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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. TSHOMBE KELLEY, Defendant and Appellant.	A093862 (Alameda County Super. Ct. No. C139184)

Tshombe Kelley appeals his conviction for first degree murder and sentence of 52 years to life, raising a variety of issues. Only one has merit: we agree that the prosecution should not have been permitted to cross-examine Kelley concerning prior unproven crimes. However, because any error in this regard was harmless in light of the considerable evidence against Kelley, we affirm the judgment in its entirety.[1]

BACKGROUND

On May 21, 2000, at 6:31 p.m., a 911 operator received a call that a man had been shot in the 4100 block of Mera Avenue in Oakland. The call came from Kelley's next-door neighbors, who heard shots coming from Kelley's house at 4126 Mera. While the husband was on the phone, the wife saw the victim, Aaron Stewart, stooped over, walking up to a neighbor's porch. She went out to Stewart. He was unable to respond to

[1] Kelley has also filed a petition for writ of habeas corpus (A093862) related to this appeal. By separate order filed on this same date, we deny the petition.

questions. He died from multiple gunshot wounds in the back. The neighbors saw no one else in the area.

Another neighbor heard shots. She awakened the father of her children. He saw Stewart slumped outside their house, went outside, and saw Kelley outside in his yard. When he asked what happened, Kelley replied, "Dude tried to rob me. Give dude back his keys," and held out a set of keys.

Police arrived within two minutes. A few minutes later, an officer saw Kelley, sweating, through the screen door of Kelley's house. When the officer asked Kelley to talk to him, Kelley began to shake and announced, "I didn't shoot anybody."

Forensics tests found blood inside Kelley's gate. The blood was consistent with Stewart's. A bullet hole in the gate indicated that a shot had been fired from Kelley's doorway or porch. Kelley's right hand tested positive for gunshot residue, though in a quantity insufficient to establish that he had recently fired a gun. Neither the murder weapon nor any spent shells were found.

The three adults at 4126 Mera were Kelley, his girlfriend Corrie Tridente, and Tridente's cousin, Cassandra Bugnatto. They were detained and questioned separately. Bugnatto, who was away at a laundromat during the shooting, said that Stewart and Kelley had had a falling out over an affair between Tridente and Stewart. After initially denying that she knew Stewart, Tridente admitted that she had had an affair with Stewart. She said that when Stewart came by, Kelley got a gun and went out to meet him. She heard yelling and then gunshots. Kelley refused to speak with police without an attorney present. Early on the morning of the 22nd, he was charged with murder.

In September 2000, shortly before trial, the prosecution asked for Kelley's outbound calls from prison to be taped. Based on these tapes, the prosecution obtained a search warrant for Kelley's prison cell and Tridente's residence, which at the time of trial was her grandmother's home. The search yielded numerous letters between Kelley, Tridente, and others that formed a central part of the prosecution's case. In these letters, Kelley coached Tridente on what actions and testimony would be favorable and suggested testimony for Bugnatto. In an October 3 letter, he asked Tridente to refuse to

testify, notwithstanding any court order, in the hope of suppressing her May 21 taped statements.

At trial, the prosecution introduced testimony from numerous witnesses that Tridente and Stewart had had an affair in 1999, and that Kelley threatened to harm or kill Stewart as a result. Stewart and Kelley were one-time friends; at some point after the affair, they partially reconciled.

In the spring of 2000, Kelley bought a car from Stewart. When it broke down shortly thereafter, Kelley held off on paying Stewart. In late April, according to prosecution witnesses, Kelley went to Stewart's house, argued with Stewart, fired a gun in the air, and left. Kelley returned that day and aimed a gun at Stewart; according to some witnesses, the gun jammed, while according to another, it was not loaded and Kelley was just trying to scare Stewart. Kelley made further threats on Stewart's life.

On May 21, the day of the shooting, Bugnatto, a friend of both Stewart and Kelley, was babysitting Stewart's son at Kelley's house. Another mutual friend of Stewart and Kelley who was with Stewart that day, David Maldonado, testified that Stewart received a call to come pick up his son from Kelley's apartment. Stewart used Maldonado's car. Maldonado called Kelley immediately after Stewart left. Kelley asked whether Maldonado was with Stewart; Maldonado said no, implying that Stewart was coming alone.

