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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID PAUL FREDIANI,

Defendant and Appellant.

D037695

(Super. Ct. No. SCN106844)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Einhorn, Judge. Affirmed as modified with directions.

A jury convicted David Paul Frediani of first degree murder (Pen. Code,¹ § 187, subd. (a)), and found true special circumstances that he committed the murder to prevent his victim from testifying in a criminal proceeding and in retaliation for the victim's prior testimony in a criminal proceeding. (§ 190.2, subd. (a)(10).) The trial court sentenced

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

Frediani to life in prison without the possibility of parole and imposed a \$1,000 restitution fine under section 1202.45, which was suspended unless parole is revoked.

Frediani appeals, contending the trial court prejudicially erred in admitting evidence of the results of deoxyribonucleic acid (DNA) tests derived from "Profiler-Plus" testing, in excluding evidence relating to third party culpability, in admitting the testimony of an expert in "crime scene reconstruction," and in instructing the jury with CALJIC Nos. 2.62 (defendant testifying--when adverse inference may be drawn) and 17.41.1 (juror misconduct). Additionally, Frediani claims the court improperly imposed a parole revocation fine under section 1202.45 as he is not eligible for parole. Finding merit in this last contention, we affirm as modified to strike the parole revocation fine.²

FACTUAL BACKGROUND

Shortly after 1:30 p.m. on August 22, 1985, Roger Franklin discovered the body of his wife, Dr. Helena Greenwood, on the ground inside the patio gate of their Del Mar home. When San Diego Sheriff's deputies arrived, they found Greenwood, who had worked as a vice-president at the biotechnological company Gen-Probe, obviously dead, lying with her legs spread apart, her skirt pulled above her waist, her pantyhose ripped at the knees and feet, and one of her shoes under her shoulder. Work-related papers and the contents of her purse were found strewn about underneath her body. The deputies also

² The People correctly concede that the section 1202.45 fine must be stricken because Frediani's term does not include a period of parole. (See *People v. Oganessian* (1999) 70 Cal.App.4th 1178, 1183-1186.)

found two broken fingernails nearby, one under the patio gate and the other under her knee.

During an investigation of the scene, San Diego Sheriff's Department Detective David Decker observed elongated blood spatter, revealing blood had been shed from above, and determined from the convergence of the angles of such spatter that the point of origin would have been near the latch of the patio gate. Decker noted that lacerations found on the back of Greenwood's head were consistent with having been caused by the gate latch. He also noted that a nearby clay pot had been overturned after the blood had already been spattered. No fingerprints, other than those belonging to Greenwood, or physical evidence were discovered in the area.

A subsequent autopsy revealed Greenwood had died of asphyxiation due to manual strangulation. Such determination was based on the fact she had suffered petechial hemorrhages in the whites of her eyes, had fingernail marks around her neck and internal damage to her larynx. In addition, Greenwood had suffered bruises and abrasions on her lips, chin, hands, knees and ankles, and two vertical lacerations on the back of her head causing bleeding into her scalp. During the autopsy, Greenwood's fingernails were scraped for evidence, and the debris was preserved.

The initial investigation eliminated Greenwood's husband as a suspect, because he had left home before 8:00 a.m. on the morning of the murder and had been called at his job in San Clemente around 1:30 p.m. by Greenwood's assistant who had tried to reach her at home when she had not reported for work. Greenwood had made a work-related telephone call from the home at around 8:30 a.m. Sometime after 8:40 a.m., a next door

neighbor had heard a series of muted screams, but did not see anything unusual in the area by the Greenwood home when he investigated several minutes later.

Through the investigation it was discovered that Greenwood and her husband had moved to Del Mar sometime in 1985 after their house in Atherton, a city in San Mateo County in northern California, had been burglarized in April 1984 by Frediani, and he had forced Greenwood to orally copulate him. Frediani was arrested for those offenses on April 22, 1985, after his fingerprints were matched to a latent fingerprint lifted from a teapot found outside an opened kitchen window of the Atherton house. Greenwood traveled back to northern California for a May 1985 preliminary hearing in the burglary/sexual assault matter. After she testified, Frediani was bound over for trial in September 1985 and remained free on bail. Although detectives investigating Greenwood's murder in August 1985 suspected Frediani may have murdered her, they had insufficient evidence at that time to charge and prosecute him for such crime. Frediani eventually pleaded no contest in connection with Greenwood's burglary/sexual assault case and served a six-year sentence.

Her murder, however, remained unsolved until April 1998, when San Diego County Deputy Sheriff Laura Heilig reviewed it and other unsolved cases in light of newer technology. The scrapings taken from Greenwood's fingernails, as well as samples of her hair and blood, were sent to the Serological Research Institute (SERI) for DNA testing. Initially, Gary Harmor, the SERI serologist who conducted the testing, employed DQ-Alpha and Polymarker tests of six genetic markers. He found the scrapings from one

nail was positive for blood from a single source other than Greenwood. The scrapings from two other nails showed a mixture of DNA from Greenwood and another person.

Heilig then requested a sample of Frediani's blood be sent to Cellmark Diagnostics (Cellmark), which created a profile of Frediani's DNA using both the DQ-Alpha and Polymarker genes and also a Profiler Plus test kit. Tests run by Cellmark on a more recent blood sample from Frediani showed the DNA profiles derived from the two samples matched. When these were compared with the SERI DQ-Alpha and Polymarker test results it was discovered that Frediani's DNA was consistent with the samples recovered from Greenwood and that only one in every 1,480 persons would have had a similar match. Based on these results, SERI did additional testing with the Profiler Plus test kit, which tests short tandem repeats (STRs) of nine genetic markers plus a sex marker. Such confirmed that the DNA found in Greenwood's scrapings from a single source "was so rare that it is to be unique to" Frediani. The probability that a randomly selected person would have matched the DNA was one in 2.3 quadrillion. Based on such evidence, Frediani was arrested outside his apartment December 15, 1999, in northern California. After waiving his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, Frediani denied he had a twin.

