Court of Appeal, Fourth District, Division 1, California.
The PEOPLE, Plaintiff and Respondent,
v.
Mon SMANN, Defendant and Appellant.
No. D045166.
(Super.Ct.No. SCD131901).
April 25, 2006.

APPEAL from a judgment of the Superior Court of San Diego County, Gale E. Kaneshiro, Judge. Affirmed in part; reversed in part.
Office of the State Attorney General, San Diego, CA, for Plaintiff and Respondent.
Kimberly J. Grove, Ligonier, PA, for Defendant and Appellant.

McDONALD, Acting P.J.
*1 Mon Smann appeals a judgment entered after a jury, in a new trial following our reversal of the judgment entered after his first trial, found him guilty of two counts of first degree murder (Pen.Code, § 187, subd. (a)) [FN1] and one count of conspiracy to commit murder (§ 182, subd. (a)(1)). Smann contends the trial court erred by: (1) excluding defense evidence of third party culpability; (2) restricting the testimonies of his expert witnesses; (3) preinstructing the jury on only prosecution theories; and (4) imposing a fine pursuant to section 1202.45.

FN1. All statutory references are to the Penal Code, unless otherwise specified.

FACTUAL AND PROCEDURAL BACKGROUND

At about 1:00 a.m. on February 2, 1992, several gunshots were heard near Morse High School in San Diego. At about 6:30 a.m., the bodies of Chang Lee, age 16, and Sisouphanh Kamphila, age 18, were found prone in the grass on the grounds of Morse High School. Both victims had been shot below their right ears and in other places in their upper bodies and heads. [FN2] A piece of yellow cloth was tied around Lee's neck, on which was a ligature mark. Several .25-caliber shell casings were recovered from the area.

FN2. Lee had been shot four times and Kamphila had been shot five times.

Kamphila's brother, Khio, had last seen Kamphila about 6:00 or 7:00 p.m. the previous evening when Kamphila left home in Lee's black Toyota Supra. Shortly after they left, Smann, a friend of Lee and Kamphila, came to Kamphila's house looking for him. Khio was unable to tell Smann where Lee and Kamphila had gone.
Lee's black Toyota Supra was found abandoned in Hollywood Park, four or five miles from Morse High School and about one mile from Smann's home. A pack of Marlboro cigarettes and an opened bag of sunflower seeds were found in its front seat. The car's

stereo, amplifier, and speakers were missing. Police found Douer Son's fingerprint on the exterior of the passenger window, but did not find any of Smann's fingerprints on the car. [FN3]

FN3. Douer Son lived in the same apartment complex as Smann.

In early February, Smann traded a .25-caliber gun to Orsbuin "Killer" Young, Sokha Chit, and Phaetra Khvann for a sound amplifier. On February 7, Young was arrested and charged with illegal possession of that handgun, which was later determined to be the gun used to kill Kamphila (and presumably Lee).
In April, Smann was found in possession of sound equipment taken from Lee's car. Employees of Alpha Sonik were asked by some individuals to install some stereo equipment in a white Toyota. The employees recognized they had previously installed the same equipment in Lee's black Toyota Supra. An employee who knew Lee's family and knew Lee had been killed informed his supervisor of the situation; the supervisor then called Lee's sister, Chou. Chou called police, drove to Alpha Sonik, and parked across the street. Chou saw Smann and Son with the white Toyota. Police later stopped the white Toyota after it left Alpha Sonik and questioned its occupants: Smann, Sopheap Keo, and Narith Sok. An officer photographed an amplifier and AM/FM CD player that had been installed in the car. Subsequently, three items of audio equipment were removed from Smann's white Toyota: a Rockford Fosgate Punch 150 amplifier, a Radion electronic crossover, and a custom speaker box. [FN4] Two fingerprints taken from the speaker box matched Smann's. Two employees of Alpha Sonik identified all three items as ones they had installed in Lee's car.

FN4. At trial, Khvann testified that in February 1992 (on a day *after* his February 3rd birthday) he, Chit, and Young traded a Rockford Fosgate Punch 150 amplifier to Smann for a .25-caliber gun, apparently the one later found in Young's possession and determined to have been used in the killing of Kamphila.

*2 Eight years later, in April 2000, Smann was taken into custody in Cambodia and brought back to San Diego, where he was interviewed by officers. During his first interview, Smann initially denied being involved in the killings of Lee and Kamphila, stating he was at home the night of the incident. [FN5] After the officers suggested that a robbery at the home of Smann's parents may have been a motive for his involvement in the killings, Smann eventually admitted he participated in the killings of Lee and Kamphila because they had robbed his parents' home and stolen his car. Smann stated it was Douer Son who had planned to kill Lee and Kamphila and "pushed" him into helping in the killings. Smann told the officers that the night of February 1, 1992, he drove Lee's car with Kamphila in the front passenger seat and Son and Lee in the backseat. Son told Smann to stop the car and stated in Cambodian, "Let's do it." [FN6] Smann admitted holding Lee and then Son shot Lee. Smann also admitted he had tried to choke Lee by placing a cord around Lee's neck, but was unsuccessful in strangling him. Smann stated Son shot Kamphila after he (Son) shot Lee. Smann and Son left in Lee's car. Son and his

brother removed stereo equipment from Lee's car and gave it to Smann. Son told Smann to keep the gun. Smann stated he later traded the gun to Chit for an amplifier.

