IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff & Respondent,

v.

ROBERT MARK EDWARDS,
Defendant & Appellant.

S073316

CAPITAL CASE

Orange County Superior Court No. 93WF1180
The Honorable JOHN J. RYAN, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an information filed on June 5, 1995, the District Attorney of Orange County charged appellant, Robert Mark Edwards (hereinafter "Edwards"), with the murder of Marjorie Deeble (count 1; Pen. Code, § 187, subd. (a))[1/] and first degree residential burglary (count 2; §§ 459, 460, subd. (a), 461.1). (I CT 198.) The information further alleged the murder was committed under special circumstances, i.e., that the murder of Deeble was committed while Edwards was engaged in the commission of residential burglary, within the meaning of section 190.2, subdivision (a)(17)(vii), the murder was intentional and involved the commission of torture (§ 190.2, subd. (a)(18)); and the murder was committed by Edwards who was previously convicted of murder in Hawaii (§ 190.2, subd. (a)(2)). (I CT 199.) Additionally, the information alleged, in counts 1 and 2, that the offenses were serious felonies within the meaning of section 1192.7, subdivisions (c)(1) and (18). (I CT 199.)

Edwards filed a section 995 motion to dismiss the prior murder special circumstance allegation, that Edwards had previously been convicted of

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1. Any subsequent statutory reference is to the Penal Code unless otherwise indicated.

murder. (I CT 240-248.) The trial court granted Edwards' motion and dismissed the prior murder special circumstance. (II CT 442.) Upon the prosecution's motion, the trial court also dismissed count 2 because it was outside the statute of limitations. (II CT 525.)

Jury trial on the guilt phase commenced on September 19, 1996. (II CT 627.) The jury began deliberations on October 17, 1996 (III CT 849), and on October 22, 1996, the jury found Edwards guilty of first degree murder as charged in count 1. (III CT 969, 1052.) The jury also found true the burglary murder special circumstance and the murder involving the infliction of torture special circumstance. (III CT 967-969, 1052.)

The penalty phase of the trial commenced on November 4, 1996. (III CT 1118-1121.) On November 26, 1996, the jury was unable to reach a verdict on penalty, and the trial court declared a mistrial. (IV CT 1239-1240.)

A second penalty phase trial commenced on March 3, 1998. (IV CT 1461.) Jury deliberations as to penalty began on April 14, 1998. (V CT 1602.) On April 16, 1998, the jury returned a verdict of death. (V CT 1745-1748.) On September 9, 1998, the trial court imposed a death sentence on the murder count. (V CT 1889-1896.)

STATEMENT OF FACTS

Guilt Phase

In May of 1986, Edwards sexually assaulted and murdered Marjorie Deeble, who was in her fifties, in her Los Alamitos home. Edwards was arrested for the murder of Deeble in 1993, after Deeble sexually assaulted and murdered 67-year-old Muriel Delbecq in her home in Maui, Hawaii. The similarities between the two murders, which included both victims having been sexually assaulted with a can of hair mousse, resulted in evidence of the Hawaii murder being introduced for the limited purposes of establishing Edwards'

identity as the killer of Deeble, and his intent to torture Deeble. The facts and circumstances surrounding Edwards' crimes against Deeble are detailed below.

Prosecution Case-in-Chief

Marjorie Deeble's daughter, Kathryn Valentine, met Edwards in March 1986. (VII RT 2072.) They were still dating at the time of Deeble's murder. (VII RT 2079.) Valentine lived at 3882 Green Street in Los Alamitos, which was about ten miles away from her mother's apartment. (VII RT 2073.) Edwards lived nearby Valentine's home. (VII RT 2073.) Deeble left an extra key to her apartment in the drain pipe in front of the apartment. (VII RT 2076.) Edwards knew Deeble kept a key there. (VII RT 2076.) Valentine had also told Edwards that a person could enter Deeble's apartment through a screen. (VII RT 2113.)

In the early part of May, Deeble and Valentine returned home from a trip to Palm Springs to find that Valentine's truck was inoperable. (VII RT 2075-2076.) Valentine allowed Edwards to drive her truck, and he had his own set of keys to Valentine's truck. (VII RT 2075.) Since it was Edwards who had been driving the truck before it broke down, Deeble made arrangements for Edwards to get her daughter's truck fixed, which led to "bad blood" between Deeble and Edwards. (VII RT 2075-2076.)

Valentine saw Deeble on Mother's Day, which was May 11, 1986. (VII RT 2074.) She also saw her mother the following morning at around 7:30 a.m. (VII RT 2074.) Valentine never saw her mother alive again after that morning. She tried calling her mother later that day, and continued calling through Thursday of that week, but Deeble did not answer her phone, so Valentine left messages for her mother on the answering machine. (VII RT 2075.)

On Monday, May 12th, Valentine left her truck parked in her driveway. Valentine always parked the truck either beyond or before the Juniper bushes

so she would not have to stand in the bushes to get into and out of the truck. (VII RT 2078.) The next morning, however, Valentine noticed that the truck was not where she had parked it the day before because she had to stand in the bushes to get into the truck.[2/] (VII RT 2079.)

Deeble was a real estate agent for Great Western Real Estate office in Los Alamitos. (VI RT 1984.) On May 12, 1986, at approximately 2:00 to 3:00 p.m., Deeble checked in with the manager of the real estate office, Rebecca Brown, to tell Brown she was on her way to an appointment which was set for 5:00 p.m.. (VI RT 1984-1985.) Deeble was one of the top and most active agents in the office, and because she had a lot of listings at the time, she was in continuous contact with Brown. (VI RT 1984-1986.) Deeble did not make the 5:00 appointment. (VI RT 1986.) Brown did not hear from Deeble on May 13, 14, or 15, which was unusual because Deeble constantly called the office to check for messages.

On May 15, 1986, Los Alamitos Police Officer Ronald Leigh Farnam went to Deeble's apartment at 3882 Green Street in Los Alamitos. (VI RT 1991, 2001.) Officer Farnam met Hoan Le of Great Western Real Estate office at the apartment. Le was concerned about Deeble's welfare, as she was one his employees. (VI RT 1984, 1992.)

Officer Farnum was the first officer to arrive at the apartment. (VI RT 1991.) Detective Vic Cantu arrived shortly thereafter. (VI RT 2001.) The front screen door was unlocked but closed; however, the solid wood front door was ajar about four inches. (VI RT 1991.) A screen to a window next to the door was lying on the ground. (VI RT 1992, 2003.) The officers entered the apartment and noticed it was generally clean and neat. (VI RT 1993, 2005.)

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2. No one besides Valentine and Edwards had the keys to her truck. (VII RT 2079.)

Officer Farnum and Detective Cantu noticed that heavy metal or hard rock music was playing loudly from a bedroom down the hall. (VI RT 1993-1994, 2009.) Officer Farnum went down the hall to the bedroom. The bedroom appeared to have been "ransacked." (VI RT 2006.) Items had been thrown apart, garments were lying in the middle of the room, a book of matches, tennis shoes, some belts, and other items were knocked over on the credenza. (VI RT 2006.) The contents of a purse were strewn about the floor, and drawers on the furniture were all open. (VI RT 2006.)

Deeble was in the bedroom. (VI RT 1996.) Deeble was lying in the prone or face down position, on the floor immediately in front of the bed and a large credenza. (VI RT 2011; VII RT 2045.) Deeble was wearing a long nightgown which had been pushed up to her waist. (VI RT 2011.) Deeble was not wearing any undergarments. (VI RT 2012.) The bottom of the nightgown had been either cut or ripped, and part of the nightgown was binding Deeble's hands behind her back. (VI RT 2011.) Her hands were also tied with a piece of telephone wire.[3/] (VI RT 2011; VII RT 2054.) Deeble's hair appeared ruffled. (VI RT 2011.) Her neck was in a noose fashioned from a belt, and Deeble's head was suspended above the ground. (VI RT 2011.) The belt was around Deeble's neck, and the free end of the belt was stretched and tied to the drawer handle of the top drawer of the credenza. (VI RT 2011-2012.) The drawer was open about six to eight inches. (VI RT 2011-2012.)

Blood was running out the Deeble's left ear. There was blood on her nose and mouth area. (VI RT 2012.) There were two wounds around Deeble's neck, one immediately below the belt. (VI RT 2012.)

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3. A telephone cord had been pulled from the wall, breaking the wall adapter. The force of the pull also loosened the screws holding a lamp, and gypsum dust from the drywall was on the lamp and the nightstand below. (VII RT 2054.) A telephone with its cord cut off was located in the southeast bedroom. (VI RT 2036-2037.)

There was a stain on Deeble's leg that appeared to be dried semen. (VII RT 2070.) Moreover, while Deeble's legs were not bound when she was found, ligature marks around her ankles indicated that she had been bound around her legs at some point. (VII RT 2070.)

A can of Merci Gelle hair mousse was found amongst a bed covering on top of the bed. (VI RT 2014, 2046.) A white cap that appeared to fit on the mousse can was found on the ground next to Deeble. (VI RT 2046.) There appeared to be dried blood underneath the ridge on the top of the mousse can. (VII RT 2046.) A presumptive test for blood on the mousse can was positive. (VII RT 2046.) The cap also appeared to have dried blood on it. (VII RT 2046-2047.)

Also found in Deeble's room were a pillow case, a red dress, and a scarf wrapped around in a bundle and taped with adhesive tape. (VII RT 2047.) Adhesive tape was also found on Deeble's left cheek during the autopsy. (VII RT 2048.) The red dress was taped to other items in such a way that the left arm was free, but right arm was obstructed. The hem of the dress was taped around the waist is such a way that it "couldn't have been worn." (VII RT 2049-2050.)

The pillow case had a "substantial amount" of blood staining on it. (VII RT 2050-2051.) The blood was heavier on the inside than the outside, indicating that the bleeding came from inside the pillow case. (VII RT 2051.) There was a knot tied at the edge of the pillow case which restricted the opening. The pillow case appeared to be fashioned into a hood. The areas which were cut appeared to have been cut with pinking shears. (VII RT 2050-2051.)

There was also a sheet found on the floor. On one side of the sheet, a strip about three to four feet long and several inches wide was cut from the

sheet. (VII RT 2052.) The sheet was also cut with what appeared to be pinking shears. (VI RT 2053.)

On the west side of the bed, near the nightstand, a telephone cord tied to an electrical cord was recovered. (VII RT 2053.)

Some of Deeble's jewelry was missing. (VII RT 2080.)

Dr. Richard Fukumoto, a pathologist, testified at trial about the autopsy of Deeble performed by his colleague, Dr. Richards, on May 16, 1986.[4/] (VII RT 2121-2122.) Dr. Fukumoto opined that Deeble's cause of death was asphyxiation or lack of air to the body, due to ligature strangulation. (VII RT 2139.)

Both an external and an internal examination was conducted on Deeble's body. (VII RT 2124.) An external examination revealed a deep furrow around Deeble's neck. This furrow was created by the belt ligature that was found around her neck. (VII RT 2126.) The furrow was deep with an abrasive thickening of the skin. This indicated that there was movement or friction by the victim while the ligature was around her neck. The abrasions also showed that the victim made movements side to side while the ligature was around her neck. (VII RT 2126.)

The whites of Deeble's eyes were bloody because of conjunctival hemorrhages or bleeding in the whites of the eyes. (VII RT 2127.) Deeble also suffered injuries to her ears. Blood was coming out of her left ear. An internal examination of the ears showed extensive hemorrhage in the middle ear, tearing in the right ear drum, and an incisional type injury to the left ear drum. (VII RT 2127.) The tearing of the right ear drum was consistent with having a ligature

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4. Dr. Richards was retired at the time of the trial. However, he prepared an autopsy report which included approximately 100 photographs of the autopsy as well as microscopic slides of Deeble's various organs. (VII RT 2123.) Dr. Fukumoto personally reviewed the report, photographs and the microscopic slides prepared in this case. (VII RT 2124.)

around Deeble's neck. The ear drums were torn because of massive bleeding in the middle ears. This was possibly caused by massive increase in pressure as a result of Deeble's struggle to obtain breath. Dr. Fukumoto opined that the pressure in the ear, to the extent that ear drums were torn, and the struggling with the ligature around the neck would have been extremely painful. (VII RT 2128.)

The incisional type cut to the left ear drum was separate from the damage caused by the ligature. (VII RT 2128-2129.) This cut was caused by a sharp or pointed instrument which broke the left ear drum. (VII RT 2127.) This incision would have been extremely painful. (VII RT 2129.)

There were also ligature marks around Deeble's ankles. (VII RT 2129.) The right ankle had a deeper, more marked injury. In addition to the marks from the ligature, Deeble suffered from two lacerations on the right ankle. (VII RT 2129-2130.) Dr. Fukumoto testified that Dr. Richards described, and he agreed, that these lacerations were consistent with the wires coming together and inflicting the injury to the ankle. (VII RT 2130.)

Deeble's face was also characterized by marked engorgement or the presence of the blood and swelling of the eyelids.[5] (VII RT 2130, 2131.) There was marked blood vessel stasis, or stoppage of the normal flow of blood, in the neck and face area. (VII RT 2130.) Deeble's nose appeared fractured because there was a crescent area on the bridge that was consistent with a fracture. (VII RT 2130-2031.)

An internal examination of Deeble showed further evidence of trauma. There were numerous petechia or pinpoint hemorrhages in the scalp and muscle tissue evident in the layers between the skull and cranium. (VII RT 2132.) The

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5. Swelling is caused by fluid outside the blood vessel which has seeped into the soft tissue. Swelling indicates that trauma has been inflicted. (VII RT 2131.)

subarachnoid fluid inside Deeble's skull was bloody instead of clear which indicated that trauma was inflicted to Deeble's brain because the fluid acts as a buffer for any movement of the brain. (VII RT 2133.) The dura or thick membrane between the skull and brain was filled with blood, and blood clots were forming, particularly on the right inner surface of the dura, which indicates that Deeble suffered from blunt force trauma to the area above Deeble's neck. (VII RT 2133.)

There was bleeding near the tail of the pancreas. (VII RT 2134.) Since the pancreas is surrounded by organs and the ribs, a tremendous amount of force was inflicted in that area in order to damage Deeble's pancreas. (VII RT 2135.)

Deeble also suffered various injuries to her genital area. There were bruises on the labia and the vaginal fault, and a hemorrhage and laceration in the area of the posterior fourchette. (VII RT 2137.) The anus was dilated, and there were mucosal lacerations of the rectum as well as tearing of the inner covering of the rectum within the dilated anus. (VII RT 2137.) Dr. Fukumoto testified that the object which caused these injuries was not something with sharp edges. Dr. Fukumoto opined that the mousse can found on Deeble's bed would be consistent with an object that could have caused these various injuries. (VII RT 2138.) Dr. Fukumoto also testified that the injuries to the vaginal and rectal areas were caused before death and would have been highly painful because the vaginal and rectal areas are highly vascular with a lot of blood and nerve endings in the area. (VII RT 2138.)

Murder of Muriel Delbecq in Maui, Hawaii

Muriel Delbecq was 67 years old and lived in Alaska, but she regularly vacationed in Hawaii around Christmas and New Year every year to visit her

daughter, Peggy Kay Ventura. (VII RT 2178.) Delbecq owned a condo at 2050 Kanoe Street, Unit 105 in Kihei, Maui, Hawaii. (VII RT 2179.)

On Monday, January 25, 1993, Delbecq and Ventura played golf and then Delbecq took Ventura home. (VII RT 2183.) Ventura's husband had a good catch of fish, so Ventura picked up Delbecq later that evening to see the fish. (VII RT 2184.) At around 8:00 p.m., Ventura took Delbecq home. (VII RT 2184.)

On January 26, 1993, Ventura called her mother at 7:20 a.m., but there was no answer. (VII RT 2185.) Ventura went to Delbecq's home at around 7:30 a.m. (VII RT 2186.) The door was closed and locked. (VII RT 2186.) Ventura knocked on the door and called through the window beside the door, but there was no response. (VII RT 2187.) Ventura, who had a key to Delbecq's condo, opened the door. (VII RT 2187.)[6/] She noticed blood on the carpet and above the front entrance. (VII RT 2188.) Ventura tried to call 9-1-1, but the telephone, which was usually on a table beside the sofa, was missing.[7/] (VII RT 2189-2190.) Ventura tried to open Delbecq's bedroom door, but it was locked, and it did not open when Ventura tried to shove the door open. (VII RT 2189.) Ventura ran out of the apartment and told a neighbor to call 9-1-1. (VII RT 2190.)

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6. Delbecq also kept a spare key outside the condo. She told Ventura that she was going to hide it under a rock near a fisherman statue in the planter area. (VIII RT 2194-2195.) Delbecq told Ventura that she was going to get a spare key made because she had locked herself out at one point and did not want to have to bother people about it again. (VII RT 2201-2202.) Ventura never found that key after Delbecq's murder. (VII RT 2195.)

7. Inside a dumpster at 2065 Kanoe Street, pieces of telephone wire and cord were later discovered in a pillowcase that was consistent with the fabric on Delbecq's bedding. (VII RT 2219, 2224, 2227-2231.) The pillowcase also contained a check in the name of Peggy Ventura and Muriel Delbecq. (VII RT 2224.)

Ventura then ran around to the pool area, where there was a window that led to Delbecq's bedroom. (VII RT 2191.) Ventura jerked the window screen off and ran inside.[8] (VII RT 2192.) The room was pitch black. There was a comforter over the window, which usually just had a curtain over it. The light did not go on when she flipped the light switch. (VII RT 2192.) Ventura opened the previously locked door leading to the hallway to let light into the room. (VII RT 2192.)

Ventura noticed a pile of blankets on the bed. When Ventura pulled the blankets off, she noticed Delbecq lying on her back, completely naked. (VII RT 2193.) Delbecq did not have a pulse and she looked white and swollen with bruises on her face. (VII RT 2193.) Ventura noted that Delbecq was not wearing her wedding ring. Delbecq never took the ring off because it had become tight from weight gain.[9] (VII RT 2196.)

At around 8:28 that same morning, Sgt. Randall Bell of the Maui County Police Department went to Delbecq's condo. (VII RT 2205-2206.) Sgt. Bell noticed blood spots on the carpet inside the main entrance, and blood in the bedroom, living room and kitchen area. (VII RT 2207.) The victim, Delbecq, was lying crossways on the bed with her legs spread. (VII RT 2208, 2234-2235.) There were definite, pronounced ligature marks on Delbecq's ankles and wrists. (VII RT 2235.)

The bedroom had been ransacked with clothes and personal effects strewn on the floor. (VII RT 2208-2209.) Sgt. Bell noticed a bloody

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8. The window screen was previously damaged, but Ventura noticed that it was more damaged or bowed out than it had been. (VII RT 2194, 2204.) Detective Matsuoka of the Malakani Police Department testified that the window screen was bent and the screen was jammed on the wrong track. (VII RT 2240.)

9. Lt. Lenie Lawrence of the Maui Police Department noticed that Delbecq had a tan line on her left ring finger. (VII RT 2234.)

impression on the wall on the right side of the Delbecq's bed. (VII RT 2215-2216.) Sgt. Bell cut the wall board out and preserved the impression. (VII RT 2216.) A white t-shirt with a footprint impressed in blood was found in a pile of clothing in Delbecq's bedroom. (VII RT 2217-2218.) Two palm prints were also found on gypsum wall. (VII RT 2244-2245.) The bloody handprint and footprint were later analyzed and found to match Edwards' known palm and footprint. (VII RT 2250, 2253, 2255, 2256, 2258.)

Edwards lived at 2153 South Kihei Road, near Delbecq's home. (VII RT 2282.) Lt. Lenie Lawrence of the Maui Police Department found a pair of binoculars on the night stand below Edwards' bedroom window. (VII RT 2285.) From that location, Lt. Lawrence was able to pick up the binoculars, look out the window, and have a direct view of Delbecq's apartment building. (VII RT 285-2286.)

An autopsy of Delbecq was conducted in late January 1993. (VII RT 2290-2291.) An x-ray revealed that a cannister was protruding into Delbecq's abdominal cavity. The can recovered from the abdominal area was a mousse can. (VII RT 2291-2292.)

An external examination of Delbecq revealed bruises to the scalp, right ear, and nose. There was an incise wound caused by a sharpened instrument to the left side of her jaw. (VII RT 2293.) There was a lot of bruising to the front and sides of Delbecq's neck. There were incise type abrasions over the voice box and fingernail marks on the neck. (VII RT 2294-2295.) An internal examination showed that the small bone right above the voice box and the hyoid bone was fractured. (VII RT 2296.) There were similar types of abrasions caused by a sharpened type of instrument on the breast, bruises to the breast and scrapes and bruises over both nipples. (VII RT 2294.)

Delbecq had linear or ligature marks to the wrists and ankles which indicated that she had been bound at some point. (VII RT 2296.)

There were injuries to Delbecq's genital area such as abrasions and scrapes consistent with fingernails, and bruising to the entrance of the vaginal cavity. (VII RT 2295.) Delbecq suffered tears through the walls of the vaginal cavity, actually entering into the rectal cavity. (VII RT 2295.) A metal canister was protruding from the vaginal area into the lower abdominal cavity and a perforation of the right upper portion of the vaginal cavity. (VII RT 2295.) Delbecq also suffered tears to her rectum and there was a perforation of the bowel in the posterior aspect into the abdominal cavity. (VII RT 2296.)

Dr. Alvin Omari, the chief medical examiner for Honolulu, Hawaii, who conducted Delbecq's autopsy opined that the probable cause of Delbecq's death was asphxia due to strangulation and/or suffocation. (VII RT 2290-2291, 2298.) Dr. Omari opined that Delbecq's injuries occurred before death. (VII RT 2297.)

Defense Case

One of Edwards' theories of defense was that the police investigation was sloppy. Sharon Krenz, a forensic specialist with the Orange County Sheriff's Department, testified that there was urine and toilet tissue in the toilet bowl of Deeble's bathroom, but a sample of these items were never collected or tested. (VII RT 2310, 2316.) Krenz also testifed that 23 latent fingerprints were lifted from Deeble's residence, and none were found to match Edwards' known fingerprint. (VII RT 2323-2325.) Latent prints recovered from Deeble's car were unable to be identified as matching Edwards' known prints. (VII RT 2331.) A criminalist for the Orange County Sheriff's office analyzed hair found on Deeble's bed and bathroom. (IX RT 2792.) The criminalist found that two of the hair samples from the bed were consistent with Deeble's but the others were not. (IX RT 2792.) Another analyst eliminated Edwards as a source for the hair found on Deeble's bed. (IX RT 2794.) The hair found

on the pillow case and the clothes on the floor were not human hair, but rather, animal hair. (IX RT 2793-2794.) A comparison of the hair from the bed against known samples of several men were not able to be conducted because there was an inadequate number of hair samples taken from Vance Price, Tom Collision, Dale Carey, Anthony Jarc, Leonard Hirsch, Alden Olson, and Paul Roy. (IX RT 2800.)

Edwards also presented evidence about his abusive childhood and family history of alcohol and drug abuse. His mother, Laura McFarland, testified that she and Edwards' father, William Edwards, Sr., had alcohol problems, and Edwards' grandmother was addicted to prescription medication. (VII RT 2528-2529, 2536.) McFarland also stated that Edwards, Sr. never liked Edwards because he did not believe Edwards was his child. (VIII RT 2529.) Edwards, Sr. beat Edwards on a daily basis, starting when Edwards was six months old. (VIII RT 2530.)

Edwards testified at trial. (IX RT 2544-2629.) He testified that he was an alcoholic and addicted to drugs. (IX RT 2545.) He drank and took drugs as early as eight years old. (IX RT 2546.) Edwards claimed that he suffered from alcoholic blackouts in 1985 through 1986, and he would find himself in strange homes and hotels. (IX RT 2567.)

Edwards testified that he met Kathy Deeble Valentine in the spring of 1986. (IX RT 2569.) Edwards denied there was any animosity between him and Deeble resulting from the time when Valentine's truck broke down. (IX RT 2585-2586.) Edwards also claimed that he was unaware of the spare key to Deeble's apartment in the drain pipe. (IX RT 2588.)

According to Edwards, on the day of Deeble's murder, he was with his brother selling fake acid at a Judas Priest Concert in Los Angeles. (IX RT 2596 -2596.) After the concert, he went to a drug house, bought drugs, and then went home to shoot up heroin and cocaine. (IX RT 2601.) Edwards also

consumed alcohol that day. (IX RT 2600, 2602.) Edwards claimed that he did not go to Deeble's home that whole week, including May 12, 1986. Edwards denied assaulting and killing Deeble. (IX RT 2604.)

On cross examination, Edwards admitted that he was convicted of murder and felony burglary in Hawaii in 1994, and of second degree burglary in 1984. (IX RT 2616.)

Several witnesses testified that Edwards was a heavy drinker and used drugs. (IX RT 2637, 2676-2681, 2707.) Janice Hunt, Edwards' girlfriend in Hawaii, testified that Edwards had alcoholic blackouts. (IX RT 2639.) Hunt also testified that before the murder of Delbecq, Edwards was very upset because he had just found out a dog to which he was very attached had died. (IX RT 2661.) The day after the Delbecq murder, Edwards came home looking tired, sad, distraught over the dog, but he appeared normal and there was nothing unusual about his appearance, speech or demeanor. (IX RT 2666.)

Dr. Alex Stalcup, a specialist in addiction medicine, testified about factors which determine if a person will become an addict. (VII RT 2386.) Dr. Stalcup opined that with Edwards' family history of alcohol and drug abuse, he did not see how Edwards could have escaped becoming an addict. (VIII RT 2432.) Dr. Stalcup's diagnostic impression of Edwards was that he was an addict. (VIII RT 2458.)