Tridente was unwilling to testify and did so only after the court granted her immunity and ordered her to testify. She repudiated her May 21 statements.

Kelley testified in his own defense. He denied that he shot Stewart. Though he knew about the affair, he denied any lasting problems with Stewart. On the evening of the shooting, he and Tridente were at home when they heard shots. Kelley saw what looked like a white male go past his window. He went outside, recognized Maldonado's car, and thought that someone must have tried to rob Maldonado. He said to his neighbor, not "Dude tried to rob me," but "Someone tried to rob him." Only later, when he saw the body being taken away, did he realize that it was Stewart who had been shot.

A jury convicted Kelley of first degree murder (Pen. Code, § 187) and personal use of a firearm resulting in great bodily injury or death (Pen. Code, § 12022.53, subds. (c) and (d)), based on the Stewart shooting, as well as willfully discharging a firearm in a grossly negligent manner (Pen. Code, § 246.3), based on the late April incident where Kelley fired a gun in the air at Stewart's house. The court sentenced Kelley to 52 years to life.

Kelley has timely appealed.

DISCUSSION

I. *Kelley Did Not Receive Ineffective Assistance of Counsel*

A. *Kelley's Counsel Was Not Ineffective for Failing to Seek Exclusion of Tridente's Statements Because the Statements Were Admissible*

When police arrived at the scene, Tridente, Bugnatto, and Kelley were separated. Tridente was taken to the police station and was questioned later the same night about the shooting. She made various statements that tended to incriminate Kelley, including that Kelley got a gun and went out to see Stewart shortly before she heard shots fired. Kelley's attorney challenged this statement at the preliminary hearing, but the court found no evidence that it was involuntary. Kelley's trial counsel, a different attorney, did not seek exclusion. Kelley challenges the effectiveness of his trial counsel, arguing that counsel failed to object to Tridente's testimony. If trial counsel had objected, he reasons, her testimony—which he contends was wrongfully coerced—would not have been admitted into evidence and the jury would have had a reasonable doubt about his guilt. (See U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 15.)

A criminal defendant has a federal and state constitutional right to the effective assistance of counsel. To establish a claim of ineffective assistance, a defendant must establish both that counsel's representation fell below an objective standard of reasonableness and that it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-688, 694-695; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) To prevail, a defendant must establish the incompetence of counsel by a preponderance of evidence.

(*Ledesma, supra,* 43 Cal.3d at p. 218.) We accord great deference in our review of the trial counsel's performance. (*People v. Duncan* (1991) 53 Cal.3d 955, 966; *Strickland, supra,* 466 U.S. at pp. 689-690.)

In order to prevail on his ineffective assistance of counsel claim, Kelley must demonstrate the validity of his underlying claim—that Tridente was wrongfully coerced and thus, her statements were inadmissible. (See *Kimmelman v. Morrison* (1986) 477 U.S. 365, 375 [defendant must prove validity of underlying substantive claim].) An accused has no standing to object to the violation of another person's constitutional rights. However, when a third person's testimony is admitted against the accused in a criminal trial, the accused has a due process right to seek exclusion of coerced third party testimony if the admission of that testimony would deprive him or her of a fair trial. (*People v. Badgett* (1995) 10 Cal.4th 330, 343-344.) "[T]he primary purpose of excluding coerced testimony of third parties is to assure the reliability of the trial proceedings . . ." (*Id.* at p. 347) Consequently, in analyzing a claim of third party coercion, the question is whether the evidence has been made unreliable by ongoing coercion. (*Id.* at pp. 347-348.)

Kelley has the burden of proving that (a) Tridente was improperly coerced, and (b) the reliability of her statements was actually impaired by the coercion. (*Badgett, supra,* 10 Cal.4th at pp. 346-350; *People v. Douglas* (1990) 50 Cal.3d 468, 500; *People v. Leach* (1985) 41 Cal.3d 92, 102-104.) The ultimate question of voluntariness is a legal one. (*Miller v. Fenton* (1985) 474 U.S. 104, 110.) We therefore conduct an independent review of the record to determine whether Kelley could have carried his burden on these points. (*Badgett, supra,* 10 Cal.4th at p. 350.) Howe ver, when faced with conflicting testimony in the record, we must accept the version of events most favorable to the judgment. (*Id.* at pp. 350-352; see also *People v. Howard* (1988) 44 Cal.3d 375, 394.)

