APL-2018-00055

To be argued by
PAUL SKIP LAISURE
(15 minutes)

Court of Appeals

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

RONG HE,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

By permission of the Honorable Priscilla Hall, Justice of the Appellate Division, Second Department, granted March 2, 2018, appellant Rong He appeals from an order of the Appellate Division, Second Department, entered December 27, 2017, affirming a judgment of the Supreme Court, Kings County, rendered on October 7, 2013, convicting him, after a jury trial, of assault in the second degree (P.L. § 120.05(1)[two counts]) and criminal possession of a weapon in the fourth degree (P.L. § 265.01(2)), and sentencing him to consecutive determinate prison terms of 7 and 4 years on the assault counts to be served concurrently with a term of 1 year on the weapon count.

On April 26, 2018, this Court granted appellant poor person relief and assigned Paul Skip Laisure as counsel on this appeal. Following submissions pursuant to Rule 500.11, on September 4, 2018, the Court terminated its review

by alternative procedure and ordered briefing and argument in the normal course. No stay has been sought. Appellant is currently incarcerated pursuant to the judgment.

This Court has jurisdiction pursuant to C.P.L. § 450.90(1) to entertain this appeal and review the issues raised. The issue raised in Point I was preserved by defense counsel's timely and repeated demands for the contact information of witnesses who had made exculpatory statements in redacted police reports disclosed to the defense. The issue raised in Point II was preserved by defense counsel's specific argument against attenuation and citation to authority relied upon on appeal.

QUESTIONS PRESENTED

1. Whether appellant, who was prosecuted on the theory that he acted alone when he allegedly stabbed two total strangers in a Brooklyn nightclub, was deprived of his due process right to a fair trial by the People's refusal to disclose contact information that would have allowed counsel to interview multiple eyewitnesses, including the nightclub owner who did not testify at trial but who told the police on the night of the crime that two regular customers, not appellant, attacked the complainants.

2. Whether appellant's statements to the police were the fruit of unlawful, flagrant police misconduct unattenuated by any intervening event that would purge its taint, and should have been suppressed.

SUMMARY OF ARGUMENT

I

The prosecution is constitutionally obligated to disclose to the defense "evidence favorable to the accused" when it is "material either to guilt or to punishment." Brady v. Maryland, 373 U.S. 83, 87 (1963). Brady material includes "even the means of obtaining evidence" and "leads" to "relevant evidence." United States v. Bowles, 488 F.2d 1307, 1313 (D.C. Cir. 1973); accord United States v. Rodriguez, 496 F.3d 221, 226 (2d Cir. 2007). In People v. Andre W., 44 N.Y.2d 179, 186 (1978), this Court recognized that the People's Brady obligations encompass the "right of a defendant to discover a potentially material witness," including contact information for material witnesses.

In this case, at least two witnesses gave the police statements that conflicted with the testimony given by the People's witnesses at trial. One witness, the nightclub owner, said that two men he recognized as regular customers, one of whom he knew by name, but neither of whom was appellant Rong He, had committed the assault. At least one other witness also indicated that two men were involved in the assault. Because the People's lone eyewitness at trial, one of the complainants, identified Mr. He as his sole attacker, these contradictory statements unquestionably constituted Brady material. Defense counsel specifically requested the contact information for those witnesses. Invoking a

general policy about concerns for the safety of witnesses, the prosecutor refused to disclose the contact information. She continued to refuse to disclose that information even when counsel, as an officer of the court, assured the prosecutor that he would not disclose that information to his client.

The People's argument in the trial court that their complete refusal to disclose Brady witness contact information was justified by concerns about the safety of their eyewitnesses as a class was unfounded. While this Court noted in Andre W. that a hearing with respect to potential harm to a particular witness might be in order, broad concerns about the safety of eyewitnesses in general cannot prevent the defendant from being able to obtain information that could raise a reasonable doubt about his guilt. The People never suggested, during their repeated refusals to disclose the contact information, that Mr. He or anyone associated with him had ever threatened, or posed a danger to, anyone, much less the witnesses in question.

Had any such showing been made, and a danger associated with disclosure established, there is no reason to believe it could not have been alleviated by a protective order requiring that defense counsel keep the witness contact information confidential and "not to divulge it to the defendant himself." The imposition of such a protective order would have permitted the People to fulfill their obligation to disclose the means for investigating exculpatory witness

information without the risk of whatever purported inchoate harm the disclosure to the defendant himself might otherwise present. See Commonwealth v. Teixeira, 475 Mass. 482 (2016).

The People's offer to contact the witnesses on defense counsel's behalf, and ask them if they wished to speak to defense counsel was not an adequate substitute for the defendant's constitutional right to exculpatory information within the control of the People. The People have an obligation to disclose exculpatory information, and the means to obtain it, unfettered by prosecutorial intervention. Because permitting such intervention would undermine the purposes of Brady by making it more difficult for the defense to conduct an independent investigation and to secure witness cooperation, counsel was constitutionally entitled to demand full Brady compliance and not settle for an inadequate substitute.

Under the New York rule, when, as here, there has been a specific demand, prejudice and materiality are established if there is a "reasonable possibility" that, had the favorable information been timely disclosed, the result of the trial would have been different. People v. Vilardi, 76 N.Y.2d 67, 77 (1990). In Andre W., 44 N.Y.2d 179, this Court held that "some basis" to believe materially exculpating information existed was sufficient. The statements by Yan Zhao and Danny Wong provided far more than "some basis" to believe that disclosure of the

witness contact information would lead to material exculpatory evidence. Because the People's case against Mr. He was far from overwhelming — it depended on the identification of Mr. He by one witness without a good opportunity to observe and an alleged unmemorialized statement by Mr. He that conflicted with the medical evidence — there was a reasonable possibility that disclosure of the contact information would have led to a different verdict. Accordingly, the People's refusal to disclose it violated Mr. He's state and federal due process rights. U.S. Const., Amend. XIV; N.Y. Const., Art I, § 6; Brady v. Maryland, 373 U.S. 83 (1980); C.P.L.§ 240.20(1)(h).

II

The hearing court in this case ruled, in Mr. He's favor, that the police violated his rights under the state and federal constitutions not to be arrested in his home without a warrant. When the police commit such a Payton violation, any custodial statements they subsequently obtain "must be suppressed unless the taint resulting from the violation has been attenuated." People v. Harris, 77 N.Y.2d 434, 437 (1991). See also Brown v. Illinois, 422 U.S. 590, 603-604 (1975).

In New York, an accusatory instrument is needed to obtain an arrest warrant (see C.P.L. §120.10(1)), and the right to counsel attaches the moment an

accusatory instrument is filed. People v. Settles, 46 N.Y.2d 154, 161 (1978). New York right to counsel law, therefore, creates an incentive for police officers to avoid arrest warrants in order to question defendants before they are informed by their attorneys of their right to remain silent. See, generally, Harris, 77 N.Y.2d at 434, 439-440. It is therefore particularly important that New York courts adhere to a careful and thorough balancing of factors associated with Payton attenuation analysis.

A statement is attenuated from an unlawful arrest if it was "acquired by means sufficiently distinguishable from the arrest to be purged of the illegality." People v. Conyers, 68 N.Y.2d 982, 983 (1986). This Court, like the United States Supreme Court, has identified three factors that the court must consider in determining whether statements are sufficiently attenuated: (1) the temporal proximity between the statement and the illegal conduct, (2) whether a significant intervening event occurred between the statement and the illegal conduct, and (3) the purpose or flagrancy of the police misconduct. Harris, 77 N.Y.2d. at 441; People v. Martinez, 37 N.Y.2d 662, 666 (1975); Brown, 422 U.S. at 603.

In this case, the People failed to show that any of those three factors established that Mr. He's statement was attenuated from his unlawful arrest. First, the lapse of four hours accompanied by the administration of Miranda warnings was insufficient to establish attenuation in the absence of an intervening event.

Second, the unreliable showup identification, which was made possible by the unlawful arrest and was the product of that unduly suggestive procedure, was not an intervening event. Third, the arrest without probable cause in Mr. He's home for the purpose of conducting the unduly suggestive identification procedure that was meant to supply the missing probable cause constituted flagrant misconduct. Because the Appellate Division relied on an additional factor — that the officers who interrogated Mr. He at the precinct were not the ones who arrested him in his home — that has never been, or should ever be, a part of attenuation analysis, its holding that the statement was attenuated from the arrest was incorrect. Accordingly, Mr. He's statements to the police should have been suppressed. U.S. Const., Amends. IV, XIV; N.Y. Const. Art. 1, § 12; Payton v. New York, 445 U.S. 573 (1980); Wong Sun v. United States, 371 U.S. 471 (1963).

STATEMENT OF FACTS

Introduction

On February 15, 2011, the police investigated a stabbing at a Brooklyn nightclub, speaking to multiple eyewitnesses and taking down statements, but did not make any arrests. At the eventual trial, the People's lone alleged eyewitness to the incident would claim that appellant, Rong He, committed the stabbing alone. Prior to trial, the People handed over redacted versions of the original

police reports, which noted that the nightclub owner, Yan Zhao, initially told the police that he had seen two regular customers, one of whom he knew by name, commit the stabbing. A second eyewitness, Danny Wong, also told the police that two men were involved, not just one, but he did not name anyone. Defense counsel made repeated demands, on constitutional grounds, for the contact information of those witnesses.

Defense counsel explained that since the club had closed and the exculpatory witnesses had very common Asian names, the contact information in the People's possession was the only means by which he could properly investigate the case. Nevertheless, the People refused to provide the contact information of the exculpatory witnesses. The court approved the People's refusal in favor of their offer, instead, to ask those witnesses whether they wished to speak to the defense, an offer defense counsel declined.

Months after the stabbing, acting on a tip, officers arrested appellant, Rong He, at his home without a warrant, which the court ruled was a violation of Payton v. New York. A witness to the stabbing alerted Chun Zhang, one of the people injured in the stabbing, about the arrest. When Mr. Zhang arrived, the police conducted a show-up during which he identified Mr. He as his assailant. The hearing court suppressed Chun Zhang's show-up identification because it was unduly suggestive, but denied defense counsel's motion to suppress

inculpatory statements Mr. He made at the precinct later that night, relying, in large part, on the suggestive show-up as an intervening factor.

After a trial, the jury acquitted Mr. He of attempted murder and attempted first-degree assault but convicted him of two counts of second-degree assault.

The People's Refusal to Disclose *Brady* Material

On October 25, 2012, defense counsel told then-presiding Justice Ruth Shillingford that the People had given him redacted discovery materials including DD5 reports documenting statements by eyewitnesses identifying persons other than Mr. He as the perpetrators of the charged stabbing (A0039). Counsel specifically asked for the redacted contact information of the witnesses who were at the scene, explaining that it was crucial to his defense because some of the witnesses "specifically identif[ied] other people as being the perpetrators of the crime" (A0039-A0040, A0041, A0043). Counsel argued that:

> [u]nder both the US Constitution and the New York Constitution . . . my client has a right to due process [and] fundamental fairness as well as Brady and other statutory rights which entail witness contact information (A0040).

The redacted discovery was not adequate, counsel maintained, because there was no way to use it to conduct an investigation. The list of witnesses consisted of "phonetically written" common Asian names (Yan Zhao and Danny

Wong) (A0041) and, since Mr. He was arrested six months after the incident, the nightclub where the stabbing occurred was "no longer even open" (A0042).

The People took the position that the requested information was not Brady material and gave what appeared to be an office policy explanation: "We do not turn over the addresses or the phone numbers of witnesses" (A0040). The prosecutor's counter-offer was that she would contact the witnesses on defense counsel's behalf: "[We] can reach out to the witnesses and ask if they would like to speak to the defense attorney" (A0040). Defense counsel proposed that the redacted Brady material be disclosed to him under an order directing him "not to divulge it to the defendant himself" (A0041).

Justice Shillingford directed the People to do what they had proposed:

> The People are directed in accordance with what they have suggested . . . to reach out to those complaining witnesses and provide them . . . with the phone number for the attorney in this case. And if they are interested in speaking with the attorney then they can do so (A0042-A0043).