Before his trial for Greenwood's murder, additional DNA testing was performed by SERI on DNA recovered from her pantyhose, and by yet another serologist in another laboratory on her previously untested fingernails and jacket, as well as her pantyhose. One of the samples tested at SERI yielded results consistent with a mixture of her DNA type and Frediani's. Only one person in 6.25 million would have matched the DNA.

Similar testing by Dr. Edward Blake of Forensic Science Associates (FSA) essentially confirmed these results. Blake also found that three of the untested nails showed DNA consistent with that of Frediani's and Greenwood and that the fourth nail contained DNA from three sources--two females and one male, which matched Frediani's DNA profile. A similar match would occur only once in every 780 million people. Blake found that DNA detected on Greenwood's jacket was also consistent with a mixture of her and Frediani's DNA.

At trial, Heilig, Harmor and Blake testified in the prosecution case about the DNA testing and findings. Greenwood's husband, next door neighbor and her business assistant also testified about the events leading up to the discovery of Greenwood's body on August 22, 1985. Various sheriff's detectives and deputies, and a medical examiner testified about the subsequent investigation stemming from Greenwood's death which eventually led to Frediani's arrest for her murder and about his statements at that time.

In addition, Greenwood's testimony from the preliminary hearing in May 1985 in the northern California case against Frediani for the burglary of her house and her sexual assault was read to the jury. Such revealed that on the night of April 7, 1984, Greenwood was awakened by a male intruder in the bedroom of her Atherton home. The man's face was concealed by a cloth wrapped around his head and he carried a flashlight and handgun. He demanded money. When Greenwood could only produce 75 cents from her purse in the study, he ordered her back to the bedroom where he forced her to orally copulate him. He told her not to call "the cops[,] " as he left.

Greenwood could not identify Frediani at the preliminary hearing as the intruder, but noted he was similar in height, build and skin tone to the intruder. Greenwood also stated that three weeks before the break-in and the attack, her house had been listed for sale and people had entered the house without her presence.

Other evidence presented at the preliminary hearing revealed that during the investigation of the burglary, it was discovered the kitchen window was open, the screen had been removed, and a crate had been placed by the window. A teapot Greenwood had used earlier in the day was found outside the window on the deck. A latent fingerprint found on the teapot was later determined to match Frediani's. He was arrested for burglary, forcible oral copulation and a firearm-use enhancement over a year after the commission of those crimes, and then released on bail pending a September 1985 trial.

Arthur Settlemyer, a friend of Frediani's and a general contractor who sometimes performed home inspections, testified at trial Frediani had told him sometime after the preliminary hearing that he was being investigated by the authorities for breaking into a house and they had his fingerprints on the outside of the house. Frediani explained the prosecution only had circumstantial evidence, the victim could not identify him, and he needed something to bolster his credibility. He asked Settlemyer to tell the sheriff's department he had been with Frediani to inspect a house that was for sale and that Frediani had been looking in the window. Although none of this was true, Settlemyer told Frediani he would think about helping him. When Frediani approached him several days later, asking whether he had considered his request, Settlemyer told him he would

not do what Frediani asked. Frediani became frantic and tried to convince him to change his mind.

On August 15, 1985, Frediani was involved in an automobile accident in southern California, near Valencia, where Magic Mountain is located. When he returned to his home in northern California, he was visibly upset about the damage to his car and about the facts the police had taken an accident report and his "plans had been ruined." Frediani told his roommate he had gone to Los Angeles because "he had some business he had to take care of." He had told Settlemyer, however, that he had been to Lake Tahoe.

The jury was apprised that Frediani had eventually pled no contest to Greenwood's burglary/sexual assault crimes and had served six years in prison for them before being charged with Greenwood's murder.

Finally, forensic consultant Rod Englert testified in the prosecution case as an expert in crime scene reconstruction and blood stain interpretation. Based on his review of the evidence, specifically the abrasions to Greenwood's knees, the lacerations to her head, and the height of the gate latch, Englert opined her head had been slammed twice into the latch while she was on her knees. Because Greenwood also had blood stains on the bottom of one shoe and there was a bloody footprint on one of her fallen papers, Englert surmised she had regained her footing after her head was slammed into the latch and she had then stepped into her own blood. Based on the defensive wounds Greenwood received, Englert thought she had resisted violently to her assault. Moreover, because of the awkward position in which Greenwood was found and the blood transfers

noted on her ankles in the shape of hands, Englert deduced the perpetrator had pushed her knees apart and had left her with her legs spread, creating a posed position which was not the position in which she had ultimately fallen.

Frediani testified in his own defense. He denied he had assaulted or murdered Greenwood, or that he had ever been to Del Mar. He claimed that on the date of the murder, he was at his apartment in northern California playing tennis and sitting by the pool. He remembered talking to his roommate around 4:00 p.m. that afternoon while at the pool.³ He explained that although he had told Settlemyer he intended to go to Lake Tahoe, he had changed his mind and had driven to southern California a week before the murder on a vacation.

