements admitted during the expert testimony in each of those cases were admitted for the truth of the facts asserted in the statements, at least for confrontation clause purposes. The four-justice lead opinion in *Williams* concluded that when an expert relies upon and testifies on direct examination to a forensic report prepared by an absent analyst, this basis evidence is *not* admitted for its truth, but is disclosed for the purpose of assisting the fact finder to evaluate the expert's opinion. (*Williams, supra,* 132 S.Ct. at p. 2228 (plur. opn. of Alito, J.).) On that basis, the plurality concluded the confrontation clause did not apply because there was a "legitimate nonhearsay purpose of illuminating the expert's thought process." (*Williams*, at p. 2240.)

However, Justice Thomas and the four dissenting justices strongly rejected the plurality's reasoning. Justice Thomas stated, "I do not think that rules of evidence should so easily trump a defendant's confrontation right." (*Williams, supra,* 132 S.Ct. at p. 2256 (conc. in judgment of Thomas, J.).) He explained, "statements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose. There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth. 'To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true.' [Citation.] 'If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis

evidence, it will be skeptical of the expert's conclusions.' [Citation.]" (*Id.* at p. 2257, fn. omitted.) The dissenting opinion, representing the views of four justices, agreed with Justice Thomas in that regard, stating that "the plurality's not-for-the-truth rationale is a simple abdication to state-law labels" and "we do not typically allow state law to define federal constitutional requirements." (*Id.* at p. 2272 (dis. opn. of Kagan, J.).)

In *Lopez*, the California Supreme Court recognized that five of the justices in *Williams* concluded that the statements from the laboratory report admitted during the expert testimony were admitted for their truth for purposes of the confrontation right. (*Lopez, supra*, 55 Cal.4th at pp. 579-580; see also *Dungo, supra*, 55 Cal.4th at p. 635 & fn. 3 (dis. opn. of Corrigan, J., joined by Liu, J.).)[16] In *Dungo*, Justice Werdegar wrote for a four-justice majority of the court in expressly stating that the observations of the nontestifying pathologist in the autopsy report "were introduced for their truth." (*Dungo*, at p. 627 (conc. opn. of Werdegar, J.).) She continued, "and since [the nontestifying pathologist] was not shown to be unavailable and had not been subject to prior cross-examination on this matter by [the] defendant, his statements, were they testimonial, would have been inadmissible under *Crawford*." (*Ibid.*) Justice Corrigan, in a dissent joined by Justice Liu, agreed. She pointed out, "The longstanding rule that unless a statement is admitted for its truth it is not hearsay remains unchanged. The question is whether a statement *is* admitted for its truth. When an expert witness treats as factual the contents of an out-of-court statement, and relates as true the contents of that statement to the jury, a majority of the high court in *Williams, supra*, 567 U.S. ___ [132 S.Ct. 2221], rejects the premise that the out-of-court statement is not admitted for its truth." (*Dungo*, at p. 635, fn. 3] (dis. opn. of Corrigan, J.); see also *id*. at pp. 633-634 (dis. opn. of

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16 In *Lopez*, it was "undisputed" that the notation in the laboratory report linking [the] defendant's name to the blood sample "was admitted for its truth." (*Lopez, supra*, 55 Cal.4th p. 584.)

Corrigan, J.) [pointing out that statements in report "were presented as facts" and characterizing statements as "testimonial hearsay"].)[17]

Thus, a five justice majority of the high court and at least six of the seven justices on the California Supreme Court appear to agree that, for purposes of the confrontation clause, out-of-court statements admitted as basis evidence during expert testimony are admitted for their truth if treated as factual by the expert and, thus, implicate confrontation rights if the statements are testimonial.[18]

2. The Autopsy Report Is Not Testimonial

The factual context in *Dungo* required the court to address a limited question: Are statements in an autopsy report relating to the observations of the victim's body made by an absent pathologist testimonial? Here we face a broader issue because Ogan testified not only to Peterson's anatomical observations but also to his *conclusion* as to the cause of death, and Peterson's entire autopsy *report* was introduced into evidence. Despite the change in scope of the out-of-court statements admitted, we conclude they were not testimonial because autopsy reports, and the findings and conclusions therein, are generally not prepared for the primary purpose required to make them testimonial.