Defense counsel strenuously objected to this procedure because the defendant had a right to present a defense "in accordance with fundamental fairness to be able to do the kind of investigation that is required," unencumbered by District Attorney's office intervention. Counsel specifically argued that "access to these witnesses only through the DA's Office's sort of funnel, . . . them contacting

them and getting their permission," would violate Mr. He's due process rights (A0043-A0044).

Justice Shillingford indicated that she would reconsider her decision upon the parties' submission of papers on the question (A0045). Defense counsel repeated his arguments in a letter dated November 13, 2012 (A0008) and cited to the relevant case law. Counsel specifically requested unredacted copies of 12 pages of redacted DD5 reports that had been turned over to the defense and sought the court's in camera review of those pages.[1] He argued that they "tended to exculpate the defendant – specifically by inculpating other individuals as perpetrators of the crime, by impeaching the prosecutor's version of what had transpired, or by denying or discrediting the prosecutor's version of the events" (A0010).

The People responded in a letter dated December 21, 2012 (A0029) maintaining that the requested contact information was "not discoverable," and

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[1] The record does not disclose whether the People gave the unredacted DD5s to the court. Detectives Hemmer and Anselmo testified at trial that Anselmo's police report indicated that the club owner reported that two men attacked the complainant with beer bottles, that he intervened, that he pointed out the two men on a surveillance video, that one was possibly named Jiang Guo Dong, and that he recognized the two men as regular customers (Hemmer: A0509-A0510; Anselmo: A0527 A0537-A0539, A0554). Hemmer also testified that Danny Wong placed a 911 call stating that two men left the scene of the attack promising to return with a gun and that Detective Hemmer interviewed him (A0499, A0520-A0521)

that it was "not Brady material." They also claimed, without a proffer of any evidence that Mr. He, who was incarcerated, posed a threat to anyone, that the disclosure of addresses, dates of birth, ages, and telephone numbers would result in witnesses "being placed in immediate danger and threat of retribution" and create a "grave risk" that "a witness will be intimidated, harmed or killed" (A0034, A0036). Instead of handing over the requested information, the People offered, once again, to contact the witnesses in question themselves to "inquire as to whether that witness is willing to speak with the defense" (A0036).

On January 7, 2013, when the parties would have expected a decision, Justice Shillingford was no longer sitting in Part 10. She wrote a note to the judge in Part 10, however, stating that "the Court believes that the People's response is appropriate" (A0046). Once the note came to light before Justice William Miller, defense counsel again argued that the defense was entitled to the contact information because "[t]here's a lot of exculpatory material" and because the Asian names were rendered phonetically and the nightclub was closed (A046e). The assigned prosecutor interpreted Justice Shillingsford's note as a denial of defense counsel's Brady request, and took the position that her note to the judge who replaced her in Part 10 was a denial of defense counsel's demand for the contact information of exculpatory witnesses identified in DD-5 reports counsel had specifically identified, and that no further formal opinion was required

(A0047). Specifically, the prosecutor said "my notes indicate decision on the motion regarding disclosure," and that there would be no forthcoming written decision by Justice Shillingford, who was "now out of this process" (A0052). When Justice Miller asked, "did [Judge Shillingford] direct the People to turn over addresses?" the prosecutor said "No" (A0054).

Defense counsel attempted to relitigate the issue in front of Justice Miller arguing that the refusal to disclose the unredacted DD5s was "a violation of Brady, due process, [and] fundamental fairness" (A0050-A0051). Justice Miller declined to revisit Justice Shillingford's decision, stating that any discussion regarding Brady disclosure would have to take place in front of her (A0055-A0056).

When counsel attempted to raise this issue yet again, this time in front of Justice Ann M. Donnelly, she also declined to address it, interpreting Justice Shillingford's note as a denial of Mr. He's Brady request (A0063). Although counsel, seeking a different decision, characterized the note as "ambiguous" (A0062), Justice Donnelly cut him off, saying, "Your remedy, if there is one, is to go back before Judge Shillingford, who is the judge who made the decision (A0062 (emphasis supplied)). In the face of continued argument by defense counsel, Justice Donnelly made clear that "Justice Shillingford did not agree with you, so — she denied your application (A0063 (emphasis supplied)). Finally,

Justice Donnelly quoted Justice Shillingford's note, "The People's response is appropriate," found it unambiguous, and concluded, "I don't have any power to change what Judge Shillingford said" (A0064).

The Suppression Hearing

On August 15, 2011, six months after a stabbing at a Brooklyn bar called the "V Lounge," a police officer informed Detective John Ko that someone had called the precinct and said that the person they were looking for in connection with that incident had just entered [redacted] Street (A0094, A0095, A0109, A0119-A0120). At approximately 8:15 p.m., Detective John Papio and his partner Detective Visconti, without arrest or search warrants, went to that location and found multiple uniformed police officers already at the scene (A0095). Detective Papio walked up to the third floor, and saw Mr. He, his wife, and at least five police officers at the top of the stairs, standing outside the doorway of an apartment (A0096-A0097). Detective Moi, who did not testify at the hearing, was speaking to Mr. He in Chinese (A0097).

According to Detective Papio, he directed Mr. He to walk down the stairs and outside so the detective could conduct a showup (Papio: A0098). Mr. He complied and stood outside the building (A0098). He was handcuffed and flanked by police officers (A0099, A0100). A police car arrived and directed a

spotlight at him (Papio: A0099). One of the complainants, Chun Zhang, identified Mr. He from inside that car (Papio: A0099-A0100, A0114; Det. James Hemmer: A0147-A0150). Detective Papio arrested Mr. He and transported him back to the station (Papio: A0100-A0101). Later, Detective Hemmer spoke with Chun Zhang, who supposedly told the detective that he had spotted the slasher entering a house and called 911 (Hemmer: A0147-A0149, A0163).

At 1:00 a.m., Officer Victor Ko read Mr. He his Miranda rights in Cantonese and Mr. He signed the card (Ko: A0128-A0129, A0131-A0134, A0138; Hemmer: H2 A0151-A0152). According to the People, this was approximately four hours after Mr. He's arrest (A0177, A0198). Translating for Detective Hemmer, Officer Ko explained that the detective wanted to talk to him about what happened on February 14, 2011 at the V Lounge, and asked Mr. He whether he knew why he was at the precinct (Ko: A0134). Mr. He allegedly said that he knew it "in [his] heart" (Ko: A0135).

Officer Ko testified that Mr. He then told them he was at the V Lounge that night and recognized a man named E-Tao, who had previously pulled a gun on him two times and had pistol-whipped him the previous summer. Mr. He approached him for a handshake, but E-Tao asked if he wanted to hit him and, seeing E-Tao's friends crowded around, Mr. He became alarmed and went to the restroom, where he "went over to the commode and broke off a piece of metal

object." On his way out, E-Tao and his friends attacked him, so Mr. He pulled out the toilet shard and began slashing people. He slashed one man in the face and another one in the neck (A0135-A0136). Officer Ko showed him security footage from that night and Mr. He identified himself as the man on the video running out of the club (A0136-A0137). The People did not introduce any written, audio, or video proof that Mr. He made that statement (A0142).

The next day, Detective Hemmer conducted a line-up and Tong Zhang, the other complainant, identified Mr. He as the assailant (A0152-A0159).

At the close of the evidence, defense counsel argued that there was a clear Payton violation because the police entered Mr. He's home without a warrant, and that Mr. He's statement should be suppressed (A0164-A0166, A0171-A0172). The court ruled that Mr. He was arrested illegally because of a Payton violation but did not suppress the statement, finding that it was attenuated (A0202).

After defense counsel protested the ruling, the court asked for written submissions (A0203). In a post-hearing memorandum, defense counsel argued that the passage of time between the arrest and the confession was relatively short, and that the only intervening event, the administration of Miranda warnings, in and of itself, was insufficient under New York case law to purge the taint of illegality (A0068). Counsel also argued that the police misconduct in this case was "reprehensible," in that the police may well have intentionally avoided

requesting a warrant because they wanted to interrogate Mr. He before his right to counsel attached (A0072-A0073).

The prosecutor responded that Mr. He's statement was sufficiently attenuated by the passage of time between arrest and statement (four hours), and defended the conduct of the police, who had brought along an officer who spoke Chinese and did not enter Mr. He's apartment by force (A0075). Furthermore, the officers who questioned Mr. He were not the same officers who had conducted the illegal arrest (A0075).

After an independent source hearing, the court suppressed the showup, which the People conceded was suggestive (A0168), as well as Chun Zhang's in-court identification (A0271-A0273).[2]

The Trial

The Incident

On February 14, 2011, Chun Hai Zhang, his friend Tong Geng Zhang, and a few other friends went to the V Lounge, a nightclub, where, according to Detective John Papio, "multiple incidents of bar fights" had previously taken place (Chun Zhang: A0302, A0303, A0307, A0309; Tong Zhang: A0369-A0372;

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[2] Chun Zhang told the prosecutor just before the independent source hearing that he was no longer certain of his identification of Mr. He (A0261-A0262).

Papio: A0436). Chun Zhang was not drinking that night, but Tong Zhang had several alcoholic beverages (Chun Zhang: A0354, A0355-A0358, A0362-A0365; Tong Zhang: A0371, A0374, A0380-A0382, A0402-A0403, A0408). A lone man whom the two friends had never previously met approached Tong Zhang and said something (Chun Zhang: A0311-A0312; Tong Zhang: A0374). According to Tong Zhang, the man asked him whether his name was "E-Tao," and Tong Zhang said "no" (Tong Zhang: A0374). The man left, but later, when Chun Zhang and Tong Zhang were in the bathroom, he opened the door, looked around, and saw them at the sink washing their hands (Chun Zhang: A0313; Tong Zhang: A0377-A0378). Tong Zhang said, "I don't know you," and the man disappeared (Tong Zhang: A0379).

Around 12:40 a.m., Chun Zhang, Tong Zhang, and their friends were on the dance floor (Chun Zhang: A0321-A0322; Tong Zhang A0382). The lighting was "somewhat dark," but there were blinking lights or possibly strobe lights (Chun Zhang: A0323-A0325; Tong Zhang: A0382). Suddenly, the man who had asked Tong Zhang about his name earlier that night walked up to him and punched him in the neck (Chun Zhang: A0323-A0325; Tong Zhang: A0383-A0384). The man kept hitting him (Tong Zhang: A0384-A0386), and then a melee broke out (Chun Zhang: A0331). Tong Zhang's friends tried to grab the attacker, but he resisted, slashing Chun Zhang's face with a sharp object (Chun

Zhang: A0325-A0327, A0328, A0329; Tong Zhang: A0387). In the confusion, the man escaped (Chun Zhang: A0329, A0333; Tong Zhang A0392).

A friend drove Chun Zhang and Tong Zhang to the hospital (Chun Zhang: A0335; Tong Zhang: A0396). Trauma surgeon Doctor Anil Hingorani stitched Chun Zhang's wounds; Tong Zhang needed emergency surgery and was hospitalized for several days (Chun Zhang: A0336; Dr. Hingorani: A0455-A0456). Dr. Hingorani said Tong Zhang's wound looked like a "sharp puncture wound lunging forward" that had been caused by a "sharp, linear, metal-like object," and could not have been caused by a toilet lever (A0465-A0466, A0471-A0472).

The Police Investigation

Detective James Hemmer responded to Maimonides Hospital, where he interviewed Chun Zhang, who told him his friend had been "hit several times by an unseen person" (A0475). Tong Zhang later gave a general description of the man (A0479, A0482).