Our inquiry focuses on whether the influences brought to bear were " 'such as to overbear [the witness's] will to resist and bring about [statements] not freely self-determined.' " (*People v. Hogan* (1982) 31 Cal.3d 815, 841, quoting *Rogers v. Richmond* (1961) 365 U.S. 534, 544.) A statement is involuntary, in violation of state and federal

due process guarantees, where it was extracted by threats, violence, direct or implied promises, or the exertion of improper influence. (*People v. Benson* (1990) 52 Cal.3d 754, 778.) It is, however, "generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect. . . . These ploys may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary." (*Miller v. Fenton* (3d Cir. 1986) 796 F.2d 598, 605; see also *People v. Lee* (2002) 95 Cal.App.4th 772, 785.)

Having independently reviewed the trial record, we conclude that Kelley has not met his burden of showing that the circumstances of Tridente's statements demonstrate coercion making the statements unreliable. Tridente was detained sometime before 7:00 p.m., immediately after the shooting, to prevent her and Kelley from scripting a version of the facts. Kelley argues that Tridente was locked in a room for seven hours, denied food or water, and sequestered from contact with anyone. There was no evidence at trial that food and drink were withheld. Tridente did not request any food. Some evidence indicates she was provided water. When she said she was cold, the police responded by giving her a jacket. When she asked to go to the bathroom, she was taken to the bathroom. Kelley also asserts that Tridente was held without sleep, but the trial record does not show one way or the other whether she took any naps. While Tridente and Kelley were prevented from seeing each other, we recognize that the sequestration of witnesses is oftentimes an essential part of a police investigation. Kelley's attempts to suggest testimony to Tridente in the months between the shooting and trial underscore this point.

Other than an initial statement at the scene, Tridente was not questioned for the first seven hours after she was detained. During this period, the officer in charge of the investigation, Sergeant Longmire, was first preparing and presenting a search warrant for the premises, in order to secure the evidence and have it available for background use during witness interviews, and then interviewing other witnesses. The trial record does

not support Kelley's implicit argument that Tridente was held without questioning in order to exert psychological pressure on her.

When police finally questioned Tridente, they did so for less than two hours before releasing her. Tridente testified that during the two hours she was questioned, the police called her names, including "whore" and "bitch," and accused her of lying.[2] The police took Tridente's statement, then began "drilling" her, and finally started yelling at her. Sergeant Longmire grabbed her by the arm once, although this did not injure her. Tridente testified that the police swore at her, but offered few specifics, and did not testify to any specific threats.[3]

Sergeant Longmire testified that he was assertive with Tridente and that he repeatedly accused her of lying. Longmire had good reason to believe Tridente was lying: Tridente denied knowing the victim, and Longmire already had information from other witnesses suggesting that this was false, that Tridente had had an affair with Stewart, and that the affair created friction between Stewart and Kelley. In the course of the interview, Tridente changed her story and admitted to lying about not knowing Stewart. Tridente denied knowing there were guns in the house, then later admitted seeing Kelley with a silver pistol, a fact she must have contributed to the story because the police never found the murder weapon. She denied knowing about any disputes between Kelley and Stewart, a statement other witnesses had indicated was almost certainly false. Finally, she implausibly denied that Stewart had come over to the house

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[2] Tridente's credibility is not enhanced by the fact that the conduct she attributed to Longmire mirrors verbatim the treatment she had previously received from Kelley. Kelley testified that he used mind games to get Tridente to "confess" to her affair with Stewart, and then beat her and called her "whore" and "bitch" when she admitted the affair. Other witnesses testified that Kelley frequently called Tridente a liar and a whore.

[3] If Tridente was upset and anxious, it is understandable for reasons entirely unrelated to any questioning by police. She had just heard a friend and former lover be shot to death. Her boyfriend may have been involved. That she was upset or anxious tells us little about whether her statements were the product of coercive and overbearing police tactics.

that evening. Longmire testified that he may have touched Tridente's arm, though not forcefully. He did not use threats and did not call Tridente names.