Dr. Paul Wolf, a clinical professor of pathology, reviewed the autopsy report of Deeble. (VIII RT 2478.) Dr. Wolf questioned Dr. Richard's conclusion that the damage to Deeble's ears were necessarily caused by an incision with a sharp object since Dr. Richards did not take a microscopic section of the area. Thus, it was impossible to be certain whether the damage to Deeble's eardrums were caused by a sharp object or by hemorrhage caused by the ligature. (VIII RT 2481.) Dr. Wolf also testified that Deeble would have become unconscious within 15 to 30 seconds because of lack of oxygen

to the brain or the blow to the head. (VIII RT 2482, 2484.) Additionally, Dr. Wolf opined that the injury to Deeble's vagina and rectum were extremely minor and could have been caused by consensual sex. (VIII RT 2492, 2514.) Finally, Dr. Wolf testified about the differences between the manner of deaths of Deeble and Delbecq. (VIII RT 2499.)

Prosecution's Rebuttal Case

Detective Jessen testified that he focused on Edwards as a suspect because Edwards refused to supply police with samples of hair, saliva and blood. (X RT 2819.) Additionally, in Detective Jessen's mind, based on information he received from laboratory personnel, Vance Price, Tom Collision, Dale Carey, Anthony Jarc, Leonard Hirsch, Alden Olson, and Paul Roy were not possible donors of semen and fluids found at the crime scene. (X RT 2838.)

Penalty Phase

Prosecution's Evidence In Aggravation

Much of the same evidence of the Deeble murder and the torture murder and burglary murder special circumstances which were offered during the guilt phase jury trial was presented in an abbreviated form during the second penalty phase jury trial. (XX RT 5125-XX RT 5203, 5216-5221, 5238-5240.) Sergeant Farnum testified that a screen next to Deeble's front door had been removed and the front door was unlocked. (XX RT 5127.) Deeble's room had been ransacked. (XX RT 5130, 5140.) Deeble's hands were tied with a telephone cord and a rip at the hem of her nightgown was looped around the ligatures on her wrists. Deeble hung from her neck by a belt tied to a drawer chest. (XX RT 5146-5147, 5159.) There was blood on the floor by her head,

on a red garment, and in a pillowcase. (XX RT 5145-5146.) Deeble's nightgown was pushed up to her waist, and she was not wearing underwear. (XX RT 5147.) A mousse can was found on Deeble's bed. (XX RT 5144.) A presumptive test of the can and the cap was positive for blood. (XX RT 5161-5162.) There appeared to be a semen or sperm stain on Deeble's thigh. (XX RT 5162.) Dr. Fukumoto testified that the ligature marks on Deeble's neck was caused by the belt. The wrinkling of the skin surface and the furrow on the neck was essentially "cooked" skin caused by the friction between the belt and Deeble's skin. This indicated a sideways movement by the victim. (XX RT 5186-5187.) There was painful damage to both eardrums caused by pressure from the ligature and a separate incision tear was caused by a sharp instrument. (XX RT 5186.) Deeble suffered blunt force trauma to the face, a broken nose, bleeding around the eyes, and bleeding in the pancreas. (XX RT 5192-5195.) There was dilation of the anus, small lacerations to the mucous membrane of the anus and rectum, bruising of the vaginal wall, and small lacerations to the posterior area of the vagina towards the anus. (XX RT 5195.) Dr. Fukumoto opined that the injuries to the vaginal areas occurred before death. While he could not be sure what caused the injuries to Deeble's genitals, the injuries were consistent with being caused by a mousse can. (XX RT 5196.) Dr. Fukumoto opined that Deeble died of asphyxiation due to ligature strangulation. (XX RT 5196.)

Evidence of the presence of criminal activity by Edwards which involved the use or attempted use of force or violence or the express or implied threat to use force or violence was also presented during the penalty phase trial. Much of the same evidence of the Delbecq murder in Hawaii was also presented to the second penalty jury. Peggy Ventura testified about finding her naked mother, whose face was bloodied and black and blue, lying on the bed of her ransacked room. (XX RT 5295-5297.) Delbecq's wedding ring was

missing. (XX RT 5300.) Sergeant Bell of the Maui police testified that a bloody footprint and palm prints were found in Delbecq's room. (XX RT 5302-5304.) The prints matched Edwards' known foot and palm prints. (XX RT 5350-5351.) Bell described Delbecq's face which appeared to have been beaten, there were lacerations about her mouth, bruises on her breasts, trauma to the nipples, and injury to her vagina. (XX RT 5309.) The medical examiner from Hawaii testified about Delbecq's various injuries and that the cause of Delbecq's death was manual strangulation and suffocation. (XX RT 5329-5342.) She had ligature marks to both ankles and wrists. (XX RT 5336.) A hair mousse cannister was protruding inside Delbecq's abdominal cavity. (XX RT 5330-5331.) The can had perforated through the vaginal cavity and pushed up at least eight to ten inches into Delbecq's abdominal cavity. (XX RT 5331.) Dr. Omari testified that the injuries to Delbecq were caused before death. (XX RT 5339.)

Naomi Lindeman Titus testified that she dated Edwards when he lived in Maui in 1990. (XX RT 5210.) One night, Edwards called her and asked if he could come over. (XX RT 5210.) Titus told him not to come over since they were broken up and Edwards sounded drunk. (XX RT 5211.) Titus went back to sleep. (XX RT 5211.) Suddenly, Titus was awakened by Edwards who was trying to insert a wine bottle into her vaginal and anal area. (XX RT 5212.) This really "pissed" Titus off, and she told Edwards "to get the fuck out of the house." (XX RT 5213.)

The prosecution also showed that Edwards possessed a shank while in custody. On July 8, 1997, Huntington Beach Police Officer Timothy Martin, who was assigned to the Men's Central Jail, saw Edwards and another inmate, Lewis, in the shower area of their day room. (XX RT 5262-5263.) Both Edwards and Lewis were wearing boxer shorts while the water in the shower was running. (XX RT 5263.) Edwards was on the ground, and he was

sharpening a piece of metal on the concrete basin that separated the showers, while Lewis talked to other inmates in the day room. (XX RT 5263.) Edwards was holding the piece of metal with a white towel. (XX RT 5268.) Officer Martin watched Edwards sharpen the metal for about two minutes, and then Edwards handed the piece of metal to Lewis. (XX RT 5264-5265.) Lewis and Edwards switched positions, and Lewis began to sharpen the metal while Edwards served as the lookout by talking to other inmates in the day room and looking up towards the guard corner.[10/] (XX RT 5265.)

Officer Martin called the module deputy and requested that they go and retrieve the piece of metal. (XX RT 5265.) When the deputies arrived to the shower, Lewis quickly got up and got into the shower. (XX RT 5267.) The shower curtain was clear, so Officer Martin was able to see Lewis go down on his knees and put the piece of metal inside the shower drain. (XX RT 5267.) The piece of metal was eventually recovered from the drain. (XX RT 5267.) In addition, another piece of metal was found inside Lewis's jumpsuit hanging in the shower area. (XX RT 5268, 5275.) The metal matched an electrical plate used for the television cable. (XX RT 5268.) An electrical plate was discovered missing from the day room. (XX RT 5269.)

During Edwards' testimony, Edwards admitted to being convicted of second degree burglary in 1983, driving or taking a car without the owner's consent in 1988, and in 1993, of second degree murder and sexual assault of Delbecq in Hawaii. (XXI RT 5371.) On cross-examination, Edwards admitted that he believed he killed Delbecq. (XXI RT 5519.)

The impact of Edwards' crimes on Deeble's family was also presented at the second penalty phase trial. Lorraine Johnston, Deeble's older and only

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10. The guard quarter was raised up approximately halfway up the downstairs tank. There was glass covering the quarter. However, it had a one-way tint applied on it, so the guards could see the inmates, but the inmates had difficulty seeing into the guard quarter. (XX RT 5266.)

sister, testified that when she found out about Deeble's death, she screamed. (XX RT 5205.) Johnston spoke about when she was six years old, she wanted a sister, so she asked God for a sister. (XX RT 5205.) When she was eight, Deeble was born. (XX RT 5206.) Johnston described the special relationship she and Deeble shared. (XX RT 5206.) She and Deeble talked on the phone often, wrote letters, and visited one another. (XX RT 5208.) She almost felt like a mother to Deeble because she watched over her. (XX RT 5206.) The manner in which Deeble died caused Johnston a lot of hurt, pain and anger. (XX RT 5208.) The fact that Deeble suffered so much particularly affected Johnston, and she became physically ill, went through counseling and saw a trauma therapist. (XX RT 5207.)

Deeble's daughter, Kathryn Valentine, also testified about the impact Deeble's murder had on her. When she found out about Deeble's death, "her life stopped momentarily." (XX RT 5241.) At the time of Deeble's death, Valentine was only 23 or 24 years old, and she had just established a friendship with her mother where they would take trips, talk on the phone, or grab a cup of coffee together. (XX RT 5241.) Valentine was angry as a result of Deeble's death because she lost a friend. Valentine also became scared, and now when other people jokingly say they are going to strangle you, Valentine panics and gets angry. (XX RT 5242.) Valentine also testified that she felt guilt about Deeble's death because she brought Edwards into her family. (XX RT 5244.)

Defense Evidence In Mitigation

Edwards testified during the penalty phase. (XXI RT 5370-5534.) Edwards admitted that Officer Martin's account of his possession of a shank was accurate. (XXI RT 5384.) However, according to Edwards, he feared for his own safety while in prison because of racial tensions and because earlier, there had been a slashing attack to another inmate. (XXI RT 5379-5380, 5384.)

Edwards claimed that he just possessed the shank for self-defense and to be able to display it to a possible aggressor. However, Edwards insisted that he would never have used the shank to assault someone. (XXI RT 5385.)

Edwards also testified about his family history. He described how his father drank heavily, and abused him as a child. (XXI RT 5389-5392.) Edwards and his siblings did not have much parental supervision when they were younger because his parents split up and his mother went to work and attended night school. (XXI RT 5393-5396.) As a result, Edwards skipped school and started drinking and doing drugs. (XXI RT 5396.) Edwards' earliest experience with alcohol was at six or seven years old. (XXI RT 5397.) By the time he was 13 or 14, he was using heroin and had already smoked marijuana, hash, snorted elephant tranquilizer, cocaine, took amphetamines and barbiturates, and ate LSD and peyote. (XXI RT 5397-5402.) Edwards drank large quantities, but still appeared sober. (XXI RT 5415.) He also experienced alcoholic blackouts. (XXI RT 5415-5420.)

Edwards denied any hostility between him and Deeble. (XXI RT 5428-5431.) On the night of Deeble's murder, Edwards claimed that he was in Los Angeles at a Judas Priest concert, where he and his brother sold concert goers fake LSD. (XXI RT 5438-5441.) Edwards then picked up drugs and alcohol and went to his grandmother's home. (XXI RT 5442-5443.) He woke up at his grandmother's home the next morning, and had no recollection of going to Deeble's house and killing her. (XXI RT 5445.)

In the 1990's he moved to Maui to be with his sister, Elena. He attended Narcotics Anonymous and Alcoholics Anonymous meetings and was clean and sober for seven to eight months. (XXI RT 5447.)

On the night of Delbecq's murder in 1993, he was told by a friend that his dog had been run over by a car. (XXI RT 5458.) Edwards became very upset because he was very close to this dog, and he had just lost his father the

month before and therefore lost any chance to have a relationship with his father. (XXI RT 5455-5457.) Edwards woke up the next morning, after doing drugs and drinking the night before, and did not remember anything strange or different occurring the night before. (XXI RT 5457.)

Edwards also discussed his son Robbie, his relationship with him, and how he is a big part in Robbie's life and education. (XXI RT 5458-5480.) Edwards also testified that he is an accomplished artist and writes short stories while in prison. (XXI RT 5475-5481; XXIII RT 6012.)

Edwards' mother, Linda McFarland, testified about her own history with drug addiction, as well as Edwards' family history, on both sides, of drug and alcohol abuse. (XXII RT 5667-5672, 5993.) McFarland also testified that since birth, Edwards' father resented Edwards because Edwards did not appear to be his child. (XXII RT 5677-5678.) At six month old, Edwards' father slapped or punched Edwards. (XXII RT 5676.) His father struck Edwards at least one or twice a week, and he also hit McFarland. (XXII RT 5680, 5686, 5996.)

Edwards' sister, Elena also testified about the abuse Edwards suffered at the hands of their father. (XXIV RT 6097-6102.) Elena was also a substance abuser, and Edwards would be helpful in her attempts to stay clean and sober. (XXIV RT 6117.)

The defense presented evidence about alcoholic blackouts in general, and that Edwards had a history of blackouts. Dr. Alex Stalcup testified as an expert on addiction. (XXI RT 5536-5597.) He testified that Edwards' family is genetically predisposed to drug and alcohol abuse. (XXI RT 5572.) Dr. Stalcup characterized Edwards as an addict who would not do well in treatment. (XXI RT 5574-5575.) Dr. Stalcup also described the characteristics of alcoholic blackouts as a type of amnesia where there is no recording in memory of the events that happened during the time of the onset of drug until

the drug wore off. (XXI RT 5576-5577.) According to Dr. Stalcup, Linda Lauer, a substance abuse counselor, and Father John McAndrew, a priest who works with people in recovery, blackouts are very common, and a person in a blackout is awake and still has fine motor and gross motor skills while in the blackout. (XXI RT 5581; XXIII RT 5927-5928; XXIV RT 6126.) Dr. Stalcup admitted in cross-examination, however, that when one is engaged in an activity while experiencing a blackout, the immediate knowledge of the activity is present; however, the alcohol blocks the memory from going into long term memory. The acts themselves are done intentionally, but ultimately forgotten. (XXI RT 5593.)

William Farmer, a recovering addict, with whom Edwards lived for a short while in Hawaii, testified that one night Edwards came home drunk. (XXII RT 5836.) Since this violated a rule of his home, Farmer told Edwards that he had to move out. (XXII RT 5836-5837.) The next morning, Edwards had no recollection of the night before, and Farmer had to remind him that he kicked Edwards out of the house. (XXII RT 5837.) Edwards appeared shocked and surprised. (XXII RT 5838.)

Janice Hunt, who dated Edwards in early 1993, testified that Edwards drank heavily. (XXIII RT 5958-5960.) On several occasions, after drinking heavily, Edwards would not remember what happened the night before. For instance, one night he forgot where he parked his car, and on another occasion, he left groceries beside his car. (XXIII RT 5962-5964.) On the night of Delbecq's murder, Edwards drank heavily because he was distraught by the death of his dog. (XXII RT 5975-5976.) Edwards told Hunt he was going to get some drugs. (XXII RT 5977.) The next morning, Hunt told Edwards that someone down the street had been murdered, and Edwards acted surprised and said, "Wow, no way." (XXIII RT 5980.)

The defense presented several witnesses to attack the evidence presented about the Deeble murder. A criminalist testified that no sample of urine or toilet tissue was recovered from Deeble's toilet bowl, so it is unknown if any blood, semen or other substance was in the toilet bowl. (XXII RT 5602-5603.) 23 latent prints were lifted from Deeble's home, and Edwards was eliminated as a possible source of the prints. (XXII RT 5612, 5620-5621.) However, the criminalist admitted that the pinking shears recovered from Deeble's home appeared to have been wiped down. (XXII RT 5614-5615.) Sergeant Jessen acknowledged that Valentine's truck, which Edwards drove, was never impounded, searched, photographed, or processed for fingerprints, blood or trace evidence. (XXII RT 5624-5625.) Another criminalist testified that Edwards' hair sample was not found to match the hair samples recovered at Deeble's home. (XXIII RT 5884-5888.)

Several correctional officers testified that Edwards was a model inmate who never gave anyone problems, kept his area clean, was helpful to newer inmates, respected guards, and was never involved in violence in the jail. (XXII RT 5798-5824; XXIII RT 6056-6060.)

Many witnesses testified about how Edwards was helpful to them in their own recovery for alcohol and substance abuse and how Edwards could remain supportive of the recovery of others if he served a sentence of life in prison. (XXII RT 5659-5665, 5745-5760, 5780–5793, 5824-5831, 5848-5854; XXIII RT 5904-5925, 5938, 6032-6042; XXIV RT 6068-6070.)

Diane Winter who counseled inmates in Maui described how Edwards, in order to better himself, took almost 60 of the classes she taught. (XXII RT5763.) Winter also testified that one day Edwards broke down and cried because he could not remember what he had done, but if he did what they said he did, then he should not be allowed to live in society. (XXII RT 5771.)

Other witnesses testified that Edwards was helpful of others, honest and a good worker. (XXIII RT 5940-5949, 6025-6031; XXIV RT 6061-6067.) Edwards found Craig Furtado's briefcase, and Edwards returned the case with all of its contents intact to Furtado. (XXIII RT 5944-5945.) Geraldine Jakeway also recounted how Edwards helped her go swimming in Hawaii by lifting her from her car and carrying her to the water. (XXII RT 5951-5954.) Edwards helped Lynn Pendzik get through the death of some family members. (XXIII RT 5993-6005.)

Finally, the defense presented evidence of Edwards' relationship with his son, Robbie, Jr. (XXII RT 5720, 5785, 5828; XXIV RT 6072-6085, 6106, 6137-6241.) Edwards is apparently very involved in Robbie's life and education, and their relationship is substantial and firm. (XXIV RT 6175, 6313.) According to Robbie's therapists, it is important and valuable for the relationship between Edwards and Robbie to continue. (XXIV RT 6175, 6210, 6241.)

Rebuttal

Dr. Park Dietz, a clinical professor of psychiatry, and a physician who specializes in forensic psychiatry, testified for the prosecution on rebuttal. (XXV RT 6332-6344.) Dr. Dietz reviewed the various crime scene reports, witness statements, autopsy reports and photographs of both the Deeble and Delbecq murders, and read Edwards' testimony in past and present trials. (XXV RT 6337-6338.) Dr. Dietz, who has researched, written about, and consulted on many cases involving alcoholic blackouts, testified that an alcoholic blackout was a loss of memory during periods of intense drinking, especially suffered by people who are heavy chronic alcohol users. (XXV RT 6339.) An alcoholic blackout is a period for which an individual no longer has the memory of the event because while they were doing the activity, their brain

did not permanently record the information into long-term memory. (XXV RT 6340.) Assuming that Edwards committed both homicides, and has no memory of either, Edwards could have been in an alcoholic blackout after both homicides, but that does not explain Edwards' mental state at the time of the homicides. (XXV RT 6341.) Dr. Dietz opined that because of the things Edwards did to gain access to the victims, the things done to the victims, their property, and leaving the crime scenes, Edwards was acting intentionally and voluntarily when he committed both homicides. (XXV RT 6343.) He knew where he was, what he was doing, who he was with, why he was engaging in each action, what he wanted to do next, and which things did and did not please him. (XXV RT 6343.) While he might not remember what happened five or ten minutes later, "for what he just did and what he is going to do next, he is not in any blackout at all. He is right there in the present tense in the moment doing as he pleases." (XXV RT 6343.) For instance, he put a comforter over Delbecq's window because Edwards knew that what he was doing at that moment was wrong, whether he later suffered a blackout or not. (XXV RT 6344.)

ARGUMENT

I.

EDWARDS' *WHEELER* MOTION WAS PROPERLY DENIED

Edwards contends his state and federal constitutional right to be tried by an impartial jury were violated by the prosecutor's discriminatory use of a peremptory challenge in contravention of *People v. Wheeler* (1978) 22 Cal.3d 258, and *Batson v. Kentucky* (1986) 476 U.S. 79 (106 S.Ct. 1712, 90 L.Ed.2d 69). (AOB 27-36.) He claims reversal is required because the trial court erroneously denied his *Wheeler* motion when it failed to find a prima facie case of discrimination was established.[11/] Since Edwards failed to establish a prima facie case giving rise to the inference of a discriminatory purpose on the part of the prosecution in exercising its peremptory challenge against an African-American potential juror, the trial court's ruling was proper.

"Exercising peremptory challenges because of group bias rather than for reasons specific to the challenged prospective juror violates both the California Constitution and the United States Constitution. [Citations.]" (*People v. Cleveland* (2004) 32 Cal.4th 704, 732.) Under both state and federal law, the trial court must follow a three-step analysis when one party claims that the other has improperly discriminated in the exercise of peremptory challenges. (*People v. Silva* (2001) 25 Cal.4th 345, 384.) First, the movant must make out a prima facie case by establishing that the totality of the relevant facts gives rise to an inference of discriminatory purpose against a cognizable group. Second, if the

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11. Although at trial defense counsel referred only to *Wheeler* (V RT 1807), this Court's precedents now permit an appellant who cited *Wheeler* below to rely on *Batson* as well for the first time on appeal because an objection under *Wheeler* suffices to preserve a *Batson* claim on appeal. (*People v. Lancaster* (2007) 41 Cal.4th 50, 73; *People v. Young* (2005) 34 Cal.4th 1149, 1174; *People v. Cornwell* (2005) 37 Cal.4th 50, 66, fn. 3.)

movant establishes a prima facie case, the burden of production shifts to the proponent of the challenge to come forward with a race-neutral explanation for the challenge. Third, if a race-neutral explanation is tendered, the trial court must then decide whether the moving party has proved purposeful racial discrimination. (*Ibid.*; *Purkett v. Elem* (1995) 514 U.S. 765, 767 [115 S.Ct. 1769, 131 L.Ed.2d 834]; *Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129]; *People v. Lancaster*, *supra*, 41 Cal.4th at p. 73.)

A defendant establishes a prima facie case of discrimination "by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson*, *supra*, 545 U.S. at p. 170.) An inference is a logical conclusion based on a set of facts. (*Id.*, at p. 168, fn. 4.) When the trial court concludes that a defendant has failed to make a prima facie case, a reviewing court reviews the voir dire of the challenged juror to determine whether the totality of the relevant facts supports an inference of discrimination. (*Johnson*, *supra*, 545 U.S. at p. 168; *People v. Lancaster*, *supra*, 41 Cal.4th at p. 73.)

Here, the record fully supports the trial court's ruling that Edwards failed to establish a prima facie case of discriminatory purposes against a cognizable group. Prospective Juror Maxine M. filled out a juror questionnaire. (X CT 3764-3777.) After asking her a few questions, Edwards passed on the juror for cause. (V RT 1805.) The prosecutor referred prospective juror Maxine M. to a response she made in the juror questionnaire. (V RT 1806.) Specifically, when asked about her general feelings regarding the death penalty in her juror questionnaire, prospective juror Maxine M. answered:

> I've thought about it on a personal level without coming to a conclusion as to whether society should or should not have the death penalty. As the law now states, we have it so therefore I am prepared to obey the law of the land. On a personal level I will continue to ponder.

(X CT 3773.) The prosecutor, referring to this response, asked Maxine M. if she had resolved the issue in her own mind since she had been at court the last few days. (V RT 1806.) Maxine M. answered, "Not really." (V RT 1806.) The prosecutor passed for cause, but used its peremptory challenge to excuse prospective juror number six, Maxine M. (V RT 1806.)

Edwards then objected based on *Wheeler* grounds. Edwards' counsel stated:

> Just for the record, this juror is African-American, black. There appear to be only two African-Americans in the entire panel and only one African-American woman, which is her.

(V RT 1807.) The trial court asked defense counsel what the prosecutor had done to "indicate[] that there is a strong likelihood that the only reason [Maxine M.] was excused was because she is African-American, an African-American female?" (V RT 1808.) Defense counsel noted that there were only two black people and only one black woman on the entire panel. (V RT 1808.) While the trial court recognized that under *Wheeler* and *Batson*, a defendant does not have to be in the particular minority group in question, the trial court nonetheless observed that Edwards was not black, and nobody involved in the case was African-American. (V RT 1809.) The trial court noted that Edwards had a burden to show that there was a "strong likelihood that Mr. Brent [the prosecutor] excused this lady because she was African-American, not because she had some reservations about the death penalty." (V RT 1809.) Defense counsel then pointed out that prospective juror Maxine M. indicated that she could be fair, and she would have an open mind at the penalty phase. (V RT 1809.) The trial court denied the *Wheeler* motion, ruling that Edwards had failed to establish a prima facie case. (V RT 1810-1811.) Specifically, the court stated then ruled:

> . . . I don't see anything on this record that shows that Mr. Brent [prosecutor] has excused this lady because of her status as an African-American. And until I get there, we don't even get into

> him justifying, even though the justification is clear based upon her responses in the questionnaire. [¶] I mean she has doubts about – I am finding there is no prima fascia [sic] basis. But if you got there, it is clear why he exercised his challenge.

(V RT 1810-1811.)

Edwards' assignment of error to this ruling fails. Examination of the record and the law demonstrates that Edwards failed to establish a prima facie case of group bias. He did not produce evidence sufficient to permit the trial judge to draw an inference that discrimination had occurred. There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 768; *People v. Griffin* (2004) 33 Cal.4th 536, 554.) It is "presumed that the prosecutor uses peremptory challenges in a constitutional manner." (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) Edwards' only argument in attempting to establish a prima facie case of group bias was that prospective juror Maxine M. was one of only two African-American people on the panel. However, "the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible. '[E]ven the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion.'" (*People v. Bonilla* (2007) 41 Cal.4th 313, 343, quoting *People v. Bell* (2007) 40 Cal.4th 582, 598, quoting *People v. Harvey* (1984) 163 Cal.App.3d 90, 111.) Edwards failed to establish a prima facie case of group bias. The prosecutor's use of a peremptory challenge to excuse prospective juror Maxine M., who happened to be one of two African Americans on the panel, did not establish a prima facie case of group bias.