Detective Hemmer returned to the V Lounge at 8:15 a.m. the next day to meet with owner, Yan Zhao (A0519). By then, Detective Hemmer had been given the following information by other police officers:

> two perps approached the victim and began arguing with him. When the victim turned away, both perps struck the victim with beer bottles, and the fight ensued. Mr. Zhao stepped into the fight, pushed the shorter perp away and stopped the fight. The victim

> was cut, which was evident by the blood stained shirt that Mr. Zhao showed the undersigned. 911 was called. And shortly after police were present at the club. After the interview, Mr. Zhao stated he wanted to show the undersigned exactly who he was talking about. So he asked if undersigned, along with Mr. Wong the interpreter, would accompany him to the surveillance video. . . . Soon after viewing the video, Mr. Zhao did point out the perps, even stating that the shorter perp's name [w]as possibly Jiang Guo Dong J-I-A-N-G, G-U-O, D-O-N-G. When asked how he knew of this name, Mr. Zhao replied, he is always in the club. And that the taller perp frequents the club also, but not as much (A0509-A0510).

When Detective Hemmer spoke to Yan Zhao the next morning, however, Zhao claimed that he never saw the incident (A0520). When Detective Hemmer showed him a photo array, presumably containing a photo of Jiang Guo Dong, Yan Zhao failed to identify him (A0515-A0516, A0519-A0520). Detective Hemmer then viewed the security footage, but concluded that the camera was too far away to show exactly what happened (A0486).

According to a Sprint report, Danny Wong told the 911 operator that two men were going to come back with a gun (A0499). Detective Hemmer eventually spoke to Danny Wong, and wrote down that he arrived at the club around 1:15 a.m., but did not follow up further (A0520-A0521). Detective Hemmer closed the case in April, noting that "none of the complainants saw the face of the perp," and that "the video from the club showed nothing" (A0494, A0500-A0506).

The Unlawful Arrest

On August 15, 2011, Detectives Papio and Hemmer responded to [redacted] Avenue, a residential building, in connection with this case (Papio: A0429). They repeated the sum and substance of their hearing testimony regarding Mr. He's arrest (A0452-A0453). Detective Papio acknowledged that the police did not have a warrant (A0438).

Officer Victor Ko and Detective Hemmer repeated the substance of their hearing testimony about Mr. He's stationhouse statement (Ko: A0522-A0524; Hemmer A0496-A0497). Chung Zhang also called Tong Zhang that day, but Tong Zhang could not remember what he said (Tong Zhang: A0413-A0424).

Tong Zhang spoke to Chun Zhang again when he arrived at the precinct (Tong Zhang: A0398-A0399). He then picked Mr. He out of a line-up (Tong Zhang: A0400-A0401).

The Defense Case

Detective Dino Anselmo responded to a call about a stabbing at the V Lounge on February 14, 2011 (A0526). He was the one who originally spoke to the owner, Yan Zhao (A0527). He did not recall what official actions, if any, he took after that night (A0552-A0553).

Detective Anselmo confirmed that Yan Zhao told him that "two perps approached the victim" (A0527, A0537-A0538, A0539). "[B]oth perps struck the

victim with beer bottles and the fight ensued" (A0538, A0539, A0554). Yan Zhao said he stepped in to break up the fight and pushed the "shorter perp" away (A0540, A0542).[3] He showed the police a surveillance video, and said he recognized the men as two individuals who frequented his club and that the "shorter perp" was possibly a man named Jiang Guo Dong (A0547-A0550, A0554, A0560-A0561).

The Appellate Division's Decision

The Appellate Division held, on the law, that "the People did not commit a Brady violation," citing two Appellate Division cases that involved demands for contact information in the absence of a showing that the witnesses would give exculpatory testimony. The court also held that Mr. He's statements were not attenuated from his unlawful arrest because (1) the questioning occurred four and one-half hours after the arrest, (2) Miranda warnings were administered, (3) the interview was conducted at a location different from the arrest, (4) "prior to interviewing the defendant, Detective Hemmer spoke to one of the victims, Chun Zhang," who had "identified the defendant as the individual who stabbed him,"

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[3] Referring to the fact that the jury had already heard Zhao's statement (during cross-examination of Detective Hemmer), the court instructed the jury, "This is not for the truth of what was said, but just that the police were told this. I will admit it, just so the jury can consider that the police were told this, okay? You have no testimony that the two persons approached anybody" (A0537-38).

and (5) "the record supports the court's finding that there was no flagrant misconduct" (A0002).

ARGUMENT

POINT I

APPELLANT, WHO WAS PROSECUTED ON THE THEORY THAT HE ACTED ALONE WHEN HE ALLEGEDLY STABBED TWO TOTAL STRANGERS IN A BROOKLYN NIGHTCLUB, WAS DEPRIVED OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY THE PEOPLE'S REFUSAL TO DISCLOSE CONTACT INFORMATION THAT WOULD HAVE ALLOWED COUNSEL TO INTERVIEW MULTIPLE EYEWITNESSES, INCLUDING THE NIGHTCLUB OWNER WHO DID NOT TESTIFY AT TRIAL BUT WHO TOLD THE POLICE ON THE NIGHT OF THE CRIME THAT TWO REGULAR CUSTOMERS, NOT APPELLANT, ATTACKED THE COMPLAINANTS.

In the days after the assault in this case, the police interviewed numerous eyewitnesses and compiled police reports containing statements indicating that the attack was committed by two, or even a group, of people. One witness, the nightclub owner, said that two men he recognized as regular customers, one of whom he knew by name, had committed the assault. Because the complainant had identified Mr. He as his sole attacker, these contradictory statements unquestionably constituted Brady material. Obligated to investigate the possibility

of third-party culpability that could clear Mr. He of any involvement in the crime, defense counsel requested the contact information for those witnesses.

Invoking concerns for the safety of witnesses, the prosecutor said it was her office's general policy not to provide witness contact information to the defense. They continued to refuse to disclose that information even when counsel, as an officer of the court, assured the prosecutor that he would not disclose that information to his client. Because Brady requires the People to disclose to the defense both exculpatory material and the means for investigating and using it, the People's refusal, with the court's approval, to provide witness contact information violated Mr. He's state and federal due process rights. U.S. Const., Amend. XIV; N.Y. Const., Art I, § 6; Brady v. Maryland, 373 U.S. 83 (1980); C.P.L.§ 240.20(1)(h).

A. The Contact Information of Witnesses Who Made Exculpatory Statements to the Police Shortly After the Crime Was *Brady* Material

To establish a Brady violation, a defendant must show (1) that the evidence in issue was favorable, (2) that it was suppressed by the State, and (3) that he was prejudiced. Banks v. Dretke, 540 U.S. 668, 691 (2004); Strickler v. Greene, 527 U.S. 263, 281-82 (1999); People v. Vilardi, 76 N.Y.2d 67 (1990); Leka v. Portuondo, 257 F.3d 89, 98 (2d Cir. 2001). The prosecution is constitutionally obligated to disclose evidence favorable to the defense when it is "material either

to guilt or to punishment." Brady v. Maryland, 373 U.S. 83, 87 (1963). That obligation extends to "even the means of obtaining evidence" and "leads" to "relevant evidence." United States v. Bowles, 488 F.2d 1307, 1313 (D.C. Cir. 1973); accord United States v. Rodriguez, 496 F.3d 221, 226 (2d Cir. 2007). In People v. Andre W., 44 N.Y.2d 179, 186 (1978), this Court recognized that the People's Brady obligations encompass the "right of a defendant to discover a potentially material witness," including contact information for material witnesses.

Here, the statements of eyewitnesses that were disclosed to the defense in the redacted DD5s were obviously Brady material. The witnesses had informed the police that more than one person assaulted the complainant and that one witness, the club owner, told them that he recognized the two assailants and supplied what he thought was the name of one of them. This was a case in which the witnesses whose contact information was withheld had given the police concrete exculpatory statements. It was not a case, like those on which the Appellate Division relied, in which the defense contention that the witnesses had exculpatory information was "entirely speculative." See People v. Pacheco, 38 A.D.3d 686 (2d Dept. 2007); People v. Estrada, 1 A.D.3d 928 (4th Dept. 2003).

Numerous courts have specifically held that Brady requires a prosecutor to disclose contact information for Brady witnesses. See, e.g., United States v. Steele, 221 F.3d 1340 (7th Cir. 2000) (prosecutor must disclose addresses of

material, exculpatory witnesses); Jackson v. United States, 424 A.2d 40, 43 (D.C. Ct. App. 1980) (Brady obligations satisfied when prosecutor furnished copy of exculpatory statement to the defense together with the address and telephone number of the declarant); United States v. Opager, 589 F.2d 799, 804-05 (5th Cir. 1979) (refusal to disclose contact information of exculpatory witness violated Brady obligation even when defendant knew the witness); People v. Emiliano, 81 A.D.3d 436, 438 (1st Dept. 2011) (recognizing that the People have no duty to disclose witness contact information except when it may be required under Brady); People v. Garcia, 46 A.D.3d 461, 463 (1st Dept. 2007) (disclosure of exculpatory witness names without contact information did not satisfy People's Brady obligation); People v. Perry, 266 A.D.2d 151 (1st Dept. 1999) (failure to disclose witness addresses and telephone numbers violated Brady). Those decisions follow from the general principle that Brady material includes "even the means of obtaining evidence" and "leads" to "relevant evidence." Bowles, 488 F.2d at 1313; accord Rodriguez, 496 F.3d at 226.

In Andre W., 44 N.Y.2d 179, in which the Court recognized that Brady includes contact information for material witnesses, the People refused to disclose the identity of a child witness who had observed the defendant in close spatial and temporal proximity of the attack for which he was convicted. Id. at 183. When the prosecutor informed the court that the witness had been unable to identify the

defendant in a photo array as the person she had seen nearby, the court concluded that her testimony would not be exculpatory. Id. at 184. This Court, finding that the inability to identify was "some basis" for believing that the witness's testimony could be material and exculpatory, reversed and remanded for a hearing to determine both materiality and whether "reasonable concern for the safety of one of her tender years" justified protections such as the People's refusal to disclose identity. Id. at 187-88. If, as the Appellate Division believed in this case, the People simply have no obligation to provide the contact information of a Brady witness, neither of these inquiries would have been necessary.

Similarly, in People v. Bryce, 88 N.Y.2d 124, 128 (1996) (emphasis supplied), this Court explained that "[a] defendant has a right, guaranteed by the Due Process Clauses of the Federal and State Constitutions, to discover favorable evidence in the People's possession which is material to either guilt or punishment." In that case, the defendant was convicted of killing his seven-week-old son by fracturing his skull. Id. at 126. Pathologists who examined the skull and brain tissue during two autopsies filed reports finding the cause of death to be a massive brain hemorrhage. They testified that this was caused by the skull being "split in half" from force akin to a fall from a second story window or an auto accident. Id. at 127. Defense experts could find no evidence of such force in the autopsy results. Id.

Defense counsel requested access to the skull and brain tissue but, according to the defense, after being assured they would be available, was given only a small piece of bone the People represented was from the front of the infant's skull. Id. at 128. After the defendant was convicted, defense counsel succeeded in having the infant's body exhumed. The ensuing examination revealed that there was no fracture to the front of the infant's skull; the bone given to the defense had come from the side of the skull, not the front. Id. This Court remitted the case to determine whether the skull was exculpatory and whether the prosecutor made the assurances claimed by defense counsel, which prevented timely defense investigation of the skull, and whether the verdict would have been affected by the introduction of testimony about the skull. Id. at 126, 130. In doing so, the Court plainly recognized that if the People prevent the defense from being able to "discover favorable evidence," id., they violate Brady. That is exactly what happened in this case when the prosecutor prevented the defense from interviewing exculpatory witnesses by withholding contact information that was the only possible way the defense could have discovered favorable evidence.