Longmire's testimony offered plausible contradictions to Tridente's inconsistent version of the interview, and we have no sound basis for rejecting it. (*People v. Ervin* (2000) 22 Cal.4th 48, 83.) *People v. Lee*, upon which Kelley relies, is readily distinguishable. There, a recording of the entire interview provided undisputed evidence that the police threatened a witness with prosecution for first degree murder and pressured the witness to name their actual suspect as the shooter. The threat was made even though the police had no good faith belief that the witness was the shooter. (*People v. Lee*, *supra*, 95 Cal.App.4th at pp. 782-785.) The conflicting evidence in the trial record does not establish any comparable threats. Indeed, even if we were to credit Tridente's testimony in its entirety, the conduct she testified to at trial would not establish that the police coerced her statement or that the statement should have been deemed unreliable and excluded.[4]

To conclude that Tridente's statements are so unreliable as to require exclusion would require a near-blanket rule that the fruits of any after-midnight questioning are per se inadmissible. We decline to adopt such a rule. Kelley has failed to meet his burden of demonstrating that the pretrial statement was involuntary. (*Badgett*, *supra*, 10 Cal.4th at p. 347.) We note as well that defense counsel questioned Tridente extensively about the circumstances of her pretrial statements, and the jury had the opportunity to consider those circumstances along with all the other evidence. The admission of Tridente's statements did not violate Kelley's due process rights.

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[4] It is undisputed that Tridente was not given *Miranda* warnings. Kelley has no standing to challenge this failure directly. (*Badgett*, *supra*, 10 Cal.4th at p. 343.) Instead, Kelley asks us to consider the failure to provide *Miranda* warnings as part of the totality of the circumstances affecting voluntariness. (See *Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 418.) The fact that Tridente received no *Miranda* warnings does not alter our conclusion. We have considered the omission, but remain convinced in light of all the circumstances that Tridente's statements were voluntary and reliable.

Because Kelley has not established that Tridente's statements were coerced and wrongly admitted, he cannot establish ineffective assistance of counsel on the ground that defense counsel should have objected to the admission of Tridente's statements. (See *Strickland, supra,* 466 U.S. at pp. 687-688; *Ledesma, supra,* 43 Cal.3d at p. 216.) We reject his ineffective assistance of counsel claim.

B. *The Failure to Request a Special Instruction on the Voluntariness of Tridente's Statements Was Not Ineffective Assistance of Counsel*

In a related claim, Kelley argues that his trial counsel should have requested a separate instruction directing the jury to assess the voluntariness of Tridente's custodial statements. Once again, Kelley must establish both deficient performance and prejudice. (*Strickland, supra,* 466 U.S. at pp. 687-692.) Because Kelley cannot show either, we reject this claim as well.

Strickland establishes a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland, supra,* 466 U.S. at p. 689.) "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts." (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) "[W]here counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926; see also *People v. Fosselman* (1983) 33 Cal.3d 572, 581 [ineffective assistance claim cognizable on direct appeal only if record "affirmatively discloses that counsel had no rational tactical purpose for his act or omission"].)

Here, the record does not disclose trial counsel's reasons for not requesting a special instruction asking the jury to consider the voluntariness of Tridente's custodial statements. However, when the concept at issue is "closer to rough and ready common sense than abstract legal principle," it is entirely proper for a trial court to reject a proposed special instruction. (*People v. Gonzalez* (1992) 8 Cal.App.4th 1658, 1665.) The concept at issue here falls in that category: "As a practical matter, most jurors would

realize that promises of leniency or other coercion could induce false statements." (*People v. Ervin* (2000) 22 Cal.4th 48, 83.) Counsel rationally could have concluded that requesting a special instruction would be both unnecessary and futile.