On cross-examination, Frediani reluctantly admitted he had burglarized Greenwood's home in northern California and had forced her to orally copulate him. Although he acknowledged his former girlfriend had testified in the earlier proceeding she had gone with him to an open house at Greenwood's home, he denied he had ever asked Settlemyer to provide a false alibi for him. When asked to explain how his DNA was found on Greenwood's murdered body, Frediani replied that he had his "own theories," but did not explain what they were.

In addition to his own DNA expert, a former neighbor of Greenwood's and a defense investigator testified in the defense case. The neighbor, who had been 10 years

³ His former roommate, however, had earlier testified she could not remember seeing him on that date and she had not provided an alibi for him when she was questioned a few days after the murder.

old at the time of the murder, said she had seen a black sports car with more than one male in it pull into Greenwood's driveway. She was uncertain at what time her sighting occurred. The defense investigator noted that Greenwood did not have a listed telephone number or address.

The DNA expert, Marc Taylor, who owned a laboratory that performs DNA testing, criticized the Profiler Plus test kit. He opined that because the manufacturer of the kit had not made the primer sequence utilized by the kit available to the scientific community for peer review, no validation studies for the kit had been completed. Although he acknowledged that tests involving a single source of DNA were accurate and reliable using the kit, Taylor noted one study had shown some mistakes were made on genotyping of mixed samples from more than one donor. Nevertheless, he conceded that a majority of scientists in the field used the Profiler Plus in testing DNA.

Based on their review of the above evidence in light of the given instructions and closing arguments, the jury found Frediani guilty of Greenwood's murder and that he had committed the murder to prevent her from testifying in the earlier northern California case and in retaliation for her preliminary hearing testimony in that case.

DISCUSSION

I

ADMISSION OF DNA EVIDENCE

In limine, the court considered Frediani's motion to exclude DNA evidence as inadmissible under the *Kelly-Frye* (*People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*), *Frye v.*

United States (D.C. Cir. (1923) 293 F. 1013 (*Frye*))⁴ standards (hereafter referred to in this opinion as the *Kelly* standard). After reviewing the extensive briefing submitted on the matter, the trial court stated:

"It would seem to this court that the easiest, most practical way to approach this *Kelly* hearing, to the extent that DNA evidence is sought to be introduced, is to consider for purposes of this proceeding the first prong of the *Kelly* test as to whether or not the evidence sought to be introduced by the People has been generally accepted in the scientific community. [¶] And toward that end, it would be appropriate at this time for this court to, consistent with other cases, indicate that the present state of California law as it relates to DNA leads this court to certain tentative conclusions of law. And that may assist both sides in pinpointing issues and testimony in connection with this hearing. [¶] First, that DNA typing has been generally accepted within the scientific community. Secondly, the PCR [polymerase chain reaction] method of typing has been generally accepted by the scientific community. Next the STR, short tandem repeat method of typing using variations in DNA lengths, has been generally accepted by the scientific community. [¶] Next, the CTT typing, which this court understands to be a form of STR method of typing, has under *People v. Allen* at 72 Cal.App.4th 1093, a 1999 case [*Allen*], been generally accepted by the scientific community."

Additionally, the court recognized that it had previously, "in other *Kelly* hearings on DNA evidence, concluded that the DQ-Alpha and polymarker methods of typing, both using variations in the DNA sequence, have been generally accepted by the scientific community." The court noted that it had been unable to find any published California appellate decisions "addressing the balance of the typing methods sought to be utilized by

⁴ Although the federal *Frye* analysis has been superseded by *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, the *Kelly-Frye* formulation continues to apply in California and is generally referred to now as the *Kelly* standard. (*People v. Leahy* (1994) 8 Cal.4th 587, 611-612 (*Leahy*).)

the People through their witnesses." With such tentative conclusions of law on the record, the court stated Frediani was entitled to a *Kelly* hearing as to the first prong "regarding the general scientific acceptance only as to those methods that have not previously been referenced today by this court, which . . . include . . . Profiler Plus and Cofiler methods of STR typing." The court further noted that Frediani would also be entitled, at his request, to an Evidence Code section 402 hearing as to the other two prongs of the *Kelly* test. Frediani's counsel agreed to the accuracy of the court's evaluation of the matter, stating he was only attacking the "STR multiplex technique that was employed in this specific case."

During the hearing, SERI forensic serologists Harmor and Wraxall, as well as Cellmark's director Cotton, testified on behalf of the prosecution. Harmor gave an overview of the "capillary electrophoresis" (CE) detection system method of STR testing for DNA. He explained that after DNA has been amplified, premade kits or cocktails, such as the Profiler Plus and Cofiler kits, are used to identify genetic markers which are then analyzed using the CE 310 genetic analyzer. Each kit contains the genetic markers for each primer to be tested. The STR test that was approved in *Allen, supra*, 72 Cal.App.4th 1093, contained a triplex test of three loci employing a process known as slab gel electrophoresis. The Profiler Plus kit contains nine genetic markers plus

amelogenin,⁵ and when used with the 310 genetic analyzer, it provides better resolution and allows for a more precise measurement of the DNA. Based on internal validation studies performed at SERI on the 310 genetic analyzer used with the Profiler Plus test kits, Harmor opined such CE detection system was generally accepted from a consensus of the relevant scientific community. Wraxall and Cotton also confirmed that the Profiler Plus used with the 310 genetic analyzer was generally accepted in the scientific community based on internal validation studies conducted in their respective laboratories.

In addition, the court took judicial notice of the testimony of Dr. Matthew McGinness in the *Garcia* case, who had testified that the CE method of STR's DNA typing had become the industry standard, and that although he had not used the 310 genetic analyzer himself, he had researched it for purposes of purchasing one, finding it obtained the same results as the gel-based PCR detection systems. (See *Garcia II, supra*, pp. 21-22.)