The nightclub owner's testimony alone would have enabled the defense to argue far more persuasively that "a person other than [Mr. He] committed the crime charged." People v. Neal, 248 A.D.2d 406, 406-07 (2d Dept. 1998). See

also Leka, 257 F.3d at 89. When he was first interviewed, Mr. Zhao said that two regular customers (not Mr. He, acting alone), had committed the assault and that he thought one was named Jiang Guo Dong. He even pointed them out on a surveillance video. The specificity of that report means not only that it was material, but also that Mr. Zhao's later implausible disavowal of it (he told police the next day that he had seen nothing and did not identify Mr. Dong in a photo array), did not eliminate the possibility that it was true. Mr. Zhao's initial statement, which was made prior to his being able to reflect on the ramifications of his involvement in the case, alone would have been powerful evidence for the defense. When offered in combination with the statements of others that there were multiple attackers, which contradicted the complainants' testimony that there was a single assailant, and only one of them could say that man was Mr. He, the defense could have mounted a third-party culpability defense with a reasonable possibility of a different result.

B. The People Violated Their *Brady* Obligations When They Refused to Disclose the Contact Information of Exculpatory Witnesses and the Defense Had No Other Means of Investigation

The Kings County District Attorney's policy, as stated by the prosecutor in this case, of categorically refusing to disclose witness contact information, regardless of whether the witnesses have given Brady statements, directly violated their obligation to disclose exculpatory material to the defense. That refusal left

defense counsel with no opportunity to conduct an adequate investigation of the exculpatory information from the DD5s that could have led to that different result. No other materials gave counsel even a starting point for an investigation. As counsel argued, there was no other way to find the witnesses using their names alone because they were common Asian names and because the V Lounge, where the stabbing occurred, was "no longer even open" (A0041-A0042).

Disregarding that disclosure of the contact information was the only way the defense could locate the witnesses to investigate the exculpatory statements they made to the police, the Appellate Division appears to have concluded that the contact information, which is not specifically identified as discoverable under C.P.L. § 240.20, was not in-and-of-itself exculpatory. But, in the absence of an alternative means of investigation, by withholding contact information for all of the witnesses who gave exculpatory statements, the People denied the defense a "meaningful opportunity" to procure their exculpatory testimony. California v. Trombetta, 467 U.S. 479, 484 (1984). Accord United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982); People v. Cortijo, 70 N.Y.2d 868, 870 (1987); see State v. Harper, 53 So.3d 1263, 1270-73 (La. 2010) (prosecution's refusal to disclose contact information of exculpatory witnesses did not violate Brady because the defense had independent means of investigation). Because Brady includes the right to a meaningful opportunity to investigate, the witness contact information

in this case possessed by the prosecution, which was the only means of investigating the exculpatory statements they had made, was Brady material.

The Appellate Division's conclusion to the contrary is inconsistent both with first principles of due process and with its own precedent and that of other New York courts. In People v. Roberts, 203 A.D.2d 600, 602 (1994), for example, the Second Department held that evidence that "deprive[s] the defendant of a fair opportunity to locate [an exculpatory] witness and conduct an adequate investigation of the facts [that witness] recounted to the prosecution" is both favorable and material, and failure to disclose it requires reversal. Similarly, in People v. Alvarez, 44 A.D.3d 562, 563 (1st Dept. 2007), the People recognized their Brady obligation and disclosed the personal contact information for a witness who identified another suspect. Appellate counsel argued, inter alia, that the Brady disclosure was untimely because by the time he received the information it had gone stale. Id. at 562. The First Department held that there was no basis for reversal, but only because other discovery materials "contained sufficient information to allow the defense to conduct an investigation of the relevant allegations." Id. at 564. See also, People v. Robinson, 34 Misc. 3d 1217A (Sup. Ct. Queens Co. 2011) (finding that delayed disclosure of contact information of a 911 caller who had relayed exculpatory information violated Brady).

C. There Was No Reason to Believe That Disclosure of the Contact Information of Potential Defense Witnesses Would Endanger Them and the People Made No Specific Proffer of Threats or Circumstances Indicating Such Danger

The People's argument in the trial court that their complete refusal to disclose Brady witness contact information was justified by concerns about the safety of their eyewitnesses as a class was simply unfounded. While this Court noted in Andre W. that a hearing with respect to potential harm to a particular witness might be in order, broad concerns about the safety of eyewitnesses in general cannot prevent the defendant from being able to obtain information that could raise a reasonable doubt about his guilt or even prove his innocence of the crime charged. The People never suggested, during their repeated refusals to disclose the contact information, that Mr. He or anyone associated with him had ever threatened or posed a danger to anyone, much less the witnesses in question. And even had such allegations been made, the appropriate response, as this Court said in Andre W., would have been to conduct a hearing similar to a Sirois hearing, see In re Holtzman v. Hellenbrand, 92 A.D.2d 405 (2d Dept. 1983), at which the People would have had an opportunity to establish that there was reason to believe that disclosure of the contact information would have jeopardized the safety of those witnesses.

Had there been such a hearing, and a danger associated with disclosure established, there is no reason to believe such danger could not have been alleviated by a protective order requiring that defense counsel keep the witness contact information confidential and "not to divulge it to the defendant himself" as counsel proposed (A0041). There being no indication in the record that counsel, as an officer of the court, could not be trusted, the imposition of such a protective order would have been perfectly appropriate and would have fulfilled the People's obligation to disclose the means for investigating exculpatory witness information without the risk of whatever purported inchoate harm the disclosure to the defendant himself might otherwise present. See Commonwealth v. Teixeira, 475 Mass. 482 (2016) (approving, upon a prosecution showing that there were pending witness intimidation charges against the defendants, protective orders requiring disclosure of contact information to defense counsel but not the defendant); United States v. Fabel, No. Cr06-041L, 2006 WL 3469586 (W.D. Wash. Nov. 29, 2006) (same); People v. Barber, No. B243668, 2015 WL 1874079 (Ct. App. 2d Dist. Div. 6 Cal. April 23, 2015) (same) (unpublished).

Because the "grave risk" that "a witness will be intimidated, harmed or killed" dramatically, but baselessly, invoked by the prosecutor (A0036) was no more likely in this case than in any other case, that invocation was clearly a statement of general policy by the District Attorney's office against disclosing

Brady witness contact information. The existence of such a policy, regardless of whether there is any evidence of danger, is borne out by the prosecutor's outright disregard of counsel's offer to withhold the information from Mr. He, as well as by her statement, "We do not turn over the addresses or the phone numbers of witnesses" (A0040). Obviously, the prosecutor was following a District Attorney's Office rule and was not acting out of any particularized concern over the safety of the witnesses in this case.

D. The Prosecutor's Offer to Contact the Exculpatory Witnesses on Defense Counsel's Behalf to Inquire Whether They Wished to Speak with the Defense Did Not Fulfill the People's Obligation to Disclose Exculpatory Material Directly to the Defense

The People's offer to contact the witnesses on defense counsel's behalf, and ask them if they wished to speak to defense counsel, was not an adequate substitute for the defendant's constitutional right to exculpatory information within the control of the People.[4] Brady simply does not contemplate prosecutorial gate-keeping with respect to a defendant's right to exculpatory

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[4] While the prosecutor's written response to the defense demand stated that the People would "reach out to those witnesses in an attempt to make them available to defense counsel for an interview," this was qualified by the notation that the witness could choose whether to speak with counsel (A0034-A0035). It was also clarified in the "Conclusion" paragraph specifying that "[t]he People are willing to contact those specific witnesses that [defense counsel] indicates and inquire as to whether that witness is willing to speak with the defense in this case" (A0036), and the prosecutor's statement to that same effect on the record (A0040), and that is what Justice Shillingford ordered (A0042-A0043).

information. Either the People have an obligation to disclose the contact information so the defense can conduct an independent investigation or they do not. There is no hybrid category of information that the defense is entitled to receive only through a prosecutor acting as an intermediary.

Endorsing such a restraint on defense counsel's right to direct access to exculpatory witnesses would ignore the whole purpose of the Brady rule in several ways. First, leaving the inquiry to opposing counsel, who could not help but signal that it was not necessary to speak to the defense, was poor substitute for direct contact by defense counsel who would be as persuasive and persistent as possible in securing crucial exculpatory information. Second, even if the prosecutor could be expected to seek the witnesses' cooperation with the same enthusiasm defense counsel would have employed, merely asking the question, "do you wish to speak with defense counsel," would effectively encourage a "no" response, since anyone who would prefer not to be dragged into a criminal trial would take the opportunity to avoid it if the decision whether to speak to defense counsel were left in the witness's hands. Third, should the witness decide not to cooperate, counsel would have no opportunity to make inquiries that might lead to other evidence. Fourth, direct contact might reveal circumstances concerning the witness that might account for a change of testimony and, therefore, would be beneficial to the defense. For example, as the court explained in Opager, 589

F.2d at 804, if any of the witnesses were incarcerated at the time, "such information could have been used to discredit" their ultimate recantations of their initial statements to the police.

In the Appellate Division, the People relied on People v. Izuierdo, 292 A.D.2d 247 (1st Dept. 2002), for the proposition that prosecutors can contact Brady witnesses to ask them whether they want to speak to the defense instead of handing over their contact information directly (Respondent's Brief at 51). In that case, however, "defendant conceded that there was no reason to believe that any of the witnesses would provide exculpatory testimony" and, therefore, there was no constitutional basis for defense counsel's request. Id. at 248. The People's refusal to disclose in that case was acceptable only because they were under no Brady obligation with respect to exculpatory material.

Roviaro v. United States, 353 U.S. 53 (1957), is instructive as to both of the People's arguments in the trial court. In that case, the prosecutor invoked the "informant's privilege" to suppress the identity of a confidential informant who had been involved in the drug sale underlying the charges against the defendant. The Supreme Court held that while the informer's privilege serves the government interest in encouraging anonymous reports by citizens of crimes,

> [w]here the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair

> determination of a cause, the privilege must give way. In these situations the court may require disclosure and, if the Government withholds the information, dismiss the action.

353 U.S. at 60-61. Thus, neither a generalized concern about witness safety, nor some form of facilitation by the government, may be employed to block disclosure of exculpatory information to the defense. See People v. Goggins, 34 N.Y.2d 163 168 (1974) (rights to due process and confrontation require court to conduct ex parte hearing before permitting the prosecution to withhold confidential informant contact information).

Neither of the cases the People cited in their Rule 500.11 submission support the proposition that contact information of exculpatory witnesses can be suppressed in favor of the prosecutor asking those witnesses whether they are willing to speak to the defense (see 500.11 Response at 24); in fact, they support the defense position. In Opager, 589 F.2d at 804-05, the court directed the government to disclose exculpatory witness contact information or actually produce the witness for an interview with defense counsel. Because the government refused both options, the Fifth Circuit — without needing to decide whether production of the witness was an acceptable alternative to disclosure of contact information — reversed the conviction. Id. at 806. In doing so, the Court held that the prosecutor's proffer that the witness did not wish to speak

with defense counsel was an insufficient basis for refusing to disclose his whereabouts. The other case involved the possibility that the defense had used deceit to contact the witness, which the court observed could have been addressed through an order clarifying the rules of the interview, not by blocking access to the witness. Leka v. Portuondo, 257 F.3d at 99.

E. Because There Was a Reasonable Possibility That Defense Investigation Using the Withheld Contact Information Would Yield Exculpatory Evidence, Reversal is Required

Under the New York rule, when, as here, there has been a specific demand, prejudice and materiality are established if there is a "reasonable possibility" that, had the favorable information been timely disclosed, the result of the trial would have been different. Vilardi, 76 N.Y.2d at 77.[5] That standard applies here. Defense counsel repeatedly requested the address or contact information for specifically enumerated witnesses as disclosed in the redacted DD5s, saying over and over that the witnesses "specifically identif[ied] other people as being the perpetrators of the crime" (A0039-A0044; A046E; A0010). The information defense counsel asked for was never turned over, not even on the eve of trial.

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[5] The New York rule is to be distinguished from the federal rule requiring that there be a "reasonable probability" of a better result. Kyles v. Whitley, 514 U.S. 419, 435-36 (1995).

Even a reasonable possibility that defense investigation would yield exculpatory information triggers the People's obligation to disclose witness contact information. In Andre W., 44 N.Y.2d 179, this Court held that "some basis" to believe materially exculpating information existed was sufficient. And in Leka, 257 F.3d at 102, the People violated Brady by obtaining a protective order preventing the defense from interviewing a witness before trial, which precluded defense investigation that would have revealed exculpatory information not yet known to exist.