In its application of the *Williams* primary purpose test to the statements challenged, *Dungo*'s analysis rested on its view of autopsy *reports*. "The preparation of an autopsy report is governed by California's Government Code section 27491, which requires a county coroner to 'inquire into and determine the circumstances, manner, and cause' of certain types of death. Some of these deaths (such as deaths from alcoholism,

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[17] The Supreme Court hinted at this result in *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), where the court impliedly assumed that information in a DNA technician's report was admitted for its truth, but concluded no *Crawford* error occurred because the report was not testimonial. (*Geier*, at pp. 605–607; see *People v. Hill* (2011) 191 Cal.App.4th 1104, 1131, fn. 18 (*Hill*).)

[18] If basis evidence is admitted for its truth for purposes of the confrontation clause, logic would seem to dictate these statements are also admitted for their truth under the hearsay rule. (See *Hill, supra,* 191 Cal.App.4th at p. 1132.) However, *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619, a pre-*Crawford* decision, holds that basis evidence is not admitted for its truth for purposes of the hearsay rule.

'sudden infant death syndrome,' and 'contagious disease') result from causes unrelated to criminal activities, while other deaths (such as deaths resulting from 'criminal abortion,' deaths by 'known or suspected homicide,' and 'deaths associated with a known or alleged rape') result from the commission of a crime. (*Ibid.*) With respect to all of the statutorily specified categories of death, however, the scope of the coroner's statutory duty to investigate is the same, regardless of whether the death resulted from criminal activity. [¶] The usefulness of autopsy reports . . . is not limited to criminal investigation and prosecution; such reports serve many other equally important purposes. For example, the decedent's relatives may use an autopsy report in determining whether to file an action for wrongful death. And an insurance company may use an autopsy report in determining whether a particular death is covered by one of its policies. (See, e.g., *People v. Rutterschmidt, supra,* 55 Cal.4th 650.) Also, in certain cases an autopsy report may satisfy the public's interest in knowing the cause of death, particularly when . . . the death was reported in the local media. In addition, an autopsy report may provide answers to grieving family members. [¶] . . . [Thus, the] autopsy continued to serve several purposes, only one of which was criminal investigation. The autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial. (*Melendez-Diaz, supra,* 557 U.S. at p. 324.)" (*Dungo, supra,* 55 Cal.4th at pp. 620-621.)

Clearly then, it is appropriate to extend *Dungo*'s limited determination to the issues here. The primary purpose of an autopsy report, including its conclusion as to cause of death, is not criminal investigation, even if, as here and in *Dungo*, there was a detective at the autopsy and the investigation had already focused on the defendant.[19] Therefore the autopsy report, including the conclusions as well as the observations

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[19] There are no indications that the detective prompted Peterson "to make any of the statements at issue, or indeed that [Peterson] was guided in his conduct and documentation of the autopsy by anything other than professional medical practices and standards." (*Dungo, supra,* 55 Cal.4th at p. 627 (conc. opn. of Werdegar, J.).)

contained in it, was not testimonial.[20] Whether its contents were introduced directly as an exhibit or through Ogan's testimony, the Sixth Amendment was not implicated.

IV. *The Trial Court Did Not Abuse Its Discretion by Discharging a Juror*[*]

Appellant contends the trial court violated his right to a fair trial by discharging Juror No. 118, who sat in the jury box as Juror No. 7. We disagree.

A. *Background to Removal of Juror*

During Gadberry's testimony, the trial court, outside the jury's presence, said to both counsel that Juror No. 118 was "having some severe problems with staying awake." The court stated, "He is not only perpetually yawning and facing his chair away from the witness, but several times today I've caught him with his eyes closed — [¶] . . . [¶] — on crucial testimony. [¶] So I want to talk to him about what the problem appears to be. If it's an issue of maybe the blinds need to be drawn or if he's working late or whatever it is. [¶] . . . [¶] But we can't have that."