FN5. An audiotape of that interview was played for the jury at trial. A transcript of the interview also was admitted in evidence.

FN6. Apparently, only Smann and Son understood Cambodian.

The following day the officers interviewed Smann a second time. [FN7] Smann repeated it was Son's idea to kill Lee and Kamphila. Smann told the officers he was mad at Lee because Kamphila told him Lee might know something about the robbery of his parents' home. Son was angry at Kamphila because Son's brother owed him (Kamphila) money. Son and another person had planned to kill Kamphila, but Son asked Smann to help and Smann agreed to do so. Smann admitted he grabbed Lee by the neck and demanded that Lee tell him who robbed his parents' home. When Lee told Smann he did not know and ran away, Son shot Lee. Smann told the officers he only wanted to question Lee about the robbery, but admitted he knew Son wanted to kill Lee and Kamphila.

FN7. A videotape of the second interview was played for the jury at trial. A transcript of that interview also was admitted in evidence.

An information charged Smann with two counts of first degree murder (§ 187, subd. (a)) and one count of conspiracy to commit murder (§ 182, subd. (a)(1)). The information also alleged Smann was armed with a firearm during the commission of the murders (§ 12022, subd. (a)(1)) and alleged the special circumstance of multiple murders (§ 190.2, subd. (a)(3)).

On May 3, 2001, a jury returned verdicts finding Smann guilty on all counts and finding true the allegations. On appeal, we reversed Smann's convictions on the ground the trial court prejudicially erred by excluding certain defense evidence of third party culpability. (*People v. Smann* (Nov. 21, 2002, D038219) [nonpub. opn.], pp. 35-36.)

After remittitur of the case, a new trial judge was assigned for all purposes. At Smann's new trial, the prosecution presented evidence substantially as described *ante.* The prosecution also presented the testimonies of two witnesses who stated Smann had said he had killed the two boys. Huch Yun testified he was a close friend of Smann. In 1992 Smann told him his (Smann's) parents' home had been robbed Halloween night and two boys, a Laotian and a Hmong, had stolen tires and some jewelry. [FN8] Smann threatened to kill whoever had robbed his parents' home. Smann later told Yun he had killed the two boys. Sopheap Keo testified he was Smann's friend and overhead Smann tell others about the robbery of his home and that he suspected two of his friends had committed the robbery. Keo later heard Smann tell others at school that he had killed the two boys, but Keo assumed Smann was joking because he was laughing.

FN8. Lee was Hmong and Kamphila was Laotian.

*3 Smann testified in his defense and denied any involvement in the killings. He denied telling anyone he had killed Lee and Kamphila. Smann also testified regarding his personal background. He was born in Cambodia in 1971. When the Vietnamese occupied Cambodia, life for Smann and his family was difficult. They were forced to work and had little or no food. Smann saw Cambodians being beaten and tortured. In 1979 Smann and his family fled Cambodia, walking and running through jungles for two weeks before reaching Thailand. They lived in refugee camps there until 1985, when they ultimately relocated to the United States (after a six- or seven-month stay in the Philippines). Smann attended high school in San Diego, graduating in 1991. In 1992 he lived with his mother, father, and sisters in a two-bedroom apartment. He did not smoke or eat sunflower seeds. Neither he nor his parents owned a handgun. At the time of the incident, he drove a white Toyota Supra. In 1995 he went to Cambodia to visit his grandmother. Although he had planned to stay only as long as his ill grandmother needed care, he remained in Cambodia after she died. He eventually married a Cambodian woman and they had a son. In 2000 he was arrested by Cambodian officers and taken to San Diego, suffering on arrival from jet lag and illness because of the 30-hour trip. He was then interrogated by San Diego police, despite his statement that he needed to sleep.

Also in his defense, Smann presented the testimony of one witness in support of his theory of third party culpability, but the trial court excluded the testimonies of other defense witnesses regarding third party culpability. Smann also challenged the reliability of his confessions to police by presenting the testimonies of two expert witnesses.

On July 21, 2004, the jury returned verdicts finding Smann guilty on all charged counts and finding true the allegations. On September 17, the trial court sentenced Smann to two consecutive terms of life without the possibility of parole on the murder counts, plus one year for the firearm enhancement. [FN9] The court also imposed a number of fines, including a $400 fine pursuant to section 1202.45, which was suspended unless Smann's parole was revoked.

FN9. Pursuant to section 654, the trial court stayed execution of its sentence of life without the possibility of parole for Smann's conviction on the conspiracy count.

Smann timely filed a notice of appeal.

