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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BERNARD KING,

Defendant and Appellant.

A087913

(San Francisco County  
Super. Ct. No. 171388)

**INTRODUCTION**

After a jury trial, appellant Bernard King was convicted of attempted murder, mayhem, and other offenses arising from the stabbing of his girlfriend. He challenges the scientific reliability of DNA evidence used against him and asserts that evidentiary and instructional errors made by the trial court, as well as prosecutorial misconduct, require his conviction to be reversed. We affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

In April 1999, appellant was charged by amended information with attempted murder, mayhem, burglary, domestic abuse, battery with great bodily injury and assault, arising from the May 1998 stabbing of his girlfriend, Denise Robinson. The charges included allegations of great bodily injury, use of a deadly weapon, and four prior prison terms. After deliberating for four days, the jury found appellant guilty of all counts and found the special allegations true. Appellant waived a jury trial as to the priors. The trial court found three of the prior prison term allegations to be true, and sentenced appellant to a total unstayed term of 18 years and 4 months in state prison.

## **THE PROSECUTION CASE**

At the time of trial, Denise Robinson had known appellant for two and a half years. After dating him for a period of time, she broke off their relationship and began going out with a man named Barney King. In October 1997, Robinson resumed her relationship with appellant and began living with him. Robinson remained friends with Barney King, which made appellant angry and jealous.

Robinson lived with appellant in an apartment he shared with his mother and two brothers. Robinson's own mother and aunt lived across the street. On the evening of May 6, 1998, appellant and Robinson argued over Barney King. Appellant warned Robinson that if she was still seeing Barney King, "Bitch, I'll kill you." Robinson told appellant he wasn't "man enough," because he didn't want to go back to jail. Appellant reacted angrily, grabbing a screwdriver and stabbing Robinson in the ankle with it hard enough to draw blood and cause the ankle to swell up painfully. Eventually, the two fell asleep and the next day appellant acted as if nothing had happened.

That evening, Robinson and appellant celebrated appellant's birthday by having dinner together at her mother's apartment. Appellant smoked a marijuana cigarette laced with crack cocaine during the evening. Robinson did not want to return to appellant's apartment that night, fearing he would start another argument. Robinson told appellant that her ankle hurt too much to walk, but he did not believe her and became angry. Eventually, appellant left and Robinson went to sleep in her mother's room for the night.

Before Robinson woke up the next morning, appellant called the apartment repeatedly, trying to speak to her. When she finally came to the phone after waking up at about 10:00 a.m., appellant expressed anger over something that had happened between him and one of his brothers and told her she had better not turn her back on him like his family did. He insisted that Robinson meet him outside immediately to talk. She refused, saying she wanted to shower and get dressed. Appellant called back four or five times sounding increasingly angry. Finally, Robinson told her mother to tell appellant she was in the shower.

After her mother left the apartment, Robinson stepped into the bathroom between 1:00 and 1:30 p.m. As she was preparing to shower, appellant suddenly entered the bathroom holding a knife raised over his head. Saying nothing, he stabbed Robinson in the left breast. Then he pulled the knife out of her breast, and stabbed her two more times, in the right breast and through the middle of her chest. Appellant then pushed Robinson down on her back and stabbed her on both sides of her face. When Robinson raised her left arm to block the knife, he stabbed her twice more on her left wrist. Robinson's aunt heard her screaming, "Momma, momma, Bernard is stabbing me." When Robinson started screaming, appellant turned and ran out of the apartment still holding the knife.

The first call to police about this incident was logged in at 2:09 p.m. Before paramedics rushed her to the hospital, Robinson told police that appellant was her attacker and described what he was wearing. Robinson's attending physician testified that her injuries were life threatening. She had been stabbed three times in the chest, twice in the forearm and twice in the face. One lung was punctured. There was significant bleeding into her thoracic cavity. One of the chest wounds penetrated four to five inches through layers of tough muscles. Two of the wounds were near Robinson's heart, one within an inch of it. The physician had seen self-inflicted knife wounds in his practice, but had never seen chest wounds of this nature that were self-inflicted.

Officers responding to the scene found a broken door window that would have allowed entry to the apartment where the stabbing took place. Appellant was arrested in his apartment later that afternoon. Police found a pair of Nike tennis shoes in his room with blood on the soles, and clothes matching Robinson's description. Police also seized a steak knife from the kitchen drawer in appellant's apartment fitting Robinson's description of the knife used in the attack.

Over appellant's objection, San Francisco Police Department Criminalist Alan Keel testified that Robinson's DNA matched the blood found on the shoe at 10 genetic loci, and that this genetic profile occurs in about 1 out of 1.3 million African-Americans.

Keel also testified that sufficient blood from the shoe was preserved to permit it to be re-tested by the defense.

### **THE DEFENSE CASE**

Kelvin George, an acquaintance of appellant's and Robinson's, testified that he ran into Robinson on the street shortly after being released from prison. Robinson told him appellant was in jail. George testified on direct that when he asked Robinson what appellant was in for, she replied, "I lied on him and said that he cut me."<sup>1</sup> George testified that he also spoke with Barney King about Robinson cutting herself to put appellant in jail. According to George, King agreed that Robinson had lied.<sup>2</sup>

Appellant's brother, Michael King, testified that appellant left the apartment the night before the stabbing after an argument with his other brother, Efrem. Appellant returned to the apartment about 7:45 a.m. after Efrem had left for work, and went to sleep. Michael left at 9:30 a.m. and returned home at approximately 1:00 p.m. He immediately left again to do laundry at a nearby laundromat, and estimated that he returned to the apartment at 1:45 or 2:00 p.m.<sup>3</sup> Appellant was still in the apartment, and had no key to let himself back in if he left during the day.