Moreover, the record establishes that Kelley was not prejudiced. Under the prejudice prong of *Strickland*, Kelley must show a "reasonable probability that, but for counsel's unprofessional error . . . petitioner would have enjoyed a more favorable outcome of the trial." (*In re Avena* (1996) 12 Cal.4th 694, 726; accord *Strickland*, *supra*, 466 U.S. at p. 694.) There is some question whether the *Strickland* standard for prejudice was modified by *Lockhart v. Fretwell* (1993) 506 U.S. 364, 372. (*In re Avena*, *supra*, 12 Cal.4th at pp. 721-722, fn. 5, and pp. 739-741 [conc. opn. of Arabian, J.]; *People v. Avena* (1996) 13 Cal.4th 394, 418, fn. 3.) *Lockhart v. Fretwell* held that outcome determination is not the sole factor in assessing the prejudice resulting from ineffective representation; instead, the pertinent inquiry is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." (*Lockhart v. Fretwell*, *supra*, 506 U.S. at p. 372.)

As in *People v. Avena*, we need not decide whether *Lockhart* applies because under either the *Lockhart* standard or the *Strickland* standard, Kelley's claim is meritless. (See *People v. Avena*, *supra*, 13 Cal.4th at p. 418, fn. 3.) Having reviewed the entire record, we conclude that it is not reasonably probable that a different result would have occurred had defense counsel requested a special instruction, in light of the evidence amassed against Kelley and the slender basis for concluding that Tridente's statements might have been involuntary. We further conclude that the failure to request a special instruction did not render the proceeding fundamentally unfair. We therefore reject this claim.

II. *The Trial Court Properly Refused to Instruct the Jury on Voluntary Manslaughter*

Kelley requested an instruction on voluntary manslaughter. The trial court refused the instruction. Kelley argues that substantial evidence supported a voluntary

manslaughter verdict based on either provocation giving rise to heat of passion or imperfect self-defense.

We need not determine whether the evidence at trial supported a voluntary manslaughter verdict based on provocation/heat of passion because the jury's verdict demonstrates that it necessarily rejected this theory. (*People v. Mincey* (1992) 2 Cal.4th 408, 438.) The jury was instructed that first degree murder required a finding that Kelley formed the intent to kill, "which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation." (CALJIC No. 8.20.) It was also instructed that second degree murder required a finding of an unlawful killing with malice aforethought where "the evidence is insufficient to prove deliberation and premeditation." (CALJIC No. 8.30.) The jury returned a verdict of first degree murder and rejected second degree murder. It therefore must have found that Kelley acted with premeditation, not in the heat of passion in response to provocation. Heat of passion and premeditation are "mutually exclusive" as a matter of law (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 251), and the jury instructions correctly reflected that mutual exclusivity.

Kelley focuses only on the absence of any instruction on provocation. However, a finding of voluntary manslaughter on this theory requires a finding of both provocation and heat of passion. (*People v. Sedeno* (1974) 10 Cal.3d 703, 719, disapproved on another point in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) Objectively, the defendant must have been provoked. Subjectively, the provocation must have given rise to a heat of passion that obscured the defendant's reason and prevented him from forming the intent to kill in a premeditated and deliberate fashion. (*Sedeno, supra,* 10 Cal.3d at p. 719; *People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1015.) Provocation that does not give rise to a heat of passion is irrelevant. Because the jury necessarily found no heat of passion, the refusal of a voluntary manslaughter instruction predicated on the theory that Kelley was provoked to kill in the heat of passion was harmless.

The same reasoning does not extend to the failure to instruct on voluntary manslaughter under a theory of imperfect self-defense, i.e., a killing arising from an actual but unreasonable belief in the need for self-defense. (*In re Christian S.* (1994) 7 Cal.4th 768, 773.) Nothing in the jury's verdict demonstrates that it necessarily rejected this theory. However, Kelley had no absolute right to this instruction. Instead, he was entitled to the instruction only if the trial record contained substantial evidence sufficient to support a jury verdict on this theory. (*Id.* at p. 783.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) We discern in this record no such evidence.

Voluntary manslaughter based on imperfect self-defense requires that the defendant possess "*actual* fear of an *imminent* harm." (*In re Christian S., supra,* 7 Cal.4th at p. 783.) The fear must be of " '*imminent* danger to life or great bodily injury.' [Citation]." (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Kelley points to Tridente's statement that she heard yelling when Stewart came by on May 21. He also points to another statement by Tridente that on a previous occasion, Stewart came by with a second man and engaged Kelley in a conversation or argument in front of Kelley's house. After Stewart left and Kelley came inside, Tridente heard gunshots. She did not identify when the incident occurred, nor did she offer any basis for concluding that it was Stewart, rather than his companion or someone else entirely, who fired the shots. From these two statements, Kelley argues that a jury could find that on May 21 he killed Stewart because he was in actual fear of grievous imminent harm, despite the fact that at trial he denied participation in the shooting and Stewart was found unarmed.