DISCUSSION

I

Defense Evidence of Third Party Culpability

Smann contends the trial court erred by excluding the testimonies of six defense witnesses in support of his defense theory of third party culpability. That theory apparently was that Young and some of his friends (e.g., Chit and Khvann) killed Lee and Kamphila.

A

At Smann's *first* trial, the trial court excluded the testimonies of all seven witnesses he offered to support his theory of third party culpability, despite its finding Young was unavailable as a witness because he (Young) invoked his Fifth Amendment right not to incriminate himself. On Smann's appeal after that first trial, we concluded the trial court

abused its discretion by excluding the testimony of Marie Merrick, Young's former girlfriend, but that it properly exercised its discretion by excluding the testimonies of Chou Lee, Sai Lee, Samon Pen, Benito Gonzalez, Gonzalez's son (also named Benito), and Jesse Hendrick. (*People v. Smann, supra,* D038219 at pp. 32-35.)
*4 At Smann's *new* trial, Smann again moved in limine to present the testimonies of the same seven witnesses in support of his theory of third party culpability. Smann apparently submitted the issue based on the record and offers of proof he made at the first trial. Accordingly, we summarize the offers of proof Smann made at his first trial. [FN10] Smann proffered that Merrick would testify she was Young's girlfriend at the time of the killings and Young told her he had killed two persons by shooting them in the head, execution-style. [FN11] She also would testify that Young told her he knew the gun in his possession when he was arrested a few days later had been used in the killings.

FN10. On July 18, 2005, we granted Smann's unopposed motion to take judicial notice of the record in *People v. Smann, supra,* D038219.

FN11. Although at Smann's new trial Merrick was known as Marie Merrick Valecruz, for purposes of clarity we refer to her in this opinion as Merrick.

Chou Lee would testify Young told her he knew who killed her brother. Young also told her he was present during the killings, but at other times denied being present. Young once told her there were three or four people present when her brother was killed. He also told her that whoever killed her brother had obtained the gun from her brother.
Sai Lee would testify Young told him there were seven or eight people present when his brother was shot. Young told him that Lee and Kamphila were shot inside a van in a parking lot at a friend's home near Morse High School and their bodies were dumped at that school. Young told him the gun was placed inside a pillowcase to muffle its sound. Young told him Lee's and Kamphila's hands were tied behind their backs and then they were shot. Young told him he (Young) did not have the power to stop the killings. Young told him "the guy who went to Cambodia" (i.e., Smann) had done the killings. Young told him the stereo was taken from Lee's car at a house near Morse High School.
Samon Pen would testify that he was in custody at juvenile hall with Young. Young told him he had been arrested while in possession of the gun used in the killings and was afraid he would be arrested for the killings. Pen would testify that he and Young agreed he (Pen) would falsely tell police that Young had obtained the gun from Smann. Although Pen initially told police that story, he later recanted.
The elder Benito Gonzalez would testify that on February 1, 1992, he saw a vehicle with two persons stopped by police in a parking lot at Hollywood Park. He saw the same vehicle in the same position in the parking lot the next day being impounded by police.
The younger Benito Gonzalez would testify that on February 2 he saw a vehicle parked in a lot at Hollywood Park. He saw its driver (its lone occupant), who was smoking a cigarette, sitting in the vehicle, and then walk away in a northerly direction. He also would testify he saw a yellow van with apparently a lizard mural or rust on it drive into the parking lot (although Smann's offer of proof was unclear as to *when* that occurred).
Jesse Hendrick would testify that he was at Hollywood Park (apparently the evening of

February 1, 1992) when he saw two groups of individuals who appeared to be Hispanics or Asians (or members of other ethnic groups) have a confrontation. There was a commotion and two individuals were tossed into a van. [FN12]

FN12. The color of that van apparently was similar to the color of a van owned by Khvann's parents.

*5 After conducting an independent analysis of the offers of proof presented at Smann's first trial and counsel's arguments at that trial, the trial court in Smann's *new* trial admitted Merrick's testimony regarding third party culpability, but declined to admit the testimonies of the other six witnesses.

B

Under the federal and California Constitutions, a criminal defendant has the right to present witnesses and other evidence in his or her defense. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *People v. Hansel* (1992) 1 Cal.4th 1211, 1219.) Pursuant to that constitutional right, a defendant may present evidence of third party culpability (i.e., that another person committed the charged offense). (*People v. Basuta* (2001) 94 Cal . App.4th 370, 386.) "To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability.... [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall* (1986) 41 Cal.3d 826, 833.) "[C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid.Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid.Code,] § 352)." (*People v.. Hall, supra,* at p. 834.) Furthermore, "[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.]" (*Ibid.*)

"Although completely excluding evidence of an accused's defense theoretically could rise to [the level of impermissibly infringing on a defendant's right to present a defense], excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.]" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103.) If a trial court erroneously excludes certain defense third party culpability evidence, but allows other defense third party culpability evidence, the proper standard of review for prejudicial error is set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, rather than the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Fudge,* at p. 1103; *People v. Bradford* (1997) 15 Cal.4th 1229, 1325; *People v. Cudjo* (1993) 6 Cal.4th 585, 611-612; *People v. Hall, supra,* 41 Cal.3d at p. 836; *People v. Adams* (2004) 115 Cal.App.4th 243, 255.) Under the *Watson* standard, it is the appellant's burden on appeal to show it is reasonably probable he or she would have

received a more favorable verdict had the erroneously excluded evidence been admitted at trial. (*People v. Watson,* at p. 836; *People v. Bradford,* at p. 1325.)