In opposition to the prosecution evidence at the hearing, forensic scientist Taylor, who owned his own noncertified laboratory that does DNA testing in California and a 310 genetic analyzer, which cost upwards of \$80,000, testified the Profiler Plus test kit was not generally accepted in the scientific community. He based this opinion on the fact the Profiler Plus kit contained a new reaction mix and primer cocktail that evaluated a

⁵ The Profiler Plus kit included the Blue kit that the court had previously found generally accepted by the scientific community in *People v. Garcia* (Super. Ct. San Diego County, 1998, No. SCN07482) (*Garcia*), which finding we upheld on appeal against similar challenges as made here in an unpublished opinion. (*People v. Garcia* (Nov. 19, 2001, D036220) (*Garcia II*).

new set of loci not present in other kits which required that new validation studies be conducted. Although he conceded there had been some validation performed on the Profiler Plus test kit, because there had not been any peer review articles published on its validity, and the manufacturer of the kit, Perkin-Elmer, had not submitted the primer sequences for the Profiler Plus test kit to the scientific community for peer review (although they had submitted them to Taylor under a confidentiality agreement for purposes of litigation in this case), Taylor opined it was not yet fully validated for scientific acceptance in the community. He also discussed several problems involving the Profiler Plus kit, acknowledging that several of those existed only in mixed samples.

After hearing this evidence, the court told Frediani's counsel it was prepared to find as a matter of law that the Profiler Plus and the Cofiler methodologies are generally accepted within the scientific community, subject to evidentiary hearings on the second and third prongs of the *Kelly* standard, unless counsel could change the court's mind. Defense counsel argued that in light of the problems mentioned by Taylor and the lack of publication of validation studies, "there simply has not been enough time between the development of this method and the forensic casework to allow a critical assessment of this procedure. The popularity of this test kit . . . is merely the result of a successful . . . marketing campaign by Perkin-Elmer." Thus, counsel contended the Profiler Plus kit had not met the standard to be acceptable within the scientific community.

The court agreed with the prosecution position that the Profiler Plus and Cofiler test kits are generally accepted in the scientific community. In doing so, the court specifically noted it had previously found other CE detection system test kits by Perkin-

Elmer that are used with the 310 genetic analyzer for DNA typing to be admissible as having been generally accepted within the scientific community. As for the different methods of typing, the Profiler Plus and Cofiler tests, used with the 310 genetic analyzer sought to be introduced in this case, the court stated it had considered the live testimony of four experts, had taken judicial notice of the testimony of another expert in a previous proceeding as well as the briefs and exhibits submitted to make its determination. Taking this evidence as a whole, the court found "that extensive peer review publication or developmental validation studies need not be the test to determine whether or not a process has been generally accepted within the scientific community." The court was satisfied that the testimony of Harmor, Wraxall and Cotton, who had all used the 310 genetic analyzer with the Profiler Plus in their daily casework, and who had discussed such test kits with other scientists, had read scientific literature on it, had internally validated such tests, had been trained on and had worked in Perkin-Elmer's laboratory with those processes and that analyzer, "even to the extent that Dr. Cotton did present at a scientific meeting the opinions that the analyzer in question and that the Profiler [Plus] are generally accepted within the scientific community[,]" outweighed the testimony of Taylor, who had criticized the Profiler Plus "because there are insufficient validation studies and lack of peer review publication[,]" and had expressed concern about the particular process. The court found the testimony of Harmor, Wraxall and Cotton more credible and that Taylor's concerns went to the weight of the evidence rather than to its admissibility.

The court therefore denied Frediani's motion to preclude the use of the DNA evidence as being in violation of the *Kelly* standard, and reiterated he was not precluded from bringing separate motions of challenges regarding the second and third prongs of the *Kelly* test. Frediani did not subsequently bring any such motions.

On appeal, Frediani contends the trial court erred in admitting DNA evidence because the prosecution failed to demonstrate that the testing procedures utilized satisfied the *Kelly* requirement of general acceptance in the scientific community.⁶ Because of the lack of studies validating the Profiler Plus test used with the 310 genetic analyzer, Frediani argued it has not gained general acceptance. We disagree.

As our Supreme Court has stated, "under the [*Kelly*] rule the proponent of evidence derived from a new scientific methodology must satisfy *three* prongs, by showing, first that the reliability of the new technique has gained general acceptance in the relevant scientific community, second, that the expert testifying to that effect is qualified to do so, and, third, that "correct scientific procedures were used in the particular case.'" (*People v. Roybal* (1998) 19 Cal.4th 481, 505 (*Roybal*); see also *Allen, supra*, 72 Cal.App.4th at pp. 1098-1099.) The party offering the evidence has the burden of proving its admissibility by a preponderance of the evidence. (*People v. Ashmus* (1991) 54 Cal.3d 932, 970 (*Ashmus*).

⁶ The DNA testing on Greenwood's jacket and pantyhose, as well as further testing regarding her fingernails by Frediani's expert, was done after the evidentiary hearing on the first *Kelly* prong.

Under *Kelly*, "reliability" means the new technique "'must be sufficiently established to have gained general acceptance in the particular field in which it belongs.'" (*Kelly, supra*, 17 Cal.3d at p. 30, italics omitted.) However, general acceptance does not require absolute unanimity of views, but rather a consensus of the relevant, qualified scientific community. (*Leahy, supra*, 8 Cal.4th at p. 612.) In resolving this matter, "[t]he goal is not to decide the actual reliability of the new technique, but simply to determine whether the technique is generally accepted in the relevant scientific community." (*People v. Barney* (1992) 8 Cal.App.4th 798, 810.) To do so, the trial court considers the quality, as well as the quantity, of the evidence supporting or opposing the new technique and, in doing so, may consider published appellate decisions and scientific literature relating to the matter. (*Leahy, supra*, 8 Cal.4th at pp. 611-612; *Kelly, supra*, 17 Cal.3d at p. 32.)