### **DISCUSSION**

#### **I. ADMISSIBILITY OF DNA EVIDENCE**

The San Francisco Crime Lab tested the blood found on appellant's tennis shoes using three DNA typing techniques: PCR polymarker, DQ-Alpha and STR. Appellant does not question the admissibility of the lab's PCR polymarker and DQ-Alpha test results, showing a DNA match between the blood sample and Robinson's DNA at six

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<sup>1</sup> On cross-examination, George agreed that Robinson's actual words to him were, "I put him in jail. I just got cut. I probably ain't going to court."

<sup>2</sup> Called as a defense witness, Barney King denied telling George that Robinson had lied about appellant stabbing her, and denied that Robinson had ever told him she had stabbed herself.

<sup>3</sup> On cross-examination, Michael testified that he might have returned between 2:00 and 2:15 p.m.

genetic loci.<sup>4</sup> Appellant's challenge to the DNA evidence focuses on the lab's use of STR testing to find three additional genetic matches between Robinson's DNA and the blood found on his shoe.

Prior to trial, appellant sought a full *Kelly/Frye* hearing<sup>5</sup> on the scientific reliability of the specific STR test system utilized by the San Francisco Crime Lab in this case. *Kelly* established a three-pronged test for the admissibility of scientific evidence. The proponent of the evidence must establish: (1) the technique has gained general acceptance in its field; (2) the testimony regarding the technique and its application is offered by a properly qualified expert; and (3) correct scientific procedures were followed in this particular case. (*People v. Venegas* (1998) 18 Cal.4th 47, 78.) Appellant insists that the *Kelly* test was misapplied in this case, and that he would not have been convicted if the STR evidence had properly been excluded.

#### **A. Background on DNA Testing Methods**

“California courts have recognized that two methodologies are widely used in forensic DNA testing: restriction fragment length polymorphism (RFLP) and PCR. [Citation.] There are three subtypes of PCR testing: DQ- Alpha, which tests a single genetic marker; Polymarker, which tests five genetic markers; and . . . STR, which tests three or more genetic markers.” (*People v. Hill* (2001) 89 Cal.App.4th 48, 57.)

PCR is an acronym for polymerase chain reaction testing. In *People v. Reeves* (2001) 91 Cal.App.4th 14, 28-29, this court described PCR testing and its polymarker variant as follows: “PCR is a molecular biology technique that copies or amplifies small pieces of DNA by a process similar to DNA's own self-replicating properties.

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<sup>4</sup> Appellant also does not dispute that analysis of a seventh locus, the amelogenin gene, established that the blood came from a female donor.

<sup>5</sup> The term “*Kelly/Frye* derives from *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*) and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 (*Frye*). *Kelly* affirmed that the admissibility in California of evidence produced by a new scientific technique requires a preliminary showing of the technique's general acceptance in the scientific community, a test first enunciated for federal purposes in *Frye*. (*Kelly, supra*, at p. 30.)

[Citations.] It has been likened to a ‘genetic photocopy machine’ [citation] . . . . [¶] PCR forensic analysis involves three steps. First, DNA is extracted from cells in the sample. Second, select regions of the DNA are amplified. Scientists have identified these regions, also referred to as genes or genetic markers, as areas that exhibit great genetic variation among the population. One widely used marker is the DQ-alpha gene. [Citation.] On average, only about 7 percent of the population shares the same DQ-alpha type. [Citation.] Like DQ-alpha, the D1S80 locus is used in PCR testing because it contains several alleles [alternative gene forms] and exhibits great variation. . . . [Citation.] Polymarker analysis, which amplifies several loci simultaneously, has also been validated for use in PCR testing. [Citation.] After amplification, in the third and final step of PCR analysis, the amplified gene is “typed,” through the use of DNA probes, to identify the specific alleles it contains. [Citation.] If the DNA profile thus constructed differs in any way between the suspect and the sample, the suspect is excluded. But if the profiles match, the analyst must next determine how common the profile is in the population.” (Fn. omitted.)

In most portions of human DNA, there is no variation in genetic makeup between individuals. (National Research Council, *The Evaluation of Forensic DNA Evidence* (1996) p. 63 (hereafter NCR report).) For identification purposes, the most useful DNA loci are those that exhibit significant variation among individuals and a relatively even distribution in the frequencies of genetic types found in the population. (*Id.* at p. 15.) Certain “STR” loci have been found to have these characteristics. (*Id.* at p. 117.) STR stands for “short tandem repeats.” (*Id.* at p. 23.) STRs are a particular type of loci where the same DNA sequence is repeated a variable number of times depending on the person’s genotype. (*Id.* at p. 70.) The exact number of repetitions found at an STR locus will identify its allele designation. STR loci are classified as “short” because the number of repetitions is smaller than in loci used for RFLP typing (called VNTRs for Variable Number of Tandem Repeats). While VNTRs have more alleles, and therefore more power to discriminate between genetic profiles, STR loci can be amplified using PCR techniques, whereas VNTRs cannot. (*Id.* at pp. 69-70.)