C

*6 The People assert Smann is barred by law of the case from challenging the trial court's exclusion of defense evidence of third party culpability. The People in effect argue that because we concluded in *People v. Smann, supra,* D038219, at pages 34-35, the trial court did not abuse its discretion by excluding *at Smann's first trial* the testimonies of the defense witnesses (other than Merrick), the trial court was bound by that conclusion and could not *at Smann's new trial* admit the testimonies of those six defense witnesses. The People argue our conclusion in the first appeal constituted a ruling of law necessary to the decision of the case and precluded any subsequent relitigation of that issue or decision by the trial court.

We are not persuaded by the People's assertion that the doctrine of law of the case applies in these circumstances to bar Smann's contention. The doctrine of law of the case provides that when an appellate court states a principle or rule of law necessary to its decision in a case, that principle or rule of law must be followed in subsequent proceedings in that case. (*People v. Stanley* (1995) 10 Cal.4th 764, 786.) That doctrine is exclusively concerned with issues of law, not issues of fact. (*People v. Shuey* (1975) 13 Cal.3d 835, 842, overruled on another ground as noted in *People v. Bennett* (1998) 17 Cal.4th 373, 389, fn. 5.) "[T]he law of the case doctrine is subject to an important limitation: it 'applie[s] only to *the principles of law* laid down by the court as applicable to a retrial of fact,' and 'does not embrace the facts themselves....' [Citation.] In other words, although an appellate court's legal determination constitutes the law of the case, 'upon a retrial ... that law must be applied by the trial court to the evidence presented upon the second trial.' [Citation.]" (*People v. Barragan* (2004) 32 Cal.4th 236, 246.) However, in *People v. Smann, supra,* D038219, we did *not* conclude the trial court, at the first trial, was required, *as a matter of law,* to exclude the testimonies of the six defense witnesses. On the contrary, we merely concluded the trial court did not abuse its discretion by excluding the testimonies of those witnesses. It is plausible that, had the trial court admitted the testimonies of some or all of those witnesses, we may have reached a similar conclusion: that the trial court did not abuse its discretion by admitting their testimonies. In *People v. Smann, supra,* D038219, our conclusion that the trial court did not abuse its discretion by excluding the testimonies of the six defense witnesses did *not* state a principle or rule of law necessary to our decision. Therefore, that conclusion did not constitute a principle or rule of law that must be followed in subsequent proceedings in the case. (*People v. Stanley, supra,* at p. 786.) On the contrary, the trial court was free to exercise its discretion anew, at the new trial, to either admit or exclude all or part of Smann's proffered evidence of third party culpability (other than Merrick's proffered testimony, which, per our opinion, was required to be admitted). (Evid.Code, § 353; *People v. Mattson* (1990) 50 Cal.3d 826, 849-850, superseded by statute on another ground as noted in *People v. Bolin* (1998) 18 Cal.4th 297, 315, fn. 2.)

D

*7 Assuming arguendo, as Smann asserts, the trial court erred by excluding the testimonies of the six defense witnesses, we conclude he has not carried his burden on appeal to show it is reasonably probable he would have received a more favorable verdict had their testimonies been admitted at his new trial. As the People note, Smann *was*

allowed to present the strongest, albeit not all, of his proffered evidence of third party culpability at his new trial. Smann's theory of third party culpability was that Young (apparently together with Chit and Khvann), and not he (Smann), committed the killings of Lee and Kamphila. At Smann's new trial, Merrick testified in support of that theory of third party culpability. Merrick testified she was Young's girlfriend from 1991 through 1994. She testified that Young's nickname was "Killer." [FN13] Both Chit and Khvann were Young's friends. Young ate sunflower seeds and had the habit of spitting them all over. Young smoked Marlboro cigarettes. During a conversation in the living room of his mother's home in 1992 (after February 2), Young told Merrick two boys were shot at Morse High School and showed her how they were shot. Young told her the boys were shot in the head, "execution-style." Because she was unfamiliar with that term, Young demonstrated for her how the boys were shot. He got on his knees with his feet crossed and his hands crossed behind his back. Young also told her the boys' hands were tied behind their backs. Merrick also overheard one of Young's telephone conversations during which Young mentioned one of the boys killed was named "Chang." In 1992 Young also showed her a gun that appeared similar to the one used to shoot Kamphila. Merrick also testified that Young told her he had shot two people in the head, but never told her who the victims were. On cross-examination, Merrick admitted her relationship with Young was an abusive relationship. An audiotape of Merrick's January 18, 1995 interview with district attorney investigator Robert Marquez also was admitted in evidence and played for the jury per the prosecutor's request. [FN14] During that taped interview, Merrick stated that in 1992 when she met Young, he was a member of "OBS," meaning the Oriental Boys gang. [FN15]

FN13. Merrick testified that she and Young's family always referred to Young as "Killer."