Once a new scientific method of proof has been approved in a published appellate decision in California or out-of-state, the issue of general acceptance is resolved unless a showing is made that the attitude of the scientific community has changed. (*Allen, supra*, 72 Cal.App.4th at p. 1099; *Kelly, supra*, 17 Cal.3d at p. 32.)

On appeal, our standard of review of the "general acceptance" finding under the first prong of *Kelly* is "'a mixed question of law and fact subject to limited de novo review.' [Citation.] '[W]e review the trial court's determination with deference to any and all supportable findings of 'historical' fact or credibility, and then decide as a matter of law, based on those assumptions, whether there has been general acceptance.' [Citation.]" (*People v. Morganti* (1996) 43 Cal.App.4th 643, 663.) The resolution of

each of the other *Kelly* prongs is reviewed under the abuse of discretion standard, giving great deference to the determinations of the trial court. (*People v. Venegas* (1998) 18 Cal.4th 47, 91; *Ashmus, supra*, 54 Cal.3d at p. 971.)

Before applying these standards here, we note several threshold matters. Although the trial court ruled DNA results obtained from both the Profiler Plus and the Cofiler tests used with the 310 genetic analyzer were admissible, Frediani only objected below and now on appeal to the results from the Profiler Plus test. Also, in that regard, he only objected that such was inadmissible because it did not satisfy the first prong of *Kelly*. Any arguments he raises on appeal for the first time regarding the second and third prongs are therefore waived. (See *People v. Clark* (1993) 5 Cal.4th 950, 1018.)

As to the court's actual ruling, it correctly found that California courts have recognized the "general acceptance" or validity in the relevant scientific community of the PCR method of forensic DNA testing, as well as its three subtypes: "DQ-Alpha, which tests a single genetic marker; Polymarker, which tests five genetic markers; and the STR, which tests three or more genetic markers. [Citation.]" (*People v. Hill* (2001) 89 Cal.App.4th 48, 57 (*Hill*)). Although the court then held a *Kelly* hearing on the first prong for the CE process of the two PCR/STR kits (Profiler Plus and Cofiler) run through the 310, subsequent to Frediani's trial, a published decision has rejected "the argument[,as made in this case below] that each new PCR/STR test kit must, as a matter of law, be subjected to a *Kelly* prong one analysis to determine scientific reliability." (*Hill, supra*, 89 Cal.App.4th at p. 58.) In *Hill*, the court found that the concerns with a particular test kit, specifically as here the Profiler Plus kit, only goes to the third prong of *Kelly*, "i.e.,

whether the procedures utilized by the forensic lab were in compliance with PCR/STR methodology. [Citations.]" (*Hill, supra*, 89 Cal.App.4th at p. 58.) Although we agree with this conclusion, because *Hill* was not published authority at the time of the trial here, we review the court's ruling regarding the first prong.⁷ Having done so, we conclude the trial court's ruling culminating in the admission of the DNA evidence was proper.

In finding the first prong of *Kelly* established, the court relied on the expert testimony of four prosecution witnesses and discounted the conflicting testimony of a defense expert witness with respect to the reliability of the CE detection method, using the 310 and Profiler Plus kit provided by Perkin-Elmer. It found such testimony established the general acceptance of such method and procedures in the relevant scientific community. Our review of the record confirms this finding. Although the defense expert disagreed the CE detection process, using the 310 and Profiler Plus kit had been generally accepted as reliable in the scientific community, he conceded there had been some validation done and that it had been validated through in-house validation procedures by Perkin-Elmer. In addition, the defense expert himself owned and used the 310, as well as other machinery and processes, in his own DNA laboratory. Because the testimony of a director or supervisor of a DNA forensic laboratory may alone establish

⁷ Although Frediani recognizes *Hill, supra*, 89 Cal.App.4th 48, rejects his argument, he claims it was wrongly decided. As noted above, we have considered *Hill* and agree with its analysis and holding. Because the trial court here provided Frediani with a prong one *Kelly* hearing, we need not address further his assertion the holding in *People v. Pizarro* (1992) 10 Cal.App.4th 57, which concerns a different type of DNA testing, requires a prong one determination even after the decision in *Hill*.

general acceptance in the scientific community (*Hill, supra*, 89 Cal.App.4th at p. 58, citing *Allen, supra*, 72 Cal.App.4th at p. 1099), we find Frediani's arguments the 310 and Profiler Plus kit has not been validated or generally accepted in the scientific community because of the lack of "peer review" research and publication due to Perkin-Elmer's proprietary secrets without merit. (See *Hill, supra*, 89 Cal.App.4th at p. 58.) We also find the trial court's credibility determination in favor of the prosecution expert witnesses supported by the record and independently conclude such evidence supports the court's finding the CE detection process on the 310 with the Profiler Plus kit is generally accepted as a reliable technique by the relevant scientific community.