The court then spoke directly to Juror No. 118, referencing his difficulty staying awake and asking what the problem was. He replied, "It's just been a very hot day. . . . I . . . went for an extended walk, and it was very, very hot. . . . [I] was trying to pay attention to the testimony being given at the time. It was becoming a little — unfortunately, some of the more fine aspects that were not I didn't think germane or key critical at that particular moment tended to have my focus wander, or I allowed myself to wander in my concentration." He admitted, "I think I fell asleep briefly for one point." He explained it was during the portion of Gadberry's testimony "where she was — they were trying to determine the screen and whether or not — how it was removed." The court asked the juror if closing the blinds would be helpful to him and he said yes. The court also took into consideration the juror's request that the fan be moved.

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[20] Because a statement is testimonial only if it is both sufficiently formal *and* produced for the requisite primary purpose (*Dungo, supra,* 55 Cal.4th at p. 619; *Lopez, supra,* 55 Cal.4th at pp. 581-582), we need not address the formality question.

[*] See footnote, *ante*, page 1.

Subsequently, during Ogan's testimony, the court, out of the jury's presence, stated it had received information about Juror No. 118 from Deputy Wolfe, who was assigned to appellant's courtroom during jury selection but was not assigned to the courtroom at the time. Wolfe told the court that Juror No. 118 had made contact with him that day and the day before. The court told counsel it was "concerned that somehow (Juror No. 118) may have established some affinity with Deputy Wolfe, and it leads to a concern that he may lean one way or the other because of these interactions which appear to be odd at best." The court stated it intended to discuss the matter with Juror No. 118 but it was inclined not to allow him to remain a juror "given the fact that he slept during previous testimony, that he's already had improper contact with Christopher Bowen, and now he's had two days worth of contact with Deputy Wolfe . . . ."

Deputy Wolfe told the court under oath that Juror No. 118 approached him the day before at a coffee shop. Juror No. 118 was standing in line directly behind the deputy and said, "I recognize you from before. You're a good bailiff. We miss you in there. I have a question to ask you." Deputy Wolfe told the juror he could not answer any questions, he was on his lunch break, and Juror No. 118 needed to leave. A similar encounter occurred the next day. Juror No. 118 approached Wolfe at a table in the same coffee shop and said, "Hey, I need to ask you a question. Can I raise my hand and ask questions during the trial?" Wolfe told the juror he could not answer the question and the juror should ask his question to the bailiff in the courtroom. Juror No. 118 was summoned to the courtroom and asked to explain the contact he had with Deputy Wolfe on the day before and on that day. Juror No. 118 said on the day before he made brief "chitchat" with Deputy Wolfe, telling the deputy he was "a funny bailiff." The juror said that the next day (the day of the hearing) he asked Wolfe what was the proper procedure to follow if a juror had a question.

After the questioning, defense counsel argued the juror should not be discharged because "the contacts were relatively innocuous." The prosecutor deferred to the trial court on whether to discharge the juror. The court decided to discharge Juror No. 118, reasoning: "I am very concerned about (Juror No. 118) in the sense that the court has

already had several conversations with him—well, with the panel as a whole regarding not to have contact with parties involved in this matter. So that's the one concern. [¶] But we have had him here before because he's been asleep, which he admitted. And he admitted he was sleeping because he didn't find some testimony to be, quote, unquote, germane, which as we all know is certainly not a decision he can make at this particular point. He's required to listen to all the testimony. [¶] Secondly, Mr. Bowen reported contact by (Juror No. 118) with him at the end of the day at the conclusion of Ms. Gadberry's testimony. [¶] And now there are two contacts, yesterday and today, with Deputy Wolfe who is not assigned to this department, who is currently in trial in Department 12 as the assigned bailiff there, and whose version of the contact is somewhat different from (Juror No. 118's). I do credit Deputy Wolfe's description of the contact. [¶] And my concern is, is that somehow (Juror No. 118) may have some alignment with Deputy Wolfe which could be a concern as a deliberating juror in this matter. [¶] So I understand, [defense counsel], that you think he should sit. And I understand, [prosecutor], you will just submit it to the court, but it's my intention, given the totality of the circumstances before me, to excuse him."