Both STR and VNTR typing involve determining, from the length of the DNA segment found at the site, the number of repetitions comprising it, and then matching that information to one of the known alleles found at this site.<sup>6</sup> In both cases, identification of the alleles present in the sample requires techniques to separate all of the DNA segments in the sample based on their length, and then to illuminate only those segments that come from the target loci. The RFLP technique, which came into use before PCR was developed, uses a slower and less exact method to visualize and identify target alleles than PCR. (1996 NCR Rep., *supra*, at pp. 17-18, 22-23, 66-70.)

**B. STR Techniques Used**

The San Francisco Crime Lab began using STR testing in 1997. The STR tests in this case were performed using a device commonly referred to as the 310 analyzer, supplied by the Applied Bio-Systems Division of Perkin-Elmer, Inc. (Perkin-Elmer). Perkin-Elmer also supplied a set of primers and reagents used in conjunction with the 310 analyzer, known as the “Green One kit.”

Using PCR techniques, the preparations in the Green One kit replicate DNA from each of three target STR loci, and attach a different fluorescent dye to DNA from each of the loci. Each dye emits light of a different wavelength when excited by a laser. The treated DNA samples and control samples are then placed in the 310 analyzer where they undergo a process of “capillary electrophoresis.” This procedure runs an electric current through a thin tube containing the sample DNA and a conducting medium. The current causes the DNA fragments to move through the column at different speeds, separating themselves by length. At a glass window in the column, a laser strikes the target DNA fragments causing them to emit light at the instant they reach the window. The analyzer records the time when the fragment emits light and the wavelength of the light. By comparing these data to those captured from control samples with known DNA run at the

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<sup>6</sup> DNA includes one allele contributed by each parent. (1996 NRC Rep., *supra*, at p. 14.) Unless both parents carry the same allele, the person’s DNA sample will show two different alleles at each loci. (*Id.* at pp. 14, 16.)

same time, the 310 analyzer's internal software computes the length of the target DNA segment for each loci, and determines its specific allele designation.

**C. *Kelly/Frye Proceedings***

The prosecution responded to appellant's request for a *Kelly/Frye* hearing by seeking judicial notice of the transcripts and findings of a 1998 *Kelly/Frye* hearing in *People v. McClanahan* (Super. Ct. S.F. City and County, 1998, No. 162412) (*McClanahan*).<sup>7</sup> In *McClanahan*, San Francisco Superior Court Judge Richard Kramer found that STR testing was generally accepted in the scientific community. Although the trial court agreed to take judicial notice of Judge Kramer's ruling, it declined on hearsay grounds to take judicial notice of the extensive scientific evidence presented in the *McClanahan* case. Further, the trial court announced its intention to follow Judge Kramer's ruling subject to appellant being afforded an opportunity to come forward, by offer of proof, with evidence of anything arising *since* the ruling that would call into question whether STR typing was generally accepted in the scientific community.

Appellant made no offer of proof conforming to the trial court's specification. Instead, appellant proffered evidence that Perkin-Elmer had declined, in a case pending in another trial court department, to provide internal validation studies on the 310 analyzer and Green One kit that appellant claimed were necessary to establish the scientific reliability of this equipment. The trial court rejected this proposed evidence as irrelevant and found, consistent with *McClanahan*, that STR testing was generally accepted in the scientific community. After hearing expert testimony from both sides, the trial court also ruled that the prosecution's proposed expert was qualified in STR testing and that correct

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<sup>7</sup> Case law permits but does not require trial courts to take judicial notice of other *Kelly/Frye* proceedings in order to avoid wasteful duplication of effort. (See *United States v. Bell* (E.D.N.Y. 1971) 335 F.Supp. 797, 800 & fn. 2; *People v. Barney* (1992) 8 Cal.App.4th 798, 810; *People v. Smith* (1989) 215 Cal.App.3d 19, 23-25.) Once a trial court decision finding general acceptance of a scientific procedure has been affirmed in a published appellate decision, other trial courts are bound by that result. (*Kelly, supra*, 17 Cal.3d at p. 32.) No California appellate case had approved STR testing at the time of the trial in this case.

STR techniques were followed in this case, clearing the way for the STR test results to be used at trial.

**D. Contentions Regarding the DNA Evidence**

A few days after the jury's verdict was entered in this case, Judge Robert Dondero of the San Francisco Superior Court ruled in the case of *People v. Bokin* (2000, No. 168461) (*Bokin*) that STR testing through the use of the Perkin-Elmer 310 analyzer and Green One kit was *not* generally accepted in the scientific community. Appellant moved for a new trial, citing *Bokin*. The trial court denied the motion, concurring with Judge Kramer's view in *McClanahan* that the reliability of the Perkin-Elmer testing system was a prong three issue under *Kelly*, not a prong one issue.

Appellant argues that the trial court committed a series of prejudicial errors in its handling of the *Kelly/Frye* issues. First, it failed to recognize that the issue framed by prong one of *Kelly* was not the scientific reliability of STR typing generally, but the reliability of the specific Perkin-Elmer technique and equipment used, which appellant maintains is still unproven. Second, the trial court erred in giving decisive weight to Judge Kramer's ruling in the *McClanahan* case and in curtailing appellant's ability to attack the basis for that ruling. Third, the trial court erred in determining that the Perkins-Elmer methodology was reliable under prong three of *Kelly*.