Moreover, there was simply nothing about Edwards or the victim or the charges to suggest that the race of the jurors would be of any importance

in evaluating the evidence. As the trial court observed, neither Edwards nor anyone involved in the case was African-American. (V RT 1809.) Accordingly, there was no theoretical gain to the prosecutor from an improper challenge to prospective jurors on the basis of race.

Additionally, even assuming arguendo a prima facie case was established, the information elicited in voir dire and the juror questionnaire showed a race-neutral reason for excusing the prospective juror. Indeed, "[t]he record . . . is devoid of any suggestion that the basis for the challenge to [the Juror] was even 'close' or 'suspicious.'" (*People v. Cornwell*, *supra*, 37 Cal.4th at p. 73, quoting *Johnson*, *supra*, 545 U.S. 162.) The trial court noted that it was not surprising that the prosecutor used its peremptory challenge to excuse Maxine M. because of her reservations about the death penalty. (V RT 1809-1810.) On her juror questionnaire, Maxine M. indicated that while she would obey the law, she would continue pondering what her personal feelings on the death penalty are. (X CT 3773.) When the prosecutor asked if she had resolved her equivocation about the death penalty, she said she had not. (V RT 1806.)

Edwards fell far short of "showing that the totality of the relevant facts [gave] rise to an inference of discriminatory purpose." (*Batson*, *supra*, 476 U.S. at p. 94, 106 S.Ct. 1712; see also *Johnson*, *supra*, 545 U.S. at p. 168; *People v. Cornwell, supra,* 37 Cal.4th at p. 66.) The trial court correctly determined that Edwards failed to make a prima facie showing of a *Batson/Wheeler* violation.

II.

THE TRIAL COURT PROPERLY DENIED EDWARDS' REQUEST TO DISMISS THE ENTIRE JURY PANEL

Edwards contends that the trial court improperly denied his motion to dismiss the jury panel because they had allegedly been prejudiced by a prospective juror's remarks about the danger that inmates pose in prison. (AOB 37-47.) The trial court did not abuse its discretion when it denied Edwards' motion to dismiss the entire jury panel because the jury venire was not tainted by a prospective juror stating his individual opinions, based on his experience, during voir dire.

Prospective juror Randy B. was a correctional officer at the California Youth Authority. (V RT 1699-1700.) During juror voir dire, the trial court asked Randy B. whether he could "be an objective juror in this type of case." (V RT 1699.) Randy B. answered:

> I am very fair. I can be objective, but I do work in that type of correctional facility – I am a correctional peace officer, so I see that – I know a lot of murderers. I have dealt with a lot of people who have been convicted of murders, and I have seen a lot of people who are there for, you know, they are there for death or 25 to life.
>
> And since I think I filled the questionnaire out, if you think about it, I sit at nighttime thinking about it. I deal with all these people, and I know what it is like when they are locked up and how to deal with it, and they are still – they are hard to deal with if they just have life, you know, because they are still affecting people. They are still – they – there are still victims inside correctional institutes and things like that and prisons.
>
> But I see there are some people that can be in for life and they are fine, you know. It is hard because I have to deal with it.
>
> The thing we just had a few weeks ago someone in for 25 to life that beat one of us officers to death.

(V RT 1700.) The trial court interrupted Randy B. and asked if the incident happened inside the California Youth Authority ("C.Y.A."), and Randy B. answered:

> Yeah, out there in Chino. So that is hard to deal with because I think that gentleman, young man, he is 24, 25, he just beat someone okay? But beat someone to death. So there is another victim he created while he was in. So it is hard to say, but I could make that decision. . . .
>
> It is, you know, I don't know what else to really say. I would have to listen to everything, hear everything. And if I am found – if the jury finds the defendant guilty or not guilty, if he is found guilty, then it would be hard not to go for the death penalty, very hard because again I see the people that are locked up. I deal with hundreds of them that are in for life, and I know what it is like in there. And I know that it is a lot easier than these people know what – you know, it is not as bad as what these people think it is.

(V RT 1701.) The trial court noted that "that is a different view." (V RT 1701.) Randy B. continued, "See, I am in there. I am locked up every day with them, and what society sees and what people –" (V RT 1702.) The trial court then cut Randy B. off and cautioned, "Let's stay to the bottom line. Can you be an objective juror in this case if you get to a penalty phase?" (V RT 1702.) Randy B. answered that he would have to listen to everything. When asked if he could conceive of voting for life without the possibility of parole in this case, Randy B. assured the court, "I would have to listen to the attorneys. I wouldn't say I would automatically jump to conclusion. I don't jump to conclusions." (V RT 1702.) The trial court then warned:

> There is another problem. One, we're not talking about the California Youth Authority here. We are talking about other places. And it wouldn't be proper for you to educate the jurors in the jury room what it is like to be incarcerated in a state prison. I know what the Youth Authority is, okay? I am not educating the jury either. [¶] But do you understand what I am saying? You would have to keep those thoughts to yourself?

(V RT 1702.)

After further questioning by both defense counsel and the prosecutor, the prosecutor passed for cause, but defense counsel stated that the prospective juror was "substantially impaired," and would not give "any serious consideration to the defense." (V RT 1713.) The trial court disagreed, characterizing Randy B. as "hedgey" and having "a very hard time articulating." (V RT 1713.) The trial court found that Randy B. was open minded, but the trial court did have concerns with Randy B.'s "attitudes towards inmates, and that may be for you or against you. . . . And I shut him off on purpose because I thought he was getting into an area that was not appropriate. And I didn't want to say any more on the record." (V RT 1714.)

Defense counsel then moved to excuse the entire jury venire based on Randy B.'s descriptions of his "experiences in C.Y.A. and knowing what he knows about life without the possibility of parole. . . . [Randy B.] basically said to them that LWOP isn't what these people think; I know it is not that hard." (V RT 1714.) The trial court denied the motion, reasoning:

> First of all, you have no basis upon which to base your conclusion that anybody has been tainted or even that anybody understood. I knew where he was going, and I shut him off. And then I told him that we're not talking about C.Y.A. We are talking about other places.
>
> And that would be a quantum leap for jurors to think that prison is like C.Y.A. Now, it is, but they don't know that. They would assume that C.Y.A. is for the kids, and that state prison is for the bad guys, and there is harsher treatment in prison, I think your conclusion is wrong. [¶] Absent some showing, which means if you want to bring it up, I will probably permit some limiting question in that regard and we can even do it one on one. I don't see a problem. I would be afraid about bringing attention to it.

(V RT 1715.) Defense counsel echoed the trial court's concern about bringing attention to the prospective juror's comments. (V RT 1715.) The trial court

reiterated that it felt it had cut Randy B. off, and its statement to the jury explained that Randy B. did not work at a state prison, but at the California Youth Authority. (V RT 1716.) The trial court denied the motion to excuse the entire jury venire, but granted the defense motion to excuse Randy B. (V RT 1716.)

After working with both defense counsel and the prosecutor (V RT 1726-1735), the trial court admonished the jury as follows:

> This morning you may recall hearing a prospective juror Mr. B[.]. . . . You may have heard that gentleman express some of his opinions and experiences as a counselor at the California Youth Authority. [¶] The custodial facilities for minors are far different than those for adults. [¶] Mr. B[.] has no experience as a custodial officer in the adult state prison system or with adult life without possibility of parole prisoners. [¶] The purpose of incarceration in a state prison for crime is punishment. Do any of you have any question regarding Mr. B[.]'s statement? If so, please raise you hand? Anybody with a hand. Do any of you wish to comment on Mr. B[.]'s statement, please raise your hand.

(V RT 1736-1737.) The trial court noted that no hands went up with questions, but several hands were raised indicating that they did not recall what Mr. B. said. (V RT 1737.) One prospective juror Jacqueline D. indicated that she had a comment. (V RT 1737.) The trial court questioned her in private, and it does not appear to have been reported. Finally, the trial court admonished the entire jury venire, "In any event, for those of you who may recall what Mr. B[.] said, you are to disregard his statement regarding his personal experiences." (V RT 1737.)

The trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required. (*People v. Medina* (1990) 51 Cal.3d 870, 889.) In evaluating the effect of a juror's remark on other prospective jurors, a totality of the circumstances test is used. (*People v. Ramos* (2004) 34 Cal.4th 494, 515, citing *People v. Martinez* (1991)

228 Cal.App.3d 1456, 1465-1467.) The conclusion of a trial judge on the question of group juror bias and prejudice is entitled to great deference and is reversed on appeal only upon a clear showing of abuse of discretion. (*People v. Martinez, supra*, 228 Cal.App.3d at p. 1466.)

> In *People v. Martinez* . . ., the court stated that '. . . the trial judge is in a better position to gauge the level of bias and prejudice created by juror comments [during voir dire].' It is within the trial court's discretion to determine that a prospective juror's statement was not prejudicial and thereby deny a defendant's motion to dismiss the jury panel. [Citations.]

(*People v. Nguyen* (1994) 23 Cal.App.4th 32, 41, quoting *People v. Martinez, supra,* 228 Cal.App.3d at pp. 1465-1466 [the trial court did not abuse its discretion by failing to dismiss the entire panel when several prospective jurors made statements that indicated bias, and the defendant claimed that those statements had tainted the entire jury panel].)

The instant claim was similarly addressed by this Court in *People v. Cleveland, supra*, 32 Cal.4th at pages 735-736. In *Cleveland*, a prospective juror was a retired law enforcement officer with substantial experience in homicide cases. During voir dire, the prospective juror expressed his opinion that "the death penalty was 'too seldom [used] due to legal obstructions.'" (*Id.*, at p. 735.) After further questioning regarding his ability to be fair to be both sides, the prospective juror responded, "To be perfectly honest, your honor, I think it would be unfair to the defense based on my knowledge of how there trials are conducted." (*Ibid.*) The rest of the voir dire was conducted outside the presence of the rest of the jury panel. *Cleveland* argued that the prospective juror's statements tainted the entire venire. (*Id.*, at p. 736.)

This Court found no error, reasoning:

> Many prospective jurors express many different general opinions regarding the judicial system. These expressions of opinion do not taint the jury. The comments here did not give the other prospective jurors information specific to the case, but

> just exposed them to one person's opinion about the judicial system. (Cf. *Mach v. Stewart* (9th Cir. 1997) 137 F.3d 630.)

People v. Cleveland, supra, 32 Cal.4th at p. 736.) This Court further found no significance in the fact that the prospective juror was a retired peace officer with experience in homicide cases. (*Ibid.*) This Court stated:

> The circumstance that this particular opinion came from a retired peace officer with experience in homicide cases and trial proceedings does not change matters. It would no more prejudice a jury panel to hear that a retired (or active) peace officer believes the system is tilted in favor of defendants than to hear a criminal defense attorney express the opposite view.

(*Ibid.*)

Like the situation in *Cleveland*, prospective juror Randy B. was just expressing his opinion about the situation at the California Youth Authority. The trial court pointed out and admonished the jury that the C.Y.A. was far different than the adult prison system, and Randy B. had no experience with the adult prison system. The trial court also admonished the jury to disregard Randy B.'s statements regarding his personal experiences. (V RT 1737.) Jurors are presumed to follow the trial court's instructions and admonitions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

Edwards relies on *Mach v. Stewart* (9th Cir. 1997) 137 F.3d 630, 631-633, where the Ninth Circuit found reversible error in an Arizona case (AOB 45-46), to support his assertion that the trial court erred in this case. *Mach* involved an extreme set of facts. It was a child sex abuse case centering on the credibility of an eight year old child as to whether her father had sexually abused her. (*Mach v. Stewart, supra*, 137 F.3d at p. 631.) In that context, the court voir dired a prospective juror who was a social worker with Child Protective Services. In front of other prospective jurors, the court elicited her opinion that sexual assault had been confirmed in every case in which one of her clients had reported such an assault. The court's continued questioning

elicited at least three more statements that, in her three years at Child Protective Services, she had never become aware of a case in which a child had lied about being sexually assaulted. (*Id.* at p. 632.) Then, while the court warned the pool that jurors had to make their determinations based upon the evidence, it also went on to elicit yet another statement from the social worker that she had never known a child to lie about sexual abuse. The court then asked the other jurors whether anyone disagreed with that statement and no one responded. (*Id.* at p. 633.)

Unlike *Mach* and like *Cleveland*, the trial court in this case did not elicit information specific to the present case. Prospective Juror Randy B. was simply stating his personal experience and opinions about the C.Y.A., not the adult prison system. The trial court in this case did stop Randy B. from elaborating about specifics of prisoners serving life without the possibility of parole sentences. The trial court refocused Randy B. and warned him to "stay to the bottom line," whether he could be objective if the case reached the penalty phase. (V RT 1702.) The trial court also told Randy B. that it was improper for him to educate other jurors about what the C.Y.A. was like, and that he should keep those thoughts to himself. (V RT 1702.)

Thus, the situation here was far different than *Mach* where the prospective juror was asked to give his or her opinion regarding a central issue of credibility in that particular case. Randy B.'s allegedly prejudicial opinions, when read in their entirety, were simply his personal opinions about the California Youth Authority.

Edwards is simply speculating that due to Randy B.'s occupation and his responses made in open court to standard questions by the trial court, the jury somehow interpreted that Prospective Juror Randy B. had "special knowledge" and, therefore, held his views in high esteem and/or took them to heart. If Edwards' argument were accepted as true, then all juries which had had a

member of law enforcement on the venire who indicated during voir dire that due to his law enforcement background, he did not feel he could be fair to the defense, would be presumptively poisoned and the defendants prejudiced. To the contrary, if anything, the remaining prospective jurors in Edwards' case did not automatically become prejudiced against Edwards; rather, they witnessed that partial jurors such as Prospective Juror Randy B. would be excused for cause. Any alleged exposure to the generalized and imprecise answers given by Randy B. had no possible influence on the outcome.

During voir dire the court continuously cautioned jurors to disregard Randy B.'s personal opinions. The trial court admonished the jury:

> This morning you may recall hearing a prospective juror Mr. B[.]. . . . You may have heard that gentleman express some of his opinions and experiences as a counselor at the California Youth Authority. [¶] The custodial facilities for minors are far different than those for adults. [¶] Mr. B[.] has no experience as a custodial officer in the adult state prison system or with adult life without possibility of parole prisoners. [¶] The purpose of incarceration in a state prison for crime is punishment. . . . In any event, for those of you who may recall what Mr. B[.] said, you are to disregard his statement regarding his personal experiences.

(V RT 1736-1737.) To the extent that Edwards complains that the curative admonition given by the trial court was not effective (AOB 46), that issue has been forfeited because defense counsel actually drafted the admonition and worked with the prosecutor and the trial court on the modifications to the admonition. (V RT 1726-1735.) Edwards cannot now argue that the admonition was improper. (See *People v. Hill* (1992) 3 Cal.4th 959, 1000 [a defendant's failure to object to and request a curative admonition waives the issue for appeal if the objection and admonition would have cured the misconduct], overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; *People v. Anderson* (1990) 52 Cal.3d 453, 468

[objections to statements or comments by the trial court must be raised at trial or are waived on appeal.].)

In any event, the admonition given by the trial court was sufficient to dispel any harm caused by Randy B.'s remarks. (*People v. Hines* (1997) 15 Cal.4th 997, 1038 [admonition found sufficient to dispel any harm].) The trial court emphasized that Randy B. worked at the California Youth Authority, and not the adult prison system. The trial court pointed out that those two systems were very different, and Randy B. had no experience working in the adult prison system or working with adult prisoners serving life terms without the possibility of parole. The trial court further instructed the jury venire that they should disregard Randy B.'s statements about his personal experiences.

Moreover, the sitting jury was instructed to base its decision on the facts and the law and to determine the facts from the evidence received in the trial and not from any other source, and to not be influenced by "mere sentiment, conjecture, sympathy, passion, prejudice or public feeling" (CALJIC No. 1.00 [Respective Duties Of Judge And Jury]; III CT 923), and that "[t]he People and the defendant are entitled to the individual opinion of each juror" (CALJIC No. 17.40 [Individual Opinion Required - Duty To Deliberate]; III CT 963). Jurors are presumed to have understood and followed the trial court's instructions absent evidence to the contrary. (*People v. Delgado*, *supra*, 5 Cal.4th at p. 331.)

Finally, Edwards claims that reversal is required "since the trial court failed to conduct a hearing to exclude those jurors who overheard [Randy B.]'s improper remarks and could not promise to ignore them during deliberations." (AOB 47.) This claim is forfeited because the trial court gave Edwards the opportunity to conduct limited questioning, but Edwards declined to do so because he did not want to bring attention to the issue. (V RT 1715.) (*People v. Ramos, supra*, 34 Cal.4th at p. 515 [Defendant forfeited his right to raise any

error because he never asked the court to question privately the prospective juror].)

In any event, the record indicates that when the trial court asked the jury venire whether they had comments or questions about Randy B.'s statements, at least one juror raised her hand, and the trial court questioned that juror privately. (V RT 1737.) Specifically, prospective juror Jacqueline D. had a comment, and the trial court told her that he would talk to her privately. (V RT 1737.) The trial court later asked, "Anybody else? If anything comes to mind, just let me know when you are called forward and we'll talk about it, but I want to talk about it in private." (V RT 1737.) Nothing in the record indicates that any of the jurors were tainted or prejudiced be Randy B.'s comments. Thus, Edwards' claim should be rejected.

III.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE DELBECQ MURDER IN MAUI, HAWAII, FOR THE LIMITED PURPOSE OF PROVING IDENTITY, COMMON PLAN AND SCHEME AND INTENT

Edwards contends the trial court prejudicially erred in admitting evidence of the Hawaii murder of Muriel Delbecq during the guilt phase because the trial court's finding that the common features between the two crimes were sufficiently distinctive was incorrect, and the trial court abused its discretion under Evidence Code section 352 because the evidence was more prejudicial than probative.[12/] (AOB 50-51.) Edwards' arguments should be rejected. The trial court properly exercised its discretion in admitting the other-crimes evidence because the two crimes shared common features, the trial court used the correct standard, and because its probative value was not substantially outweighed by the danger of undue prejudice.

Prior to trial, the prosecutor filed a motion to admit evidence of the Delbecq murder in Hawaii. (II CT 527-540.) The prosecutor also sought the admission of the evidence to prove identity, intent to kill, torture and inflict great bodily harm and common plan and scheme to intentionally inflict pain. (VI RT 1196, 1941-1942, 1200-1201.) In the prosecutor's trial brief, the prosecutor alleged that on January 26, 1993, Delbecq, who was 67 years old, was found strangled to death in her bedroom in Maui, Hawaii. (II CT 528.) Her face had been beaten, and she had a fractured nose. Delbecq also had

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12. Appellant also claims that the trial court's modification of the standard CALJIC 2.50 instruction, its special instruction for the use of evidence of other crimes, and its denial of the defense proposed instruction on other crimes evidence were improper. (AOB 84-93.) This issue is addressed in Argument XI below with the discussion of other alleged errors in jury instructions.

ligature marks on both her ankles and wrists. A cut telephone cord had been found in a dumpster a block away. (II CT 528.) The victim's apartment had been ransacked, and jewelry was missing. (II CT 529.) Entry into the apartment had been made by removing a screen from a window. A hair mousse can had been shoved up Delbecq's rectum and vagina and was found lodged in her abdominal cavity. (II CT 529.)

In its offer of proof, the prosecution argued that both the current case and the Hawaii murder had the following similarities: (1) the murders occurred on Monday night, (2) the murders occurred in the victim's bedroom while the victim was in night clothes, (3) both victims had first floor apartments, (4) both victims were elderly, caucasian and female, (5) both victims lived alone, (6) entry was made by removing screens, (7) there was no forced entry, (8) the bedrooms of both victims were ransacked, (9) jewelry was missing, (10) both victims suffered beatings to the face that resulted in fractured noses, (11) both victims were bound at the wrists and ankles with telephone cords, (12) both victims were strangled, (13) both victims were employed as realtors, (14) both victims had the initials, M.E.D., and (15) both victims were violently penetrated vaginally and rectally while alive with hair mousse cans of the same dimensions. (II CT 529-530.)

The prosecutor argued that while the two crimes were not "carbon copies" of each other, they were very similar. Deeble's injuries to her anal and vaginal areas were consistent with being caused by the mousse can found in the bedroom. While the can was not lodged in Deeble's abdomen as in the Delbecq case, the prosecutor characterized the use of the mousse can as an "extreme similarity." (II RT 1190.) The prosecutor also pointed out that both women were "damaged and tortured greatly," and the fact that one was manually strangled while the other was strangled by ligature were "distinctions without a lot of difference." (II RT 1190-1191.)

Edwards objected to the admission of the Hawaii murder on grounds that the evidence was irrelevant, the dissimilarities between the uncharged act and the charged offense outweigh the similarities, and that under Evidence Code section 352, the evidence was more prejudicial than probative. (II CT 583-595; II RT 1198-1200.) Edwards also argued that *People v. Tassell* (1984) 36 Cal.3d 77 (overruled by *People v. Ewoldt* (1994) 7 Cal.4th 380, 387), which required that the charged and uncharged acts constitute an ongoing scheme to be admissible, was controlling because it was in effect in 1986 when the murder took place. (VI RT 1945-1947.) Edwards claimed that there was an ex post facto violation by using the standard set forth in *Ewoldt*. (VI RT 1947.)

The trial court properly ruled that evidence of the uncharged murder of Delbecq in Hawaii admissible because it was relevant to the issues of identity, common plan and intent pursuant to Evidence Code section 1101. (II RT 1199-1200, 1205, 1215; VI RT 1942-1943, 1950.) The trial court noted that

> As far as I.D. is concerned, I think the similarities are overwhelmingly similar, common plan and scheme. We have more in common here than we had in *Ewoldt* or probably any of the other cases cited in *Ewoldt*.

(II RT 1215.) The trial court also ruled that the evidence of the uncharged acts was more probative than prejudicial pursuant to Evidence Code section 352. (II RT 1215; VI RT 1951.) The trial court noted that the evidence, to be admissible under Evidence Code section 352, it must "tend to logically, naturally and by reasonable inference prove an issue upon which it is offered. And it is offered upon an issue which will ultimately prove to be material to the People's case. And it is not merely cumulative with respect to other evidence which the People may use to prove – may use to prove the related issues." (VII RT 1949.) The trial court noted that there was no change in law, *Ewoldt* just held that *Tassell* was wrong. (VI RT 1947.) However, the trial court found inadmissible that the victims shared the same initials and that the victims were

both realtors. (II RT 1187-1188, 1200.) The trial court also found irrelevant evidence that pubic hair and underwear were cut. (II RT 1215-1216.)

A. The Trial Court Properly Exercised Its Discretion in Admitting the Other Crimes Evidence Under Evidence Code Section 1101 for the Purpose of Proving Identity, Intent and Common Scheme and Plan

Evidence Code "[s]ection 1101 prohibits the admission of other-crimes evidence for the purpose of showing the defendant's bad character or criminal propensity." (*People v. Catlin* (2001) 26 Cal.4th 81, 145; Evid. Code, § 1101, subd. (a).) This section, however, also authorizes the admission of other-crimes evidence against a defendant "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b); see also *People v. Carter* (2005) 36 Cal.4th 1114, 1147; *People v. Kipp* (1998) 18 Cal.4th 349, 369.) Like other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence of some other rule requiring exclusion. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 146.) In addition, a defendant's plea of not guilty puts into issue all elements of the charged offense, including identity and intent, for the purpose of deciding the admissibility of evidence of uncharged misconduct. (*People v. Carpenter* (1997) 15 Cal.4th 312, 379; *People v. Daniels* (1991) 52 Cal.3d 815, 857-858; see also *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 400, fn. 4.)

Contrary to Edwards' assertions that this Court should use "heightened scrutiny" because this case is a capital case (AOB 52), established case law dictates that trial court rulings under Evidence Code section 1101 are reviewed under the deferential abuse of discretion standard, examining the evidence in the light most favorable to the court's ruling. (*People v. Gray* (2005)

37 Cal.4th 168, 202; *People v. Cole* (2004) 33 Cal.4th 1158, 1195; *People v. Catlin, supra*, 26 Cal.4th at p. 120; *People v. Lewis* (2001) 25 Cal.4th 610, 637; *People v. Kipp, supra*, 18 Cal.4th at p. 369.) Under this standard, "[a]buse may be found if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner . . . ." (*People v. Coddington* (2000) 23 Cal.4th 529, 587-588, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Edwards' argument that the use of the *Ewoldt* standard constituted a retroactive and unforeseeable enlargement of Evidence section 1101, subdivision (b) (AOB 50-51, fn. 6) should be rejected. On numerous occasions prior to its decision in *Tassell*, this Court found that evidence of uncharged similar misconduct may be employed to establish a common design or plan. (See *People v. Thomas* (1978) 20 Cal.3d 457, 465; *People v. Archerd* (1970) 3 Cal.3d 615, 620; *People v. Sam* (1969) 71 Cal.2d 194, 205; *People v. Ing* (1967) 65 Cal.2d 603, 612; *People v. Peete* (1946) 28 Cal.2d 306, 317-318; *People v. Lisenba* (1939) 14 Cal.2d 403, 434.) Then, in *Tassell*, the Court promulgated a new rule that evidence of uncharged misconduct could be used to demonstrate a common design or plan only "where it is claimed that there is, in truth, a 'single conception or plot' of which the charged and uncharged crimes are individual manifestations. [Citation.] Absent such a 'grand design,' talk of 'common plan or scheme' is really nothing but the bestowing of a respectable label on a disreputable basis for admissibility — the defendant's disposition." (*People v. Tassell, supra,* 36 Cal.3d at p. 84, fn. omitted.)