FN14. A transcript of that interview also was admitted in evidence.

FN15. Merrick also stated that Khvann's parents owned a brown Toyota van.

The trial court instructed the jury on evidence of third party culpability. [FN16] Smann's counsel also argued in closing the defense theory of third party culpability (i.e., that Young, Chit, Khvann, and possibly others, but not Smann, committed the murders of Lee and Kamphila). In particular, Smann's counsel focused on Merrick's testimony, her 1995 interview with Marquez, Young's possession on February 7, 1992, of the gun used to kill Kamphila, and Young's eating of sunflower seeds and smoking of Marlboro cigarettes, both of which items were found in Lee's abandoned car after the killings.

FN16. The court instructed: "Evidence has been presented which, if believed, may show that a person other than the defendant committed the crime of murder as charged in Counts 2 and 3. If, after consideration of this evidence alone, or together with any other evidence in this case, you have a reasonable doubt the defendant committed the crimes charged, you must find him not guilty."

Therefore, there was substantial evidence admitted to support Smann's defense theory of third party culpability. However, in finding Smann guilty, the jurors presumably found that defense theory unpersuasive or at least insufficient to create a reasonable doubt in their minds that Smann was guilty of the murders of Lee and Kamphila and conspired in the commission of those murders. The major crux of this case apparently was Smann's credibility. The jurors presumably placed great weight on Smann's two confessions to police. They viewed the videotapes of Smann's confessions. They also observed Smann's trial testimony during which he denied any involvement in the murders of Lee and Kamphila. The jurors were able to weigh and compare Smann's credibility in the conflicting stories he told during his confessions and during his trial testimony. By their verdict, the jurors found Smann's confessions truthful and his trial testimony not truthful. Smann's confessions, together with other evidence presented by the prosecution, constituted extremely strong evidence of Smann's guilt of the charged offenses. Although the admission of Smann's proffered *additional* evidence of third party culpability (i.e., the testimonies of the other six defense witnesses) presumably would have provided greater details and weight to that defense theory, we nevertheless conclude it is not reasonably probable the jury would have reached a different verdict had the trial court admitted that additional evidence of third party culpability. (*People v. Bradford, supra,* 15 Cal.4th at p. 1325; *People v. Fudge, supra,* 7 Cal.4th at pp. 1103-1104; *People v. Hall, supra,* 41 Cal.3d at p. 836; *People v. Adams, supra,* 115 Cal.App.4th at p. 255.)

II

Restrictions on Defense Expert Witness Testimony

*8 Smann contends the trial court erred by restricting the testimonies of his expert witnesses.

A

Before trial, the prosecution filed a motion in limine to limit the testimonies of Smann's proposed expert witnesses on the voluntariness of Smann's confessions. Smann opposed the prosecution's motion and sought a court ruling that his expert witnesses be allowed to testify on certain matters, including Dr. Richard Leo's opinion that his (Smann's) confessions on April 4 and 5, 2000, were coerced and Leo's opinion regarding factors that in the abstract give rise to coerced confessions. Smann also sought admission of the conclusions set forth in Dr. Ricardo Weinstein's written report and the bases for those conclusions.

The trial court granted the prosecution's motion to limit the testimonies of Smann's expert witnesses, stating:

"[N]either expert, Dr. Leo or Dr. Weinstein, will be permitted to express an opinion as to whether, in his opinion, the defendant's confession was reliable or accurate, true or false, or the defendant's state of mind, given the overall method of investigation .[¶] ... [¶]

"... I will permit Dr. Weinstein and Dr. Leo to testify as experts on the general factors affecting the issue of reliability or accuracy of confessions in an interrogative setting....

"Neither expert, again, will be permitted to express an opinion as to whether, in his opinion, defendant's confession was reliable or accurate, true or false, or the defendant's state of mind at the time of the confession, given the overall method of investigation.

"I will permit, in this matter, that hypotheticals may address the specific facts of this case,

but reference may not be made specifically to defendant or to specific pages of the transcript.
"... I want things in hypotheticals kept general without reference to Mr. Smann specifically or without reference to a specific page in the transcript.
"In this matter, Counsel, Dr. Weinstein may not address factors relating to the Cambodian culture, as he himself has indicated he is not an expert in that field. Therefore, he is incompetent to testify on the Cambodian culture, and therefore any testimony from Dr. Weinstein as it relates to Cambodian culture is irrelevant, notwithstanding what may be his, quote, 'gut feelings,' end of quote.
"Additionally, in this matter, I will not permit either Dr. Weinstein or Dr. Leo to testify whether, in [his] opinion, defendant's confession was voluntary or coerced.... Because as the Court sees the law, the Court determines whether a confession is voluntary or involuntary. If a confession is coerced, it is involuntary. The Court makes that decision. The jury does not revisit that issue.
"The Court, however, notes that Dr. Leo, in testifying [presumably at the first trial], appears to use the same factors in determining whether a statement is reliable or unreliable as when he is testifying as to whether a statement is coerced or not coerced. However, I will not permit testimony specifically addressing the words 'coerced' or 'uncoerced,' 'voluntary,' or 'involuntary.' It appears that Dr. Leo, at his last trial, was very successful in wording it otherwise. Okay. And that's because, again, the jury does not relitigate the issue, under Evidence Code section 405, whether a statement was voluntary or coerced. Therefore, it's not relevant."