**1. PRONG ONE ISSUES**

Appellant acknowledges that an appellate decision published after the trial court's ruling in this case, *People v. Allen* (1999) 72 Cal.App.4th 1093 (*Allen*), has affirmed that STR typing is generally accepted as reliable in the scientific community. This presents a significant obstacle to our review of appellant's contentions under *Kelly* prong one. Under *Kelly*, *Allen* would be binding on the trial court on any remand of this case. (17 Cal.3d 24 at p. 32.) As pointed out in *People v. Smith* (1989) 215 Cal.App.3d 19, such an

intervening appellate precedent would make remand, the only remedy available to this court, an idle remedy.<sup>8</sup> (*Id.* at p. 26.)

Appellant seeks to avoid the effect of *Allen* by arguing that it was wrongly decided because it was based solely on out-of-state precedents, and by urging that the specific Perkin-Elmer methodology for STR typing was not addressed by *Allen*. Both contentions fail.

The trial court decision affirmed in *Allen* was based on the testimony of a Cellmark Labs employee regarding general scientific acceptance of STR typing. (*Allen, supra*, 72 Cal.App.4th at p. 1099.) The Court of Appeal specifically found that testimony to constitute competent evidence of scientific reliability under *Kelly*. To reinforce its determination of the issue, the appellate court cited cases decided by the highest courts of two states, Massachusetts and Nebraska, finding that STR testing is scientifically reliable. (*Allen, supra*, at pp. 1099-1100.) Our Supreme Court has specifically endorsed the practice of looking outside the trial record to sister-state precedents as a factor in determining whether a technique is generally accepted. (*People v. Brown* (1985) 40 Cal.3d 512, 530, revd. on another ground *sub nom. California v. Brown* (1987) 479 U.S. 538.) We decline to deem *Allen* wrongly decided because it followed this practice.

The STR testing in *Allen* was done by Cellmark Labs. (*Allen, supra*, 72 Cal.App.4th at p. 1098.) Appellant claims *Allen* is not controlling because the issue of general acceptance can only be decided based on the specific Perkin-Elmer machine and test kit used here. Such an approach to deciding prong one issues would be entirely out of step with our case law, and would weigh down our trial courts with duplicative evidentiary hearings each time an established forensic test was refined or improved.

For example, DQ-Alpha targets a single locus whereas PCR polymarker tests five other loci. The two tests require different sets of reagents to replicate and identify the target loci. (See *People v. Morales* (1996) 643 N.Y.S.2d 217, 219.) Nonetheless, in

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<sup>8</sup> Even if we were inclined to do so, the record before us would not permit us to decide as a matter of law that STR is *not* generally accepted in the scientific community.

*People v. Wright* (1998) 62 Cal.App.4th 31, 37-38, the Court of Appeal relied on the determination affirmed in *People v. Morganti* (1996) 43 Cal.App.4th 643, 671 that PC DQ-Alpha testing was generally accepted in the scientific community to find that PCR polymarker analysis was also generally accepted.

In *People v. Venegas, supra*, 18 Cal.4th at pages 76-79, our Supreme Court rejected the defendant's argument that two earlier decisions approving RFLP testing, *People v. Barney, supra*, 8 Cal.App.4th 798 and *People v. Axell* (1991) 235 Cal.App.3d 836, applied only to the RFLP procedures of Cellmark Labs, not to those of the FBI. The Court found that that differences in the protocols, enzymes, probes, and matching criteria used under the FBI and Cellmark methodologies might support an argument under prong three that the FBI failed to follow correct scientific procedures, but such variations in technique did not require a full-blown *Kelley/Frye* hearing on whether the FBI's RFLP methodology was generally accepted in the scientific community. (*People v. Venegas, supra*, at pp. 78-79.) A *Kelley/Frye* hearing is required for new methodologies, not new devices. (*People v. Nolan* (Feb. 5, 2002, E028780) \_\_\_ Cal.App.4th \_\_\_ [2002 D.A.R. 1379, 1380].)

The Second District's recent decision in *People v. Hill* (2001) 89 Cal.App.4th 48 (*Hill*) is directly on point. Notwithstanding prior appellate approval of STR typing in *Allen*, the defendant in *Hill* contended he was entitled to a full *Kelley/Frye* hearing before STR typing results could be introduced against him. He argued that the particular STR test kit used in his case was a "novel testing device" not specifically approved in *Allen*.<sup>9</sup> (*Hill, supra*, at pp. 55-56.) *Hill* disposes of this contention as follows:

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<sup>9</sup> Like the test system used here, the "Profiler Plus" kit was supplied by Perkin-Elmer. (*Hill, supra*, 89 Cal.App.4th at p. 56.) The STR techniques in *Hill* appear to be identical to those used here: "[T]he Profiler Plus kit uses fluorescent tagging. After the primer is mixed with the DNA, it is illuminated with a laser. The tags in the primer are excited by the laser and glow blue, green, or yellow. The fluorescent glow is recorded by a camera, digitized by computer software, and analyzed by another computer program." (*Id.* at pp. 57-58.)

“We reject the argument 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. (E.g., *People v. Bury* (1996) 41 Cal.App.4th 1194, 1202 . . . [Kelly/Frye hearing not required for latest field version of breath testing device]; *People v. Cooper* (1991) 53 Cal.3d 771, 812-813 . . . [once electrophoresis testing is admitted by a court, criticism of specific methodology goes to weight of the evidence] . . . . The Kelly prong 1 analysis applies to ‘new scientific techniques.’ [Citations.] [Defendant’s expert] stated that STR forensic analysis is ‘pretty widespread.’ This is not a case in which the scientific community views the test methodology ‘as experimental or of dubious validity.’ [Citation.] [¶] . . . [Defendant’s expert] admitted that the Profiler Plus kit is used by the California Department of Justice, the FBI, and the majority of forensic labs conducting DNA tests. Other state courts have held that PCR/STR testing is generally accepted in the scientific community. [Citations.]” (*Hill, supra*, 89 Cal.App.4th 48, 58-59.)