The court also directed the bailiff to dispose of the juror's trial notebook, stating, "And for the record, Deputy Moreno is going to be disposing of this notebook, because repeatedly during this trial — and I don't know if counsel have noticed it — he has had the notebook in his mouth. [¶] . . . [¶] And using it in some very bizarre gestures. And so that notebook is being disposed of as we speak."

B. *Analysis*

Penal Code section 1089 authorizes the trial court to discharge a juror at any time before or after the final submission of the case to the jury if, upon good cause, the juror "is found to be unable to perform his or her duty." (See also Code Civ. Proc., § 233 [trial court may order discharge of juror who is unable to perform his or her duty].) A juror's inability to perform as a juror " ' " 'must appear in the record as a demonstrable reality.' " [Citation.]' [Citation.]" (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.) The trial court's ruling is reviewed for abuse of discretion. (*Ibid.*)

In *People v. Bonilla* (2007) 41 Cal.4th 313 (*Bonilla*), the Supreme Court indicated that sleeping during trial may constitute good cause to discharge a juror. There, one juror submitted a note advising the court that, "due to an extended night shift work schedule, he had 'drifted off to sleep a couple of times this past week.' " (*Id.* at p. 350) The court had not observed the juror sleeping. (*Id.* at p. 351.) On further inquiry, the juror informed the court and counsel that he did not think he had missed any testimony because he caught himself when he started to nod off. (*Ibid.*) The trial court declined to discharge the juror, but it did discharge another juror based on testimony from defense witnesses that they had seen the other juror sleeping. (*Id.* at p. 352.) *Bonilla* indicated that discharge of the juror who had been witnessed sleeping was "supported by the evidence." (*Id.* at p. 350.)

In the present case, during the testimony of Gadberry, the key witness, the trial court observed Juror No. 118 "perpetually yawning and facing his chair away from the witness," and "several times" the court caught him "with his eyes closed . . . on crucial testimony." (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1349 [juror inattentiveness is generally not a basis for new trial motion " 'in the absence of convincing proof that the jurors were actually asleep during material portions of the trial. [Citations.]' [Citation.]"].) Although the court did not immediately decide to discharge the juror due to his inattentiveness, his inattentiveness during Gadberry's testimony provides sufficient support for the court's discretionary decision to discharge the juror. In light of that conclusion, we need not decide whether the juror's contacts with Deputy Wolfe separately support the implied finding that Juror No. 118 was unable to perform his duty.

V. *The Trial Court Did Not Err in Excluding Certain Impeachment Evidence*[*]

Appellant contends that the trial court violated his constitutional right to present a defense by excluding "relevant impeachment evidence regarding crucial prosecution witness" Gadberry. We reject the claim.

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[*] See footnote, *ante*, page 1.

A. *Background*

During defense counsel's cross-examination of Richardson, the trial court sustained relevance objections to a number of questions intended to impeach Gadberry's credibility. Counsel asked who was the more controlling and more mature person in Gadberry and appellant's relationship, and counsel asked if Richardson had an opinion about Gadberry's reputation for honesty. Outside the jury's presence, defense counsel argued that Gadberry, by testifying about appellant's "violence and his sexual depravity,"[21] had "put into issue the question of who was controlling that relationship." Counsel also said Richardson had seen Gadberry "acting in the role of prostitution" on another occasion, which would impeach Gadberry's credibility because prostitution is a crime of moral turpitude.

Defense counsel made an offer of proof. Richardson would testify she saw Gadberry late at night in an area known for prostitution. Another witness would testify that on at least two occasions Gadberry was seen on a street corner in Fairfield in an area known for prostitution. They would also testify Gadberry had a reputation for dishonesty. Richardson would testify Gadberry told a man she had "used" him after she had sex with him. Finally, Richardson would testify Gadberry was the more mature and controlling person in her relationship with appellant, and that appellant would go to a shoe store where Gadberry worked "and simply sit there and watch her while she worked for hours on end on multiple occasions."

The court ruled that much of the proffered evidence was inadmissible hearsay. Furthermore, the proffered evidence was more prejudicial than probative, it was time-consuming, and it had the potential to confuse the jury. However, the court would allow evidence that Gadberry was present late at night in an area known for prostitution.