The decision in *Tassell* was based upon the erroneous premise that a common design or plan could not be established by evidence reflecting that the defendant committed markedly similar acts of misconduct against similar victims under similar circumstances, unless all of these acts were part of a single, continuing conception or plot. (*People v. Ewoldt, supra*, 7 Cal.4th at

p. 399.) As this Court has recognized, the flawed reasoning of *Tassell* produced an equally flawed result in *People v. Ogunmola* (1985) 39 Cal.3d 120, 123. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 400.)

Recognizing *Tassell* and *Ogunmola* as anomalies "in more than 50 years of California case law," this Court in *Ewoldt* overruled *Tassell* and *Ogunmola* to the extent they hold that evidence of a defendant's uncharged similar misconduct is admissible to establish a common design or plan only where the charged and uncharged acts are part of a single, continuing conception or plot. The court in *Ewoldt* held instead that evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 401-402, fn. omitted.) The foregoing makes clear that both before and after this Court's decision in *Tassell*, evidence of similar uncharged misconduct was found to be relevant and admissible to prove common design or plan. Accordingly, the trial court's use of the standard set forth in *Ewoldt* was not an impermissible ex post facto application of the law.

The highest degree of similarity between the charged and uncharged offenses is required when the uncharged offense is offered to prove identity. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123; *People v. Kipp, supra,* 18 Cal.4th at p. 370; *People v. Ewoldt, supra*, 7 Cal.4th at p. 403.) In order to be relevant to prove identity, the charged and uncharged offenses must "display a pattern and characteristics . . . so unusual and distinctive as to be like a signature." (*People v. Kipp, supra*, 18 Cal.4th at p. 370, quoting *People v. Ewoldt, supra,* 7 Cal.4th at p. 403, quoting 1 Mccormick on Evidence (4th ed. 1992) § 190, pp. 801-803.) "The strength of the inference in any case depends upon two factors: (1) the *degree of distinctiveness* of individual shared marks, and (2) the *number* of minimally distinctive shared marks." (*People v. Carter,*

supra, 36 Cal.4th at 1148, quoting *People v. Thornton* (1974) 11 Cal.3d 738, 756, italics in original, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.) Requiring a "'highly unusual and distinctive nature [for] both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense.'" (*People v. Roldan* (2005) 35 Cal.4th 646, 706, quoting *People v. Balcom* (1994) 7 Cal.4th 414, 425, 427; see also *People v. Gray*, *supra*, 37 Cal.4th at p. 203.) To be highly distinctive the charged and uncharged crimes do not need to be "mirror images" of each other. (*People v. Carter, supra,* 36 Cal.4th at p. 1148.) Consideration of the common marks of the charged and uncharged offenses, singly or in combination, logically operate to set apart the offenses from other crimes of the same general variety and tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses. (*People v. Miller* (1990) 50 Cal.3d 954, 987.) But the inference of identity does not depend on one or more unique or nearly unique common features because features of substantial but lesser distinctiveness may result in a distinctive combination when considered together. (*Ibid.*)

Edwards claims that because the foundational "signature" of the two crimes was never established and because the two crimes were too dissimilar, the trial court erred in admitting evidence of the murder in Hawaii for the purpose of proving identity. (AOB 58-70.) Specifically, Edwards argues that there was no evidence that Deeble was sexually assaulted with the hair mousse can. (AOB 58.) The record belies Edwards' claims. Here, the trial court properly exercised its discretion in ruling that evidence of the Delbecq murder in Hawaii was relevant to prove identity, common design or plan, and intent.

As the prosecutor argued, the use of the mousse can in both the murder of Deeble in Los Alamitos and the murder of Delbecq in Maui was an "extreme similarity." (II RT 1190.) Edwards claims that it was never established that a

hair mousse can was used to assault both Deeble and Delbecq. (AOB 58.) However, the evidence presented pretrial to the trial court and at trial support an inference that Deeble's injuries to her genital area were consistent with being caused by the mousse can. In the Los Alamitos case, officers found a mousse can underneath some sheets on Deeble's bed. (VI RT 2014; VII RT 2046.) Criminalist Reed discovered what appeared to be blood underneath the ridge around the top of the can. (VII RT 2046.) The cap that fit the mousse can also appeared to have blood on it. (VII RT 2046-2047.) Reed performed a presumptive test on the can, and it was positive for the presence of blood. (VII RT 2046.) The autopsy of Deeble indicated bruises on the labia and vaginal fault. There was a hemorrhage as well as a laceration in the area of the posterior fourchette which is at the bottom of the opening of the vagina. (VII RT 2137, 2156.) Deeble's anus was dilated, and there was a tearing of the inner covering of the rectum within the dilated anus. (VII RT 2137.) Dr. Fukumoto testified that the object that caused the injuries would "not have any sharp edges." (VII RT 2138.) Dr. Fukumoto testified that the mousse can found in Deeble's bedroom would "be consistent with an object that could have caused these various injuries." (VII RT 2138.) The vaginal and rectal injuries were also inflicted before Deeble died. (VII RT 2138.)

In the Hawaii murder, the mousse can was obviously used to sexually assault Delbecq, as an x-ray performed on Delbecq revealed the can protruding from the vaginal and rectal area into her abdominal cavity. (VII RT 2292, 2295.) There was bruising into the entrance of the vaginal cavity, tears through the walls of the vaginal cavity and a perforated right upper portion of the vaginal cavity. (VII RT 2295.) There was also a perforation of Delbecq's bowels into the abdominal cavity. (VII RT 2295.) Like Deeble's injuries, the injuries to Delbecq's anal and vaginal area were caused before death. (VII RT 2297.)

While the injuries to Delbecq were greater than Deeble's injuries, the cases were similar because it was reasonable to infer from the evidence presented that a mousse can was used to sexually assault both women. The use of a mousse can is certainly "unusual and distinctive as to be like a signature." (*People v. Ewoldt, supra*, 7 Cal.4th at 403.) As this Court noted in *People v. Carter*, "to be highly distinctive, the charged and uncharged crimes need not be mirror images of each other." (*People v. Carter, supra*, 36 Cal.4th at 1148.) The differences go to the weight of the evidence and do not preclude the prosecution from introducing the evidence. (*Ibid.*)

Moreover, the two murders shared numerous other "shared marks." For instance, both women were older, caucasian women who died from strangulation. (VII RT 2126, 2139, 2181, 2298.) Both women at some point were also bound around their wrists and ankles by ligatures. (VII RT 2036-2037, 2129, 2235.) The ligatures around Deeble's wrists were present when she was discovered. Although her ankles were not bound at the time her body was discovered, there were noticeable ligature marks around her ankles which indicated they had been bound at one time. (VII RT 2070.) Similarly, Delbecq's wrists and ankles were not bound when she was found in her bedroom. (VII RT 2219.) However, there were definite, pronounced ligature marks on her ankles and wrists when her body was discovered. (VII RT 2235.)

Another distinctive and unusual aspect of both murders was that the ligatures were fashioned from materials procured at the scene, specifically, telephone cords taken from Deeble's and Delbecq's homes, and later found at or near both women's apartments. Deeble's wrists were bound by telephone cord twisted with an electrical cord. (VII RT 2036-2037, 2053-2054.) The telephone cord had been yanked from the wall. (VII RT 2036-2037, 2053-2054.) In the Delbecq murder, pieces of telephone cord taken from Delbecq's phone were tied together and found in a pillowcase in a dumpster near her

home. (VII RT 2224.) The pillowcase matched bedding at Delbecq's home, and a check in her name was found in the pillowcase. (VII RT 2213, 2224, 2227-2231.)

Both women also suffered from incise wounds or wounds caused by a sharpened instrument. (VII RT 2293.) There was an incisional wound to Deeble's left ear drum, which was separate from the tearing of the ear drum caused by the ligature strangulation. (VII RT 2127.) Delbecq had an incise wound to her jaw and a puncture wound with a pointed object on her left chest. (VII RT 2293-2295.) Both Deeble and Delbecq also suffered fractured noses. (VII RT 2130-2131, 2298.) Both women also suffered blunt force trauma to their heads. (VII RT 2132-2133, 2293.)

Finally, the appearance of both crime scenes shared similarities. For instance, both apartments were first floor apartments. There were no signs of forced entry in either location; however, screens were removed from a window in each place. (VI RT 1992, VI RT 2003.) Both the Los Alamitos and Maui bedrooms were ransacked, and jewelry was missing from both. (VI RT 2006, 2080; VII RT 2196, 2234.)

Viewing the evidence in the light most favorable to the trial court's ruling, the charged and uncharged crimes displayed common features that revealed a highly distinctive pattern. (*People v. Kipp, supra*, 18 Cal.4th at p. 370.) The trial court did not abuse its discretion in admitting evidence of the Delbecq murder to prove identity. The number of the shared marks as well as the distinctiveness of the shared marks, singularly or in combination, between the Deeble and Delbecq murders display a pattern so unusual and distinctive as to support an inference that the same person committed both offenses. (*Ibid.*; *People v. Miller, supra*, 50 Cal.3d at p. 987.)

Edwards also argues that evidence of the uncharged offense was inadmissible to prove intent. (AOB 70-72.) Edwards' claim that "evidence of

the Hawaii murder was admissible, if at all, only to show identity, since the commission of the act of murder was not in dispute" (AOB 57), should be rejected because a defendant's plea of not guilty puts into issue all elements of the charged offense, including intent, for the purpose of deciding the admissibility of evidence of uncharged misconduct. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 379; *People v. Daniels*, *supra*, 52 Cal.3d at pp. 857-858; see also *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 400, fn. 4.)

"A lesser degree of similarity is required to establish relevance to prove common design or plan." (*People v. Carter, supra*, 36 Cal.4th at 1149, quoting *People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) For this purpose, "the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Id.* at p. 403.) The least similarity is required to establish relevance to prove intent. (*People v. Carter, supra*, 36 Cal.4th at 1149.) To be admissible to prove intent, the uncharged crimes need only be sufficiently similar to the charged offenses to support the inference that the defendant "probably harbored the same intent in each instance." (*Id.*, quoting *People v. Kipp, supra*, 18 Cal.4th at p. 371.) The incidents need not have the greater degree of similarity required to show the existence of a common plan or the shared distinctive pattern required to show identity. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15.) "[W]hen the other crime evidence is admitted solely for its relevance to the defendant's intent, a *distinctive* similarity between the two crimes is often unnecessary for the other crime to be relevant. Rather, if the other crime sheds great light on the defendant's intent at the time he committed that offense it may lead to a logical inference of his intent at the time he committed the charged offense if the circumstances of the two crimes are substantially similar even though not distinctive." (*People v. Demetrulias*,

supra, 39 Cal.4th at pp. 16-17, quoting *People v. Nible* (1988) 200 Cal.App.3d 838, 848-849.)

Here, Edwards argues that "the crimes were not committed in so similar a manner that the same intent to kill or torture could be inferred." (AOB 71.) Specifically, Edwards contends that the evidence of the intent to kill Delbecq and cause extreme pain was strong, while Deeble died as a result of her binding and "the balance of her injuries are too minor to support a finding of either an intent to kill or torture." (AOB 72.) Edwards' contentions should be rejected.

As discussed above, the murders were committed in a very similar, unusual and distinct manner. The manner in which both Deeble and Delbecq were murdered support the inference that the Edwards probably harbored the same intent in each instance, namely, an intent to kill, torture, or cause "extreme pain." Both women were bound by the wrists and ankles by telephone cords. Both died of strangulation. While Delbecq was manually strangled, and Deeble died of asphixiation due to ligature strangulation, the two crimes were substantially similar. Moreover, evidence that Edwards intended to cause each woman extreme pain to support an intent to torture was evident in both cases. In the Deeble murder, she was elaborately bound. Her arms were hog tied behind her back with the telephone cord. (VI RT 2011.) A noose was fashioned from the belt and placed around her neck. (VI RT 2011.) She was suspended inches from the ground by the noose which was tied to a dresser drawer. (VI RT 2011-2012.) Contrary to Edwards' assertions, restraining a victim around her neck did not just show an intent to restrain movement, but rather an intent to kill. Edwards did not just restrain Deeble's hands and feet, but rather, put a noose around her neck which, suspended from the floor, was sure to cause strangulation. Dr. Fukumoto testified that there was a deep furrow around Deeble's neck, and there was friction caused by the victim struggling against the ligature. (VII RT 2126.) According to Dr. Fukumoto, struggling

against the belt would have been extremely painful. (VII RT 2128.) Dr. Fukumoto also opined that the pressure to Deeble's eardrums which caused them to tear, as well as the separate incisional wound to the ear, would have been extremely painful. (VII RT 2128-2129.) Finally, Dr. Fukumoto testified that the injuries to Deeble's vaginal and anal areas would have been painful because that area is highly vascular with a lot of nerve endings, so any trauma would have been highly painful. (VI RT 2137-2138.) According to microscopic examination, injuries to the genital area were caused before death, thus, an inference can be made that Deeble suffered from extreme pain before she died.

The Delbecq murder was similarly characterized by the intent to kill, torture, and cause extreme pain. Delbecq was manually strangled. The injuries to her vaginal, rectal and abdominal area were obviously painful as a mousse can was found embedded in her abdominal cavity. Delbecq's injuries to her genitals were also inflicted before death. And like Deeble, she was also bound by ligatures at one point. There were telephone cords found near her home. Thus, the manner in which both Deeble and Delbecq were murdered support the inference that the Edwards probably harbored the same intent in each instance, namely, an intent to kill, torture, or cause "extreme pain."

Edwards also claims that because the Los Alamitos and Hawaii murders occurred seven years apart and not in the same area, they were too dissimilar to be admissible for the purpose of proving intent. (AOB 70-71.) Edwards cites this Court's reasoning in *Demetrulias* to support his assertion. In *Demetrulias*, defendant, on two separate occasions in one evening, entered an older man's home, confronted the man alone, and stabbed the man several times hard enough to inflict very serious wounds, including in both cases, stab wounds to the chest. Both times the defendant claimed the other man had attacked or threatened him first and that he had acted in self-defense. (*People v.*

Demetrulias, supra, 39 Cal.4th at p. 16.) In countering the defendant's arguments that the two offenses were dissimilar in some aspects, this Court found, "Especially in light of the close proximity in place and time between the two incidents, we disagree that these dissimilarities vitiated the inference that defendant had the same intent in each incident." (*Ibid.*)

From this, Edwards assumes a requirement that both charged and uncharged offenses need to be close in spatial and temporal proximity. (AOB 70-71.) Nothing in this Court's opinion in *Demetrulias*, however, indicates that proximity in time and place is a requirement to find an uncharged offense admissible to prove intent under Evidence Code 1101. As the trial court in this case noted in ruling the evidence admissible, "There was more than seven years in *Ewoldt* and one of the cases in *Ewoldt* had as much as 24 years[13/]." (II RT 1204.) Thus, while proximity of time and place are factors to consider in determining whether a charged and uncharged offense are similar, neither is necessarily required in finding a degree of similarity sufficient for an uncharged offense to be admissible for the purpose of proving intent.

Therefore, the trial court did not abuse its discretion in admitting the evidence for purposes of proving intent.

B. The Trial Court Properly Exercised Its Discretion in Admitting the Other Crimes Evidence Under Evidence Code Section 352

Edwards also argues that assuming the evidence of the Hawaii murder was admissible under Evidence Code section 1101, subdivision (b), it should have been excluded under Evidence Code section 352 because its probative value was substantially outweighed by the danger of undue prejudice. (AOB 72-82.) Edwards' contention should be rejected.

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13. *People v. Ewoldt, supra*, 7 Cal.4th at pp. 395-396, citing *People v. Peete, supra*, 28 Cal.2d 306.

Evidence that qualifies for admission under Evidence Code section 1101, must still satisfy the admissibility requirements of other evidentiary rules, including Evidence Code section 352. (*People v. Cole, supra,* 33 Cal.4th at p. 1194.) "Under Evidence Code section 352, the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Id.* at p. 1195) Factors relevant to the determination of whether uncharged offenses should be admitted under this section include: the tendency of the evidence to demonstrate a material fact other than character; whether the source of the information regarding uncharged crime is independent of the source of the charged crime; whether the uncharged crime resulted in a conviction; whether the uncharged crime is more serious or inflammatory than the charged crime; the time lapse between the charged and uncharged crimes; and whether the information is cumulative. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 404-407.) A trial court's rulings under Evidence Code section 352 are reviewed on appeal for an abuse of discretion. (*People v. Cole, supra,* 33 Cal.4th at p. 1195; *People v. Lewis*, *supra*, 25 Cal.4th p. 637.)

Based on the offer of proof, the probative value of the uncharged crimes evidence in this case was strong because, as discussed above, the similarities between the charged and uncharged offenses supported an inference that the same person committed both offenses, that Edwards harbored the same intent on both occasions, and that the offenses were committed according to a common plan. The probative value of the evidence was enhanced by the fact that it came from completely independent sources. (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 404-405; *People v. Balcom*, *supra*, 7 Cal.4th at p. 427.) The Deeble murder was investigated by Los Alamitos officials, while the evidence of Delbecq's murder came from Hawaii witnesses.

Edwards testified at trial, and on cross-examination, admitted that he had been convicted of murder in Hawaii in 1994. (IX RT 2616.) Because of his admission, the jury was not "diverted to a determination whether or not defendant had committed the uncharged offenses . . . ." (*People v. Balcom*, *supra*, 7 Cal.4th at p. 427.) Secondly, "the jury was not tempted to convict defendant of the charged offenses, regardless of his guilt, in order to assure that he would be punished for the uncharged offenses," because the jury was aware that Edwards was convicted of the Hawaii murder. (*Ibid.*) The fact that the jury knew Edwards was convicted in the earlier incident reduces any prejudicial effect. (*Ibid.*; *People v. Steele* (2002) 27 Cal.4th 1230, 1245.)

Moreover, contrary to Edwards' assertions, the other-crimes evidence was no stronger or more inflammatory than the current offenses. While the Delbecq murder was horrific, it was no more horrific than the Deeble murder. The prosecutor did not present any photographs of the autopsy, so the jury did not see photos of Delbecq's injuries. (VII RT 2275.) The trial court also excluded the x-ray which actually showed the mousse can embedded in Delbecq's abdominal cavity. (VII RT 2278). The trial court only allowed a hand drawn autopsy diagram to show the type of injuries and where the ligature marks were on Delbecq and how the marks were similar to the Deeble murder. (VII RT 2273-2275.) Deeble had blood running out of her ear, nose and mouth. (VI RT 2012; VII RT 2127.) The whites of her eyes had become red with blood. (VII RT 2127.) Deeble's genital area was bruised. (VII RT 2137.) Because of the way Deeble was hogtied and dangling from the dresser by a belt noose, an argument can be made that the evidence presented of the Deeble crime scene was actually more horrific. In any event, the evidence of the Hawaii murder was no stronger or more inflammatory than the current offense.

As to the remoteness issue, a seven year gap does not necessarily make the uncharged offense remote. The passage of a substantial length of time does

not automatically render a prior incident inadmissible, and no specific time limits have been established in determining when a prior offense is too remote. (*People v. Branch* (2001) 91 Cal.App.4th 274, 284; *People v. Soto* (1998) 64 Cal.App.4th 966, 991.) As noted above, *Ewoldt* involved conduct 12 years prior. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 395-396.) Other cases have similarly held that evidence of uncharged misconduct was properly admitted even though the prior offense was a number of years removed. (See *People v. Peete, supra*, 28 Cal.2d 306 [24 years]; *People v. Ing, supra*, 65 Cal.2d at pp. 607, 612 [15 years]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [child molestation 20 years prior not too remote in kidnapping and child molestation case].) "[T]he prior convictions were not remote in time because [Edwards] essentially was in prison during the time between the convictions, and thus his convictions had not 'been followed by a legally blameless life'[.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 607; see also *People v. Ing, supra*, 65 Cal.2d at pp. 607, 612 [holding trial court properly admitted evidence of uncharged misconduct committed even though one of the prior offenses was committed 15 years before the charged offenses]. Here Edwards was in and out of jail in 1984, 1987, 1988 and 1994; thus, the gap between the Los Alamitos and Hawaii murders did not make the uncharged offense too remote.

Moreover, the other-crimes evidence was not cumulative. The Hawaii murder was the only other crimes evidence admitted. The trial court excluded evidence that Edwards had hog-tied an ex-girlfriend, Naomi Lindeman Titus, and tried to penetrate her vagina and rectum with a champagne bottle. (II CT 531-578; II RT 1196.) The trial court also excluded other evidence that it ruled irrelevant, too dissimilar, or prejudicial. For instance, the trial court excluded evidence that Deeble and Delbecq shared the same initials and that both women were realtors. (II RT 1187-1188.) The trial court also found some aspects of

the Hawaii murder to be irrelevant, such as evidence that victim's pubic hair and underwear were cut. (II RT 1215-1216.)

Finally, the court reduced the risk of prejudice by instructing the jury [14] that it could only consider the uncharged offenses for a limited purpose, and not as disposition evidence.[15] (*People v. Johnson* (1991) 233 Cal.App.3d 425,

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14. Edwards contends, in this Argument, that the admission of the Hawaii evidence was prejudicial since the trial court improperly modified the standard CALJIC Instruction Number 2.50 and erred in denying Edwards' request to instruct the jury with the defense proposed instructions. (AOB 84-93.) Respondent addresses this argument in Argument XI below which responds to all of Edwards' arguments involving jury instructions.

15. The jury was instructed, in pertinent part, as follows:

> Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were admonished that it could not be cosnidered for you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider such evidence for any purpose except the limited purpose for which it was admitted.

(CALJIC 2.09; III CT 929, XI RT 3116-3117.)

> Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial. [¶] Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. [¶] Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:
>
> The identity of the person who committed the crime, if any, of which the defendant is accused;
>
> A characteristic design or plan in the commission of criminal acts similar to the design or plan or scheme used in the crime charged.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case, you are not permitted to consider

(continued...)

446; CALJIC Nos. 2.09, 2.50, 2.50.1, 2.50.2.) The principles contained in the court's instructions were reinforced by argument by counsel. (X RT 2962-2963, 3020-3039; XI RT 3094-3097.) Under these circumstances, the trial court properly exercised its discretion in admitting the other-crimes evidence over Edwards' Evidence Code section 352 objection.

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15. (...continued)
such evidence for any other purpose. [¶] For identity to be established, the uncharged misconduct and charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts.

(CALJIC 2.50 (modified)(1994); III CT 935; XI RT 3120-3121.)

IV.

THE TRIAL COURT PROPERLY ADMITTED EDWARDS' 1994 CONVICTIONS OF MURDER AND BURGLARY IN HAWAII FOR IMPEACHMENT

Edwards contends that impeachment with his 1994 convictions for murder and burglary in Hawaii and 1984 conviction of auto burglary violated state law and deprived him of his federal constitutional right to due process. (AOB 104-117.) Edwards' arguments should be rejected. The trial court acted within its discretion in admitting Edwards' prior convictions to impeach his credibility.

Edwards testified in his defense at trial. (IX RT 2544-2629.) Edwards testified that he was addicted to alcohol and drugs at a very young age. (IX RT 2545-2552.) He also suffered from alcoholic blackouts. (IX RT 2566.) On the night of Deeble's murder, Edwards claimed that he was selling fake LSD at a Judas Priest concert and then drank liquor and shot up heroin and cocaine later that night. (IX RT 2596-2597, 2601-2603.)

On cross-examination, the prosecutor asked Edwards if, "on March 10th of 1994 you were convicted of the murder of Muriel Delbecq in the state of Hawaii –" (IX RT 2605.) Edwards objected, moved to strike, and moved for a mistrial based on prosecutorial misconduct. (IX RT 2605.) Edwards argued that based on the trial court's prior ruling at the section 995 motion, that the prior conviction in the Hawaii case was inadmissible. (IX RT 2605.) Edwards also argued that it was prejudicial to admit evidence of his conviction in Hawaii when it came in pursuant to Evidence Code section 1101, subdivision (b), as well. (IX RT 2606.) Specifically, Edwards feared that the jury would assume that "once a guy has done a crime like this, he has – must have done the one here, too." (IX RT 2608.)

The prosecutor argued that all felony convictions can be used for impeachment purposes. The prosecutor stated, "I never heard any of limitations

whatsoever brought on me. Until they put Mr. Edwards on the stand, it wasn't relevant. Once they put him on the stand, it became extremely relevant." (IX RT 2607.)

The trial court stated that it was never asked to rule on the issue. (IX RT 2606.) Specifically, the trial court stated:

> The prosecutor is being accused of misconduct. There was never a motion to prevent the prosecutor from impeaching Mr. Edwards in the event he took the stand, and that is a simple motion that is made. It is typically made, you know, before every trial.

(IX RT 2606.) The trial court, noted, however, that even if a motion had been made, it would have denied defense motion because the Hawaii convictions were "crime[s] of moral turpitude the worst type of moral turpitude. Highly relevant on credibility." (IX RT 2607.)

Edwards' defense counsel then brought up that Edwards had three other prior felonies on which he wished the court rule. (IX RT 2607.) Edwards had also suffered on March 10, 1994, in Hawaii, convictions for kidnapping, two counts of sexual assault, robbery in the first degree, and first degree burglary. (IX RT 2608-2609.) Edwards also suffered a 1998 conviction for felony theft of a vehicle and receiving stolen property. (IX RT 2609.) On September 1987, Edwards was convicted of possession of a firearm. (IX RT 2610.) Edwards was convicted of second degree felony burglary in August 1984. (IX RT 2610.)

The trial court granted Edwards' motions as to the misdemeanors and found them inadmissible. (IX RT 2612.) However, the trial court denied Edwards' motion as to the murder and burglary convictions in Hawaii, reasoning:

> Here is the problem. Your client has testified, and he hasn't made himself out to be the All-American citizen who has never violated any law. He has admitted several serious violations while on the stand, so I don't know where all this prejudicial

impact is coming from. I mean this is the nature of your case, and it is fine.