B

*9 Evidence Code section 801 provides guidelines for admission of expert witness testimony:
"If a witness is testifying as an expert, his [or her] testimony in the form of an opinion is limited to such an opinion as is:
"(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
"(b) Based on matter (including his [or her] special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him [or her] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his [or her] testimony relates, unless an expert is precluded by law from using such matter as a basis for his [or her] opinion."
In general, "[a] witness is qualified to testify about a matter calling for an expert opinion if his [or her] peculiar skill, training, or experience enable [the witness] to form an opinion that will be useful to the jury." (*People v. Davis* (1965) 62 Cal.2d 791, 800.)
"The jury need not be wholly ignorant of the subject matter of the opinion in order to justify [admission of an expert opinion]; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would 'assist' the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that [people] of ordinary education could reach a conclusion as intelligently as the witness.' [Citation.]" (*People v. McDonald* (1984) 37 Cal.3d 351, 367, overruled on another

ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) Nevertheless, "an expert witness may so thoroughly educate a jury regarding applicable general principles that 'the factual issues in the case become ones that the jurors can answer as easily as the expert.' In other words, an expert's thorough description of the general principles to be applied in a given case may make additional (and more specific) expert testimony superfluous. [Citations.] In such a case, ' "[t]here is no necessity for [additional expert] evidence, and to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the [witness]." ' [Citations.]" (*People v. Page* (1991) 2 Cal.App.4th 161, 188-189 .)

"As a general rule, a trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused. [Citation.]" (*People v. Page, supra,* 2 Cal.App .4th at p. 187.)

C

Smann asserts the trial court abused its discretion by precluding his expert witnesses from testifying whether his confessions were coerced or involuntary. However, the court allowed Smann's expert witnesses to testify on general factors that affect the issue of the reliability or accuracy of confessions in an interrogative setting. At trial, Dr. Leo testified as an expert in police interrogations and confessions. He testified he had reviewed the video--and audiotapes of Smann's confessions. Dr. Leo testified about factors that may affect the reliability of confessions or other statements made during a police interrogation. He described to the jury various tactics of interrogation used by law enforcement to move an individual from denial to admission and explained a trained interrogator will convince an individual he or she is caught with no way out and offer reasons or incentives to make admissions against his or her interests. Lower level incentives include appeals to an individual's family, morals, or religious values. Systemic benefits may then be offered the individual. Finally, the highest level incentives include promises of leniency, threats of greater punishment, or threats against the individual or those persons close to him. Dr. Leo testified that those interrogation "techniques, if they're coercive or involve [a] threat or promise, might explain why somebody confessed falsely if, in fact, they confessed falsely."

*10 Because the trial court had previously made the legal determination that Smann's confessions were not coerced or involuntary and therefore were admissible in evidence, that issue was *not* before the jury for its determination. Rather, it was the jury's function to determine whether Smann's confessions were reliable and accurate. We conclude the trial court properly exercised its discretion by precluding Smann's expert witnesses from giving opinions on the legal issues of whether Smann's confessions were coerced or involuntary (or even using the terms "coerced" or "involuntary"). Because the factual issue for the jury's determination was the reliability or accuracy of Smann's confessions, the trial court could have reasonably concluded the terms "coerced" and "involuntary" were irrelevant or, even if relevant, would be misleading or confusing to the jury (and therefore excludable under Evidence Code section 352). [FN17] Dr. Leo was not precluded from testifying fully on the general factors relating to the reliability or accuracy of confessions in an interrogative setting. Because the jury was "thoroughly educated" regarding those general principles, it was in as good a position as Dr. Leo to apply those principles to the circumstances of Smann's confessions in making the ultimate factual determination of whether those confessions were reliable or accurate.

(*People v. Page, supra,* 2 Cal.App.4th at pp. 188-189.) As in *Page,* "[h]aving been educated concerning those factors, the jurors were as qualified as the [expert witness] to determine if those factors played a role in [Smann's] confession[s], and whether, given those factors, his confession [s] [were] false." (*Id.* at p. 189.) [FN18]

FN17. Evidence Code section 405 did not provide Smann with a right to present evidence on an irrelevant issue (i.e., whether Smann's confessions were coerced or involuntary). The issue of whether those confessions were coerced or involuntary was not a "preliminary fact" that also was an issue of fact for the jury's determination under Evidence Code section 405. We note Dr. Leo *was* permitted to testify on the *relevant* issues of whether those confessions were reliable or accurate.