II

EXCLUSION OF THIRD PARTY LIABILITY EVIDENCE

In limine the court considered the People's motion to preclude evidence of third party culpability based on Frediani's intent to introduce evidence of a telephone call to one of Greenwood's coworkers nearly a year after her murder, in which the unidentified caller told the coworker to tell Greenwood's successor at Gen-Probe that he was the man who had murdered and raped her predecessor. According to Frediani's offer of proof, he was incarcerated at the time of the telephone call, he had no telephone privileges in prison, and even if he had received access to a telephone, a call from the prison would have had to have been collect. Frediani's counsel argued the proffered evidence was relevant to show that Greenwood's murder had been committed by a third party in light of other defense evidence that a person had seen a black sports car at the scene, as well as a

finding that DNA belonging to an unidentified third party was also found underneath one of Greenwood's nails.

In ruling the evidence of third party culpability in the form of a phone call from an unidentified caller to Greenwood's successor at work was inadmissible, the trial court found that the statement did not "even have a modicum of reliability. But beyond that, it doesn't show a motive or opportunity of a third party, whether it was from a third party or the defendant." Relying on *People v. Huggins* (1986) 182 Cal.App.3d 828, the court reasoned that because the person who had made the call was unidentified, the statement could not be admitted under the declaration against penal interest exception to the hearsay rule as it "does not point to a particular third party culpability." In addition, the court noted that even if Frediani himself had not made the call, a friend or acquaintance of his could not be ruled out from having made the call. Likewise, a person with a grudge against Greenwood's successor could have made the call after reading newspaper accounts of her death. Thus, it could not be shown that the statement was trustworthy.

Later, the court permitted Frediani to file a motion for reconsideration of its ruling on the third party culpability evidence. However, after reviewing the motion and attached exhibits, which Frediani asserted substantiated his claim there was evidence of third party culpability independent of the telephone call, the court denied the motion. The court explained that it was not finding the credibility of the proposed witness was lacking in trustworthiness, "but rather the circumstances under which the anonymous call takes requires the court to still make an initial determination that the statement has an indicia of reliability to make it admissible." The court found that such threshold had not

been met "by any stretch of the imagination" because the single anonymous call provided no specifics to add to the statement's reliability, and the unidentified caller was incapable of being traced to determine his identity. "Accordingly, it[']s blatant hearsay and it is not admissible as evidence of third party culpability[,] and the original ruling of this court granting the People's in limine motion to exclude that evidence is confirmed."

On appeal, Frediani maintains the trial court erred when it excluded the statements made by the unidentified caller to Greenwood's successor because they were statements against the caller's penal interest and relevant to the issue of third party culpability. We disagree.

First, because Frediani sought to admit the statements by the unidentified caller for the truth of the matter asserted, i.e., that the caller had killed Greenwood, the statements constituted hearsay. As such, they were not admissible absent an applicable exception to the hearsay rule. Although Frediani argued the statements were admissible as a declaration against penal interest, the court found otherwise.

To constitute a declaration against penal interest sufficient for the Evidence Code section 1230 exception to the hearsay rule, a statement must be made by an unavailable declarant who has sufficient knowledge of the subject which causes the declarant to be in "risk of civil or criminal liability" such that "a reasonable man in his position would not have made the statement unless he believed it to be true." (*Ibid.*) The focus of such exception "is the basic trustworthiness of the declaration." (*People v. Frierson* (1991) 53 Cal.3d 730, 745.) In determining this threshold requirement of trustworthiness, "a trial court 'may take into account not just the words but the circumstances under which they

were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (*People v. Cudjo* (1993) 6 Cal.4th 585, 607 (*Cudjo*)). Our Supreme Court has recognized that assessing trustworthiness in such context ""requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception." [Citation.]" (*People v. Duarte* (2000) 24 Cal.4th 603, 614.) "Such an endeavor allows, in fact demands, the exercise of discretion." (*Frierson, supra*, 53 Cal.3d at p. 745.) Thus, we will only overturn a trial court's finding regarding trustworthiness if there is an abuse of such discretion. (*Ibid.*) Here, none is shown.

Quite simply the trial court correctly determined the statement was untrustworthy because the anonymous caller had no reason to fear being identified or caught and, without such possibility, the statement could not be considered against the caller's penal interest. Also, as the court pointed out, there was no way of knowing whether Frediani had asked someone else to make the call or whether the caller had had a grudge against Greenwood's successor and simply wished to terrorize her. Further, Frediani's admission at trial that he was the person who burglarized Greenwood's home and sexually assaulted her revealed the proposed statement not only lacked credibility, but was demonstrably false. (See *Cudjo, supra*, 6 Cal.4th at pp. 608-609.) Under all the circumstances, the trial court did not abuse its discretion in excluding the untrustworthy statement as hearsay.

Nor was the statement admissible to show a third party committed Greenwood's murder. Because the truth of the statement was shown to be false through Frediani's own testimony and the DNA at the murder scene, and the caller's statement did not provide

any explanation for such DNA at that location, and did not preclude the possibility of an accomplice, it failed to raise a reasonable doubt about Frediani's guilt. Without raising such a doubt, the admission of such purported third party evidence was well within the court's discretion to exclude. (See *People v. Hall* (1986) 41 Cal.3d 826, 833-835; *People v. Johnson* (1988) 200 Cal.App.3d 1553, 1564.) No error is shown.