There was far more than "some basis" to believe that Yan Zhao and Danny Wong had material, exculpatory information to which the defense was entitled. Mr. Zhao had named someone other than Mr. He. Both Mr. Zhao and Mr. Wong said two men attacked the victims, not just one who could have been Mr. He acting alone, as Chun and Tong Zhang claimed at trial. That Mr. Zhao changed his story the next day and suddenly could remember none of the specific information he had given the police previously indicated only that he regretted giving it, not that it was untrue. Defense counsel may well have prevailed upon him to testify for the defense.

It is anticipated that the People will argue, as they did in their Rule 500.11 submission, that Mr. He's claim before this Court "rests on the speculation that, using the contact information in the police reports, he would have been able to

make contact with the witnesses and the witnesses would have been willing to speak with defense counsel" (see 500.11 Response at 23). That argument ignores this Court's "some basis" standard and, if adopted, would create an incentive for the People to err on the side of refusing to disclose. If the defense is given the burden of proving what exculpatory information would have been unearthed during the investigation counsel was prevented from conducting, the prosecution's suppression of information necessary to that investigation could rarely, if ever, be found to violate Brady. After all, the outcome of an investigation that never occurred would never be known. As Mr. He has made clear, that is not the law (see Part A, ante at 20-23).

Given the problems with the People's case, a third-party culpability defense could well have changed the outcome of the trial. The sole eyewitness, Tong Zhang, did not know Mr. He, had only a very brief opportunity to see his face, and observed him under less than ideal circumstances in a dark nightclub after having been drinking late at night. Tong Zhang also told the police on the night of the crime that he did not see the perpetrator's face (A0501). He nevertheless picked Mr. He out of a line-up more than six months after the crime when his memory could hardly have improved.

Nor did Mr. He's alleged statement, about which no contemporaneous police record was made or introduced, eliminate the possibility of a different

result had the defense been able to conduct a third-party culpability defense. Mr. He was said to have claimed he broke a lever from a restroom fixture and swung it at people in the club. Dr. Hingorani testified that Tong Zhang's wound had been caused by a razor-like object, not a crude, broken restroom lever.

While defense counsel attempted to counter the People's evidence that Mr. He acted alone by introducing Wong's statement that two men were going to return to the club with a gun, without Wong's testimony, counsel was unable to prove that these were the two men who attacked Tong Zhang and Chun Zhang. Similarly, although counsel was permitted to introduce Zhao's statement naming two assailants other than Mr. He, the jury was instructed that this was not evidence in chief; the statement could be used only for the fact that it was made (A0537-38). The fact that a statement was made by an absent witness was not an adequate substitute for the testimony of that witness. Far from being "insignificant," (see 500.11 Response at 28), this limitation prevented the jury from considering whether Zhao's statement proved that someone other than Mr. He committed the crime with which he was charged, or at least raised a reasonable doubt as to whether the testimony of the People's witnesses was accurate. It is well established that the jury will be presumed to follow the legal instructions it is given. People v. Baker, 14 N.Y.3d 266, 274 (2010).

Thus, because the precise nature of the materially exculpatory statements was clear, and defense counsel had no other means to investigate, Mr. He has established both that the contact information was material and that he was prejudiced by its having been withheld. Accordingly, reversal is required.

F. A Rule Permitting the People to Withhold the Contact Information of Exculapatory Witnesses Would Violate Both the Spirit and the Letter of Brady

The rule requiring the prosecution to disclose exculpatory information to the defense is based on the constitutional mandate that criminal trials be conducted in a fundamentally fair manner. As the Supreme Court explained in Brady, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Brady, 373 U.S. at 87.

Investigation of crimes is conducted by the police, an arm of law enforcement that, in our adversarial system, is controlled by one party to a criminal trial — the prosecution. If the prosecution, by virtue of its relationship to the police, obtains exculpatory information that the defense has no independent means of obtaining but withholds that evidence, "[t]hat casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." Id. When the prosecution, by virtue of its monopoly on all information obtained by the police prior to defense counsel's entry into the case,

has access to exculpatory information the defense cannot obtain, it is fundamentally unfair to prevent the defense from accessing that information. Indeed, this concept is codified in New York's discovery statute, which requires the People to disclose to the defendant, "Anything required to be disclosed, prior to trial, to the defendant by the prosecutor pursuant to the constitution of this state or of the United States." C.P.L. § 240.20(h) (emphasis supplied). The Appellate Division's apparent reliance in this case on the absence of a specific reference in the discovery statute to witness contact information should be rejected.

When the United States Supreme Court changed its test for determining the materiality of specifically requested exculpatory information from a "reasonable possibility" that with disclosure the result would have been different, to a "reasonable probability" that it would be different, see United States v. Bagley, 473 U.S. 667 (1985), this Court held firm to the higher standard, which is "essentially a reformulation of the 'seldom if ever excusable' rule." Vilardi, 76 N.Y.2d at 763. Reaffirming this Court's observation in Andre W., that a defendant has the right to discover exculpatory information which cannot be frustrated by the prosecution, would be consistent with New York's recognition that the Brady rule is central to due process.

The notion that the prosecution may prevent defense access to exculpatory information by withholding witness contact information is also antithetical to current efforts to require more discovery of potential Brady material to criminal defendants in New York, not less. Chief Judge DiFiore recently directed trial courts to issue orders specifically directing prosecutors to timely disclose materially favorable information to the defense. Unified Court System Press Release of November 8, 2017.[6] And in 2014, the New York State Bar Association Task Force on Criminal Discovery recommended "enhanced training" of prosecutors, police, defense counsel, and trial judges concerning Brady requirements, and improved documentation of disclosure. It also recommended a requirement that all Brady material be disclosed before plea bargaining and that Brady violations be tracked and violators be subject to specific disciplinary procedures. NYSBA Task Force on Criminal Discovery Final Report for the Consideration of the House of Delegates, December 1, 2014.[7] A decision in this case permitting prosecutors to refuse to disclose Brady witness contact information that the defense has no way to independently discover would set back efforts to ensure the full constitutional protections Brady requires.

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[6] http://www.nycourts.gov/PRESS/PDFs/PR17_17.pdf, last visited October 31, 2018.

[7] https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=54071, last visited October 31, 2018.

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In sum, the value of Yan Zhao's and Danny Wong's contact information is obvious. In this attempted murder case, a witness who identified someone other than Mr. He as the perpetrator would have been powerful evidence indeed. Such testimony is the gold standard, particularly coming from two people. The People's refusal to disclose the contact information for those witnesses therefore violated Mr. He's due process right to a fair trial, requiring reversal and a new trial prior to which the People must disclose the contact information for Yan Zhao and Danny Wong.[8]

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[8] The People's argument in the Appellate Division, that there was no ruling on the defense demand for disclosure of the contact information, is directly contradicted by the record of counsel's repeated demands (see pp. 6-10, ante). The final word came on April 16, 2013, when, during a lengthy colloquy before Justice Donnelly, the prosecutor and the court both understood that the note by Justice Shillingford that had been discussed before Justice Miller on March 5, 2013 (apparently off the record) was, in fact, a decision (A0062). Since this was defense counsel's fourth demand, before three judges, for an order directing the People to disclose the contact information of the exculpatory witnesses, and each judge refused to order disclosure, the issue is also fully preserved for review.

POINT II

APPELLANT'S STATEMENTS TO THE POLICE WERE THE FRUIT OF UNLAWFUL, FLAGRANT POLICE MISCONDUCT, UNATTENUATED BY ANY INTERVENING EVENT THAT WOULD PURGE ITS TAINT, AND SHOULD HAVE BEEN SUPPRESSED.

The hearing court ruled that the police committed a Payton violation when they arrested Mr. He in his home without a warrant or probable cause.[9] This Court has sought to remove police incentive for making such unlawful arrests by prohibiting the use of a statement obtained after a Payton violation even when the police have probable cause to arrest. Only if the statement was attenuated from the unlawful arrest is the statement admissible at trial. In this case, the People failed to show that any of the three factors courts are required to consider established that Mr. He's statement was attenuated from his unlawful arrest. First,

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[9] As the Appellate Division majority correctly noted, C.P.L. § 470.15(1) bars appellate review of the Supreme Court's ruling in Mr. He's favor that he was illegally arrested in violation of Payton (A0004). People v. LaFontaine, 92 N.Y.2d 470, 473 (1998). Should Mr. He prevail before this Court on his attenuation argument, the remedy under that case would be to remit the matter for further consideration in Supreme Court. Id. at 476; People v. Concepcion, 17 N.Y.3d 192, 196-97 (2011). It should be made clear, however, that the remittitur would be for the purpose of Supreme Court incorporating this Court's legal ruling into its suppression decision and not for the purpose Justice Hall stated in her dissent, to "give the People an opportunity to seek re-examination of the issue of whether the arrest was unlawful," because that would run afoul of this Court's "one full opportunity" rule. People v. Havelka, 45 N.Y.2d 636, 643-44 (1978).

the lapse of four hours accompanied by the administration of Miranda warnings was insufficient to establish attenuation in the absence of an intervening event. Second, the suppressed showup identification, which was made possible by the unlawful arrest and was the product of that unduly suggestive procedure, was not an intervening event. Third, the warrantless arrest in Mr. He's home, without probable cause, which permitted the unduly suggestive identification procedure that was later relied upon as the missing probable cause, constituted flagrant misconduct. Accordingly, Mr. He's statements to the police should have been suppressed. U.S. Const., Amends. IV, XIV; N.Y. Const. Art. 1, § 12; Payton v. New York, 445 U.S. 573 (1980); Wong Sun v. United States, 371 U.S. 471 (1963).

When police officers violate a defendant's rights under Payton, any custodial statements they subsequently obtain "must be suppressed unless the taint resulting from the violation has been attenuated." People v. Harris, 77 N.Y.2d 434, 437 (1991). See also Brown v. Illinois, 422 U.S. 590, 603-604 (1975). In New York, an accusatory instrument is needed to obtain an arrest warrant (see C.P.L. §120.10(1)), and the right to counsel attaches the moment an accusatory instrument is filed. People v. Settles, 46 N.Y.2d 154, 161 (1978). This creates a uniquely powerful incentive on the part of New York police officers to avoid arrest warrants in order to question defendants before they are informed by their attorneys of the many benefits of exercising their Fifth Amendment rights.

See, generally, Harris, 77 N.Y.2d at 434, 439-440. Hence, the robust protections New York recognizes under Payton include suppressing fruits of a warrantless home arrest even when the police have probable cause.[10] It is therefore particularly important that New York courts adhere to a careful and thorough balancing of factors associated with Payton attenuation analysis.

That analysis begins with the prosecution having the burden of establishing that the taint of illegal police conduct has been attenuated. People v. Johnson, 66 N.Y.2d 398 (1985). A statement is attenuated from an unlawful arrest if it was "acquired by means sufficiently distinguishable from the arrest to be purged of the illegality." People v. Conyers, 68 N.Y.2d 982, 983 (1986). This Court, like the United States Supreme Court, has identified three factors that the trial court must consider in determining whether statements are sufficiently attenuated: (1) the temporal proximity between the statement and the illegal conduct, (2) whether a significant intervening event occurred between the statement and the illegal conduct, and (3) the purpose or flagrancy of the police misconduct. Harris, 77 N.Y.2d. at 441; People v. Martinez, 37 N.Y.2d 662, 666 (1975); see Brown v. Illinois, 422 U.S. 590, 603 (1975).

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[10] The New York rule is broader than its federal counterpart, which prohibits the use of a statement made following an unlawful arrest only if it was made without probable cause. New York v. Harris, 495 U.S. 14 (1990).

While a particularly short lapse of time between arrest and confession is often cited to support a holding that the confession is tainted, it does not follow that a long one, in and of itself, can attenuate a confession from the illegality of an underlying arrest. In fact, "[i]f there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one." People ex rel. Jones v. Board of Parole, 76 A.D.2d 782, 783 (1st Dept. 1980) (citing Dunaway v. New York, 442 U.S. 200, 220 (1979), Stevens, J., concurring).