FN18. Assuming arguendo the trial court erred by limiting Dr. Leo's testimony, we nevertheless would conclude Smann has not shown it is reasonably probable he would have received a more favorable verdict had the court not erred. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

D

Smann also asserts the trial court abused its discretion by limiting the testimony of Dr. Weinstein regarding the bases for his opinion that Smann suffered from posttraumatic stress disorder.

Smann's counsel asked Dr. Weinstein a hypothetical question:

"If Mr. Smann, at a young age, left the country of Cambodia, say, the age [of] 6, 7 or 8, traveled with his family in a life-threatening situation through forests until they arrived in Thailand; assuming further that while in Thailand there were conditions impacting upon food, sleep, employment, and assume that he was there in more than one refugee camp for over 6 years, would that indicate to you anything concerning the conclusion of posttraumatic stress?"

The trial court overruled the prosecutor's objection to that question and then instructed the jury regarding hypothetical questions:

"In examining an expert witness, Counsel may ask a hypothetical question. This is a question in which the witness is asked to assume the truth of a set of facts and to give an opinion based on that assumption. In permitting this type of question, the Court does not rule and does not necessarily find that all the assumed facts have been proved. It only determines that those assumed facts are within the possible range of the evidence. It is for you to decide, from all the evidence, whether or not the facts assumed in a hypothetical question have been proved. If you should decide that any assumption in a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumed facts."

*11 Dr. Weinstein then answered the hypothetical question:

"Individuals that experience war, particularly children, individuals that experience escaping, seeing dead bodies, that suffer hunger, that live in very difficult circumstances, often--about, if I'm not mistaken, about 35 percent of the individuals exposed to that can be diagnosed with posttraumatic stress disorder. So it is a relatively high percentage of individuals that suffer this disease that have been exposed to circumstances similar to

what the hypothetical [question] described."
Dr. Weinstein then stated that he diagnosed Smann with posttraumatic stress disorder. He explained he "took ... a clinical history of Mr. Smann, and he provided information similar to the one that you provided in the hypothetical." The trial court sustained the prosecutor's *hearsay* objection to that last statement, instructing the jury:
"The Court has admitted evidence of the testimony of an expert in this case regarding statements made by [Smann] in the course of an examination of [Smann] which was made for the purposes of diagnosis. These statements may be considered by you only for the limited purpose of showing the information upon which the expert based his [or her] opinion.... This testimony is not to be considered by you as evidence of the truth of the facts disclosed by the defendant's statements to the expert."
After giving that limiting instruction, the court stated it allowed Dr. Weinstein's answer to remain.
However, the trial court sustained the prosecutor's objection to the next question asked by Smann's counsel referring to a paragraph of Dr. Weinstein's report with the heading, "The family." The court confirmed that it was precluding "[a]t this point" any history received by Dr. Weinstein. Dr. Weinstein then testified regarding the meaning of a posttraumatic stress disorder diagnosis.
We are not persuaded by Smann's assertion that the trial court abused its discretion by limiting Dr. Weinstein's testimony regarding the bases for his opinion that Smann suffered from posttraumatic stress. In compliance with Evidence Code section 802, the court *did* allow Dr. Weinstein to testify on what information he considered in forming that opinion. [FN19] It allowed him to testify he relied on Smann's clinical history, including information given him by Smann. However, the trial court properly exercised its discretion to preclude Dr. Weinstein from presenting inadmissible hearsay (i.e., Smann's statements to him) even though it was a basis for his opinion. (*People v. Price* (1991) 1 Cal.4th 324, 416; *People v. Coleman* (1985) 38 Cal.3d 69, 91- 93; *People v. Nicolaus* (1991) 54 Cal.3d 551, 582-583.) As *Price* stated: "On direct examination, an expert may give the reasons for an opinion, including the materials the expert considered in forming the opinion, but an expert may not under the guise of stating reasons for an opinion bring before the jury incompetent hearsay evidence." (*People v. Price,* at p. 416.) While an expert may testify regarding the matters on which he or she relied in forming an opinion, that expert may not testify regarding the details of those matters if they are otherwise inadmissible (e.g., inadmissible hearsay). (*People v. Coleman, supra,* at p. 92.) Although, as Smann suggests, a limiting instruction may cure the prejudicial effect of admitting such hearsay evidence, in aggravating situations such an instruction may not be sufficient to cure the prejudicial effect. (*Ibid.*) In the circumstances of this case, we cannot conclude the trial court abused its discretion by excluding Dr. Weinstein's hearsay testimony rather than admitting it and giving a limiting instruction. [FN20]

FN19. Evidence Code section 802 provides: "*A witness testifying in the form of an opinion may state* on direct examination the reasons for his [or her] opinion and *the matter* (including, in the case of an expert, his [or her] special knowledge, skill, experience, training, and education) *upon which it is based,* unless he [or she] is precluded by law from using such reasons or matter as a basis for his [or her] opinion...."