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[21] Gadberry testified she went along with the plan to rob a customer from El Rodeo because she wanted to stop appellant from abusing her. Appellant beat her because she would not agree to rob her ex-boyfriends. He hit her with his fist and sticks. She received bruises to her legs and black eyes once or twice a month from 2004 to 2005. She also testified that appellant made her put a screwdriver into her vagina.

Subsequently, Richardson testified on questioning by defense counsel that she saw Gadberry late one night in approximately March 2005 standing in an area known for prostitution. Richardson asked her what she was doing there and Gadberry replied that she was waiting for her aunt to get off work, but Gadberry did not have an aunt working in that area.

Later, after all the witnesses had testified, defense counsel offered into evidence a letter purportedly written by Gadberry and found by the bailiff in a magazine possessed by Gadberry around the time of her testimony. Counsel argued that the letter, addressed to someone other than appellant, showed that Gadberry had "moved on to another paramour of interest other than" appellant. Counsel argued the letter would impeach Gadberry's testimony she still had personal feelings for appellant. The prosecutor argued the fact that Gadberry may be in a relationship with another person four years after her relationship with appellant was not relevant to her credibility. The court largely excluded the proffered evidence, reasoning: "I do think it's relevant in terms of her credibility that she wrote a letter and placed it in a magazine, which is in violation of jail policy. That impacts on her credibility. [¶] Whether or not she has moved on in her relationship . . .[,] I don't think that's relevant for purposes of this hearing. But I do think the fact of the letter is relevant. [¶] So if the two of you can prepare a stipulation to that effect, that will be admitted." The parties cite to nothing in the record reflecting that any such stipulation was offered to the jury.

B. *Analysis*

"The principles governing the admission of evidence are well settled. Only relevant evidence is admissible [citation], 'and all relevant evidence is admissible unless excluded under the federal or California Constitutions or by statute. [Citations.]' [Citation.] 'The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.' [Citation.] In determining the credibility of a witness, the jury may consider any matter that has a tendency in reason to prove or disprove the truthfulness of his [or her] testimony at the hearing, including but not limited to: a witness's character for honesty

or veracity or their opposites; the existence or nonexistence of a bias, interest, or other motive; his [or her] attitude toward the action in which he [or she] testifies or toward the giving of testimony; and his [or her] admission of untruthfulness. [Citation.] Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach, subject to the court's discretion under Evidence Code section 352. [Citation.] . . . [¶] The trial court has broad discretion in determining the relevance of evidence. [Citation.] We review for abuse of discretion a trial court's rulings on the admissibility of evidence. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 337.)

The trial court properly exercised its discretion in permitting some but not all of the evidence proffered by the defense to impeach Gadberry. The court allowed the defense to introduce Richardson's testimony that she saw Gadberry possibly engaged in soliciting customers for prostitution, as well as a stipulation that Gadberry had violated jail policy with respect to letters. The court properly concluded that other evidence was irrelevant, including that Richardson thought Gadberry was more dominant and mature, that Gadberry said she had "used" a man with whom she had sex, that appellant watched Gadberry as she worked, and that Gadberry had moved on to another romantic interest. Even if this and other proffered evidence had some minimal relevance, the court properly excluded the evidence under Evidence Code section 352, because it could reasonably have concluded that any minimal probative value was outweighed by the possibility of jury confusion and excessive consumption of time. On appeal, appellant fails to demonstrate error with respect to any specific piece of proffered impeachment evidence.

In sum, the trial court did not abuse its discretion in its rulings regarding the proffered Gadberry impeachment evidence. Moreover, the trial court's proper exercise of its discretion did not impermissibly infringe on appellant's right to present a defense. (*People v. Lucas* (1995) 12 Cal.4th 415, 464.)

DISPOSITION

The convictions for murder and robbery are reversed; the conviction for burglary is affirmed. The matter is remanded for resentencing and further proceedings consistent with this opinion.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.

Contra Costa County Superior Court No. 05-051785-4, Theresa J. Canepa, Judge

J. Frank McCabe, under appointment by the Court of Appeal, for Defendant and Appellant.

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