We find that *Allen* and *Hill* were correctly decided and foreclose the prong one arguments appellant advances on this appeal. (See *Kelly, supra*, 17 Cal.3d at p. 32; *People v. Smith, supra*, 215 Cal.App.3d at p.26.) In any event, the trial court did not err in relying on the *McClanahan* ruling. The DNA evidence challenged in *McClanahan* was obtained using the same genetic loci, the same test kit and the same model analyzer as the evidence in issue here. The extensive factual record developed in *McClanahan* independently confirms the scientific reliability of those techniques. The testimony of Dr. Cydne Holt as well as peer-reviewed publications that are part of the *McClanahan* record attest to the reliability of Perkin-Elmer’s specific techniques. (See, e.g., Lazaruk et al., *Genotyping of Forensic STR Systems Based on Sizing Precision in Capillary Electrophoresis Instrument* (1998) 19 *Electrophoresis*, pp. 86-93; Moretti et al., *The CODIS STR Project: Evaluation of Fluorescent Multiplex STR Systems*.)<sup>10</sup>

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<sup>10</sup> At oral argument, appellant took the position that a *Kelley/Frye* proceeding is required for each new STR locus used, citing Dr. Holt’s testimony in *McClanahan* that not all STR loci give good results. However, the gist of Holt’s testimony was not that some STR loci are unreliable, but that certain loci are less useful for human identification

Appellant offered no evidence that STR testing was considered unreliable by any segment of the scientific community. His sole prong one argument was that Perkin-Elmer's refusal, on proprietary grounds, to make its internal validation studies available for peer review made it impossible for the scientific community to form a well-founded consensus about the reliability of the company's products. This argument misconstrues the nature of the court's inquiry and of the prosecution's burden under prong one.

Accordingly, we find no error in the trial court's determination that the DNA evidence satisfied prong one of *Kelly*.

## 2. PRONG THREE ISSUES

Our review under prong three of *Kelly* is limited to determining whether the trial court abused its discretion in finding that correct scientific procedures were followed in this case. (*People v. Ashmus* (1991) 54 Cal.3d 932, 971.)

Criminalist Alan Keel, who heads the DNA testing unit of the San Francisco Crime Lab, testified about the steps taken to ensure that the Green One kit and 310 analyzer were correctly utilized by the lab both in general and in this case. This included the implementation of testing guidelines and protocols based on quality control standards approved by the nationally recognized Technical Working Group on DNA Analysis and Methods, as well as internal studies to verify that the lab was using the 310 analyzer properly and that the reagents in the test kit were performing as expected. Thus, there was substantial evidence that the San Francisco Crime Lab used the Perkin-Elmer system correctly in producing the disputed DNA evidence.

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because they have a smaller number of alleles. Her 1998 testimony in *McClanahan* was that the three loci in issue in that case, the same ones used here, were already in wide use then and their reliability for human identification had repeatedly been demonstrated and reported in the scientific literature. More recent scientific literature of which we have taken judicial notice has further confirmed general scientific acceptance of both the test system and loci used in this case. (See, e.g., Moretti et al., *Validation of Short Tandem Repeats (STRs) for Forensic Usage: Performance Testing of Fluorescent Multiplex STR Systems and Analysis of Authentic and Simulated Forensic Samples* (2001) J. Forensic Sci. pp. 647-660.)

Appellant does not challenge this conclusion on appeal. Instead, he argues that such a showing fails to satisfy the requirements of prong three. According to appellant, if general acceptance by the scientific community of the Green One kit and 310 analyzer is not required under prong one of *Kelly*, such proof must, at least, be necessary to satisfy prong three. Our Supreme Court rejected this precise contention in *Venegas*: “The *Kelly* test’s third prong does not apply the *Frye* requirement of general scientific acceptance—it assumes the methodology and technique in question has already met that requirement. Instead, it inquires into the matter of whether the procedures actually utilized in the case were in compliance with that methodology and technique, as generally accepted by the scientific community.” (*People v. Venegas, supra*, 18 Cal.4th at p. 78, italics omitted.)

Nonetheless, appellant is correct in one respect. If scientific evidence is disputed, the question of whether the particular devices and procedures used to generate it are in fact consistent with the underlying science must be answered at some point under *Kelly/Frye*. The trial court correctly determined that this question must be reached under prong three of *Kelly*.

The record here supports the conclusion that the Green One kit and 310 analyzer produce reliable STR typing. Keel was qualified as an expert on STR typing. He testified he was familiar with the operations of the Perkin-Elmer STR test system, and with the theories underlying it. He described the system as simply a method of convenience not materially different from other available methods of performing STR typing. He further testified that his lab tested the performance of the Perkin-Elmer system when it was first introduced in the lab, and re-validates its accuracy with internal controls each time it is used. Thus, there was substantial evidence on the record that the Perkin-Elmer system functioned in a manner fully consistent with the generally accepted science of STR typing.

Appellant’s own expert, Dr. Christie Davis, implicitly confirmed Keel on this point. She based her opinion that correct scientific procedures were not followed in this case solely on the crime lab’s asserted failure to observe one of Perkin-Elmer’s guidelines. She offered no opinion and appellant ventured no argument based upon her

testimony that the Perkin-Elmer system itself is flawed, or that it departs from accepted scientific principles for STR typing.