This evidence is not substantial. While a defendant's denial of any participation in a shooting does not preclude the giving of a voluntary manslaughter instruction, there at least must be evidence presented of a defense "deserving of any consideration whatever," albeit inconsistent with the defendant's broad denials. (*People v. Medina* (1978) 78 Cal.App.3d 1000, 1005.) Here, the evidence presented was insufficient for any

reasonable jury to return a verdict of voluntary manslaughter. The trial court did not err in refusing the request for a voluntary manslaughter instruction.

III. *The Prosecution's Wiretap of Kelley's Jailhouse Conversations Was Legal*

The prosecution recorded Kelley's jailhouse telephone conversations and introduced portions of the transcripts, as well as evidence seized based on those conversations. Kelley challenges the wiretap under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 United States Code section 2510 et seq. ("Title III") and state law. We review these issues de novo. (*U.S. v. Van Poyck* (9th Cir. 1996) 77 F.3d 285, 291.) We find no violation of either federal or state law.

With certain limited exceptions, Title III prohibits the unauthorized interception of "any wire, oral, or electronic communication." (18 U.S.C. § 2511, subd. (1)(a).) Thus, "[i]t protects an individual from all forms of wiretapping except when the statute specifically provides otherwise." (*Abraham v. County of Greenville, S.C.* (4th Cir. 2001) 237 F.3d 386, 389.) Those protections apply to prisoners and prison monitoring. (See, e.g., *U.S. v. Amen* (2d Cir. 1987) 831 F.2d 373, 378.) Therefore, the recordings of Kelley were obtained legally only if one of the statutory exceptions to the prohibition applies. The People argue that two of the specified exceptions, the consent and law enforcement exceptions, render its use of the recordings proper in this case. Because we agree that the consent exception applies, we need not address the law enforcement exception.

Under Title III, "it shall not be unlawful . . . for a person acting under color of law to intercept a wire, oral, or electronic communication, where . . . one of the parties to the communication has given prior consent to such interception." (18 U.S.C. § 2511, subd. (2)(c).) "The legislative history of [Title III] shows that Congress intended the consent requirement to be construed broadly." (*Amen, supra,* 831 F.2d at p. 378; see S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S.C.C.A.N. 2112, 2182.) Consistent with this intent, every federal circuit court to address the question has concluded that a prisoner who, while on notice that his telephone conversation is subject to taping,

proceeds with the conversation, has given implied consent to that taping. (*U.S. v. Footman* (1st Cir. 2000) 215 F.3d 145, 155; *U.S. v. Workman* (2d Cir. 1996) 80 F.3d 688, 693-694; *U.S. v. Horr* (8th Cir. 1992) 963 F.2d 1124, 1125-1126; *Van Poyck*, *supra*, 77 F.3d at p. 292; but see *U.S. v. Daniels* (7th Cir. 1990) 902 F.2d 1238, 1244-1245 [criticizing other courts' broad views of consent but deciding case on another ground].)

Our Supreme Court's recent decision in *People v. Loyd* (2002) 27 Cal.4th 997 demonstrates that at least two members of that court would agree with the views of these federal courts. While the majority found it unnecessary to reach the issue, Justice Moreno, joined by Justice Kennard, spelled out his agreement with the consensus interpretation of the circumstances sufficient to find implied consent by prisoners. (*Id.* at pp. 1014-1015 [conc. op. of Moreno, J.].) We agree as well. So long as a prisoner is given meaningful notice that his telephone calls over prison phones are subject to monitoring, his decision to engage in conversations over those phones constitutes implied consent to that monitoring and takes any wiretap outside the prohibitions of Title III.