I think that the prosecutor for impeachment purposes, should be permitted to get into the fact that he was also convicted of a burglary related to the homicide because that bears heavily on credibility grounds, even though it is a much less serious crime than murder. It is moral turpitude. And I am assuming the burglary was with intent to commit theft or robbery as well as anything else. So that is a very heavy factor in determining admissibility.

Obviously it has no impact on your client's testimony. He has already testified – and I don't think these things are going to make him look that much worse than he looks already as far as living a life of crime to support a dope habit and an alcohol habit.

(IX RT 2612-2613.) The trial court also found that the crimes were not remote because Edwards had continuously been in and out of trouble from 1984, 1987, 1988, and 1994. The court stated:

So I will permit impeachment with the auto burg in August of '84. I think the misdemeanor stuff tends -- don't really prove that much and tends to take too much time and could end up confusing the jury. And it just serves no value.

The only negative or meaning in the defense favor on the murder is that it is an identical crime, but that is offset by the fact that they have already heard the 1101 (b) evidence. The test is the same. The evidence in Hawaii was very strong in that palm prints were left and there is probably going to be no attach against that. . . .

(IX RT 2613.) The trial court found admissible the murder and burglary in Hawaii and the fact of the 1984 auto burglary. (IX RT 2614.) The trial court found the 1987 and 1988 auto thefts inadmissible. (IX RT 2614.)

During cross-examination, the prosecutor then asked Edwards if he had been convicted of murder and felony burglary in Hawaii on March 10, 1994, and second degree burglary in California on August 1984. (IX RT 2616.) Edwards answered affirmatively. (IX RT 2616.)

A. The Trial Court Acted Within Its Discretion in Admitting Edwards' Prior Convictions for Murder, Burglary and Auto Burglary to Impeach His Credibility

Felony convictions are admissible to impeach a witness's credibility. (Evid. Code, § 788; *People v. Harris* (2005) 37 Cal.4th 310, 337 ["Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach, subject to the court's discretion under Evidence Code section 352."].) "'Sections 788 and 352 of the Evidence Code control the admission of felony convictions for impeachment. Together, they provide discretion to the trial judge to exclude evidence of prior felony convictions when their probative value on credibility is outweighed by the risk of undue prejudice. [Citation.]' [Citation.]" (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) The trial court is guided by four factors when determining the admissibility of prior convictions: (1) whether the prior conviction reflects adversely on honesty or veracity; (2) whether the prior conviction is remote in time; (3) whether the prior conviction is for the same or substantially similar conduct as the charged offense; and (4) whether fear of prejudice will prevent the defendant from testifying. (*Ibid.*) "[T]he trial courts have broad discretion to admit or exclude prior convictions for impeachment purposes. . . . The discretion is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded." (*People v. Hinton* (2006) 37 Cal.4th 839, 887, quoting *People v. Collins* (1986) 42 Cal.3d 378, 389.) A trial court's admission of a prior conviction for impeachment will not be disturbed unless the ruling exceeds the bounds of reason and results in a miscarriage of justice. (*People v. Green* (1995) 34 Cal.App.4th 165, 182-183.)

Edwards' prior convictions for murder, burglary and auto burglary reflect adversely on his honesty and veracity. However, Edwards argues that

"a conviction for a crime of violence does not create a strong adverse inference that an individual lacks veracity." (AOB 108.) Section 28(f) of article I of the California Constitution, which was added by Proposition 8, provides in pertinent part that "[a]ny prior felony conviction . . . shall subsequently be used without limitation for purposes of impeachment . . . in any criminal proceeding. . . ." (*People v. Hinton, supra*, 37 Cal.4th at p. 887.) This Court held in *People v. Castro* (1985) 38 Cal.3d 301, 306, "that – always subject to the trial court's discretion under [Evidence Code] section 352 – [Proposition 8] authorizes the use of any felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty." (*People v. Hinton, supra*, 37 Cal.4th at p. 887.) Contrary to Edwards' assertions, his prior felony convictions all involved moral turpitude and reflected adversely on his credibility. "California courts have repeatedly held that prior convictions for burglary, robbery, and other various theft-related crimes are probative on the issue of the defendant's credibility." (*People v. Mendoza, supra,* 78 Cal.App.4th at p. 925.) Moreover, convictions for murder and attempted murder involved moral turpitude and were therefore admissible for impeachment. (*People v. Hinton*, *supra*, 37 Cal.4th at p. 888.)

With respect to the remoteness factor, Edwards' auto burglary conviction in 1984 and his murder and first degree burglary convictions in 1994 were not remote. While convictions characterized as remote would generally lessen their probative value, convictions remote in time are not automatically inadmissible for impeachment purposes. Even a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior. (*People v. Boyd* (1985) 167 Cal.App.3d 36, 44; *People v. Kemper* (1981) 125 Cal.App.3d 451, 454-455.) In fact, in *People v. Green*, *supra*, 34 Cal.App.4th at page 183, the court admitted a 20-year-old prior conviction, reasoning that defendant's 1973 conviction was followed by five

additional convictions in 1978, 1985, 1987, 1988, and 1989. The court reasoned that "the systematic occurrence of [appellant's] priors over a 20-year period create[d] a pattern that [was] relevant to [his] credibility." (*Ibid.*, citing *People v. Muldrow* (1988) 202 Cal.App.3d 636, 648.) The fact that the intervening convictions were in and of themselves probative on the issue of defendant's honesty and credibility mitigates in favor of admission of the remote prior. (*People v. Muldrow, supra,* 202 Cal.App.3d at p. 648, citing *People v. Newton* (1980) 107 Cal.App.3d 568, 576.) In this case, defendant has not led a legally blameless life, as he had suffered multiple convictions in 1984, 1987, 1988, and in 1994. The trial court admitted the 1984 conviction and the 1994 convictions, which are in and of themselves probative on the issue of defendant's credibility. As the trial court noted, the jury should "be able to . . . put [Edwards'] life in somewhat proper context." (IX RT 2613.) Thus, the remoteness factor would not mitigate against admission of the priors.

Edwards' objection that the priors ought to have been excluded as too similar to the charged crime is likewise without merit. "While before passage of Proposition 8, past offenses similar or identical to the offense on trial were excluded, now the rule of exclusion on this ground is no longer inflexible." (*People v. Hinton*, *supra*, 37 Cal.4th at p. 888, quoting *People v. Tamborrino* (1989) 215 Cal.App.3d 575, 590; see generally *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139, citing *Tamborrino.*) "The identity or similarity of current and impeaching offenses is just one factor to be considered by the trial court in exercising its discretion." (*People v. Green, supra,* 34 Cal.App.4th at p. 183.)

The trial court did not abuse its discretion in admitting these crimes of violence. (*People v. Tamborrino, supra,* 215 Cal.App.3d at p. 590.) To do otherwise would have given defendant a "false aura of veracity." (*Ibid.;* see also *People v. Muldrow, supra*, 202 Cal.App.3d at p. 647.) Additionally, as

the trial court pointed out (IX RT 2613), any prejudice was offset by the fact that evidence of the Hawaii murder and burglary had already been presented to the jury. Moreover, the evidence in Hawaii was very strong, as bloody palm prints and footprints found to match Edwards' known prints were found in Delbecq's bedroom. (VII RT 2254, 2256-2258.) Thus, Edwards' admission that he was convicted of the Hawaii crimes was not prejudicial.

With respect to the last factor regarding fear preventing a defendant from testifying, it has no application in this case because Edwards actually took the stand and was impeached with the priors.

Thus, balancing all of the factors, the trial court acted well within its discretion in finding that Edwards' prior convictions were more probative than prejudicial under Evidence Code section 352.

B. Any Error Was Harmless

Because the "application of ordinary rules of evidence . . . does not implicate the federal Constitution," this Court has reviewed "allegations of error under the 'reasonable probability' standard of *Watson*[.]" (*People v. Marks* (2003) 31 Cal.4th 197, 227.) As noted above, the evidence of the Hawaii murder was strong and was already presented to the jury, thus any prejudice from Edwards' admission of the fact of the prior convictions was mitigated. Moreover, the jury was instructed of the limited purpose for which the evidence was admitted. (CALJIC No. 2.23[16]; III CT 933; XI RT 3119.) The jury is

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16. The jury was instructed as follows:

> The fact that a witness has been convicted of a felony, if such be a fact, may be considered by you only for the purpose of determining the believability of that witness. The fact of such a conviction does not necessarily destroy or impair a witness's believability. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

(continued...)

presumed to have abided by the court's instructions. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1014.) Thus, any error was harmless.

To the extent Edwards claims that the court violated his federal constitutional rights (AOB 117), he forfeited those claims by failing to raise them below. (See *People v. Smithey* (1999) 20 Cal.4th 936, 995.) In any event, Edwards' due process rights were not violated by the proper application of evidentiary rules, as discussed above. (See *People v. Lucas* (1995) 12 Cal.4th 415, 464.)

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16. (...continued)
(CALJIC No. 2.23; III CT 933; XI RT 3119.)

V.

THE TRIAL COURT PROPERLY EXCLUDED DEFENSE EVIDENCE

Edwards makes several claims of error that the trial court improperly restricted the allegedly exculpatory testimonies of several witnesses. (AOB 117-150.) Namely, Edwards claims the trial court erred in excluding (1) testimony by Dr. Wolf that Deeble's injuries to her genital area were consistent with consensual sexual intercourse (AOB 117-133); (2) certain evidence allegedly corroborating that Edwards was in an unconscious state at the time of the murder (AOB 133-140); (3) evidence that allegedly would have established that Kathy Valentine, and not Edwards, stole Deeble's jewelry (AOB 140-145); (4) evidence of Edwards' alleged surprise reaction to the news of Deeble's murder (AOB 146-148); and (5) evidence that allegedly would have rebutted the prosecution's theory that Edwards committed the Deeble murder because of its similarity to the Delbecq murder (AOB 148-150). In excluding this evidence, Edwards also argues that his federal constitutional rights to due process and to present a defense were violated. Edwards' claims are all without merit. The trial court acted within its discretion in excluding the proferred defense evidence. In any event, any error was harmless.

A. The Trial Court Acted Within Its Discretion in Excluding Dr. Wolf's Testimony That Injuries to Deeble's Vaginal and Rectal Areas Were Caused by Consensual Sexual Intercourse

Edwards asserts that the trial court's ruling, partially limiting the questioning of the defense witness, Dr. Wolf, constituted an abuse of discretion because "ample evidence in the record support the challenged hypotheticals." (AOB 123.) Edwards claims that his right to present a defense was violated because of the trial court's rulings. (AOB 125-127.) These claims should be rejected.

During the prosecution's case in chief, Dr. Fukumoto testified that there were bruises on Deeble's labia and vaginal fault, and a hemorrhage and laceration in the area of the posterior fourchette of the vagina. (VII RT 2137.) According to Dr. Fukumoto, Deeble's anus was dilated, and there was tearing of the inner covering of the rectum. (VII RT 2137.) While Dr. Fukumoto could not testify as to what exactly caused Deeble's injuries to her genital area, Dr. Fukumoto testified, "All I can say is it is something that is – does not have any sharp edges." (VII RT 2138.) The prosecutor then showed the pathologist the mousse can that had been found on Deeble's bed, and Dr. Fukumoto agreed that the cannister "would be consistent with an object that could have caused these various injuries." (VII RT 2138.)

On the cross-examination of Dr. Fukumoto, Edwards' counsel asked if the dilation of the rectum could be caused by fingers or a penis, and Dr. Fukumoto answered affirmatively. (VII RT 2148.) Dr. Fukumoto also testified that there is no way to tell what caused the injuries. (VII RT 2148.)

Paul Wolf, M.D., a clinical professor of pathology, reviewed Deeble's autopsy report and testified on behalf of the defense. (VIII RT 2474.) Dr. Wolf testified about Deeble's injuries to her vaginal and rectal areas. (VIII RT 2489-2492.) The following colloquy took place between Dr. Wolf and Edwards' counsel:

> Q. Now, Doctor, the degree of injuries in the Deeble case, can you determine as a pathologist that the trivial amount of injuries in this case are minor enough that they are consistent with consensual vaginal and rectal intercourse?
>
> Mr. BRENT [prosecutor]: Assumes facts not in evidence, object.
>
> THE COURT: Sustained.
>
> Q. BY Mr. BATES [Edwards' counsel]: What, if anything, is this degree of submucosal or microscopic injury consistent with?
>
> Mr. BRENT: Objection, your honor, calls for speculation. Assumes facts not in evidence.

THE COURT: Sustained.

Q. BY Mr. BATES: Doctor, as a pathologist, do you have access to studies in particular, and is it accepted in the field that ordinary vaginal intercourse, ordinary routine intercourse can cause microscopic injuries inasmuch as 61 percent of the cases?

Mr. BRENT: Objection, assumes facts not in evidence, your honor.

THE COURT: Sustained.

Q. BY Mr. BATES: Doctor, do you have any information on that subject?

Mr. BRENT: Objection, your honor, vague. Same objection, assumes facts not in evidence. Can we go on to another question?

THE COURT: The objection is sustained.

Q. BY Mr. BATES: Doctor, this will just take a yes or no answer. In your opinion are pathologists in 1996 in a position to be able to render an opinion as to whether microscopic injury to the vagina can be caused by ordinary intercourse?

Mr. BRENT: Objection, relevance, assumes facts not in evidence in this case.

THE COURT: Sustained.

(VIII RT 2490-2492.)

Generally, an expert may render opinion testimony on the basis of facts given in a hypothetical question that asks the expert to assume their truth. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) The assumptions that make up the hypothetical question, however, "must be rooted in facts shown by the evidence." (*Ibid.*; *People v. Ward* (2005) 36 Cal.4th 186, 209.) "Like a house built on sand, the expert's opinion is no better than the facts on which it is based." (*People v. Gardeley, supra,* at p. 618.) In addition, a trial court "has considerable discretion to control the form in which the expert is questioned and to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein." (*People v. Gardeley, supra,*

14 Cal.4th at p. 619, citations omitted; *People v. Gonzalez* (2006) 38 Cal.4th 932, 944.)

Here, the trial court did not abuse its discretion in sustaining the prosecutor's objection to the proposed line of hypothetical questioning. The hypothetical questioning of the defense expert was not "rooted in facts shown by the evidence." (*People v. Gardeley, supra,* 14 Cal.4th at p. 618.) Whether Deeble engaged in consensual sex at or near the time of her death was never "rooted in fact." Rather, it was speculative. Edwards argues that Deeble's romantic relationship with Paul Roy and the fact that Roy called Deeble the night before her death "should have been sufficient facts in the record to justify a question about whether sexual intercourse was the cause of her injuries other than a mousse can." (AOB 124.) However, at the time the question was posed to Dr. Wolf, evidence about Paul Roy had not yet been presented. (IX RT 2770-2773.) Thus, the trial court's ruling was proper at the time.

Even when evidence regarding Roy was presented, there was no evidence that Deeble and Roy had engaged in consensual sexual intercourse around the time of Deeble's death. Sgt. Jessen testified that in an interview of Roy in 1986, Roy stated that he called Deeble on May 12, 1986, to see if he could come over. (IX RT 2771.) Roy went to Deeble's house, knocked on the door, but there was no answer, so he placed a card between her screen and wooden door. (IX RT 2772.) Roy left a message on Deeble's answering machine on May 15, 1986, the day the body was discovered. (IX RT 2773.) There was never any evidence presented regarding any actual contact between Roy and Deeble during that time, much less consensual sexual contact between Deeble and Roy or anyone else. As a result, the hypothetical questioning was not rooted in the evidence, and any answer to the questions was irrelevant. (*People v. Gardeley, supra,* 14 Cal.4th at p. 618; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135 [expert opinion based on

"assumptions which are not supported by the record" have "no evidentiary value"].) Furthermore, Edwards' question regarding what the injury was consistent with was speculative and vague. Defense counsel's characterization of Deeble's injuries as "trivial" were also argumentative. Additionally, the question regarding studies was properly sustained as assuming facts not in evidence because no evidence had been presented regarding any studies. Finally, what other pathologists in 1996 are able to opine regarding microscopic injury caused by sexual intercourse was irrelevant. Consequently, the trial court did not abuse its discretion in precluding the questioning.

In any event, any error was harmless under the *Watson* standard. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1311 [applying *Watson* standard to erroneous exclusion of defense evidence].) Despite sustaining the prosecution's objections on those four questions discussed above, expert evidence regarding whether Deeble's injuries to her vagina and rectum were consistent with consensual vaginal and rectal intercourse was presented to the jury on a number of occasions. For instance, in the cross-examination of Dr. Fukumoto, Edwards' counsel asked if the dilation of the rectum could be caused by fingers or a penis, and Dr. Fukumoto answered affirmatively. (VII RT 2148.) Dr. Fukumoto continued stating that there is no way to tell what caused the injuries. (VII RT 2148.)

Moreover, after the trial court sustained the questioning of Dr. Wolf on various grounds, Edwards' counsel asked Dr. Wolf later in his testimony, "From the injuries that you viewed in this case, the autopsy, the related documents and the microscopic sections that you have reviewed, is the condition of the vagina consistent with penetration by a finger?" (VIII RT 2493.) Over the prosecution's objection, the trial court allowed Dr. Wolf to answer. (VIII RT 2493-2494.) Dr. Wolf answered affirmatively. (VIII RT 2494.) Edwards' counsel also asked, "Could the damage that you saw in the

slides and read about in the autopsy could have been caused by a finger?" (VIII RT 2494.) Dr. Wolf, answered, "Yes." (VIII RT 2494.) Counsel went on to ask, "Could it have been caused by a penis?" (VIII RT 2494.) Dr. Wolf answered, "Yes. There is adequate literature to support my statement. Quite a few articles –" (VIII RT 2494.) The prosecutor then objected and moved to strike the doctor's answer, arguing that it was nonresponsive. (VIII RT 2494.) The trial court struck only the last portion of Dr. Wolf's statement. (VIII RT 2494.) Dr. Wolf went on to testify that based on medical literature relating to consensual sex or sexual intercourse, the degree of Deeble's injury could have been caused by a finger or penis. (VIII RT 2494.) Dr. Wolf testified that the injuries could have been caused by consensual sex because "The medical literature points out that in 60 percent of women who have consensual sex, there can be microscopic injury to the vagina and about 30 percent of the individuals who have sexual assault can also have those vaginal microscopic injuries." (VIII RT 2495.)

The same questions that were excluded earlier, were later admitted when they were rephrased by Edwards' counsel. Even the prosecution's expert admitted that the dilation of the rectum could have been caused by a finger or penis. (VII RT 2148.) Evidence that the injuries to Deeble were also consistent with consensual sexual intercourse was thus presented to the jury. Therefore, Edwards' right to present a defense was not violated. Moreover, there was no prejudice by the exclusion of some of Dr. Wolf's testimony which were not properly phrased.

Finally, in addition to the fact that the contested evidence was actually admitted, evidence of Edwards' guilt was strong. Thus any error was harmless. He was familiar with Deeble, as he was dating Deeble's daughter, Valentine. (VII RT 2072.) Edwards had been to Deeble's home twice, and he knew where a spare key was kept and that a person could enter Deeble's apartment through

the screen window. (VII RT 2076, 2077, 2113.) There was also "bad blood" between Deeble and Edwards because of a disagreement about Valentine's truck. (VII RT 2075.) Valentine also testified that on the night of Deeble's death, someone had used Valentine's truck without her knowledge because it was not parked in the manner she had parked it the night before. (VII RT 2078-2079.) Edwards was the only other person besides Valentine who had a key to the truck. (VII RT 2075.) For the limited purpose of proving identity, common plan and intent, evidence was also presented that Edwards murdered Delbecq in a distinctive fashion which was uniquely similar to Deeble's murder. Thus, any error in the exclusion of Dr. Wolf's testimony was harmless, as it is not reasonably probable that Edwards would have received a more favorable result had the evidence been admitted.

Edwards also claims that in addition to violating state law, the trial court's ruling excluding the hypothetical questioning also violated his constitutional right to due process. (AOB 128.) This contention is waived for failing to raise a constitutional claim below. In any event, it should be rejected, as it is well settled that a trial court's proper application of the "ordinary rules of evidence" does not, except in extremely rare circumstances, amount to a constitutional violation. (*People v. Hall* (1986) 41 Cal.3d 826, 834; *People v. Catlin*, *supra*, 26 Cal.4th at p. 133, fn. 12.)

B. The Trial Court Properly Excluded Evidence That Edwards Stated That He Could Not Recall Two Specific Incidents as Inadmissible Hearsay

Edwards contends that the trial court improperly excluded Edwards' statements that he did not recall, after drinking heavily, a fight with his girl-friend, and an incident when he did not recall where he had put groceries the night before. (AOB 133-140.) Edwards contends that the prosecution's hearsay objections in both instances were improperly sustained because the

statements were offered to prove Edwards' then existing state of mind and were circumstantial evidence that he had similarly "blacked out" when he committed the homicides. (AOB 136-137.) Edwards' claim should be rejected. The trial court properly excluded the statements because they were inadmissable as hearsay. In any event, any error was harmless because Hunt did testify that Edwards suffered from blackouts and testified to a time when Edwards forgot where he parked his car after a night of heavy drinking.

During Edwards' case, Vincent Portillo, Edwards' first cousin, testified that he lived in Maui for a month in 1991 and 1992. (IX RT 2713.) At that time, Edwards' girlfriend was named "Brenda." (IX RT 2713.) One night, Portillo spent a night of heavy drinking with Edwards and Brenda. (IX RT 2713.) Portillo said Brenda hit Edwards several times. Edwards blocked her hits, but could not hit her back because he was driving at the time. (IX RT 2714.) Portillo spent that night at Edwards' home. (IX RT 2715.) The next morning, Edwards did not appear to be upset with Brenda. (IX RT 2715.) The following questioning took place between Edwards' counsel and Portillo:

> Q. Now, on the following day after this incident, this just calls for what you said on the following day after this incident, did you mention the incident to Rob [Edwards]?
>
> A. Yes, I did.
>
> Q. Now, did Mr. Edwards reply back to you that he did not recall any of it?
>
> Mr. BRENT: Your honor, that, of course, calls for hearsay, and I would object to it.
>
> Mr. BATES: Your honor, on that issue I would offer it not as hearsay at all but as circumstantial evidence of an alcoholic blackout and pursuant to 1250 of the Evidence Code, your honor.
>
> Mr. BRENT: No foundation that ties into any kind of blackout.
>
> THE COURT: Sustained.

(IX RT 2715-2716.)

Janice Hunt, who lived with Edwards in December 1992, also testified on behalf of the defense. (IX RT 2634-2675.) Hunt testified that Edwards was a heavy drinker, regularly drinking about 12 to 24 cans of beer in a span of three to four hours. (IX RT 2637-2638.) In December 1992, Edwards' father was killed in a plane crash. (IX RT 2638.) Thereafter, Edwards became more quiet, depressed, and he began to drink more heavily. (IX RT 2639.) According to Hunt, there were occasions where Edwards drank so heavily he actually experienced alcoholic blackouts. (IX RT 2639.)

Hunt described a time where she and Edwards went to search for his truck the morning after he had drank heavily the night before. (IX RT 2641.) Hunt was with Edwards the night before and she saw him drinking heavily. He left in his truck. The next morning the truck was not at their home, and she and Edwards went to search for it. (IX RT 2642.)

Hunt also testified about a time when she found a bag of groceries with items that needed to be refrigerated in or near her car. (IX RT 2643-2644.) The night before Edwards had been drinking heavily, and Hunt had asked Edwards to pick up a few items from the store. (IX RT 2644-2645.) The following colloquy took place between defense counsel and Hunt:

Q. And did you confront Mr. Edwards with your finding?

A. When I –

Mr. BRENT: Objection, nonresponsive.

THE COURT: Sustained.

Q. BY Mr. SEVERIN: Did you tell him that you had found these things down there?

A. Yes.

Q. And what was his response?

Mr. BRENT: Objection, calls for hearsay.

Mr. SEVERIN: Your honor, it is not offered for its truth, state of mind.

THE COURT: The objection is sustained.

Q. BY Mr. SEVERIN: You showed Mr. Edwards the items?

A. Yes.

Q. How did he appear when you showed him the items?

Mr. BRENT: Objection, relevance.

THE COURT: Overruled.

THE WITNESS: Surprised.

Q. BY Mr. SEVERIN: Did you tell him where you found them?

A. Yes.

(IX RT 2645-2646.)

1. Edwards' Proffered Statements Constituted Inadmissible Hearsay

Evidence Code section 1250 provides in pertinent part that,

> evidence of a statement of the declarant's then existing state of mind ... is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind ... at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant.

(Evid.Code, § 1250, subd. (a).) In order for a hearsay statement to be admissible under this exception it must be a statement of the hearsay declarant's "then existing state of mind." (*Ibid.*) The trial court's evidentiary rulings are reviewed under an abuse of discretion standard. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.)

In the present case, defense counsel asked Portillo, "Now, did Mr. Edwards reply back to you that he did not recall any of it?" (IX RT 2715.) The prosecutor's objection was sustained on hearsay grounds. (IX RT 2715.) Edwards argued that it was not hearsay but a statement of his then existing state of mind and as circumstantial evidence of an alcoholic blackout. (IX RT 2715-2716.) Contrary to Edwards' assertions, the proffered statement says nothing at all about Edwards' state of mind at the time the hearsay declaration was

made. The hearsay statement was, rather, a statement of Edwards' memory or belief, namely his belief that he did not remember the fight between him and Brenda the night before. This type of statement is strictly excluded from the hearsay exception under Evidence Code section 1250, subdivision (b), which states, "This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."[17] The statement in question here indicated that Edwards believed that events had occurred in the past that he did not remember, and was being offered to prove the truth of the matter asserted-that Edwards had suffered such memory lapse.