On this record, we find no abuse of discretion in the trial court's ruling that the DNA evidence was admissible under prong three of *Kelly*.

### 3. PREJUDICE

Respondent contends that any error in admitting the disputed DNA evidence was harmless because the other evidence against appellant was more than sufficient to ensure a guilty verdict.

The applicable standard is whether it is reasonably probable the verdict would have been more favorable to appellant if the disputed DNA evidence had been excluded. (*People v. Venegas, supra*, 18 Cal.4th at p. 93.) We find no such probability here. Robinson identified appellant unequivocally as her attacker. Considerable circumstantial evidence corroborated her account of the event. To overcome this testimony, the defense argued that Robinson deliberately stabbed herself and then falsely accused appellant in order to send him to prison so that she could resume an intimate relationship with Barney King. That defense could not be sustained with or without the STR evidence.

First, the defense theory was extremely implausible given the number, severity, and location of Robinson's knife wounds. It strains credulity to claim that such wounds, including obviously defensive wounds on Robinson's arm, facial cuts, and deep chest wounds near her heart, could have been self-inflicted for the purpose of getting appellant out of her life. This physical evidence was sufficient in itself to thoroughly undermine the defense theory. Second, the defense's primary witness for its false accusation theory, Kelvin George, effectively recanted his testimony on cross-examination, and was impeached with multiple prior felony convictions. Finally, the unchallenged blood evidence from seven other genetic loci would be sufficient confirmation of appellant's guilt in light of all of the other evidence against him.

Thus, we conclude that any error in the admission of the DNA STR evidence was harmless as a matter of law.

## II. EVIDENTIARY RULINGS

Appellant claims the trial court erred in failing to strike Robinson's testimony that, the night before the stabbing, appellant "smoked some weed with some crack in it." Appellant argues this evidence was irrelevant to any issue in the case and was prejudicial in that it stigmatized him as a criminal and drug user in the jury's eyes.

It is inconceivable that Robinson's fleeting reference to one instance of drug use by the appellant would have so distracted the jury from the unrelated facts of the charged offenses that the verdict must be deemed unreliable. The prosecutor made no reference to Robinson's testimony on this point in her closing. Appellant's claim that this isolated testimony painted him as "drug-crazed" is completely unfounded. We find any error in the admission of this evidence was insubstantial and harmless.

Appellant next complains that the trial court made a series of one-sided evidentiary rulings that had the cumulative effect of depriving him of a fair trial. First, Robinson was permitted to testify to two prior acts of domestic violence by appellant, an incident on May 7, 1998, in which he stabbed her in the ankle with a screwdriver, and a March 1998 incident in which appellant stabbed Robinson on her wrist with a knife, sending her to the hospital for stitches. This evidence was expressly permitted by the trial court on the authority of Evidence Code section 1109.<sup>11</sup> Then, appellant was precluded from presenting the following evidence of *Robinson's* alleged propensity for violence: (1) the details of Robinson's 1986 conviction for manslaughter; (2) a 1983 uncharged assault by Robinson on a police officer; and (3) an allegation that Robinson had shown appellant pictures of herself with gang members.<sup>12</sup> According to appellant,

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<sup>11</sup> Evidence Code section 1109 provides another exception to the prohibition on character evidence in domestic violence prosecutions: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

<sup>12</sup> Appellant argued that the evidence was admissible under Evidence Code section 1103, which makes evidence of the *victim's* character admissible in certain circumstances: "In a criminal action, evidence of the character or a trait of character (in

the trial court's rulings deprived him of a fair trial by permitting the prosecution to introduce propensity evidence against him, while denying him the reciprocal right to adduce evidence of his accuser's violent propensities.

No principle of reciprocity or parity requires a court to abandon individualized consideration of proffered evidence under Evidence Code section 352.<sup>13</sup> Due process does not *entitle* a defendant to attack the character of the victim once the defendant's own bad character is shown. Such evidence must still withstand scrutiny independently under Evidence Code sections 352 and 1103. (See *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448.) A defendant has no constitutional right to present all conceivably relevant evidence in his favor without regard to its probative value and potential for misleading the jury. (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553.)

Here, appellant primarily wished to present evidence that Robinson stabbed and killed her mother's boyfriend (who was also her uncle) in 1986. Robinson admitted pleading guilty to voluntary manslaughter in 1986, but the trial court would not allow appellant to delve into the facts of the offense, including the use of a knife. According to appellant, the circumstances were "nearly identical" to the facts of the present case in that Robinson stabbed her uncle on the uncle's birthday following a drug and alcohol party. We are not persuaded. Robinson's act of violence against *another person* 13 years earlier is of negligible probative value in showing a propensity to stab *herself* in the circumstances presented here. Testimony on this subject would have opened up a time-consuming mini-trial on the facts surrounding Robinson's stale offense while having little or no "tendency in reason" to support appellant's defense. (Evid. Code, § 210.)

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the form of opinion, evidence of reputation or evidence of specific instances of conduct) of the victim . . . is not made inadmissible by Section 1101 if the evidence is:  
[¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

<sup>13</sup> Evidence Code section 352 permits a trial court to exclude evidence if "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

We find that the trial court acted within its discretion in excluding evidence of the details of Robinson's voluntary manslaughter offense. Likewise, the trial court did not abuse its discretion or deprive appellant of a fair trial by excluding evidence of an uncharged assault committed by the victim 16 years earlier or of her alleged association with gang members.