III

ADMISSION OF ENGLERT'S TESTIMONY

In limine, Frediani objected to the prosecutor's motion to admit Englert's testimony as an expert in crime scene reconstruction and blood spatter, arguing the fact that there had been a violent struggle was not contested and Englert's conclusions based on photographs that would be entered into evidence were readily apparent to the average lay juror. At the hearing on the motion, the trial court found the subject appropriate for expert testimony, but expressed concern as to the extent of such testimony. After further offers of proof regarding such evidence and argument by counsel that such testimony was unnecessary and an undue consumption of time on a matter not contested, i.e., that there was a violent struggle in which Greenwood received a gash to her neck and head after hitting the gate, the court ruled it would permit Englert's testimony. In so doing, the trial judge specifically stated:

"I'm going to let the People call Mr. Englert. I'm finding that his testimony as to the struggle; as to the victim resisting; as to the victim suffering injuries to her hands, feet and legs, and defensive wounds, as to the fact that she was moved; as to the pattern of blood found are all relevant to the issue of a first degree murder charge. [¶] I will . . . entertain [Evidence Code section] 352 objections should [defense counsel] conclude that Mr. Englert's testimony in

any particular area is unduly time consuming or meets any of the other [Evidence Code section] 352 criteria for exclusion. So you may object to particular questions as they are posed, sir, but his testimony in the People's case-in-chief will be permitted.

Defense counsel renewed his objections before Englert testified, arguing his testimony was cumulative because the jury had already received testimony from one detective regarding blood spatter and from another about the position of Greenwood's body. The court overruled the objections to exclude the testimony in its entirety, but reiterated it would entertain objections to exclude specific portions of the testimony on grounds that it was cumulative or prejudicial under Evidence Code section 352.

When Englert testified, he first gave extensive background for his expertise as a forensic consultant on crime scene reconstruction and blood stain interpretation before explaining the interdisciplinary approach of crime scene reconstruction in general and the different categories and types of blood stains. After doing so, Englert rendered his opinion that the gate latch had been the cause of the injury to the back of Greenwood's head. This conclusion was based on noting the latch alignment with the back of the head of a kneeling female detective used as a model. Such position was consistent with the lacerations on the back of Greenwood's head and the abrasions on her knees. Blood from the head wound had flowed down Greenwood's hair, casting off satellite spatter. Because the only source of blood from Greenwood came from these lacerations, Englert was able to determine the sequence of the events, including the fact she had regained her footing after her head hit the latch because she left a bloody footprint afterwards, evidencing she had violently resisted the attack. Englert was also able to tell that Greenwood's final

resting position was not natural, but had been staged, because of the hand patterns in blood transferred to her ankles by someone who had grabbed them and had pushed them up.

On appeal, Frediani contends the trial court abused its discretion when it admitted Englert's expert testimony on blood spatter and crime scene reconstruction. He specifically argues there was insufficient foundation for Englert to give such testimony, the testimony he gave was not a proper subject for expert testimony, and such testimony was more prejudicial than probative. None of these assertions has merit.

Evidence Code section 801, subdivision (a) provides that an expert may offer his or her opinion if it is, among other things, "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." Generally, its admissibility "is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would 'assist' the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information. . . ." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300.) Expert testimony regarding blood spatter has long been recognized in California as admissible. (See, e.g., *People v. Bolin* (1998) 18 Cal.4th 297, 321-322; *People v. Carter* (1957) 48 Cal.2d 737, 750-751.) Inferences made from such evidence generally requires "knowledge and experience beyond those of ordinary jurors and could assist them to weigh the evidence more perceptively than they could unaided." (*Ibid.*)

We will not disturb a trial court's decision to allow expert testimony absent a manifest abuse of discretion. (*People v. Mayfield* (1997) 14 Cal.4th 668, 766.)

Here, no such abuse of discretion is shown. Although some jurors may have had some understanding of the basic laws of fluid dynamics, Englert's testimony regarding blood spatter, castoff, blood transfer and defense wounds went beyond that of the experience of ordinary jurors. From such evidence it was reasonable for Englert to render an expert opinion as to what had happened to the victim, i.e., that her head was slammed against the gate latch. Also it was reasonable to permit Englert to interpret the sequence of events based on the blood spatter, i.e., the regaining of Greenwood's footing during the violent struggle, and the final positioning of her body. No abuse of discretion is shown in such regard.

Moreover, because Frediani did not challenge Englert's education and experience, or otherwise object that he was unqualified to render his expert opinions, his claim of no foundation for such testimony without argument on appeal is waived. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11; *People v. Roberts* (1992) 2 Cal.4th 271, 298.)

We also reject Frediani's claim the court abused its discretion under Evidence Code section 352 in failing to exclude such expert testimony either as cumulative or too prejudicial. Frediani raised only one such objection when Englert testified that the sheriff's deputies had determined the latch to be the murder weapon when the offense was originally investigated. By failing to raise a contemporaneous objection to other portions of Englert's testimony based on Evidence Code section 352, although invited by the court

to do so, Frediani has waived any further claims of error on such ground. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1179.)

As to his one Evidence Code section 352, objection, no abuse of discretion is shown by the court's overruling of such objection. Although the statement by Englert that a deputy had previously found the latch to be the murder weapon during the initial investigation tended to be cumulative, it was a foundational fact given to him as an expert to review for purposes of rendering his opinion as to the sequence of events leading to Greenwood's death. Because such isolated statement was brief and noninflammatory in light of the brutality of Greenwood's murder, there was no possible prejudice. (*People v. Clark* (1993) 5 Cal.4th 950, 1019.) No abuse of discretion is shown in the admission of Englert's testimony.

IV

JURY INSTRUCTIONS

Frediani next claims the trial court prejudicially erred in giving several jury instructions. The general rule is that in a criminal case the trial court must instruct on the "principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty 'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' [Citation.]" (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) With this preliminary rule in mind, we address Frediani's instructional error contentions in turn.