FN20. Assuming arguendo the trial court erred by so limiting Dr. Weinstein's testimony, we nevertheless would conclude Smann has not shown it is reasonably probable he would have received a more favorable verdict had the court not erred. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) It is doubtful any error was prejudicial, particularly because Smann testified at trial regarding his personal history and that history presumably was substantially the same history he presented during his clinical interview with Dr. Weinstein. Furthermore, Smann's trial testimony presumably provided support for each of the underlying factual assumptions presented in the hypothetical question posed to, and answered by, Dr. Weinstein.

III

Preinstructions

*12 Smann contends the trial court erred by preinstructing the jury on only the prosecution's theories of first degree murder and conspiracy and by refusing his request for preinstructions on the lesser included offenses of second degree murder and voluntary manslaughter. In refusing Smann's request, the trial court explained to counsel that it would give preinstructions only on the charged offenses of first degree murder and conspiracy to commit murder, which the prosecution was required to prove at trial, and would then "see where the evidence develops" before instructing the jury on lesser included offenses.

The trial court preinstructed the jury that its "preliminary instructions" would assist the jury in weighing the evidence and that "[a]ll of the law, whether I give it to you now or at the completion of the case, are equally important." It then instructed:

"If I repeat my instructions, any principles or directions in varying ways, no emphasis is intended by me and none should be inferred by you. [¶] Additionally, *the fact that I give you some instructions now and some at the completion of the evidence in this matter should not influence you. All of the instructions are to be considered as a whole and all are of equal importance.*" (Italics added.)

Despite its prior ruling, the trial court preinstructed the jury on conspiracy to commit murder and first degree murder and *generally* on *second degree murder.* The court instructed that murder that was the result of deliberation and premeditation was murder of the first degree and described the meaning of the terms "deliberation" and "premeditation." The trial court then preinstructed *generally* on second degree murder: "Murder in the second degree is also the unlawful killing of a human being with malice aforethought, when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation." [FN21]

FN21. That general instruction on second degree murder was based on CALJIC No. 8.30. However, the trial court did not preinstruct with CALJIC No. 8.31, which sets forth the specific elements of second degree murder.

Based on the record in this case, we conclude the trial court did not abuse its discretion in preinstructing the jury. Under section 1093, subdivision (f), the court had discretion as to when to instruct the jury. [FN22] (*People v. Chung* (1997) 57 Cal.App.4th 755, 758-760; *People v. Valenzuela* (1977) 76 Cal.App.3d 218, 221; *People v. Webb* (1967) 66 Cal.2d

107, 128.) The court reasonably exercised its discretion by preinstructing the jury only on the prosecution's charges and not specifically on Smann's theories of lesser included offenses (i.e., second degree murder and voluntary manslaughter). Until there had been sufficient evidence presented at trial to support instructions on those lesser included offenses, the court reasonably declined to specifically instruct on them. (See generally *People v. Breverman* (1998) 19 Cal.4th 142, 154, 162; *People v. Barton* (1995) 12 Cal.4th 186, 197-201.) In this case, Smann did not present *any* evidence at trial to support a defense theory of voluntary manslaughter as a lesser included offense. Accordingly, the trial court (in retrospect, wisely) chose not to preinstruct on that lesser included offense. Regarding the lesser included offense of second degree murder, the court preinstructed on first degree murder and *generally* on second degree murder, thereby allowing the jury to understand at the outset of the trial the basic distinction between first degree and second degree murder. At the end of the trial, the court fully instructed on both first degree and second degree murder. When those preinstructions and the court's closing instructions are considered with its other instructions, including its instruction that "[a]ll of the instructions are to be considered as a whole and all are of equal importance," we conclude the jury could not have placed greater emphasis on the court's preinstructions or been more inclined to focus on the prosecution's case. In any event, Smann does not carry his burden on appeal to show it is reasonably probable he would have received a more favorable verdict had the trial court preinstructed specifically on the lesser included offenses of second degree murder and voluntary manslaughter. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

FN22. Section 1093, subdivision (f) provides in pertinent part: "At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case...."

IV

The Section 1202.45 Fine

*13 Smann contends, and the People agree, the trial court erred by imposing a $400 restitution fine pursuant to section 1202.45. When Smann was sentenced in 2004, section 1202.45 provided: "In every case where a person is convicted of a crime *and whose sentence includes a period of parole,* the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional restitution fine shall be suspended unless the person's parole is revoked." (Italics added.) Because the trial court sentenced Smann to two consecutive life terms *without the possibility of parole,* plus one year, section 1202.45 is inapplicable. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183-1186.) Accordingly, the $400 parole revocation restitution fine imposed by the court under that statute must be reversed.

DISPOSITION

The $400 restitution fine imposed pursuant to section 1202.45 is reversed; in all other respects, the judgment is affirmed.

WE CONCUR: McINTYRE and AARON, JJ.

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Not Reported in Cal.Rptr.3d, 2006 WL 1075228 (Cal.App. 4 Dist.) Not Officially Published, (Cal. Rules of Court, Rules 976, 977)
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