Kelley relies on two passages from earlier California Supreme Court decisions to argue that that court would take a different view of Title III than the federal courts. (*People v. Otto* (1992) 2 Cal.4th 1088, 1098-1099, fn. 7; *Halpin v. Superior Court* (1972) 6 Cal.3d 885, 900, fn. 21.) *Otto* and *Halpin* each suggest in footnotes that the protections of Title III apply even if a telephone caller has no reasonable expectation of privacy. While this may be so, it has little bearing on our inquiry. The issue is not whether Kelley's calls were within the ambit of Title III as an initial matter; both sides agree that they were. Instead, the issue is whether any of the limited exceptions spelled out in Title III remove those calls from Title III's protections. On that point, *Otto* and *Halpin* are not instructive. We rely instead on *Loyd* and the developed federal consensus on the scope of the consent exception.

That consent exception applies here. Kelley's housing unit had a warning sign above its telephones, which stated, "Telephone calls may be monitored and recorded." In addition, the prison phone system contained a warning at the beginning of each call stating that all calls were subject to monitoring or recording. Meaningful notice includes

"a monitoring notice posted by the outbound telephone, or a recorded warning that is heard by the inmate through the telephone receiver, prior to his or her making the outbound telephone call." (*Loyd, supra,* 27 Cal.4th at p. 1015 [conc. op. of Moreno, J.].) Such notice is precisely the sort of notice previously found sufficient to hold that a prisoner has impliedly consented to monitoring. (See *Amen, supra,* 831 F.2d at p. 379; *Workman, supra,* 80 F.3d at p. 693; *Van Poyck, supra,* 77 F.3d at p. 292; *Horr, supra,* 963 F.2d at p. 1126.) Because Kelley had notice that his calls were subject to monitoring, he consented when he used the prison's phone system.

It is true that this rule presents prisoners with "a choice between unattractive options," limiting their contact with the outside world or submitting to government eavesdropping. (*Langton v. Hogan* (1st Cir. 1995) 71 F.3d 930, 936.) However, there is no reason to believe Congress intended to draw the statute so narrowly as to exclude such prisoner choices from the notion of consent. (*Footman, supra,* 215 F.3d at p. 155.) The use of prison telephones is a privilege, not a right.

With respect to state law, our Supreme Court recently held that a prosecutor does not commit misconduct when he seeks the surreptitious recording of conversations between an imprisoned defendant and third parties, as the deputy district attorney did here. (*Loyd, supra,* 27 Cal.4th 997.) Twenty years earlier, the same court held that such actions constituted misconduct. (*DeLancie v. Superior Court* (1982) 31 Cal.3d 865.) However, *Loyd* concluded that intervening statutory amendments have abrogated *DeLancie*. (*Loyd, supra,* 27 Cal.4th at p. 1010.)

Kelley concedes that *Loyd* disposes of his state law challenge to the wiretapping based on *DeLancie*. However, he raises a second state law challenge based on Penal Code section 629.50. We find no violation of that statute either. Section 629.50 governs applications for judicial approval of wiretapping. No such approval was required here. California's wiretapping statutes, like Title III, do not apply to the monitoring and recording of conversations where one party consents. (Pen. Code, § 631, subd. (a) [prohibiting only "unauthorized" wiretap]; *People v. Canard* (1967) 257 Cal.App.2d 444, 463-464.) Because Kelley consented to have his conversations monitored, the deputy

district attorney did not need to seek judicial approval, and section 629.50 is inapplicable. The admission of tapes of Kelley's conversations, as well as the fruits of those tapes, was proper.

IV. *The Prosecution's Questioning About Unproven Prior Crimes Was Harmless Beyond a Reasonable Doubt in Light of All the Evidence*

As one part of its cross-examination of Kelley, the prosecution asked Kelley about a 1996 domestic violence incident involving the mother of his child and robbery charges against Kelley that were dismissed. Kelley's attorney filed a motion in limine to exclude these questions, which was denied, moved for an Evidence Code section 402 hearing to have the prosecution prove these incidents, which was denied, and objected vigorously during the trial. His objections were overruled. Kelley contends on appeal that this line of questioning was improper both because it lacked foundation and because it was irrelevant. He further contends that the questions tainted the entire trial.