A. CALJIC No. 2.62

During the discussions regarding jury instructions, Frediani's counsel objected to the giving of CALJIC No. 2.62 on grounds there was no specific evidence that Frediani has denied, other than DNA evidence, which is scientific evidence subject to expert opinions. The court overruled the objection, impliedly agreeing with the prosecutor's position that the DNA evidence was "within the defendant's particular knowledge to explain and to which no explanation [was] offered."

The court subsequently instructed the jury under CALJIC No. 2.62 that it may draw an adverse inference from Frediani's failure to explain or deny evidence against him when he testified.⁸ On appeal, Frediani contends he did respond to the questions concerning DNA evidence, therefore the instruction should not have been given.⁹

⁸ The court told the jury: "In this case defendant has testified to certain matters. [¶] If you find that defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] The failure of a defendant to deny or explain evidence against him does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain this evidence."

⁹ In response to the question of how his DNA could have been left under Greenwood's fingernails, Frediani had explained at trial he had his "own theories on where DNA may have come from but [he was] not so sure they would agree with [the prosecutor's] theory."

Although CALJIC No. 2.62 is properly given "when a defendant testifies but fails to deny or explain inculpatory evidence or gives a 'bizarre or implausible explanation'" (*People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1029-1030), we need not determine whether such was properly given in this case because even assuming it should not have been given, no prejudicial error is shown. As the court in *People v. Ballard* (1991) 1 Cal.App.4th 752 (*Ballard*) noted:

"CALJIC No. 2.62 does not direct the jury to draw an adverse inference. It applies only if the jury finds that the defendant failed to explain or deny evidence. It contains other portions favorable to the defense (suggesting when it would be unreasonable to draw the inference; and cautioning that the failure to deny or explain evidence does not create a presumption of guilt, or by itself warrant an inference of guilt, nor relieve the prosecution of the burden of proving every essential element of the crime beyond a reasonable doubt)." (*Id.* at p. 756.)

Here, in light of the DNA evidence, Frediani's equivocal statements as to how such DNA evidence came to be under Greenwood's fingernails in Del Mar, where he denied ever being, evidence of his attempt to persuade Settlemeyer to lie for him for his earlier crimes against her and the motive shown for killing her to prevent her from testifying in such earlier northern California burglary/sexual assault case, it is not reasonably probable a more favorable verdict would have been rendered even if CALJIC No. 2.62 had not been given. (See *Ballard, supra*, 1 Cal.App.4th at p. 757.)

B. CALJIC No. 17.41.1

Frediani finally contends the court erred in instructing the jury with CALJIC No. 17.41.1, which provides:

"The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

More specifically, Frediani argues the instruction violated his right to an independent and impartial decision by each juror and also misinformed the jury regarding its power to nullify. These arguments have no merit.

At the outset of our analysis, we note defense counsel did not object to CALJIC No. 17.41.1. Nor did the jury ask any questions regarding the challenged instruction or report any alleged misconduct to the court. Thus, we have absolutely no information in this case as to how the instruction might have impacted Frediani's right to a jury trial. We are left to speculate with him as to how, in the abstract, the instruction might have the deleterious effects he now asserts.

In addressing the validity of Frediani's assertions, we note two recent Supreme Court cases have rejected similar arguments. First, in *People v. Williams* (2001) 25 Cal.4th 441 (*Williams*), our Supreme Court determined that although a jury has the power to nullify the law, it has no right to do so, and a juror may properly be discharged from the jury for refusing to follow the law. (*Id.* at p. 463.) From this it necessarily follows that while juries have the power to decide factual questions regarding guilt, they must apply the facts to the law as given by the court. Such holding comports with federal law which "[m]ore than a century ago, . . . recognized that jurors are required to follow the trial court's instructions." (*Id.* at p. 451, citing *Sparf & Hanson v. United States* (1895)

156 U.S. 51.) Accordingly, we reject Frediani's claim that CALJIC No. 17.41.1 infringes upon his right to jury nullification.

Second, since briefing in this case was completed, our Supreme Court decided *People v. Engleman* (2002) 28 Cal.4th 436 (*Engleman*), which resolved the question of whether giving CALJIC No. 17.41.1 constituted constitutional error by interfering with the jurors' deliberation process or impacting the rights to trial by jury or to a unanimous jury. (*Engleman, supra*, 28 Cal.4th at pp. 441, 444.)¹⁰ The court, although sharply critical of the instruction, and despite directing that it not be given in future cases, held it did not constitute error. (*Id.* at pp. 439-440.) The court ruled that in the absence of facts showing the jury was impacted by the instruction, reversal of a conviction is not warranted.

However, given the Supreme Court's concerns in *Engleman, supra*, 28 Cal.4th 436, we look to whether the giving of CALJIC No. 17.41.1 in this case prejudiced Frediani in any manner. As we previously indicated, there are no facts in this record upon which we can find any such prejudice. Nothing in the record suggests CALJIC No. 17.41.1 had any prejudicial impact on the jurors' deliberative process or the right to a unanimous jury. Thus, in light of *Engleman, supra*, 28 Cal.4th 436, we reject Frediani's remaining challenges to the instruction and conclude there was no prejudicial error.

¹⁰ The California Supreme Court had earlier found in *People v. Cleveland* (2001) 25 Cal.4th 466, that a trial court has the responsibility to make appropriate inquiry into alleged violations of jury instructions once such are brought to its attention, and such does not infringe on the privacy or the deliberative process of the jury. (*Id.* at pp. 481-483.)

DISPOSITION

The section 1202.45 parole restitution fine is stricken. As so modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect such modification and to forward a copy of the amended abstract of judgment to the Department of Corrections.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

McCONNELL, J.