Appellant further contends that the trial court abused its discretion in excluding certain evidence he proffered solely for impeachment purposes including Robinson's 1996 theft conviction, her uncharged 1983 assault and hospital records showing Robinson's history of drug and alcohol use. As noted, the trial court allowed the fact of Robinson's 1986 manslaughter conviction to be admitted. This latter, felony offense was far more significant for impeachment purposes than the 1983 assault or Robinson's 1996 conviction for stealing less than \$5 worth of food. On this record, the trial court acted well within its discretion in excluding a remote, uncharged misdemeanor and a petty theft conviction as impeachment evidence.

The trial court also acted within its discretion in excluding evidence of Robinson's drug and alcohol use. Illegal drug use by itself is not a crime involving moral turpitude. (See *People v. Castro* (1985) 38 Cal.3d 301, 317.) Appellant mounted no defense that Robinson was so impaired by alcohol or drug abuse that she misidentified him as her attacker. Although the hospital records in question might have cast doubt on whether Robinson's drug intake the night before the stabbing was as minimal as she claimed, the records did not logically contradict that testimony or show her to be untrustworthy on any point material to the prosecution's case.<sup>14</sup> The trial court did not err in excluding this evidence.

Taken singly or in combination, we find no abuse of discretion or constitutional infirmity in the trial court's non-DNA evidentiary rulings.

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<sup>14</sup> According to appellant, the proffered evidence consisted of a hospital record containing Robinson's admission that she regularly used marijuana two or three times per week and crack cocaine twice per week.

### III. ALLEGED PROSECUTORIAL MISCONDUCT

Appellant charges the prosecutor with multiple acts of misconduct, including deliberately eliciting or failing to prevent inadmissible testimony, attacking his counsel's integrity and making improper closing arguments. We find no merit in this shotgun barrage of misconduct claims.

We find nothing in the record to support appellant's claim that the prosecutor either deliberately elicited or was derelict in failing to prevent the following witness testimony: (1) Robinson's statement that appellant knew of the broken window because he had come in that way once before to "beat [her] up"; (2) Inspector Sanford's testimony that he recognized a photograph of appellant as a "San Francisco mug shot"; and (3) Sanford's testimony that one of the two steak knives found in appellant's apartment matching Robinson's description of the stabbing weapon "had smudges over it as if it was freshly wiped." In any event, in light of the record as a whole and the trial court's admonitions, it is not reasonably probable that any of this disputed testimony affected the jury's verdict. The prosecutor also did not commit misconduct in eliciting Robinson's brief reference to appellant's drug use the night before the stabbing because the trial court specifically allowed this testimony.<sup>15</sup>

In her closing argument, the prosecutor told the jury that the reason Robinson came forward and subjected herself to the ordeal of testifying is that she "does not want this Defendant to walk away from her apartment a second time with her blood on the bottom of his shoes." The prosecutor had previously asked Robinson if she was still afraid, at the time of trial, that appellant would kill her, but appellant's objection to this question was sustained. Appellant claims that the prosecutor's improper purpose in

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<sup>15</sup> Appellant also complains that it was improper "vouching" to ask Officer Sanford whether it was common for there to be minor inconsistencies in the statements of domestic violence victims over the course of multiple interviews. The court sustained appellant's objection to this question, obviating any arguable prejudice. A prosecutor does not commit misconduct merely by asking a question to which an objection is sustained.

asking this question, confirmed by her closing argument, was to imply that if the jury acquitted appellant he would kill Robinson. This argument is specious. Plainly, the prosecutor was trying to establish Robinson's sincerity and truthfulness. In any event, appellant made no objection to the prosecutor's closing argument on this point and has waived any claim of prosecutorial misconduct arising from it. (*People v. Seaton* (2001) 26 Cal.4th 598, 660.)<sup>16</sup>

Appellant complains that the prosecutor demeaned his attorney's integrity by describing one of his arguments as "trickery," and by telling the jury that Robinson's testimony was credible notwithstanding minor inconsistencies because she is not a "slick lawyer." We find that any arguable misconduct in making these statements was insignificant and harmless.

Finally, appellant complains that the prosecutor improperly attempted to shift the burden of proof by arguing that the defense could have had the blood evidence re-tested if the lab results were in error, and could have had the knives re-tested for fingerprints. Appellant concedes no objection was made to either argument at trial, but asserts without explanation that "no admonition could have cured the harm." However, if the harm in question is to convey an impression that the defense has the burden of proof, an admonition from the court could certainly have cured it. Thus, we find that appellant has waived this objection. In any event, we do not agree that the prosecutor committed misconduct. She was entitled to comment on appellant's failure to produce logical evidence. (See *People v. Medina* (1995) 11 Cal.4th 694, 755-756; *People v. Pinholster* (1992) 1 Cal.4th 865, 948.) Such comment did not shift the burden of proof to appellant.

Accordingly, we find appellant's claims of prosecutorial misconduct to be unsupported by the record.

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<sup>16</sup> Appellant also waived objection to the prosecutor's argument that the jury should "honor" Robinson's testimony because she survived the attack, unlike many other victims of this type of crime.

#### IV. OTHER CRIMES INSTRUCTION

The jury heard evidence of two prior incidents of domestic violence by appellant and was instructed on the significance of this evidence by the reading of CALJIC No. 2.50.02 as revised in 1999: “If you find that the Defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the Defendant had a disposition to commit the same or similar type offenses. [¶] If you find that the Defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused. [¶] However, if you find by a preponderance of evidence that the Defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses. [¶] The weight and significance, if any, are for you to decide. [¶] Unless you are otherwise instructed, you must not consider this evidence for any other purpose.”