Likewise, with respect to his proffered statements to Hunt, Edwards was again attempting to admit statements that he did not remember putting the groceries by the car. For the same reason, Evidence Code section 1250, subdivision (b), prohibits its admission under the state of mind exception to the hearsay rule set forth in that section.

Moreover, as the prosecutor argued, there was no foundation set that Edwards' lack of memory of events at some time in the past was even relevant to Edwards' state of mind at a time that his state of mind was at issue, as also required by Evidence Code section 1250. For these reasons, the trial court did not abuse its discretion in excluding Edwards' statements to Portillo and Hunt that he did not remember certain events.

2. Any Error Was Harmless

A judgment will be reversed on the grounds of erroneously admitted or excluded evidence only where it is reasonably probable a result more favorable to the defendant would have been obtained. (*People v. Watson* (1956)

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17. Edwards mistakenly quotes Evidence Code section 1250, subdivision (b), as stating that the section "does not make *inadmissible* [sic] evidence of a statement of memory or belief to prove the fact remembered or believed." (AOB 136, italics added.)

46 Cal.2d 818, 836.) Here, any error in excluding the statements was harmless because evidence that Edwards suffered alcoholic blackouts and that he did not remember certain incidents after drinking heavily were nonetheless admitted. In addition to Edwards' own testimony that he suffered blackouts, Hunt also testified to that effect. Hunt testified that Edwards was a heavy drinker, regularly drinking about 12 to 24 cans of beer in a span of three to four hours. (IX RT 2637-2638.) After the death of Edwards' father, Edwards began to drink more heavily. (IX RT 2638-2639.) According to Hunt, there were occasions where Edwards drank so heavily he actually experienced alcoholic blackouts. (IX RT 2639.)

Hunt also testified about an incident where Edwards could not remember where he left his truck the night before after drinking heavily, thus implying that Edwards suffered an alcoholic blackout. (IX RT 2641-2642.) Even during the questioning of Hunt where Edwards' statements were excluded, Hunt was able to testify that Edwards was surprised to find groceries left beside their car. (IX RT 2646.)

Thus, while a couple of the prosecution's objections were sustained and the statements were excluded, evidence that Edwards suffered blackouts and he forgot specific incidents after drinking heavily were nonetheless admitted. The jury was presented with Edwards' defense which included his testimony and corroboration by other witnesses. However, Edwards' defense was rejected by the jury. Therefore, even if Edwards' statement were admissible, any error in their exclusion was harmless because it is not reasonably probable that Edwards would have enjoyed a more favorable outcome even if they had been admitted.

In addition, due process does not guarantee defendant the right to introduce relevant hearsay evidence. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 42 [116 S.Ct. 2013, 135 L.Ed.2d 361] (plur. opin. of Scalia, J.) ["the

proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible"].) "'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.' *Taylor v. Illinois,* 484 U.S. 400, 410, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988)." (*Montana v. Egelhoff, supra,* 518 U.S. at p. 42.)

Evidence Code section 354, which provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice. . . ." Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103.) As stated above, Edwards' defense was not completely excluded. There was no due process violation.

C. The Trial Court Properly Excluded Deeble's Alleged Statements to Roy That Valentine Took Things Out of Her Apartment and Roy's Opinion That Deeble Removed the Key to Her Home From the Drainpipe to Keep Her Children From Entering Her Home

Edwards contends that the trial court improperly excluded a statement made by the victim to her boyfriend, Roy, that Valentine would take things out of her apartment, and Roy's opinion that he believed Deeble removed the key from the drainpipe so her children would not be able to get into her home. (AOB 140-145.) Edwards claims that the statement was not hearsay but was admissible as evidence of her then existing state of mind. (AOB 143.) Additionally, Edwards argues that Roy's opinion that Deeble removed the key was admissible lay opinion. (AOB 144.) These arguments are without merit.

The trial court acted within its discretion in excluding the evidence because the statement purportedly made by Deeble was inadmissible hearsay, and Roy's opinion was irrelevant and speculative.

Edwards subpoenaed Roy to testify. (III CT 816; IX RT 2758.) However, Roy claimed that he was not required to testify because he was a "sovereign citizen."[18] (IX RT 2758.) While Roy appeared in court, he was "willfully evasive" and answered all questions with, "I don't recall." (IV RT 2751-2755.) The prosecutor proposed that the defense should make their offer of proof regarding Roy's testimony, the prosecutor could object accordingly, and the trial court could rule. (IX RT 2759.) The defense proffered that according to a statement Roy made to Sgt. Jessen on August 4, 1986, Deeble told Roy that "Kathy would come into the apartment sometimes when [Deeble] was not there and would take things out of the apartment which would upset the victim quite a bit." (IX RT 2761.) Edwards also proffered, "as to her frame of mind near in time to her demise, she also told Mr. Roy that – or his impression, he feels that the victim finally removed the key from its hiding place in the drain pipe so that the kids could not get into the house while she was gone." (IX RT 2761.) Edwards argued that Deeble's statement to Roy and Roy's opinion were admissible as to her state of mind "near in time to her demise." (IX RT 2761.)

The prosecutor objected to Deeble's statements to Roy and Roy's opinion as hearsay, irrelevant, and "it gets into third party culpability for which the defense has no evidence to link to anybody." (IX RT 2763-2764.) The trial court sustained the objection to Deeble's statement as irrelevant. (IX RT 2765.)

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18. Roy filed an affidavit with the trial court in which he asserted that the government is not his sovereign, but rather, God is. (III CT 793.) He asserted that he is not a citizen of the United States, but a "non resident alien" and free of the jurisdiction of the United States and the State of California. (III CT 794-795.)

The trial court also found Roy's opinion that the key was removed as irrelevant. The trial court pointed out that Edwards never even asked Valentine whether she took any jewelry from Deeble's home when Valentine testified. (IX RT 2767.)

Evidence Code section 210 states that "'[r]elevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evidence Code section 350 provides that "[n]o evidence is admissible except relevant evidence." Section 352 permits a court in its discretion to exclude evidence;

> [i]f 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.

An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including a ruling concerning the relevance of evidence. (*People v. Waidla, supra,* 22 Cal.4th at p. 717.) Likewise, a trial court's decision to admit evidence pursuant to section 352 "'will not be disturbed on appeal unless there is a manifest abuse of [its] discretion resulting in a miscarriage of justice.' [Citation.]" (*People v. Cain* (1995) 10 Cal.4th 1, 33.)

Moreover, a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under Evidence Code section 352. (*People v. Williams* (1997) 16 Cal.4th 153, 213.) Thus, we may "infer an implicit weighing by the trial court on the basis of record indications well short of an express statement." (*People v. Padilla* (1995) 11 Cal.4th 891, 924, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823.)

As set forth above, Evidence Code section 1250, subdivision (a), provides that evidence of a statement of a declarant's then existing state of mind is not made inadmissible by the hearsay rule when the evidence is offered to prove the declarant's state of mind, emotion or physical sensation at the time or is offered to prove or explain acts or conduct by the declarant.

Here, the trial court did not abuse its discretion in ruling that Roy's statement to Sgt. Jessen that Deeble told him that Valentine took things from her apartment were irrelevant and inadmissible hearsay. Edwards' offer of proof never specified, nor was the foundation established, as to when Deeble made those statements to Roy. Thus, there was no foundation that Deeble's statement was even relevant to her state of mind at that time. Moreover, as the prosecutor noted, Deeble's state of mind at the time of her death was not relevant to any issue in the present action.

Furthermore, Roy's opinion about what Deeble did or did not do with the key in the drainpipe was properly excluded. Roy's "impression" of what Deeble did with the key was purely speculative and would serve to mislead the jury. No evidence was proffered that Roy had any personal knowledge that Deeble actually did anything with the key.

Edwards' claim that the evidence was admissible as a statement against his interest pursuant to Evidence Code section 1230[19/] is likewise without merit.

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19. Evidence Code section 1230 provides:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability . . . or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community that a reasonable man in his position would not have made the statement unless he believed it to be true.

The justification for receiving in evidence statements against penal interest by an unavailable witness lies in the assumption that they have a high degree of trustworthiness due to a person's natural desire to avoid criminally or civilly implicating himself or herself. (*People v. Spriggs* (1964) 60 Cal.2d 868, 874-875; Cal.Jur.3d Evidence § 281.) Deeble's statement about her daughter possibly taking things from her home did not constitute a statement against penal interest. The statement did not involve a risk to Deeble's pecuniary or proprietary interest, did not implicate her criminally or civilly and did not risk making her the object of hatred or ridicule. Thus, it was properly excluded.

Finally, any error in the exclusion of this evidence was harmless and did not present a due process violation because of the significant evidence of Edwards' guilt, as discussed above. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

D. The Trial Court Did Not Abuse Its Discretion in Excluding a Statement by Valentine and Evidence About Edwards' Concern and His Thoughts About Being at the Police Station

Edwards claims that the trial court improperly excluded evidence of his surprised reaction to the news of Deeble's murder. (AOB 146-148.) The trial court properly excluded Valentine's statement as hearsay, and evidence of Edwards' concern and thoughts about being at the police station were irrelevant and untrustworthy. In any event, any error was harmless because evidence that Edwards was not afraid to go to the police station was nonetheless admitted.

Edwards testified that he and Valentine went to the police station together. (IX RT 2594.) After learning of her mother's death, Valentine went into the lobby and told Edwards about Deeble's death. (IX RT 2595.) The following exchange then took place between Edwards and defense counsel:

Q. Do you remember what she told you?

Mr. BRENT: Objection, Calls for hearsay, relevance.

THE COURT: Sustained.

Mr. SEVERIN: It is not offered for the truth, your honor.

THE COURT: It is irrelevant.

Mr. SEVERIN: It is state of mind.

THE COURT: The objection is sustained.

Q. BY Mr. SEVERIN: Mr. Edwards, were you concerned at all about being at the Los Alamitos police department with Kathy Deeble on that date?

Mr. BRENT: Objection, relevance.

THE COURT: Sustained.

Q. BY Mr. SEVERIN: When you left your aunt's residence to drive Miss Deeble to the Los Alamitos Police Department, what were you thinking?

Mr. BRENT: Objection, relevance.

THE COURT: Sustained.

Q. BY Mr. SEVERIN: Did you have any fear about going to the Los Alamitos Police Department with her?

A. No, Sir.

Mr. BRENT: Objection, relevance.

THE COURT: Overruled.

Q. BY Mr. SEVERIN: What was the answer?

A. No, Sir, I didn't.

(IX RT 2595-2596.)

Evidence Code section 210 provides that "'[r]elevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Here, what Valentine told Edwards at the police station was inadmissible hearsay and was irrelevant. It did not prove or disprove any disputed fact because there was no question that Deeble was dead. Moreover, whether Edwards was concerned or not about being in the police station was vague, irrelevant and untrustworthy.

Whether Edwards was concerned did not have any consequence to the determination of the action. Finally, what he was thinking when he left his aunt's house to go to the police department was also irrelevant and self-serving. These self-serving statements were properly excluded as they were not "made under circumstances such as to indicate [their] lack of trustworthiness." (Evid. Code, § 1252; see *People v. Smith* (2003) 30 Cal.4th 581, 629 [defendant's statements to his wife, which might have been relevant state-of-mind evidence at penalty phase to show he had remorse for his crimes, were properly excluded as "untrustworthy because [defendant's] primary motivation in making them was to placate her"].)

Edwards also argues that his statements should have been admitted because they are analogous to "furtive actions after the commission of the crime" or "flight after crime" which can "properly be considered by the jury as an indication of guilt." (AOB 147.) Edwards' argument should be rejected because so-called "consciousness of innocence" evidence is inadmissible. "We reaffirm the California rule to the effect that exculpatory extrajudicial statements of a defendant . . . are not admissible because they indicate a lack of consciousness of guilt." (*People v. Cruz* (1968) 264 Cal.App.2d 350, 361; see *People v. Green* (1980) 27 Cal.3d 1, 39, disapproved on other grounds by *People v. Martinez* (1999) 20 Cal.4th 225, 233-237; *People v. Harvey*, *supra*, 163 Cal.App.3d at pp. 114-115 [evidence of defendant's cooperation with police properly excluded]; *People v. Doran* (1972) 24 Cal.App.3d 316, 321, disapproved on other grounds by *People v. Beamon* (1973) 8 Cal.3d 625, 629, fn. 2 [trial court properly excluded evidence arresting officer took off defendant's handcuffs while they ate and yet defendant did not try to escape].)

In any event, any error in the exclusion of evidence was harmless. Further questioning, which was more specifically phrased, was admitted to show that Edwards was not afraid to go to the police station. Defense counsel

asked Edwards, "Did you have any fear about going to the Los Alamitos Police Department with [Valentine]?" To which Edwards replied, "No, Sir." (IX RT 2595.) Therefore, evidence that showed his allegedly innocent state of mind was nevertheless presented to the jury. There is no reasonable probability that he would have enjoyed a more favorable outcome if the similar questions regarding his "concern" or "thought" had been allowed. (*People v. Harvey*, *supra*, 163 Cal.App.3d at p. 115, fn. 13.)

E. The Trial Court Acted Within Its Discretion in Excluding an Envelop With an Article and Photographs

Edwards argues that the trial court erred in excluding evidence of an envelop addressed to Steve Deeble[20/] and its contents that were found in the southwest bedroom of Deeble's home. (AOB 148-149.) Edwards claims his federal and state due process rights were violated by the exclusion of the article about bondage murder and the photographs of a woman in bondage and of Charles Manson because these items would have rebutted the theory that Edwards murdered Deeble. The trial court acted within its discretion in excluding the evidence pursuant to Evidence Code section 352.

Detective Cantu testified at trial that on May 16, 1986, a flier and an envelop, which were marked as Defense Exhibit C, were recovered from a southwest bedroom of Deeble's home. (VI RT 2025.) The prosecutor later objected to the admission of Defense Exhibit C. (X RT 2842.) The article was about bondage murder and there were photographs of a woman in bondage and of Charles Manson. The envelop was addressed to Steve Deeble. (X RT 2843.) Edwards argued that the evidence should be admitted because:

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20. Steve Deeble is Marjorie Deeble's adult son who had moved out of Deeble's home and lived in the Long Beach area at the time of Deeble's murder. (VII RT 2089, 2094.)

> it shows an interest in exactly the kind of homicide that was committed in this case by Mr. Steve Deeble. It also tends to connect him to the location of the homicide. . . . [¶] Anybody's common sense would dictate the common sense of the police officers was that it was a coincidence that surpassed all credulity that you would have literature about a bondage murder right next to a bondage murder with somebody's name on it and have it be unconnected with the bondage murder that they were investigating. [¶] So on those grounds it tends to connect Mr. Steve Deeble not only to the location to the crime, but as to the exact nature of the crime.

(X RT 2843.) The trial court sustained the prosecutions objection, reasoning:

> This article under [Evidence Code section] 352, I mean if it is offered to show that Steve Deeble could have been the perpetrator, you don't cross the threshold. The article on bondage is not even remotely similar to the evidence in this case. The photograph – I have seen similar photographs in smut materials that have been in this court before. It is just, you know, confusing, not helpful to the defense and, et cetera, et cetera, et cetera.

(X RT 2845.)

Evidence tending to show that someone other than the Edwards committed the charged offense is admissible if it could raise a reasonable doubt about the Edwards' guilt. (*People v. Avila* (2006) 38 Cal.4th 491, 577-578; *People v. Lewis* (2001) 26 Cal.4th 334, 372.) However, evidence that a third person merely had a motive or opportunity to commit the crime is insufficient to raise such doubt, and as such, inadmissible. (*People v. Geier* (2007) 41 Cal.4th 555, 581; *People v. Avila, supra*, 38 Cal.4th at pp. 577-578; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1017.) In order for third-party culpability evidence to be admissible, there must be "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Geier, supra*, 41 Cal.4th at p. 581, quoting *People v. Hall, supra*, 41 Cal.3d at p. 833; see also *People v. Edelbacher, supra*, 47 Cal.3d at p. 1017.)

This Court has held that trial courts should treat evidence of third-party culpability "like any other evidence, if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion. ([Evid. Code,] § 352)." (*People v. Lewis, supra*, 26 Cal.4th at p. 372; *People v. Avila*, *supra*, 38 Cal.4th at p. 578.) Section 352 permits a court in its discretion to exclude evidence;

> [i]f 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.

(§ 352.) A trial court's decision to exclude evidence of third-party culpability is reviewed for an abuse of discretion. (*People v. Lewis, supra*, 26 Cal.4th at pp. 372-373.)

Moreover, a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under Evidence Code section 352. (*People v. Williams*, *supra*, 16 Cal.4th at p. 213.) Thus, we may "infer an implicit weighing by the trial court on the basis of record indications well short of an express statement." (*People v. Padilla*, *supra*, 11 Cal.4th at p. 924, overruled on another point in *People v. Hill*, *supra*, 17 Cal.4th at p. 823.)

Here, the trial court properly excluded the envelop addressed to Steve Deeble and the article and photographs contained therein. A generic article and photographs that did not pertain to this particular case were not "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall, supra*, 41 Cal.3d at p. 833.) As the trial court stated, the article did not "cross the threshold" regarding whether "Steve Deeble could have been the perpetrator." (X RT 2845.) Contrary to Edwards' assertions below, the items found in the bedroom did not connect Steve Deeble to the

location of the crime. (X RT 2843.) There was no evidence presented regarding how or when the items got to Deeble's residence. As the trial court also pointed out, the article on bondage was "not even remotely similar to the evidence in this case" and the photographs were not out of the ordinary in terms of pornographic materials. The proffered evidence was insufficient to link Steve Deeble to the actual perpetration of the crime, nor was the evidence sufficient to demonstrate that the article and photographs could have raised a reasonable doubt as to Edwards' guilt.

The trial court also acted within its discretion in ruling that the evidence was more prejudicial than probative because the admission of the photographs and article would have caused jury confusion. The admission of the proffered evidence would have necessitated an undue consumption of time on a collateral issue, necessitating a mini-trial on Steve Deeble's involvement based on an article and photographs that failed to provide any information about the actual offense. (See *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1136.) This would have confused the jury. Thus, the trial court did not abuse its discretion in admitting the evidence.

Assuming arguendo the trial court abused its discretion when it excluded Edwards' proffered third-party culpability evidence, Edwards was not prejudiced as it is not reasonably probable appellant would have enjoyed a more favorable outcome at trial had such evidence been admitted. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see *People v. Bradford* (1997) 15 Cal.4th 1229, 1325 [exclusion of third-party culpability evidence evaluated under *Watson*]; *People v. Hall, supra*, 41 Cal.3d at p. 834.) As set forth above, the evidence of Edwards' guilt was overwhelming, and the article and photographs did not raise a reasonable doubt as to Edwards' guilt. Given that no prejudicial error occurred in the instant case, Edwards' constitutional challenges also fail.

(*People v. Panah* (2005) 35 Cal.4th 395, 482, fn. 31; *People v. Staten* (2000) 24 Cal.4th 434, 456, fn. 4.)

F. Edwards Received a Fair Trial

Edwards contends that the cumulative effect of the allegedly improper exclusion of exculpatory evidence denied him his right to present a defense and to have a fair trial. (AOB 149-150.) Edwards received a fair trial. As the discussion *ante* shows, there were no errors in the trial. In any event, even if there were any errors, as with the individual effects of these errors, if any, their cumulative effect was not prejudicial. (See, e.g., *People v. Horning* (2004) 34 Cal.4th 871, 913 [rejecting cumulative error claim where "[t]here was little, if any, error to accumulate[,] and [d]efendant received a fair trial."]; *People v. Morrison* (2004) 34 Cal.4th 698, 731 [rejecting cumulative error claim where two or three possible errors that occurred in case were minor and harmless, whether considered individually or together]; *People v. Haley* (2004) 34 Cal.4th 283, 317 ["because none of the instructional errors in fact prejudiced defendant, his argument for cumulative prejudice must fail"]; *People v. Coffman* (2004) 34 Cal.4th 1, 128 [rejecting cumulative error claim where cumulative effect of five non-prejudicial errors did not render trial unfair].) A defendant is entitled to a fair trial, not a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214.) Edwards received a fair trial.

VI.

THE EXPERT OPINIONS OF DR. FUKUMOTO, TESTIMONY THAT DELBECQ HAD A SPARE KEY OUTSIDE HER APARTMENT, AND SGT. JESSEN'S TESTIMONY REGARDING WHY HE FOCUSED ON EDWARDS AS A SUSPECT IN THE DEEBLE MURDER, WERE PROPERLY ADMITTED

Edwards claims his rights to due process and to confront adverse witnesses under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated when the trial court admitted testimony and exhibits on several occasions. Specifically, Edwards contends that: (1) the admission of the coroner's opinion that Deeble's injuries were painful and inflicted before death violated Edwards' rights under the confrontation clause as set forth in *Crawford v. Washington* (2004) 541 U.S. 36, 59 (124 S.Ct. 1354, 158 L.Ed.2d 177) (AOB 150-158), and his due process rights were violated because the opinion testimony was not relevant, lacked foundation and was more prejudicial than probative (AOB 158-176); (2) the trial court improperly denied, as untimely, an objection to Ventura's testimony that Delbecq told her that she kept a spare key outside her apartment (AOB 176-179); and (3) Sgt. Jessen's testimony on rebuttal that he focused on Edwards as a suspect in the Deeble murder after receiving information from lab personnel that other suspects were eliminated as donors of semen and fluids at the crime scene was improperly admitted because it was hearsay and was a willful presentation of false evidence that lacked foundation. (AOB 180-192.) Appellant's claims are meritless.

A. The Admission of Dr. Fukumoto's Opinion That Deeble's Injuries Were Painful and Inflicted Before Her Death Did Not Violate Edwards' Right to Confrontation

Edwards argues that his right to confront witnesses under the Sixth Amendment were violated because Dr. Fukumoto's testimony was based largely upon the autopsy report prepared by Dr. Richards, who had retired.

Edwards claims that Dr. Fukumoto's testimony was hearsay, and its admission violated *Crawford*, 541 U.S. 36. (AOB 150-158.) The claim should be deemed forfeited; furthermore, it is meritless.

Dr. Fukumoto is a licensed physician and surgeon specializing in pathology. (VII RT 2121.) Dr. Fukumoto served as a pathologist in the U.S. Army, and had served as Chief of Anatomical Pathology at the Orange County Medical Center. Since 1966, Dr. Fukumoto has been a doctor with the private pathology practice of Richards, Fisher, Fukumoto Medical Group, Inc., which had contracted with the Orange County Sheriff's Department of perform the autopsies in Orange County. (VI RT 2121-2122.)

Dr. Richards, who was a partner in that private practice, performed the autopsy on Deeble. He retired in 1989 or 1990. (VII RT 2122.) Dr. Richards created an autopsy report in the normal course of business. The entries in the report were made "fairly contemporaneous with the specific autopsy that is performed." (VII RT 2123.) As part of the autopsy, Dr. Richards took upwards of 100 photographs of Deeble's body, and created microscopic slides of Deeble's tissues and organs. (VII RT 2123.) Specifically, a microscopic slide was taken of Deeble's vaginal area, which Dr. Fukumoto personally examined. (VII RT 2145.) Dr. Fukumoto personally reviewed all of the photographs and slides taken during the autopsy. (VII RT 2123-2124.) Dr. Fukumoto described that the vaginal and anal areas of the body are highly vascular areas with a lot of nerve endings and blood in that area. Dr. Fukumoto thus opined that trauma to the vaginal and rectal areas would have been very painful. (VII RT 2137-2138.) Dr. Fukumoto also opined that injuries to the vaginal and rectal areas were caused before Deeble died. (VII RT 2138.)

1. Edwards Has Forfeited His Claim

A defendant may not complain for the first time on appeal that the admission of evidence violated the right to confrontation, or any other right under the federal Constitution. (*People v. Boyette* (2002) 29 Cal.4th 381, 424 [due process, reliable penalty determination, and cruel and unusual punishment]; *People v. Alvarez* (1996) 14 Cal.4th 155, 186 [confrontation]; *People v. Zapien* (1993) 4 Cal.4th 929, 979-980 [confrontation]; *People v. Raley* (1992) 2 Cal.4th 870, 892 [confrontation and due process].) In this case, Edwards did not object to Dr. Fukumoto's testimony on grounds that his right to confrontation was violated. At trial, Edwards only objected that there was no foundation to Dr. Fukumoto's testimony that the injuries to Deeble's vaginal and rectal areas were caused before death. (VII RT 2138-2139.)

The Supreme Court's decision in *Crawford*, *supra*, 541 U.S. 36, does not change the fact that Edwards has forfeited his constitutional claim. *Crawford* merely applied the Confrontation Clause. The decision did not create a new constitutional right which was not in existence at the time of Edwards' trial. Thus, if Edwards wished to object on the specific ground that there was a violation of the right to confrontation, he could have done so even before *Crawford*. It remains the rule that in order to preserve an issue for appeal, there must be an objection on a specific basis. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 186.)

2. Dr. Fukumoto's Testimony Was Not Testimonial Within the Meaning of *Crawford v. Washington*, and as an Expert Witness, Dr. Fukumoto Was Entitled to Rely on Hearsay Evidence

Edwards contends that Dr. Fukumoto's opinions that the injuries suffered by Deeble were painful and inflicted before her death violated his Sixth Amendment right to confrontation because Dr. Fukumoto relied on an

autopsy report and evidence from the autopsy performed by Dr. Richards, who was retired at the time of trial. (AOB 150-158.) Edwards' argument should be rejected, as Dr. Fukumoto's opinions were not testimonial under *Crawford*. Furthermore, *Crawford* does not change this long-standing rule that an expert's opinion may be based on matter, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates.