Thus, even a somewhat lengthy lapse of time between the arrest and the statement, notwithstanding the administration of Miranda warnings, is insufficient to attenuate the link between unlawful police conduct and a defendant's statement. Taylor v. Alabama, 457 U.S. 687, 691-92 (1982) (Miranda warnings and six-hour lapse); People v. Newson, 155 A.D.3d 768, 771, 773 (2d Dept. 2017) (Miranda warnings and nine-hour lapse); People v. Gundersen, 255 A.D.2d at 454-55 (1998) (Miranda warnings and "several" hours elapsed). As the Supreme Court has noted, "[i]f Miranda warnings were viewed as a talisman that cured all Fourth Amendment violations, then the constitutional guarantee against unlawful searches and seizures would be reduced to a mere 'form of words.'" Taylor, 457 U.S. at 690 (quoting Brown, 422 U.S. at 603); see also

Dunaway, 442 U.S. at 217 (noting that "if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached").

Contrary to the holding of the Appellate Division in this case, no relevant intervening circumstance attenuated Mr. He's statement from his unlawful arrest. Typically, significant intervening events deemed sufficient to attenuate a statement from illegal police action consist of information obtained by the police independently, and conveyed to the defendant before he makes his statement. See People v. Bradford, 15 N.Y.3d 329 (2010) (defendant advised before he made statements that the victims of the crime had implicated him); People v. Wilson, 57 N.Y.2d 786 (1982) (intervening identification); People v. Buchanan, 136 A.D.3d 1293 (4th Dept. 2016) (presentation of fingerprint report).

The only asserted intervening event between Mr. He's arrest and his statement was Chun Zhang's showup identification of Mr. He as his attacker. When he made that identification, Chun Zhang, who had not seen the stranger who slashed him in six months, was transported to the scene of the illegal arrest for the express purpose of making an identification, made his identification from the back of a police car, and testified that Mr. He was handcuffed at the time and surrounded by multiple officers. The People conceded that this procedure was unacceptably suggestive (A0205), and the court, finding no independent source, suppressed Chun Zhang's unreliable identification (A0273).

The People argued, and the Appellate Division held, that, notwithstanding its being the product of undue suggestiveness, Chun Zhang's identification was an intervening factor. However, as Justice Hall pointed out in her dissenting opinion, "the facts that Chun Zhang had recognized the defendant on the street as the perpetrator, followed him to the 52nd Street building and called 911 were all known to the police prior to the arrest" (A0006) (emphasis supplied). Since Chun Zhang's unreliable identification was the product of an unduly suggestive showup made possible by the unlawful arrest, nothing about it constituted "independent evidence" of the sort that might purge the taint of the unlawful arrest. In short, this Court should not permit the police to cleanse the violation of one constitutional right by committing another one.

With respect to the final factor of the analysis, the police decision in this case to arrest Mr. He in his home without probable cause, and their after-the-fact attempt to manufacture probable cause by conducting an unduly suggestive showup, strongly suggests that the arrest was made for improper "investigatory purposes," a hallmark of flagrant misconduct. Brown, 422 U.S. at 605 (warrantless arrest for the purpose of questioning indicates misconduct); see Dunaway 442 U.S. at 215-16; Martinez, 3 N.Y.2d at 559 (presence of gun in car gave police non-investigatory reason to arrest defendant). Absent the unlawful arrest, there would have been no showup and, absent the undue suggestiveness,

there was no probable cause. Thus, the People cannot sustain their burden of establishing that there was only minimal police misconduct such that the Miranda warnings and four-hour delay were sufficient to attenuate the statements from the unlawful arrest. See Harris, 77 N.Y.2d at 437. To the contrary, since the arrest was made both in violation of Payton and in the absence of probable cause, the illegality of the police conduct in this case must be considered flagrant.

The Appellate Division's decision holding that the statements were attenuated from the illegal arrest depended in part on its reliance on factors that are not part of attenuation analysis at all: that the interview was conducted at a different location by a different officer. This part of the Appellate Division's analysis, which is more appropriate to the question whether post-Miranda statements must be suppressed because of unlawful pre-Miranda interrogation, see People v. Paulman, 5 N.Y.3d 122 (2005), has not been recognized either by this Court, or by the United States Supreme Court, as a factor that should be considered in attenuation analysis. Nor should it be, since the question is whether the arrest in violation of Payton has given the police an unfair opportunity to extract a statement irrespective of who does the interview or where it takes place.[11] The erroneous denial of the suppression of Mr. He's statement was not

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[11] By considering two factors other than the ones this Court has held to be (continued...)

harmless beyond a reasonable doubt. People v. Crimmins, 36 N.Y.2d 230, 237-38 (1975); Chapman v. California, 386 U.S. 18, 23, (1967). A confession makes such a powerful impact that the refusal to suppress one has been found to be "harmful" even in cases where there was other compelling evidence of a defendant's guilt. See People v. Jones, 47 N.Y.2d 528, 534 (1979) (erroneous admission of full confession held not harmless despite eyewitness testimony of several security officers). The additional evidence here was far from compelling. The sole eyewitness, Tong Zhang, did not know Mr. He, had limited opportunities to see his face, and observed him under less than ideal circumstances. See, e.g., People v. Foster, 64 N.Y.2d 1144, 1147 (1985) (error not harmless where sole identifying witness smoked marijuana and drank at the time of the incident and later gave different accounts of what happened). Tong Zhang, who had been drinking at the club, also told the police on the night of the crime that he did not see the perpetrator's face (A0501). He nevertheless picked Mr. He

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[11](...continued)
relevant to the attenuation analysis, the Appellate Division applied an incorrect standard of review. Accordingly, its decision presents a question of law that this Court has jurisdiction to review. People v. Borges, 69 N.Y.2d 1031, 1033 (1987) ("While questions of attenuation generally present mixed questions of law and fact, where, as here, the lower courts have applied an incorrect legal standard, an issue of law reviewable by this court is presented").

out of a line-up more than six months after the crime when his memory could hardly have improved.

Defense counsel preserved this issue by arguing that Mr. He's statements should be suppressed on the ground that they were obtained as a result of a Payton violation (A0164-A0166), and were not attenuated from the unlawful arrest (A0070-A0073). Moreover, the court expressly decided the issue in its decision (A0202; A0271-A0272). People v. Edwards 95 N.Y.2d 486, 491 n.2 (2000) (suppression argument preserved by court decision deciding issue). This Court should, accordingly, reverse Mr. He's conviction, and grant him suppression and a new trial.

CONCLUSION

FOR THE ABOVE REASONS, APPELLANT'S CONVICTION SHOULD BE REVERSED AND THE MATTER REMANDED FOR A NEW TRIAL.

Respectfully submitted,

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November 2, 2018

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- RONG HE, Defendant-Appellant.	:	CERTIFICATION PURSUANT TO 22 N.Y.C.R.R. Part 500.13(c)

PAUL SKIP LAISURE, an attorney admitted to practice before the Courts of this State, certifies, pursuant to 22 N.Y.C.R.R. Part 500.13(c), that the total number of words in the brief, exclusive of the table of contents and authorities, and 5531 statement is 12,621.

Dated: New York, New York
November 2, 2018

Paul Skip Laisure

PAUL SKIP LAISURE

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,	:
	:
Respondent,	:
	:
-against-	:
	:
RONG HE,	:
	:
Defendant-Appellant.	:

STATEMENT PURSUANT TO RULE 5531

1. The indictment number in the court below was 7085/11.

2. The full names of the original parties were the People of the State of New York against Rong He.

3. This action was commenced in Supreme Court, Kings County.

4. This action was commenced by the filing of an indictment on August 22, 2011.

5. This appeal is from an order of the Appellate Division, Second Department, affirming a judgment convicting appellant, after a jury trial, of two counts of assault in the second degree and criminal possession of a weapon in the fourth degree.

6 This is an appeal from a December 27, 2017, Order of the Appellate Division, Second Department, affirming a judgment of the Supreme Court, Kings County, rendered October 7, 2013.

7. Appellant has been granted permission to appeal as a poor person. The appendix system is being used.

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Not Officially Published
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California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal,
Second District, Division 6, California.

The PEOPLE, Plaintiff and Respondent
v.
Kenneth Richard BARBER,
Jr., Defendant and Appellant.

2d Crim. No. B243668
|
Filed 4/23/2015

Frank J. Ochoa, Judge, Superior Court County of Santa Barbara. (Super. Ct. No. 1346175) (Santa Barbara County)

Attorneys and Law Firms

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Opinion

PERREN, J.

*1 Kenneth Richard Barber, Jr., appeals from the judgment following his conviction by jury of the attempted willful, deliberate, and premeditated murder of Jerry Coffee (Pen.Code, §§ 187, subd. (a), 664) [1] and two counts of assault with a deadly weapon upon Coffee and George Durst (§ 245, subd. (a)). The jury found that appellant personally inflicted great bodily injury (§ 12022.7, subd. (a)) and used a deadly weapon (§ 12022, subd. (b)(1)) in committing each offense. It also acquitted him of a charged attempted murder of Durst. In a bifurcated proceeding, the trial court found that appellant had a prior strike conviction (§ 667, subds. (d)(1) & (e)(1)); a prior serious felony conviction (§ 667, subd. (a)(1)); and served a prior prison term (§ 667.5, subd. (b)). The court sentenced him to 14 years to life, plus 26 years in prison. Appellant challenges the sufficiency of the evidence to support the attempted willful, deliberate and premeditated murder. He further contends that the court abused its discretion and violated his Sixth Amendment right to represent himself (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*)) when it revoked his "pro per" status; abused its discretion by admitting gang evidence and evidence of uncharged crimes; and erred by imposing an upper term sentence for assault with a deadly weapon and imposing a prior prison term enhancement. Respondent concedes the latter sentencing error. We accept its concession, strike the prior prison term enhancement, otherwise affirm and remand to the superior court with directions to modify the abstract of judgment to conform t the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case

In August 2008, appellant was housed in the Northwest D module (NW D) of the Santa Barbara County Jail. NW D had upper and lower tiers, with cells on each tier. Caucasian, African–American and Hispanic inmates occupied NW D. Jail staff usually assigned inmates of only one race to each cell. Ordinarily, inmates also segregated themselves by race while outside their cells. Appellant and George Durst shared a bottom tier cell. Jerry Coffee and another inmate shared an upper tier cell. Durst and Coffee were friends who had known each other for nearly 20 years. Coffee met appellant in custody in August 2008 and they usually got along.

Appellant is an associate of the Ventura Skinhead Dogs, a neo-Nazi skinhead, and white supremacist. He has tattoos that reflect his affiliations and he uses the moniker, "Trippy." Appellant was the leader ("shotcaller") of Caucasian inmates in NW D.

Jail rules prohibit the possession of weapons. NW D inmates nonetheless use weapons crafted from available supplies, including razors and toothbrushes. Appellant told Coffee that he kept a razor blade in his mouth, and

that he cut Bruce, a former NW D inmate, before Coffee arrived there.

Appellant organized and directed exercise sessions for Caucasian inmates. On August 23, Coffee and two other Caucasian inmates were exercising in an upper tier cell with appellant. Coffee was doing sit-ups. Appellant's hands were inside shower shoes, near Coffee's feet. He directed Coffee to punch the shoes each time he sat up. Coffee refused, and said his hand was injured. Appellant slapped Coffee in the chest with a shoe. Coffee stood, told appellant to "Get fucked," and went to his cell. Minutes later, appellant entered Coffee's cell, smiled at him, and said he loved him. He approached Coffee, as if he were about to hug him, and cut the left side of Coffee's throat. It bled profusely. Unarmed, Coffee covered his throat, lay on his bunk, and elevated his feet to resist any further assault. Appellant stood over him, stared at him, and told him he would work out when appellant told him to work out. Another inmate entered Coffee's cell and told appellant to leave. He complied.