In order for these incidents to have any relevance at all, the prosecution had to prove a critical preliminary fact: that Kelley committed them. (*People v. Coddington* (2000) 23 Cal.4th 529, 591; *People v. Sanders* (1995) 11 Cal.4th 475, 512-514.) With respect to the domestic violence incident, there was no dispute. Defense counsel raised the incident in his direct examination and Kelley expressly admitted it. With respect to the robbery, the prosecution submitted an offer of proof.

The prosecution's offer of proof distinguishes this case from cases such as *People v. Wagner* (1975) 13 Cal.3d 612, upon which Kelley principally relies. In *Wagner*, the prosecution asked a series of questions about prior criminal actions without making an offer of proof or introducing any evidence to substantiate the witness's involvement. Our Supreme Court rejected this approach. "The rule is well established that the prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestion they inevitably contained, rather than for the answers which might be given.' [Citations.]" (*Id.* at pp. 619-620.) Here, in contrast, the prosecution's offer of proof satisfied its obligation to establish a foundation. The trial court was not required to grant an Evidence Code

section 402 hearing so long as it was satisfied by the prosecution's offer of proof. (*People v. Hart* (1999) 20 Cal.4th 546, 649.)

Although we disagree with Kelley's argument that the prosecution's questions lacked foundation, we agree that they were improper because they sought only irrelevant and inadmissible matter. Evidence Code section 1101 prohibits the introduction of evidence of a person's character, including specific incidents of uncharged misconduct, to prove the person's conduct on a specified occasion. (§ 1101, subd. (a); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) In contrast, evidence of other acts is admissible when offered for the purpose of proving facts other than the person's character or disposition, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (§ 1101, subd. (b); *People v. Ewoldt, supra,* 7 Cal.4th at p. 393.) This list is not exhaustive. "The categories listed in section 1101, subdivision (b), are examples of facts that legitimately may be proved by other-crimes evidence." (*People v. Catlin* (2001) 26 Cal.4th 81, 146.)

The People argue that questioning concerning the domestic violence incident was permissible because Kelley first raised the incident on direct. However, Kelley raised the incident only because the People's motion in limine permitting them to cross-examine Kelley on this incident had already been granted. The People offer no independent theory for how this incident was relevant to the events of May 21, and with reason. It was not. We conclude that the trial court abused its discretion when it allowed questioning about the domestic violence incident.

The People contend that the earlier robbery was relevant to Kelley's credibility, because he told the police he had never been arrested. This rationale makes the fact of the arrest relevant, but does not extend to any of the details of the robbery. Alternatively, the People argue that the robbery was relevant because Kelley mentioned robberies in his letter, but this was not a material fact. Here as well, the trial court abused its discretion when it overruled Kelley's objections to this line of questioning.

However, these errors did not prejudice Kelley. Kelley argues that the more stringent *Chapman v. California* (1967) 386 U.S. 18 harmless error standard should

apply, while the People argue for the more lenient *People v. Watson* (1956) 46 Cal.2d 818, 836 standard. We need not decide this issue, because the error was harmless under either standard. The prosecution's questions comprised a relatively brief portion of the cross-examination of Kelley, and of the trial as a whole. To the extent they portrayed Kelley as a dangerous criminal, they were at least partially cumulative of evidence already in the record, much of it from Kelley. This was not a close case; the prosecution's case for first degree murder was compelling, even though based on circumstantial evidence. In light of the record, we conclude that the error was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

GEMELLO, J.

We concur.

JONES, P.J.

STEVENS, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. TSHOMBE KELLEY, Defendant and Appellant.	A093862 (Alameda County Super. Ct. No. C139184)

BY THE COURT:

1. The petition for rehearing, filed herein on November 1, 2002, is denied.

2. Pursuant to California Rules of Court, rule 976(b)(1) and (3) the court orders publication of the introductory paragraph, Background, part III of the Discussion, and the Disposition of its opinion in People v. Kelley, A093862.

Trial court:	Alameda County Superior Court
Trial judge:	Hon. Vernon Nakahara
Counsel for plaintiff and respondent:	Bill Lockyer Attorney General Robert R. Anderson Chief Assistant Attorney General Ronald A. Bass Assistant Attorney General Laurence K. Sullivan and Aileen Bunney Deputy Attorneys General
Counsel for defendant and appellant:	Matthew Zwerling and J. Bradley O'Connell, under appointments by the Court of Appeal