The jury was further instructed under CALJIC No. 2.250.1 that the defendant’s commission of a prior offense involving domestic violence must be proved by a preponderance of the evidence.

Appellant challenges the above instructions on the ground that they violated his state and federal due process rights by diminishing the prosecution’s burden to establish every element of the crime with which he was charged by proof beyond a reasonable doubt. This court has held that the pre-1999 version of CALJIC No. 2.50.02 *did* raise due process concerns on this specific ground. (See *People v. James* (2000) 81 Cal.App.4th 1343, 1352-1360 (*James*)). However, the former version in issue in *James* contained no cautionary language reminding jurors that proof of a prior offense is not sufficient to prove beyond a reasonable doubt that the defendant committed the present offense. (See *id.* at p. 1349 & fn. 6.) In *People v. Falsetta* (1999) 21 Cal.4th 903, 923-924 (*Falsetta*), the California Supreme Court expressed its approval of this identical cautionary language in a parallel instruction on prior sexual offense evidence, CALJIC No. 2.50.01. The court noted that the language in question was appropriate generally for “cases involving the admission of disposition evidence.” (*Falsetta, supra*, at p. 922.) In reliance on *Falsetta*,

Division Two of this court in *People v. Brown* (2000) 77 Cal.App.4th 1324, 1335-1336, upheld the use of CALJIC No. 2.50.02 against a due process challenge.<sup>17</sup>

While we suggested in *James* (81 Cal.App.4th at pp. 1357-1358, fn. 8) that revised CALJIC No. 2.50.02 would benefit from further clarification, we agree with *Falsetta* and *People v. Brown* that it satisfies the requirements of due process. In combination with other instructions on the burden of proof, the instruction adequately reminds the jury that proof of similar crimes, although it may be taken as evidence of guilt, is not sufficient to meet the prosecutor's burden of proving guilt beyond a reasonable doubt.

In any event, a due process defect in the use of CALJIC No. 2.50.02 would not compel reversal as a matter of law. (See *James, supra*, 81 Cal.App.4th at pp. 1360-1363.) We apply federal harmless error analysis to measure the significance of the instruction against the other evidence presented to the jury. (*Id.* at pp. 1362-1363.) Here, the nonpropensity evidence pointing to appellant's guilt was overwhelming. He was well known to the victim and she identified him unequivocally. Means, motive, and opportunity were all amply proven. Strong DNA evidence linked appellant to the scene of the attack. At the same time, appellant's alternative explanation for his accuser's injuries, that she inflicted life-threatening injuries on herself in order to get rid of him, was highly implausible and almost entirely lacking in evidentiary support. On the facts of this case, any error in the propensity instruction was harmless beyond a reasonable doubt.

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<sup>17</sup> The Supreme Court cautioned that its endorsement of the instruction was limited to the issues before the court. (*Falsetta, supra*, 21 Cal.4th at p. 924.) However, the court specifically addressed the issue of whether statutes allowing "other crimes" evidence, such as Evidence Code sections 1008 and 1009, violated due process by impermissibly reducing the prosecutor's proof burden. (See *id.* at p. 920.) As noted in *People v. Brown*, it is unlikely the court would have approved the implementing instruction if it perceived a due process problem in its language. (*People v. Brown, supra*, 77 Cal.App.4th at p. 1336.)

Accordingly, we find no constitutional error in the giving of CALJIC No. 2.50.02. In light of the totality of the evidence pointing to appellant's guilt, such error would have been harmless in any event.

#### V. CONSECUTIVE SENTENCE FOR MAYHEM

The trial court sentenced appellant to nine years for the principal offense of attempted murder, and added consecutive terms totaling eight years for the domestic violence, weapon, and prison prior enhancements. Additional sentences for the burglary, domestic abuse, battery and assault charges were stayed pursuant to Penal Code section 654<sup>18</sup> based upon the court's finding that these offenses were incidental to appellant's principal offense of attempted murder. However, finding that the unaggravated mayhem charged in count 2 was "independent and not merely incidental to" the principal charge, the court added another consecutive term of one year and four months for the mayhem conviction.

Appellant contends the consecutive sentence for mayhem was error because no independent intent to maim was shown by the evidence. Whether a defendant held dual criminal objectives, so that a course of conduct violating two statutory provisions may be punished by consecutive sentences, presents a question of fact reviewable under the substantial evidence test. (*People v. Arndt* (1999) 76 Cal.App.4th 387, 397.)

In this case, there was ample evidence that appellant intended to maim as well as murder his victim. Appellant stabbed Robinson through both breasts before plunging the knife into the center of her chest. Then, after she fell down, appellant stood over her in order to stab her once on each side of her face, leaving her with two permanent facial scars. Had appellant's sole objective been to kill Robinson, he would not have deliberately stabbed her breasts, and he would not have prolonged the attack in order to inflict injuries to her face. On these facts, separate punishment for mayhem does not

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<sup>18</sup> That section provides in pertinent part as follows: "An act or omission . . . punishable in different ways by different provisions of law [may be punished under one of such provisions], but in no case shall [it] be punished under more than one . . ."

violate Penal Code section 654 but effectuates its purpose of ensuring punishment commensurate with appellant's greater culpability. (See *Neal v. State* (1960) 55 Cal.2d 11, 20.)

**DISPOSITION**

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Parrilli, J.