"The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides, 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" (*Idaho v. Wright* (1990) 497 U.S. 805, 813 [110 S.Ct. 3139, 111 L.Ed.2d 638].) In *Crawford*, the Supreme Court held that the Sixth Amendment right to confrontation in criminal cases prohibits testimonial hearsay evidence when the declarant is unavailable and the defendant had no prior opportunity to cross-examine the declarant. (*Crawford, supra*, 541 U.S. at pp. 68-69; *People v. Geier*, *supra*, 41 Cal.4th at p. 597.) Although the high court in *Crawford* declined to provide a comprehensive definition of "testimonial[,]" it did provide illustrations of statements that could be considered testimonial. Specifically, the court referenced, "ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"; and police interrogations. (*Crawford, supra*, 541 U.S. at pp. 51-52.) The court stated that at the very least

"testimonial" means "testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p. 68.) In discussing whether historical sources supported the conclusion there were exceptions to the general rule of exclusion of hearsay evidence, the court noted most of the hearsay exceptions covered statements that were not "testimonial" such as business records. (*Id.* at pp. 53-56; *People v. Geier, supra*, 41 Cal.4th at p. 598.) The United States Supreme Court made it clear in *Crawford* that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ." (*Crawford, supra*, 541 U.S. at pp. 50-52.)

In *Davis v. Washington* (2006) 547 U.S. 813 (126 S.Ct. 2266, 2273, 165 L.Ed.2d 224), the United States Supreme Court further clarified that not all statements made during police interrogation are "testimonial." The high court explained that the kind of interrogation it had in mind when it decided *Crawford* was one "solely directed to establishing facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." (*Id.*, at p. 2276.)

This Court in *People v. Geier, supra*, 41 Cal.4th at page 598, addressed "whether the admission of scientific evidence, like laboratory reports, constitutes a testimonial statement that is inadmissible unless the person who prepared the report testifies or *Crawford*'s conditions – unavailability and a prior opportunity for cross-examination – are met."

One of the issues in *People v. Geier*, a capital murder case, was whether the People's expert could rely upon DNA test results to formulate her opinion that the defendant's DNA and that extracted from one of the victims matched even though the expert did not run the tests herself and the analyst who ran them did not testify. The defendant asserted that the DNA report, which formed the basis of the expert's testimony, was testimonial because it was "made under circumstances that would lead an objective witness reasonably to

believe that the statement would be available for use at a later trial." (*People v. Geier*, *supra*, 41 Cal.4th at p. 598.) This Court rejected that argument. (*Id.* at p. 605.)

Based upon an interpretation of *Crawford* and *Davis,* this Court in *Geier* ruled that to be testimonial, a statement must be: (1) made to a law enforcement officer or agent, and (2) describe a past fact related to criminal activity for (3) possible use at a later trial. (*Ibid.*) This court ruled that the DNA test results, upon which the expert relied, were not testimonial under these criteria. (*Id.* at p. 607.) Most importantly, the analyst who conducted the DNA test "recorded her observations regarding the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks." (*Id.* at pp. 605-606.) Thus, her observations "constitute[d] a contemporaneous recordation of observable events rather than the documentation of past events." (*Id.* at p. 605.) Like the victim in *Davis,* when she made these observations, she was neither acting as a witness nor testifying. (*Id.* at p. 606.)

Further, this Court in *Geier* interpreted *Davis* as requiring it to consider the circumstances under which the out-of-court statement was made to determine whether it is testimonial. (*Id.* at p. 607.) These circumstances, the court ruled, further indicated that the DNA test results were not testimonial. The analyst who generated the report and notes did so "as part of a standardized scientific protocol." (*Ibid.*) Further, she did so "as part of her job, not . . . to incriminate [the] defendant." (*Ibid.*) Moreover, merely recounting the procedures she used was not "accusatory, as DNA analysis can lead to either incriminatory or exculpatory results." (*Ibid.*) Finally, the accusatory opinions "were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying [expert] witness." (*Ibid.*)

Under these circumstances, the analyst did not "bear witness" against the defendant. (*People v. Geier*, *supra*, 41 Cal.4th at p. 607.)

The present case is analogous to the situation in *Geier.* Here, Dr. Richards performed the autopsy, but had retired at the time of trial. (VII RT 2122.) Dr. Fukumoto was the expert witness who testified at trial after reviewing the autopsy report and the slides and photographs taken during the autopsy. (VII RT 2123, 2124.) Dr. Fukumoto and Dr. Richards were partners in the same pathology medical group. (VII RT 2121.) Even if it is assumed that the autopsy report was prepared on behalf of law enforcement within the meaning of the first and third prongs of the test enunciated in *Greier*, because Dr. Richards' medical group was under contract by the Orange County Sheriff's Department to perform autopsies, and the statements therein were prepared for possible use in a trial, the autopsy report and supporting materials are not testimonial. (See VII RT 2121-2122.) However, like the *Geier* case, the statements in the autopsy report "constitute[d] a contemporaneous recordation of observable events rather than the documentation of past events." (*Id.* at p. 605.) The autopsy report was created by Dr. Richards in the normal course of business at their medical group. (VII RT 2123.) The entries in the autopsy report were made "fairly contemporaneous with the specific autopsy" that was performed. (VII RT 2123.) The photographs and microscopic slides were made at the time of the autopsy. (VII RT 2123.) Moreover, the observations made in the report were not "accusatory," as the autopsy findings could have "lead to either incriminatory or exculpatory results." (*People v. Geier, supra*, 41 Cal.4th at p. 607.) Finally, the accusatory opinions about which Edwards complains, namely that the injuries to Deeble were painful and inflicted before death "were reached and conveyed not through the nontestifying [pathologist's] notes and report, but by the testifying [expert] witness." (*Ibid.*) Under these circumstances, Dr. Richards did not "bear

witness" against the Edwards. (*People v. Geier*, *supra*, 41 Cal.4th at p. 607.) Thus, Dr. Fukumoto's opinions did not violate Edwardss right under the confrontation clause, as they were not "testimonial" under *Crawford* and *Davis*.

Furthermore, the rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay. (See *People v. Gardeley*, *supra*, 14 Cal.4th at pp. 618-619; Evid. Code, § 801, subd. (b) [an expert's opinion may be based on matter "whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, . . ."].) The United States Supreme Court's opinion in *Crawford, supra*, 541 U.S. 36, does not change this long-standing rule. Even if the autopsy report prepared by Dr. Richards constitutes testimonial evidence, the Confrontation Clause does not bar the use of testimonial statements "for purposes other than establishing the truth of the matter asserted." (*Id.* at p. 59, fn. 9; see also *Tennessee v. Street* (1985) 471 U.S. 409, 414 [105 S.Ct. 2078, 85 L.Ed.2d 425].) Accordingly, *Crawford* does not undermine the long-standing rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions.

This is so for two reasons. First, the materials upon which the expert relies are not elicited for their truth but, rather, are examined to assess the weight of the expert's opinion. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210; *People v. Fulcher* (2006) 136 Cal.App.4th 41, 56-57; see also *Delaware v. Fensterer* (1985) 474 U.S. 15, 19 [106 S.Ct. 292, 88 L. Ed.2d 15]; *People v. Coleman* (1985) 38 Cal.3d 69, 90, 92-93.) Secondly, an expert is subject to cross-examination about his or her opinions. (*People v. Thomas*, *supra*, 130 Cal.App.4th at p. 1210.)

The court in *People v. Brown* (2001) 91 Cal.App.4th 623, after noting that the second analyst's report was properly admissible as a business record, determined that the testifying analyst could properly base her expert opinion on the non-testifying analyst's report. In *Brown*, the defendant claimed the prosecution failed to salsify the *Kelly*[21] test of admissibility because it did not call a second DNA analyst to testify as to the procedures she employed in testing the evidence; instead, the prosecution relied upon the testimony of another analyst from the same laboratory who testified that the proper procedures were followed. The *Brown* court reasoned:

> We agree with the conclusion of a New Jersey court:
>
> > We reject the notion that the tests were rendered inadmissible because of the State's failure to call Dr. Blake's assistant, Ms. Mihalovich. Dr. Blake was permitted to rely on facts or data made known to him prior to his testimony of a type reasonably relied on by experts in forming and rendering opinions upon the subject in question. [Citation.] Indeed, an expert's testimony may be based on the work done or even hearsay evidence of another expert, particularly when, as here, the latter's work is supervised by the former. [Citation.]

(*People v. Brown, supra,* 91 Cal.App.4th at p. 653, quoting *State v. Dishon* (1997) 297 N.J.Super. 254, 280-281 [687 A.2d 1074, 1087].)

An expert's recitation of sources relied upon for an opinion "does not transform inadmissible matter into 'independent proof' of any fact." (*People v. Gardeley, supra,* 14 Cal.4th at p. 619.) The Confrontation Clause is satisfied in such circumstances because the defendant is able to cross-examine the expert rendering the opinion. If Dr. Fukumoto had been unable to explain the basis for his opinion that the injuries to Deeble were painful and inflicted before death, then they would not have been entitled to any weight. Indeed, *People v. Campos* makes this abundantly clear: "On direct examination, the expert

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21. *People v. Kelly* (1976) 17 Cal.3d 24.

witness may state the reasons for his or her opinion, and testify that reports prepared by other experts were a basis for that opinion." (*People v. Campos* (1995) 32 Cal.App.4th 304, 307-308, citing *People v. Coleman*, *supra*, 38 Cal.3d at p. 92.)

Here, Dr. Fukumoto testified based on his own expertise, which he outlined at the beginning of his testimony. (VII RT 2121-2122.) While Dr. Fukumoto relied on the report prepared by Dr. Richards to form his opinions, Dr. Fukumoto personally reviewed the photographs, slides and x-rays to come to his own findings and opinions about Deeble's injuries. For instance, when Dr. Richards described that the scratch on Deeble's foot were caused by wires coming together, Dr. Fukumoto testified that his opinion was "consistent" with Dr. Richard's findings. (VII RT 2130.) Moreover, when Dr. Fukumoto opined that the injuries to Deeble's vaginal and rectal areas were inflicted before death, he testified that he was basing his opinion on his examination of the microscopic slides. (VII RT 2138.) Dr. Fukumoto also testified about things he would have done differently than Dr. Richards. For example, Dr. Fukumoto testified that he would have taken more sections or microscopic slides. (VII RT 2142.) He would have taken a microscopic section of the ear drum to examine the incisional injury to Deeble. (VII RT 2142.) While Dr. Fukumoto reviewed the x-rays of Deeble's nose and noticed some flattening that were consistent with a fracture (VII RT 2142-2143), Dr. Fukumoto would have also taken a microscopic slide to date the age of the injury to the nose. (VII RT 2143.) Thus, while Dr. Fukumoto relied on Dr. Richard's autopsy report, the opinions he testified to were his own opinions based on his own personal review of the report, the photographs, x-rays and the slides. Dr. Fukumoto did not just relate the contents of Dr. Richard's report.

Dr. Richard's autopsy report, slides, photographs and X-rays provided a reliable basis for Dr. Fukumoto's opinion, regardless of whether the autopsy

report was testimonial. The rule in *Crawford* is no bar to the use of this sort of hearsay as the basis for expert testimony. Dr. Fukumoto's testimony about the contents of Dr. Richard's report was admitted for a nontestimonial purpose, as that information provided the basis for Dr. Fukumoto's opinion. Edwards had an adequate opportunity at trial to cross-examine Dr. Fukumoto and to impeach his opinion by calling another expert. Moreover, the jury was instructed it was "not bound to accept an expert opinion as conclusive" and the jury could "disregard" the expert's testimony should they "find it to be unreasonable." (III CT 939; XI RT 3123; CALJIC No. 2.80.) Thus, even assuming *arguendo* that the autopsy report was "testimonial," its admission as a basis for Dr. Fukumoto's expert opinion did not violate Edwards' confrontation rights under *Crawford*.

3. The Trial Court Acted Within Its Discretion in Admitting the Expert Testimony Regarding the Pain Deeble Suffered and That the Injuries Were Inflicted Before Her Death

Edwards also claims that even if Dr. Fukumoto's testimony did not violate his right to confrontation, his opinions that her injuries were painful and occurred before death were nevertheless erroneously admitted in violation of his due process rights because the opinions lacked proper foundation, were irrelevant and their admission was more prejudicial than probative. (AOB 158-174.) Specifically, Edwards contends that the jurors were capable of drawing their own conclusions whether the injuries were painful without the expert's opinion (AOB 159-160), Dr. Fukumoto's opinion about pain felt by Deeble was outside his area of expertise (AOB 164-170), and his opinions were conclusory (AOB 170-172). The trial court acted within its discretion in admitting the expert opinion testimony of Dr. Fukumoto because his testimony regarding the pain suffered by Deeble was beyond the common experience of an average juror. Moreover, there was proper foundation laid for

Dr. Fukumoto's testimony. Finally, his expert opinions were more probative than prejudicial.

An expert witness is someone with "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720.) An expert witness may testify if the testimony is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a); *People v. Gardeley*, *supra,* 14 Cal.4th at p. 617.) The admissibility of expert opinion is a question of degree. When

> "the jury has some knowledge of the matter, expert opinion may be admitted [if] it would 'assist' the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.'" [Citation.]

(*People v. McAlpin*, *supra*, 53 Cal.3d at pp. 1299-1300.) Admission of opinion evidence is reviewed on appeal for abuse of discretion. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1207, overruled on other grounds by *People v. Griffin*, *supra*, 33 Cal.4th at p. 555 fn. 5.) In this case, the trial court properly allowed the testimony of Dr. Fukumoto.

Dr. Fukumoto's testimony and expert opinion about the pain suffered by Deeble "assisted" the jury in determining whether Deeble experienced "extreme physical pain" as required to prove the torture special circumstance. Dr. Fukumoto's medical expertise was helpful because his expertise and training involved the human anatomy, particularly regarding the numerous nerve endings present in the vaginal and rectal areas, which Dr. Fukumoto described as being "highly vascular." (VII RT 2137-2138.) Additionally, Dr. Fukumoto described the pain which would have been felt when Deeble's ear drums tore as a result of the pressure from the ligature around her neck. (VII RT 2127-2128.) Because of his medical expertise, Dr. Fukumoto was able

to differentiate this injury from the extremely painful injury to Deeble's ear that was caused by the incision from a sharp instrument which was separate from the one caused by the ligature. (VII RT 2128-2129.) This sort of medical expertise is beyond the common knowledge of the average juror.

Edwards also argues that a proper foundation was not laid for Dr. Fukumoto's testimony. (AOB 163-172.) Edwards claims that Dr. Fukumoto's opinions regarding pain response and whether injuries were inflicted before death were not within his area of expertise. (AOB 164, 169.) Edwards' argument is without merit.

Dr. Fukumoto testified that he was a licensed physician, surgeon and a specialist in pathology. (VII RT 2121.) He was a pathologist with the U.S. Army and served as the Chief of Anatomical Pathology at the Orange County Medical Center. (VII RT 2121.) At the time of trial, he had been a pathologist with the private practice of Richards, Fisher, Fukumoto Medical Group, Inc. for approximately 30 years. (VII RT 2121.) Dr. Fukumoto had conducted over 12,000 autopsies and qualified as an expert in pathology throughout the courts of this state on numerous occasions. (VII RT 2121.)

Edwards claims that only a neurologist should have been able to give an opinion about whether pain was suffered.[22/] (AOB 170.) However, by virtue of his medical training and specialty in pathology, Dr. Fukumoto surely had an expertise on the human body and which areas would be highly vascular and which areas had a lot of nerve endings, thus causing more pain. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 766 [the pathologist who conducts an autopsy generally is permitted to testify as to cause, means, and time of death and also as to circumstances under which the fatal injury could or could not

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22. Dr. Wolf, the defense expert, who testified that the ligature marks were not consistent with extreme pain, was also a pathologist and not a neurologist. (VIII RT 2474-2476, 2486.)

have been inflicted]; see also *Brown v. Colm* (1974) 11 Cal.3d 639, 645 [referring to an "unmistakable general trend in recent years . . . toward liberalizing the rules relating to the testimonial qualifications of medical experts"].) With Dr. Fukumoto's education, training, and over 30 years of experience as a pathologist who has handled over 12,000 cases, the trial court did not abuse its discretion in determining that Dr. Fukumoto was qualified to testify on the points disputed by Edwards.

Additionally, Edwards contends that Dr. Fukumoto's opinions were conclusory. (AOB 170-172.) As Edwards acknowledges, however, Dr. Fukumoto testified that the trauma to the vaginal and rectal areas were painful because those areas are highly vascular and "full of lots of nerve endings." (VII RT 2137-3138.) Moreover, Dr. Fukumoto testified that his opinion regarding whether the injuries were caused before death was based on microscopic examination. (VII RT 2138.) A failure to elaborate on the basis of his opinion goes to the weight of this evidence and not to its admissibility. Thus, Edwards' complaint that the opinions were conclusory should be rejected.

Moreover, Edwards argues that admission of the expert's opinion was an abuse of discretion because it was more prejudicial than probative. (AOB 173-174.) As stated *ante*, Evidence Code section 352 permits a court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.) A trial court's rulings under Evidence Code section 352 are reviewed on appeal for an abuse of discretion. (*People v. Cole, supra,* 33 Cal.4th at p. 1195; *People v. Lewis, supra,* 25 Cal.4th at p. 637.) Here, the opinion of Dr. Fukumoto was very probative to the issue of whether Deeble suffered extreme pain. Contrary to Edwards'

assertions, Dr. Fukumoto's brief statement of opinion did not necessitate an undue consumption of time, was not prejudicial, did not confuse issues or mislead the jury. The opinions were no more inflammatory than the testimony about the actual injuries inflicted. Thus, the trial court acted within its discretion in admitting the expert opinion testimony.

Finally, a due process violation occurs when the erroneous admission of evidence renders a trial fundamentally unfair. (*People v. Holloway* (2004) 33 Cal.4th 96, 128.) For the reasons set forth below, any error here did not render Edwards' trial fundamentally unfair. (AOB 174-176.) Thus, any error here involved only the misapplication of ordinary rules of evidence and Evidence Code section 352. Application of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1173; *People v. Kraft* (2000) 23 Cal.4th 978, 1035.) Because the "application of ordinary rules of evidence . . . does not implicate the federal Constitution," this Court has reviewed "allegations of error under the 'reasonable probability' standard of *Watson*[.]" (*People v. Marks*, supra, 31 Cal.4th at p. 227.) As the United States Supreme Court has previously held, violations of an accused's right to confront witnesses as guaranteed by the Sixth Amendment are subject to harmless-error analysis under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (87 S.Ct. 824, 17 L.Ed.2d 705). (*Neder v. United States* (1999) 527 U.S. 1, 18 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680-684 [106 S.Ct. 1431, 89 L. Ed.2d 674].) Nothing in *Crawford* changed this analysis. Accordingly, assuming error, the question presented regarding the confrontation clause is whether the admission of the opinions was harmless beyond a reasonable doubt.

Under either standard, here, even if Dr. Fukumoto's testimony should have been excluded, Edwards was not prejudiced. The jury was instructed

that they were not bound to accept an expert opinion as conclusive, and that they may disregard the opinion if it was found to be unreasonable. (CALJIC No. 2.80 (modified); III CT 939; XI RT 3123.) Thus, if the jury felt that Dr. Fukumoto's opinions about pain and the infliction of injuries before death were conclusory, then they could have disregarded his opinion or given it less weight. Moreover, as discussed in Argument VII below, the evidence that Deeble suffered extreme pain was overwhelming even without Dr. Fukumoto's testimony. Finally, evidence of Edwards' guilt was overwhelming as discussed above. Thus, the admission of the opinions was harmless beyond a reasonable doubt.

B. The Trial Court Acted Within Its Discretion by Denying, as Untimely, Edwards' Objection to Ventura's Testimony Regarding the Spare Key to Delbecq's Home

Edwards contends that the admission of Ventura's testimony that Delbecq had put a spare key outside her home was error because the statement was inadmissible hearsay to which Edwards timely objected. (AOB 176-179.) The trial court properly denied the objection as untimely.

During direct examination, Ventura testified that Delbecq had kept a spare key outside of her apartment. (VII RT 2194.) Ventura explained:

> A. Yes she did. [Delbecq] had been locked out once, and she had to call me at work and ask me if I had my spare key. And of course I did. And she went to the neighbor then who drove her up to go get the spare key and she said then that she was never going to let that happen again because she hated bothering everybody. So she said she was going to hide a key. And even though I never asked her –
>
> Mr. BATES: Excuse me. The objection to this is irrelevant, no indication of relevancy.
>
> THE COURT: Overruled. [. . . .]
>
> A. Even though I hadn't asked her the exact location, she had talked about – there was a little planter area right at the front entrance there on

the right-had corner where the bathroom is . . . . And she said that she was just going to hide it under a rock there.

Q. Did you ever find that key or see a key later afterwards?

A. No.

(VII RT 2194-2195.) During cross-examination, defense counsel again questioned Ventura about the key:

Q. Then you said she basically – you said she – am I right that she commented on this to you, but you never – she never showed you where she was going to keep the key?

A. Right. She had said she was going to leave it under a rock.

Q. And did you see the key that she obtained?

A. No.

Q. All right. So if I have this right, you never saw the key, and you never saw the rock where she was going to keep it; is that correct?

A. No. We had talked about it, and I told her to be careful about where she kept it, that it wasn't obvious, but -

Q. Ma'am, so if I have this right, the only thing you know about this as far as the obtaining a key or putting it under a rock, that is nothing you ever saw yourself; it is just something she stated to you; is that correct?

A. Uh-huh. that is correct.

(VII RT 2201-2202.) Edwards then made a motion to strike Ventura's testimony as "being hearsay, no foundation of personal knowledge of this witness." (VII RT 2202.) The trial court denied the request, reasoning, "You did not object to the question or to the answer when it was given, so you are overruled." (VII RT 2202.)

After all the evidence was presented at trial, Edwards moved to strike Ventura's testimony. (III CT 840-843; X RT 2846.) The trial court denied the motion as untimely. (X RT 2847.)

Evidence Code section 353 provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . . .

A timely objection is statutorily required to preserve a claim of error in the admission of evidence as prejudicial. (*People v. Pollock, supra,* 32 Cal.4th at p. 1181.)

Here, the trial court properly ruled that the objection was not timely. Although Edwards later raised an objection, that objection was not sufficiently timely to preserve the issue. (*People v. Boyette*, *supra*, 29 Cal.4th at pp. 423-424.) The requirement that an objection to evidence be timely made is important because it allows the court to remedy the situation before any prejudice accrues. (*Ibid.*) Applying these principles, the trial court reasonably concluded that Edwards' failure to lodge a *timely* hearsay objection to Ventura's testimony forfeited such objection. (See *People v. Panah*, *supra*, 35 Cal.4th at p. 476.) It was clear from Ventura's answers on direct examination that Delbecq told her that she was going to leave a key, but Ventura never asked her the exact location. (VII RT 2195.) A hearsay objection should have been made at that time. However, Edwards did not object until after cross-examination. The trial court properly ruled that this objection was untimely, and the issue is forfeited on appeal.

In any event, any error was harmless. The defense was able to cross-examine Ventura, and it was clear from her answers that she did not know for sure whether her mother actually left a key outside. There was no real question that Edwards committed the Delbecq murder, as bloody hand and footprints connected him to the crime scene. Thus, it is not reasonably probable that

Edwards would have received a more favorable result had the trial court sustained his hearsay objection.

C. Sergeant Jessen's Testimony on Rebuttal Was Properly Admitted Because It Was Relevant to the Sergeant's State of Mind

In his final argument regarding allegedly erroneous admissions of evidence, Edwards contends that Sgt. Jessen's testimony that he focused on Edwards after he received unspecified information from unspecified lab personnel was erroneously admitted in violation of his state and federal due process rights. (AOB 185-192.) Edwards' contention should be rejected. The testimony was properly admitted because the evidence was relevant to the sergeant's state of mind and rebutted the defense theory that police focused on Edwards as a suspect without thoroughly investigating other leads.

One of the defense theories of the case was that the police investigation was not thorough and prematurely focused on Edwards as a suspect. To further this theory, during the defense case, Edwards asked Richard Brown, who worked at the Orange County Coroner at the time of the murder, if he compared the known standards of hair submitted by Vance Price, Tom Collison, Dale Carey, Anthony Jarc, Leonard Hirsch, Alden Olson and Paul Roy with the hair found at the Deeble murder scene. (IX RT 2800.) Brown testified that the hair standards submitted by the individuals did not contain an adequate number of hairs to make a comparison. (IX RT 2800.) Brown sent a report to the Los Alamitos Police Department to that effect, but he was never provided with an adequate sample from those individuals. (IX RT 2801.)

During rebuttal, the prosecutor called Sgt. Jessen and questioned him about his state of mind at the time he received the report that the hair and fingerprint samples submitted by a group of individuals were inadequate.

(X RT 2818-2819.) The prosecutor and Sgt. Jessen had the following exchange:

> Q. BY Mr. BRENT: First of all, Sergeant Jessen, you began to focus on Mr. Edwards to the exclusion of the persons that the defense mentioned, correct?
>
> A. Correct.
>
> Mr. SEVERIN: Objection, Irrelevant.
>
> THE COURT: Overruled. [. . . .]
>
> Q. BY Mr. BRENT: And one of the reasons was, was it not, what has already come out that Mr. Edwards refused to supply you with samples of hair, saliva and blood?
>
> A. Correct.
>
> Q. Okay, Another reason, is it not true that these persons had been eliminated by DNA from providing the samples at the Deeble residence of semen and fluids, and Mr. Edwards had not been eliminated, correct:
>
> Mr. SEVERIN: Objection, No foundation, speculation.
>
> THE COURT: Sustained.