***2** Durst entered Coffee's cell and asked to see his wound. Durst got upset and went to confront appellant in their cell. Appellant attacked Durst as he entered the cell, with a weapon that Durst had constructed weeks earlier.

Coffee and Durst were taken to the hospital for treatment. Coffee's throat wound was two and a half inches long, close to his jugular vein and only about one-quarter inch away from his carotid artery. If it had reached either vessel, Coffee would have quickly suffered a severe blood loss. Because the wound was deep, doctors sutured it with two layers of stitches. Durst received three wounds in his abdomen, one in his left shoulder, and two in his left arm. His combined wounds were potentially fatal, absent medical treatment.

Coffee and Durst were transported to jail after their treatment. Both men declined to discuss the attacks with investigators or deputies. Durst said he injured himself by falling down the stairs. Coffee was shaking and crying. He discussed the attack later, in monitored conversations on the jail telephone. Coffee told a friend he was scared, and declined to name the attacker. He said the authorities knew "who did it" and "got who did it." Coffee told his mother (Nina Ford) he could not identify his attacker because if he said "the wrong thing ... it could be bad" if "they" heard it.

At trial, Coffee identified appellant as his attacker. He explained he did not identify him initially because he feared "repercussions" pursuant to the inmate "code." That code prohibits inmates from "snitching or ratting" by providing information regarding inmates to authorities, or cooperating with them. Upon breaking the code, an inmate becomes a "rat" or "snitch," who risks retaliation, including serious injury or death. Inmates publicize snitching by circulating "paperwork," such as police reports.

Durst persistently refused to make any verbal statements against appellant to authorities, but he made some gestures that partially confirmed their suspicions regarding appellant. Durst said he did not want appellant to be prosecuted for the attack. Before and after their release from custody, Durst urged Coffee not to identify appellant as his attacker.

Gangs and Groups in Penal Institutions

Simi Valley Police Department Major Crimes Investigator Dan Swanson, formerly of the Ventura Police Department's gang unit, testified as a gang expert. Bruce Jones, an inmate and white supremacist skinhead, also testified about white supremacist groups.

In penal institutions, an inmate must segregate himself with members of his own race, or risk making his race appear weak as a group. Caucasian inmates are typically outnumbered by members of other races, and generally consider it safer to segregate themselves.

The Aryan Brotherhood ("A.B.") is a Caucasian prison gang that uses symbols associated with Nazis. A.B. adheres to a white supremacist ideology, follows pagan religious beliefs, and admires Odin, a mythological Nordic god. A.B. engages in drug sales and commits violent crimes, including murder. At times A.B. has controlled all Caucasian inmates in the California prison system. The California Department of Corrections and Rehabilitation ("CDCR") tries to limit A.B.'s influence by isolating its leaders in Segregated Housing Units ("S.H.U.s"). A.B. therefore relies upon members and associates of other gangs (e.g., the Nazi Lowriders and Public Enemy Number 1 ("PENI") who are housed outside S.H.U.s to carry out its orders.

*3 There are Caucasian inmates who self-identify as skinheads, without supporting white supremacists or Nazi tenets. Neo–Nazi skinheads do follow white supremacist and Nazis tenets. Independent skinheads follow the "Odinist" belief of a "pure white race," but do not necessarily join an organized group. Some skinheads join several gangs. For example, appellant is an independent skinhead, and an associate of the Ventura Skinhead Dogs, a Neo–Nazi skinhead gang. Incarcerated members of different white supremacist groups are compatible, but compete with each other to control Caucasian inmates.

White supremacist inmate groups revere respect, loyalty, and power. Respect is the paramount value. Committing an act of violence or having others obey one's order to do so are the most common ways to earn respect among gangs in penal institutions. Inmates boast about committing violent crimes and confirm their boasts by disseminating paperwork.

The Caucasian shotcaller in a penal institution dictates the conduct of Caucasian inmates. Subordinates must follow the shotcaller's orders. The shotcaller is expected to respond immediately to any sign of disrespect from subordinates by disciplining them. Discipline can range from mandatory exercise to violent punishment, including murder. A shotcaller who fails to respond immediately to subordinates' disrespect risks losing standing with more highly ranked prison shotcallers. Reduced standing will "drastically affect that jail leader's ability to continue to establish their own criminal resume or just continue to climb any rank structure within the prison."

A.B. leaders in S.H.U. facilities often use a code based upon an ancient Nordic alphabet to communicate and impose orders. They send messages through an intermediary, such as another inmate or a female outside the penal system. Before trial, appellant corresponded with multiple A.B. associates, including Lee Simpson, who was housed in a S.H.U. Simpson was the "primary conduit of information" for Charles Sherwin, a high-ranking A.B. associate and PENI gang member housed in a S.H.U. at Pelican Bay State Prison. In corresponding with Simpson and others, appellant used a code and phrases commonly used by Neo–Nazi skinheads, as well as references to Odin. While appellant was housed at Calipatria State Prison ("Calipatria"), Simpson corresponded with him regarding a position A.B. offered him to conduct business on its behalf. In his May 13, 2010 letter, appellant asked Simpson about the position, and how many inmates and facilities he would control. Appellant sent Simpson an acceptance letter on May 14, using a coded message. On May 17, Simpson sent appellant a letter regarding some "cowardly" inmates at Calipatria with an offer to place appellant on a team that would get the cowards "back in line." A later letter contained a coded message authorizing appellant to discipline three named inmates by violently assaulting them.

Uncharged Assaults

Bruce Jones testified that he was housed in NW D in the summer of 2008, until August 11. Jones, a skinhead, shared a cell with his friend, Durst. One day, Jones got angry at appellant for making derogatory comments about Jones's girlfriend. Later that day, another inmate told Jones appellant wished to see him. Jones returned to his cell, where appellant rushed him with a tomahawk (a weapon constructed of two razor blades attached to a comb or toothbrush) and inflicted multiple wounds on Jones's upper left torso and one wound on his left arm. Each wound was six to seven inches long. Appellant also threatened to cut off Jones's face and said, "Never disrespect another skinhead." Jones believed appellant attacked him for disrespecting him in front of other Caucasians. He did not report the incident because appellant was a fellow skinhead.

*4 On November 6, 2009, appellant fought with Robert Dennis while they were incarcerated in Calipatria. Dennis was a white supremacist. There was blood on both men. Officers found a weapon (a razor blade tied to a toothbrush) between the men. It lay near Dennis's feet, within appellant's reach. Dennis had several slash wounds, including one in his neck. Appellant had scrapes, abrasions and one cut on his knee.

Defense Case

Ryan Erskine testified that he and Coffee shared NW D cell 5 on August 23. They were inside cell 5, on the upper tier, working out with appellant and another inmate. Coffee whined, said he would not work out, and other inmates ridiculed him. Coffee told appellant, "Oh, fuck you, Trippy," and left. Appellant, Erskine and the other

inmate remained in cell 5. Minutes later, they heard thuds and bangs coming from outside cell 5. They found Coffee holding his throat and staggering outside the upper tier cells.

Dominguez Rodriguez testified that he was housed in NW D in August 2008. Appellant was the well-respected Caucasian leader. To preserve their power, jail leaders "check" inmates of their own race who disrespect them. Rodriguez testified that appellant and Durst were drinking Pruno (jail-made alcohol) on August 23. Santa Barbara County Sheriff Lieutenant Shawn Lammer testified that Coffee told him appellant was under the influence of Pruno on August 23.

Detective Steven Gonzales testified that he or another detective told prosecution witness Jones that he might receive an early parole date if he helped the prosecution but made no promises to him. Jones told Gonzalez appellant had once slashed him with a "tomahawk."

DISCUSSION

I. *Sufficiency of the Evidence*

Appellant contends that the evidence of attempted willful, deliberate and premeditated murder is not sufficient to satisfy federal due process. We disagree.

In reviewing claims of insufficient evidence, we examine the entire record in the light most favorable to the judgment to determine whether there is substantial evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Maciel* (2013) 57 Cal.4th 482, 514–515.) We do not reweigh the evidence or reassess the credibility of witnesses. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.) We accept the logical inferences that the jury might have drawn from the evidence even if we would have concluded otherwise. (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) If the trier of fact's findings are reasonably justified by the circumstances, the opinion of the reviewing court that a contrary finding might also reasonably be reconciled with the circumstances does not warrant reversing the judgment. (*People v. Jones* (2013) 57 Cal.4th 899, 961.)

" 'Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citation.] Attempted murder requires express malice, that is, the assailant either desires the victim's death, or knows to a substantial certainty that the victim's death will occur.' [Citation.]" (*People v. Houston, supra,* 54 Cal.4th at p. 1217.)

An attempted murder is premeditated and deliberate if it resulted from the defendant's " 'careful thought and weighing of considerations,' " rather than an " 'unconsidered or rash impulse.' " (*People v. Banks* (2014) 59 Cal.4th 1113, 1153.) " ' "[T]he process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly[.]' [Citation.]" ' " (*People v. Watkins* (2012) 55 Cal.4th 999, 1026.) In reviewing the sufficiency of a finding of premeditation and deliberation, courts often consider evidence of the defendant's planning, motive, and method, although these factors "need not be present in some special combination or afforded special weight, nor are they exhaustive. [Citation.]" (*People v. Booker* (2011) 51 Cal.4th 141, 173.)

***5** There is sufficient evidence to support the attempted willful, deliberate and premeditated murder. Appellant approached Coffee, as if he were going to hug him, said he loved him, and cut his neck, near the jugular vein, just a quarter inch away from his carotid artery. He inflicted a deep wound that required two layers of stitches. Appellant's feigned friendly approach reflects his planning and deliberation. Coffee was unarmed. "In plunging the knife so deeply into such a vital area of the body of an apparently unsuspecting and defenseless victim, defendant could have had no other intent than to kill." (*People v. Bolden* (2002) 29 Cal.4th 515, 561.)

II. Revocation of Appellant's Self–Representation

Appellant contends the court abused its discretion by revoking his pro per status. (*Faretta, supra,* 422 U.S. 806) We disagree.

We review a trial court's decision to revoke a defendant's self-representation status for an abuse of discretion.

(*People v. Williams* (2013) 58 Cal.4th 197, 252.) We "accord due deference to the trial court's assessment of the defendant's motives and sincerity as well as the nature and context of his misconduct and its impact on the integrity of the trial in determining whether termination of *Faretta* rights is necessary to maintain the fairness of the proceedings." (*People v. Carson* (2005) 35 Cal.4th 1, 12) (*Carson*); accord, *People v. Williams, supra,* at p. 252.)

A defendant has a federal constitutional right to self-representation. (*Faretta, supra,* 422 U.S. 806.) However, there are limits on the right to act as one's own attorney. The right of self-representation is not absolute. (*Ibid.*) "[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. [Citation.]" (*Id.*, at p. 834, fn. 46; *Carson, supra,* 35 Cal.4th at pp. 8–9.) A trial court may terminate a defendant's self-represented status for misconduct that seriously threatens the core integrity of the trial. (*Carson,* at p. 6.) "One form of serious and obstructionist misconduct is witness intimidation, which by its very nature compromises the factfinding process and constitutes a quintessential 'subversion of the core concept of a trial.' [Citation.]" (*Id.*, at p. 9.)

Background

Appellant represented himself for two separate time periods before trial. When he first represented himself in April 2010, the trial court issued a protective order which prohibited appellant from having any contact with victims Coffee and Durst. On May 21, 2010, the court issued additional protective orders prohibiting appellant's investigator from providing appellant with discovery material that contained witness contact information, and barring appellant and his investigator from providing discovery to third parties. The court issued the May orders after it learned of a letter appellant wrote to victim Durst in April, which said he had sent "one of the Huntington Comrades" to look for him at the home of Durst's mother. The letter also included the following direction for Durst: "Don't explain anything about that day. Nothing. Just wait.... I'll set something up once I know you got this."

On June 10, 2010, appellant sent a message to victim Dennis in a letter he sent to his mother, Marsha Dennis. The message stated: "I'm fighting 2 cases.... They are using that bullshit down south against me so I imagine someone will be looking for you soon. I believe my investigator ... Rose ... (805) ... can make sure you don't have to take a road trip. Please give him a call A.S.A.P. He'll explain. He will try to get ahold of you before anyone else. I wanted to send you something first. They're making quite the big deal out of this."

***6** On July 2, 2010, the court granted appellant's request to appoint counsel to represent him.

On May 23, 2011, the trial court granted appellant's second motion to represent himself. Before granting the motion, the court questioned and admonished him as follows: "Do you understand that your right to act as your own lawyer is not a license to abuse the dignity of this [C]ourt? If the Court determines that you're doing that by engaging in deliberate misbehavior that's causing disruption in the trial proceedings, the Court can terminate your right to self-representation. Do you understand that?" Appellant answered in the affirmative. The court appointed an investigator and advisory counsel to assist him.

During proceedings on July 25, 2011, the trial court considered appellant's request for witness and victim information which had been redacted from discovery documents. The prosecution objected that outstanding protective orders prohibited disclosing the redacted data to appellant. In addition, the prosecutor cited a 2010 incident in which appellant had arranged for investigator Ron Rose to use intimidating tactics while interviewing victim Coffee. The court denied appellant's request.

In the same hearing, a deputy county counsel reported that Rose took photographic and video contraband to the jail for appellant. The deputy further reported that Rose had sent subpoenas to a government agency with a statement that a lawsuit would be brought if the agency did not comply with the subpoena, pursuant to appellant's request. The court admonished appellant as follows: "It looks very much to me as though you are using public funds ... for the purpose of having this investigator intimidate witnesses." The court found that appellant was using discovery procedures to seek irrelevant material. The court asked Rose about the "threatening and intimidating" questions he had asked Coffee. Rose denied any intent to intimidate Coffee, and said he just asked the questions that appellant gave him.

The court granted Rose's request to be removed from the case.

On February 22, 2012, the prosecutor advised the trial court of an August 2010 incident in which jail staff had recovered an excerpt of the transcript from a statement by victim Coffee to a prosecution investigator. The excerpt had been passed among inmates in two modules of the jail to "get the word out that Jerry Coffee is a rat." Appellant had received a transcript of Coffee's statement in discovery while he was "in pro per." On March 5, 2012, the trial court issued orders to prohibit appellant from taking discovery materials into his cell. The orders permitted him to view discovery materials according to the policies, procedures and protocols of the jail. Jail staff permitted appellant to review discovery material in the jail's professional visitation booth ("PV booth"), to take notes regarding the discovery material, and to possess notes (but no discovery material) in his cell.

Throughout pretrial proceedings, appellant repeatedly moved to continue trial, claiming that he had not had sufficient opportunity to prepare. On May 1, 2012, the prosecutor and a deputy county counsel asserted that appellant was engaging in "delay tactics," by repeatedly declining to review discovery material in the jail PV booth while telling the court he needed to review them in his cell in order to timely prepare for trial. The court denied his renewed request to take discovery into his jail cell, but arranged for appellant, his investigator and advisory counsel to use the courtroom to review discovery. On May 3, the prosecutor advised the court that on May 2, appellant had declined to use the courtroom beyond the noon hour. On May 21, 2012, a jail deputy testified about multiple occasions from January 12, through May 3, 2012, on which appellant had declined offers to use the PV booth to review discovery.

*7 On May 25, 2012, the prosecutor filed its response and opposition to appellant's request for additional victim contact information which provided evidence of appellant's repeated violation of protective orders. An attached report prepared by Melissa Adams, a Federal Bureau of Investigation forensic examiner and cryptanalyst, described excerpts from appellant's coded correspondence. Coded sections of appellant's correspondence with A.B. associate Simpson and others concerned the distribution of victim contact information. For example, appellant's May 4, 2010 letter to Simpson contained a coded numerical message which corresponded to the phone numbers of Coffee's girlfriend and mother. Other correspondence between appellant and Simpson discussed an unidentified task that appellant had asked Ventura Skinhead Dogs associate Justin Mattley to perform. In his August 4, 2010 letter to Mattley, appellant sent a coded message instructing him to dispose of any documentation regarding Coffee's mother.

On May 25, the court found that appellant "continuously abused the court processes and [was] engaging in a pattern of conduct in an endeavor to tamper with and intimidate witnesses, that he [had] engaged in obstructionist misconduct that ... compromise[d] the fact-finding process and constituted a ... subversion of the concept of a trial." Among other things, the court noted his ongoing attempts to delay trial in order to obtain information to further intimidate victims and witnesses. The court revoked appellant's "pro per" status and appointed the attorney who had served as advisory counsel to represent him.

Appellant contends the trial court abused its discretion because it did not consider "alternative sanctions" before it terminated his self-representation. We disagree. Appellant violated the court's protective orders repeatedly and used deceptive tactics to delay the proceedings in an effort to engage in victim and witness intimidation. He threatened those individuals, personally, or through cohorts, in blatant violation of protective orders. Moreover, he used a complex code to convey information to his cohorts, which delayed and nearly prevented authorities from discovering the extent of his serious and obstructionist misconduct. Under the circumstances, the court did not abuse its discretion in terminating appellant's self-representation before considering alternative sanctions. (*Carson, supra,* 35 Cal.4th at pp. 6, 9.)

III. Gang Expert and Cryptanalysis Testimony

Appellant further claims that the trial court abused its discretion and violated his right to a fair trial by allowing the prosecution to present expert testimony regarding the A.B. and the cryptanalyst's testimony regarding appellant's coded letters. The record belies his claim.

Gang evidence is admissible where it is relevant to establish motive or intent. (*People v. Williams* (1997) 16 Cal.4th 153, 193.) Expert testimony concerning the culture, habits, and psychology of gangs as well as motivation for a particular crime and rivalries among gangs is the proper subject of expert testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656–657.) Where gang evidence is relevant to motive, it can be admitted even where the prosecution does not attach gang enhancements. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194–1195.) We review the admission of gang evidence for an abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 547.) There was none.

The challenged gang expert testimony was highly probative to explain the motive for appellant's crimes. He had violently attacked unarmed Caucasian inmates with whom he was usually friendly, under circumstances that would seem innocuous to jurors. Absent the gang evidence, there was no apparent motive. Gang mores demand that a shotcaller punish subordinates' lack of respect, as appellant did in attacking Coffee and Durst. Following the charged attacks, appellant acquired more status in the prison gang structure, as demonstrated by his correspondence with Simpson. "[W]here evidence of gang activity or membership is important to the motive, it can be introduced even if prejudicial. [Citations.]" (*People v. Martin* (1994) 23 Cal.App.4th 76, 81.) Moreover, much of the challenged gang evidence was cross-admissible, where its content showed consciousness of guilt, including appellant's correspondence with gang associates regarding witness and victim intimidation. Similarly, the challenged cryptanalysist's testimony explaining the contents of appellant's coded messages was probative to show motive and consciousness of guilt. The trial court did not abuse its discretion in admitting the challenged testimony.

Uncharged Crimes

***8** Appellant contends that the trial court violated his due process rights and abused its discretion under Evidence Code section 352 by admitting evidence of uncharged crimes. We disagree.

The trial court allowed the prosecution to present evidence of appellant's August 2008 assault upon county jail inmate Jones and his November 2009 assault upon Dennis at Calipatria. Before trial, the court ruled the uncharged crimes evidence was relevant to show appellant's motive and intent in attacking Coffee and Durst (Evid.Code, § 1101, subd. (b)); and that its probative value outweighed "any concerns related to undue consumption of time, confusion of issues to the jurors or prejudice to the defense." (Evid.Code, § 352.) After trial began, counsel for appellant renewed his objection to evidence of the Dennis assault and argued it was irrelevant because it occurred after the charged offenses. The court ruled it was admissible, despite its timing, because appellant had mentioned it in his letters, and it occurred in the "entire context of what arguably is a plan to engage in violent activities ... and ... use letters and coded messages to inveigle people into a plan not to testify against" appellant.

We review a trial court's ruling under Evidence Code sections 352 and 1101 for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) Evidence Code section 352 gives the court discretion to exclude evidence if "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Evidence of a defendant's criminal conduct on another occasion may be admitted to prove motive, intent, or lack of self-defense. (Evid.Code, § 1101, subd. (b).) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) "To be admissible to show intent, 'the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.' [Citations.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1194.) Where an act is sufficiently similar to prove intent, motive, common plan or identity, its relevance is not diminished by the fact that it occurred after the charged offense. (*People v. Balcom* (1994) 7 Cal.4th 414, 425.)

The trial court did not abuse its discretion in admitting the Jones and Dennis assaults to prove intent. In each instance appellant cut an apparently unarmed Caucasian inmate. In the Jones and Durst assaults, he used a weapon crafted by Durst. The Jones assault further resembled appellant's assaults upon Coffee in that he entered the victim's cell to

attack him immediately after the victim displayed conduct he considered disrespectful. In the Coffee, Durst and Dennis assaults, appellant cut the victim's neck. Although the Dennis assault occurred outside a cell, unlike the charged offenses, it was " 'sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.' " (*People v. Cole, supra,* 33 Cal.4th at p. 1194.)

***9** We also reject appellant's assertion that the trial court abused its discretion under Evidence Code section 352 by admitting the uncharged crime evidence because its prejudicial impact outweighed its probative value. The uncharged crime evidence was not more inflammatory than the evidence of the charged crimes which caused injuries that required professional medical treatment. Further, the court repeatedly instructed jurors with CALCRIM No. 375 that the uncharged crimes evidence could not be used to conclude that appellant had a bad character or was predisposed to commit the charged crimes, and that jurors must only consider it for the limited purpose of establishing identity, intent, or motive.

IV. *Sentencing Issues*

Appellant contends the trial court abused its discretion in imposing an upper term sentence for the count 4 assault with a deadly weapon because the court failed to give the requisite statement of reasons and the interests of justice were not served "by such an excessive sentence." The claim is forfeited because it was not raised below. (*People v. Scott* (1994) 9 Cal.4th 331, 353–357.) In any event, the claim lacks merit. [2]

We review a trial court's sentencing decision for an abuse of discretion. (*People v. Sandova* l (2007) 41 Cal.4th 825, 846–847.) Appellant was sentenced under section 1170, subdivision (b), which provides in pertinent part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court.... In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports, ... and any further evidence introduced at the sentencing hearing...."

During sentencing the prosecutor argued that the aggravating factors listed in the probation report supported the imposition of the upper term. Those factors are (1) appellant had engaged in violent conduct which indicated a serious danger to society, and (2) his prior convictions were numerous or of increasing seriousness. The probation report listed no mitigating factors and appellant cites none. The court announced its selection of the upper term shortly after the prosecutor cited the aggravating factors, which implies the court based its sentencing decision upon them. The court did not abuse its discretion in imposing the upper term. Because it is not reasonably probable that resentencing would result in a sentence more favorable to appellant, we will not remand this matter for a statement of reasons for the selection of the upper term. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 155.)

Appellant further contends, and respondent appropriately concedes, that the trial court improperly imposed a section 667.5, subdivision (b) one-year prior prison term enhancement because the mayhem conviction on which that enhancement was based was used to impose a five-year section 667, subdivision (a) enhancement. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150–1153; *People v. Perez* (2011) 195 Cal.App.4th 801, 805.) We accept respondent's concession and strike the prior prison term enhancement.

DISPOSITION

We modify the judgment to strike the section 667.5, subdivision (b) prior prison term enhancement. The superior court shall amend the abstract of judgment accordingly and forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

We concur:

GILBERT, P.J.

YEGAN, J.

All Citations

Not Reported in Cal.Rptr.3d, 2015 WL 1874079

Footnotes

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

2 We reject appellant's related claim that counsel's failure to object deprived him of the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 746.) Because he has not shown that his count 4 sentence would have been more favorable but for counsel's claimed failure, appellant has not established the requisite prejudice to support that claim. (*Ibid.*)