(X RT 2819-2820.) A side bar conference outside the presence of the jury took place. (X RT 2820.) Edwards objected on grounds that the question elicited improper hearsay and speculation. (X RT 2821.) In addition, there was no basis to form the opinion as to whether the individuals had been eliminated in the first place, and because the prosecutor had previously indicated that no DNA evidence would be presented, a section 402 hearing on its admissibility was never conducted. (X RT 2821.) Edwards also argued that it was improper rebuttal because rebuttal was limited to only new matter brought up by defense. Finally, Edwards claimed that the prosecutor committed misconduct and asked the court to declare a mistrial. (X RT 2822.)

The prosecutor explained that the evidence he sought does not call for hearsay because it was not being offered for the truth of the matter asserted, but rather, went to Sgt. Jessen's state of mind and to rebut the defense theory

that police did not thoroughly investigate other individuals who could have left physical evidence at the crime scene. (X RT 2821.) The prosecutor argued:

> The point of the matter is, of the names that the defense read off, people who supplied the cards, fingerprint exemplars and hair samples and those matters, these persons were all eliminated. And that is why this detective did not go forward and reobtain their samples. It is the defense, 'We want to attack the police. They did a crappy job.' [¶] They didn't. It is not being offered for the truth. It is being offered for his state of mind to show he didn't do a crappy job.

(X RT 2823.)

The trial court asked the prosecutor how these other individuals were eliminated. (X RT 2827.) The prosecutor explained that they were eliminated by DNA testing on the semen stain on Deeble's thigh and other stains on the bed. Defense counsel elaborated that both Edwards and Steve Deeble were included as possible contributors to the semen stain on the thigh. However, the stain on the bed eliminated Steve Deeble, but not Edwards. (X RT 2827.) The other individuals listed by the defense were not tied into the semen stain. (X RT 2831.)

The trial court denied the motion for mistrial and ruled that the evidence that these other individuals had been ruled out as suspects or were not included in the semen samples was relevant to Sgt. Jessen's state of mind. The trial court, however, noted that evidence of DNA results was inadmissible unless the prosecutor decided to put all evidence of DNA on after the necessary foundational and admissibility hearings were conducted. (X RT 2823-2824.) The trial court stated that "I think [defense] made the witness's state of mind relevant. I think that the prosecutor should be entitled to get into that state of mind and do it without referring to the DNA." (X RT 2834.) Earlier the trial court reasoned:

> Your getting into the DNA may be beyond that. I think his state of mind as to the exclusion of the other possible suspects is

> relevant and can come in. There is no misconduct, if you want him to put on the DNA stuff to get out all it would show how inconclusive it was, he could do that. He is prepared to do that. So that is not misconduct. [¶] And it is relevant as to the officer's state of mind. I had assumed as much early on when the questions started coming out. I mean that is how police are. They are not going to spin wheels once they are satisfied that certain individuals could not have committed the crime. That is your case. He is allowed to rebut it. [¶] Your motion for mistrial is denied. I would stay away from the DNA unless you are going to put it on. And it is not going to prove anything. It is not going to help either side.

(X RT 2823-2823.) The trial court granted Edwards' request to admonish the jury to disregard any reference that had been made to DNA. (X RT 2826, 2831.)

When the jury was called back, the trial court admonished them:

> Earlier in the trial we told you that certain evidence was being offered for a limited purpose. Well the last question by the way is stricken. The jury is ordered to disregard it. [¶] But these questions of this officer is being offered for a limited purpose, and the limited purpose is this officer's state of mind. And what that is relevant to, I think will become obvious by the questions and by any cross-examination on those questions. [¶] The letters 'DNA' were used in the last question. Don't assume or think about it. Those letters are stricken. They are meaningless as far as your duty is concerned. Is that understood? You can handle that all right?

(X RT 2837-2838.)

The prosecutor then asked Sgt. Jessen the following questions:

> Q. BY Mr. BRENT: Sgt. Jessen, isn't it true that as a result of scientific testing that this group of names the defense had mentioned as persons who had supplied inadequate samples that I asked you about before were eliminated as the donors of the various semen and fluids at the crime scene?
>
> Mr. SEVERIN: Objection, misstates the testimony, lack of foundation.
>
> THE COURT: Rephrase your question. [. . .]

Q. Mr. BRENT: Isn't it true that in your mind, based upon information you had received from other people, lab personnel, that this list of people that the defense had mentioned who had provided inadequate samples were eliminated as donors of semen and fluids at the crime scene?

Mr. SEVERIN: Objection, lack of foundation.

THE COURT: Overruled.

THE WITNESS: Yes. Excuse me. Yes.

Q. BY Mr. BRENT: And with that and other information that you had, then you focused on Mr. Edwards back in your investigation, correct?

Mr. BATES: Objection, irrelevant, vague as to time.

THE COURT: Overruled.

THE WITNESS: Correct.

Q. BY Mr. BRENT: But it wasn't until you received a phone call from Hawaii indicating a homicide that took place over there in 1993 that you felt you had enough evidence to actually arrest Mr. Edwards, true?

A. Correct.

(X RT 2838-2839.)

1. The Evidence Was Properly Admitted as Relevant to Sgt. Jessen's State of Mind

Evidence Code section 1250 provides in pertinent part that,

> evidence of a statement of the declarant's then existing state of mind . . . is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind . . . at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant.

(Evid.Code, § 1250, subd. (a).) In order for a hearsay statement to be admissible under this exception it must be a statement of the hearsay declarant's "then existing state of mind." (*Ibid.*) The trial court's evidentiary rulings are reviewed under an abuse of discretion standard. (*People v. Waidla, supra,* 22 Cal.4th at pp. 717-718.)

During the defense case, the defense focused on the investigation by police. Supervising Forensic Specialist Sharon Krenz testified for defense that police had not taken samples of urine or tissue in Deeble's toilet bowl, so it is not known if any blood, semen or other bodily fluids were in the toilet. (VII RT 2316.) The defense also questioned Sgt. Jessen about receiving a phone call from the Orange County laboratory regarding poor quality of the elimination prints obtained from Steve Deeble, Tom Collison, Anthony Jarc, Leonard Hirsch, and Victoria Stephens. (IX RT 2694.) The defense then questioned Sgt. Jessen about the hair standards submitted by multiple people, but only Edwards' sample was compared with the hair found at the crime scene at that time. (IX RT 2701.) Richard Brown, who worked at the Orange County Coroner at the time of the murder, was later called by the defense. Brown was asked if he compared the known standards of hair submitted by Vance Price, Tom Collison, Dale Carey, Anthony Jarc, Leonard Hirsch, Alden Olson, and Paul Roy with the hair found at the Deeble murder scene. (IX RT 2800.) Brown testified that the hair standards submitted by the individuals did not contain an adequate number of hairs to make a comparison. (IX RT 2800.) Brown sent a report to the Los Alamitos Police Department to that effect, but he was never provided with an adequate sample from those individuals. (IX RT 2801.) It was clear that the defense was attempting to show the jury that the police investigation was less than thorough, and Edwards was improperly targeted by the police.

On rebuttal, the prosecutor attempted to show Sgt. Jessen's then existing state of mind at the time of the investigation by asking if it was "true that these persons had been eliminated by DNA from providing the samples at the Deeble residence of semen and fluids, and Mr. Edwards had not been eliminated." (X RT 2820.) The defense objection was sustained, Sgt. Jessen did not answer

the question and the trial court struck the question and admonished the jury.[23] (X RT 2820, 2823-2823, 2837-2838.) After the trial court ruled the evidence was relevant to Sgt. Jessen's state of mind, the prosecutor later asked Sgt. Jessen, "Isn't it true that in your mind, based upon information you had received from other people, lab personnel, that this list of people that the defense had mentioned who had provided inadequate samples were eliminated as donors of semen and fluids at the crime scene?" (X RT 2838.) Sgt. Jessen answered affirmatively that this was the reason the police then focused on Edwards in the investigation. (X RT 2838.)

The testimony was not hearsay, because it was not admitted for the truth of the matter asserted, but was rather a statement of Sgt. Jessen's then existing state of mind. (Evid. Code, § 1250, subd. (a).) The testimony was relevant to rebut the defense theory. The police did not just target Edwards on a whim, but rather, they received information from the laboratory that the other people who had submitted inadequate hair samples could not be included as possible donors of the stains left on the bed and on Deeble's thighs.

Moreover, the question was limited to rebutting the defense theory and explain Sgt. Jessen's state of mind. The prosecution did not attempt to present the results of scientific testing. The trial court struck the question which alluded to DNA testing and admonished the jury to disregard it. They were also instructed on the limited purpose for which the evidence was admitted. (X RT 2837-2838.) The trial court did not abuse its discretion in admitting the testimony because: (1) it was highly relevant state of mind evidence; (2) the reference to DNA testing was stricken; (3) the testimony was itself brief and not a focal point; (4) the jury was properly instructed on the limited purpose of the testimony; and (5) the evidence was more probative than prejudicial. For these

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23. Edwards' claim that this constituted prosecutorial misconduct (AOB 185- 189) is addressed herein in Argument IX.

same reasons, any error was harmless. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) Moreover, Edwards' due process rights were not violated by the proper application of evidentiary rules. (See *People v. Lucas*, *supra*, 12 Cal.4th at p. 464.)

VII.

SUBSTANTIAL EVIDENCE SUPPORTS EDWARDS' FIRST DEGREE MURDER CONVICTION OF MURDER BY TORTURE AND THE TRUE FINDING AS TO THE TORTURE SPECIAL CIRCUMSTANCE ALLEGATIONS

Edwards argues in Arguments VII and VIII that there was insubstantial evidence to support the first degree murder conviction based on torture murder and the jury's true finding as to the torture special circumstance allegation. (AOB 194-226.) Edwards claims that there was insufficient evidence to support the first degree murder conviction of torture murder because there was no evidence that: (1) Deeble suffered prolonged pain; (2) Edwards intended to inflict pain; and (3) the injuries that caused pain were the cause of her death. He also claims that there was insufficient evidence of the torture special circumstance allegation because there was no evidence that: (1) Deeble suffered extreme pain; (2) Edwards intended to inflict extreme pain; and (3) Edwards intended to kill Deeble. (AOB 201-212, 220-224.) Edwards' contentions are without merit, as there was substantial evidence to support both the first degree murder by torture conviction as well as the true finding on the torture special circumstance allegation.

In determining evidentiary sufficiency, a reviewing court reviews the entire record, in the light most favorable to the judgment, for the presence of substantial evidence. (*People v. Chatman* (2006) 38 Cal.4th 344, 389.) Substantial evidence is "'evidence which is reasonable, credible, and of solid value-such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Kelly* (2007) 42 Cal.4th 763, 787-788, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the

defendant's guilt beyond a reasonable doubt. 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' [Citations.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 504, quoting *People v. Bean* (1988) 46 Cal.3d 919, 932-933.) The same standard of review applies in considering circumstantial evidence and the support for special-circumstance findings. (*People v. Valdez* (2004) 32 Cal.4th 73, 104-105.) "Where, as here, the jury's findings rest to some degree upon circumstantial evidence, we must decide whether the circumstances reasonably justify those findings, 'but our opinion that the circumstances also might reasonably be reconciled with a contrary finding' does not render the evidence insubstantial." (*People v. Earp* (1999) 20 Cal.4th 826, 887-888.) Here, substantial evidence supports the jury's verdict and true finding.

A. Substantial Evidence Supports Edwards' Conviction of First Degree Murder by Torture

Edwards contends that there was no solid evidence that the victim suffered extreme or prolonged pain, that Edwards had the intent to inflict the pain, and that the injuries that caused extreme or prolonged pain were the cause of her death. (AOB 223-224.) This claim should be rejected.

Murder which is perpetrated by means of torture is murder of the first degree. (§ 189; *People v. Steger* (1976) 16 Cal.3d 539, 543.) Murder by torture is categorized as first degree murder because of the calculated nature of the acts resulting in death. (*People v. Davenport* (1985) 41 Cal.3d 247, 267-268.) "The essential elements of first degree torture murder are: (1) the acts causing the death must involve a high degree of probability of death, and (2) the defendant must commit the acts with the intent to cause cruel pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic

purpose." (*People v. Mincey* (1992) 2 Cal.4th 408, 432, citing *People v. Davenport, supra*, 41 Cal.3d at p. 267.)[24/] Murder by torture is murder committed with a willful, deliberate and premeditated intent to inflict extreme and prolonged pain. (*People v. Proctor* (1992) 4 Cal.4th 499, 530; *People v. Raley, supra,* 2 Cal.4th at p. 888; *People v. Steger, supra*, 16 Cal.3d at p. 546.) The intent to inflict torturous pain and suffering is at the heart of murder-torture. (*People v. Davenport, supra*, 41 Cal.3d at pp. 267-268.) A defendant need not intend to kill the victim. The malice element may be supplied by an intentional act involving a high degree of probability of death in conscious disregard for human life. (*People v. Davenport, supra*, 41 Cal.3d at pp. 267-268.) But there must be a causal relationship between the torturous act and the victim's death. (§ 189; *People v. Davenport, supra*, 41 Cal.3d at p. 267.)

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24. The jury was instructed on Murder by Torture as follows:

> Murder which is perpetrated by torture is murder of the first degree. The essential elements of murder by torture are:
>
> 1. One person murdered another person, and
>
> 2. The perpetrator committed the murder with a willfull [sic], deliberate, and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose,
>
> 3. The acts or actions taken by the perpetrator to inflict extreme and prolonged pain were a cause of the victim's death.
>
> The crime of murder by torture does not require any proof that the perpetrator intended to kill his victim, or any proof that the victim was aware of pain or suffering. [¶] The word "willfull" [sic] as used in this instruction means intentional. [¶] The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. [¶] The word "premeditated" means considered beforehand.

(III CT 953; XI RT 3132.)

For purposes of proving murder by torture, the intent to inflict extreme pain "may be inferred from the circumstances of the crime, the nature of the killing, and the condition of the victim's body. [Citation.]" (*People v. Elliot* (2005) 37 Cal.4th 453, 467; *People v. Crittenden* (1994) 9 Cal.4th 83, 141; *People v. Proctor*, *supra*, 4 Cal.4th at p. 531; *People v. Mincey, supra*, 2 Cal.4th at p. 433.) The finding of murder-by-torture encompasses the totality of the brutal acts and the circumstances that lead to the victim's death. (*People v. Proctor*, *supra*, 4 Cal.4th at p. 530.) "The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture." (*Id.* at pp. 530-531.)

In the present case, contrary to Edwards' claims that the evidence was insufficient to show that the torturous wounds were inflicted for a prolonged period, and that there was no intent for the victim to suffer and die because the bindings were only intended to immobilize Deeble, there was substantial evidence to support his conviction of murder for torture. The position of Deeble, the condition of her body, as well as her injuries support a finding that Edwards committed the acts with intent to cause extreme and prolonged pain for a sadistic purpose, and the acts causing death involved a high degree of probability of death.

When Deeble was discovered, Deeble was bound in an elaborate way that would indicate not just an intent to immobilize, as Edwards suggests, but rather an intent to inflict extreme pain and suffering for a prolonged period. Her hands were tied around her back with a telephone cord that had been pulled from the wall and an electrical cord tied together. (VI RT 2011, VII RT 2053-2054.) Part of her nightgown was also used to bind her hands. (VI RT 2011.) A noose was fashioned from a belt. The victim was face down, suspended in the air with the free end of the belt tied to the top drawer of a credenza. (VI RT

2011-2012; VII RT 2045.) Deeble's dress had also been taped or arranged in an elaborate way so that the left arm was free, but the right harm was obstructed. The hem of the Deeble's dress was taped around her waist. (VII RT 2049-2050.) Edwards also took the time to use pinking shears to fashion a hood out of a pillow case. (VII RT 2050-2051.) The heavier amount of blood on the inside of the pillowcase indicated that the bleeding came from the inside out. (VII RT 2051.) This hood shows that Deeble wore the hood and bled heavily while it was over her head, again showing extreme suffering. A sheet was also found in Deeble's bedroom. Again, Edwards took the time to cut a 66-inch by 15-inch strip from the sheet with pinking shears as well as another piece about three to four feet long. (VII RT 2052-2053.) The autopsy also revealed that at one point Deeble's feet had been bound because there was marked injury and ligature marks to Deeble's ankles. (VII RT 2129-2130.) There was also adhesive tape residue found on Deeble's left cheek. (VII RT 2048.) This would indicate that her mouth was taped shut at one point. It is reasonable to infer from this tape that Edwards wanted to keep Deeble quiet for a prolonged period of time. The position of Deeble's body, the way she was elaborately bound around her hands and neck, and the meticulous preparation of her dress, the sheet, the hood, and the time taken to remove the ligatures around the ankles all suggest that Deeble's suffering was for a prolonged period. Edwards' intent for Deeble to suffer the brutal acts that would lead to her death was also exhibited by the bindings. The circumstances of the crime do not indicate an explosion of violence but rather an intent to torture. (*People v. Crittenden, supra*, 9 Cal.4th at p. 141 ["The careful, even excessive, binding and gagging of the victims, involving a considerable expenditure of time and effort, such as occurred in the present case, generally is inconsistent with the theory that an 'explosion of violence' occurred."].)

Moreover, while "the nature of the victim's wounds is not determinative" (*People v. Davenport, supra*, 41 Cal.3d at p. 268), the injuries Deeble sustained also support a finding that Deeble suffered extreme and prolonged pain and that Edwards committed these acts with intent to cause cruel pain and suffering for a sadistic purpose. Deeble died from ligature asphyxiation. Tying a noose fashioned from a belt around a person's neck and suspending that person above the ground by tying the other end to the credenza was an act which involved a high degree of probability of death by strangulation. While an intent to kill need not be proven, there was certainly a causal relationship between this torturous act and Deeble's death. (§ 189; *People v Davenport, supra,* 41 Cal.3d at p. 267.) There was a deep furrow around Deeble's neck. (VII RT 2126.)

Edwards claims there was no evidence to show how long Deeble suffered any pain, if she even suffered it at all, before her death because she may have become unconscious within sixty seconds. (AOB 223.) It has long been held that awareness of pain by the victim is not an element of first degree murder by torture. (*People v. Davenport, supra,* 41 Cal.3d at p. 268, citing *People v. Wiley* (1976) 18 Cal.3d 162, 168-169.) In *Wiley*, the defendant argued that actual awareness of pain by the victim was an element of murder by torture. This Court rejected that contention, stating, "attempts to measure the amount of pain, if any, suffered by victims of torturous acts . . . [who] mercifully may have been quickly rendered unconscious at the outset of the homicidal assault, not only promises [sic] to be futile, but are unnecessary." (*People v. Wiley, supra*, 18 Cal.3d at p. 173; *People v. Davenport, supra,* 41 Cal.3d at p. 268.) This Court also stated, "The murderer who exhibits 'the cold-blooded intent to inflict pain for personal gain or satisfaction' may not assert the victim's condition as a fortuitous defense to his own deplorable acts." (*Ibid.*) Likewise, in the present case, Edwards should not be able to defend his

torturous acts on the possibility that Deeble was rendered unconscious from the ligature within a minute.

Nonetheless, the autopsy revealed that the victim actually struggled against the ligature, thus indicating Deeble actually suffered extreme and prolonged pain. Dr. Fukumoto testified that the victim struggled against the ligature because there were abrasions and some wrinkling of the skin around the front part of the furrow around the neck which indicated that Deeble struggled from side to side against the ligature before she died. (VII RT 2126.) Dr. Fukumoto opined that struggling against the belt would have been extremely painful. (VII RT 2128.) The damage to her eyes and ears also indicates suffering from the ligature. There was bleeding in the whites of Deeble's eyes. (VII RT 2127.) There was intensive hemorrhage and tearing to her ear which was caused by the massive increase in pressure as the victim struggled to obtain breath while in the ligature. (VII RT 2127.) The increase in pressure could have broken the ear drum, which Dr. Fukumoto opined was extremely painful. (VI RT 2127-2128.) Aside from the pain caused by the ligature and damage to eardrum, Edwards also used a sharp instrument to tear Deeble's left ear drum. (VII RT 2128-2129.) This incisional tear, along with the injuries sustained as a result of the ligatures around her neck, certainly exhibits an intent to torture and to cause extreme and prolonged pain to Deeble.

Deeble also suffered some non-fatal wounds which are indicative of intent to cause cruel suffering for a sadistic purpose. For instance, Deeble's nose was fractured, there were lacerations to her chin, she had suffered blunt force trauma to the area above Deeble's neck because there were hemorrhages to her scalp, the subarachnoid fluid was bloody, and blood clots were forming in the dura or thick membrane between the skull and the brain. (VII RT 2130-2131, 2133.) Dr. Fukumoto also testified that there was bleeding to Deeble's pancreas. This was significant because the pancreas is situated deep within

the body with other organs and ribs covering it. Thus, in order to damage the pancreas, a tremendous amount of localized force must have been inflicted to the area above her navel. (VII RT 2135.) Additionally, there was injury to Deeble's genital area. There were bruises on her labia and her vaginal fault. There was a hemorrhage and laceration on the posterior fourchette. The anus was dilated and there was tearing of the inner covering of the rectum. (VII RT 2137.) Dr. Fukumoto opined that these injuries were consistent with being caused by the mousse can found in the room which had blood on it. (VII RT 2138.) Dr. Fukumoto also opined that because the area of the vagina and rectum had a lot of nerve endings and was highly vascular, the trauma to those areas would have been highly painful. He also opined that after reviewing microscopic slides of the areas, the injuries to those areas occurred before death. (VII RT 2138.)

Finally, the evidence of the Delbecq murder in Hawaii was admitted for the limited purpose of proving, among other things, intent to torture. (Evid. Code, § 1101, subd. (b).) The Deeble and Delbecq murders were sufficiently similar to support the inference that Edwards "probably harbored the same intent in each instance." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) The similarities between the two murders were indicative of Edwards' intent to inflict cold-blooded, torturous pain and suffering on his victims for his own personal satisfaction, sexual arousal, or sadistic purposes. Both Deeble and Delbecq had been bound in similar ways. While she was not bound when she was discovered, Delbecq did have definite, pronounced ligature marks around her ankles and wrists. (VII RT 2235.) A telephone cord and wire which were tied together was found in a dumpster near Delbecq's house. (VII RT 2210, 2224.) Cut cloths and scissors were also found in the dumpster. (VII RT 2224.) Delbecq's injuries were also similar. There were bruises to her scalp, her nose was injured, and there were incisional wounds to the left side of her

jaw and breast. (VII RT 2293, 2294.) Both women died of asphyxiation, though Delbecq's death was from manual as opposed to ligature strangulation. (VII RT 2294, 2298.) Finally, Delbecq was injured in her genital area by a mousse can which tore through her vaginal cavity and rectum and was found in her abdomen. (VII RT 2295-2296.) The coroner from Hawaii opined that the injuries suffered to Delbecq's anal and vaginal areas occurred before she died because the evidence of hemorrhage indicates a person being alive at the time of the injury. (VII RT 2297.) It is reasonable to infer that Edwards used a mousse can to penetrate or attempt to penetrate the genital areas of both women. This shows a intent to inflict extreme and prolonged pain for a sadistic purpose.

For these reasons, there was substantial evidence to support Edwards' conviction of first degree murder by torture.

B. Substantial Evidence Supports the True Finding on the Torture Special Circumstance Allegation

Edwards contends that the torture special circumstance allegation should be reversed because there was insufficient evidence to show that the injuries inflicted caused Deeble "extreme pain" (AOB 201-204), that Deeble experienced extreme pain (AOB 204-206), that Edwards intended to inflict extreme pain (AOB 207-211), and that Edwards intended to kill Deeble (AOB 211-212). For the same reasons set forth above, Edwards' arguments should all be rejected, as substantial evidence supports the jury's true finding as to the torture special circumstance allegation.

"Section 190.2, subdivision (a)(18), provides a special circumstance if '[t]he murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of *extreme physical pain* no matter how long its duration.'" (*People v. Wade* (1988) 44 Cal.3d 975, 993, italics added; see *People v. Davenport*, *supra*, 41 Cal.3d

at p. 271.)[25/] Distilled, "proof of a murder committed under the torture-murder special circumstance therefore requires proof of first degree murder (§ 190.2, subd. (a)), proof the defendant intended to kill and to torture the victim (§ 190.2, subd. (a)(18)), and the infliction of an extremely painful act upon a living victim. [Citation.] The special circumstance is distinguished from murder by torture under section 189 because under section 190.2, subdivision (a)(18) the defendant must have acted with the intent to kill." (*People v. Davenport, supra*, 41 Cal.3d at p. 271; *People v. Bemore, supra*, 22 Cal.4th at p. 839.) The same substantial evidence standard of review for convictions of criminal offenses is used for special circumstance findings. (*People v. Frye* (1998) 18 Cal.4th 894, 953.)

Edwards' first claim is that the evidence was insufficient to show that the "injuries caused Mrs. Deeble "extreme pain" because "unconsciousness could have occurred in less than one minute and death approximately five minutes thereafter" and there was no evidence that the injuries occurred before death. (AOB 201.) Edwards also argues that there was insufficient evidence that Deeble "experienced extreme pain." (AOB 204.) These arguments are without merit. Awareness of pain by the deceased is not a necessary element of torture. (*People v. Davenport, supra,* 41 Cal.3d at p. 268.) Moreover, as discussed above, the autopsy revealed that Deeble was alive before she received the injuries from the ligatures around her neck. Dr. Fukumoto testified that Deeble struggled from side to side in the ligature, causing abrasions, a deep furrow and wrinkling of the skin. Deeble must have been alive while she

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25. Proposition 115, passed by the California electorate on June 6, 1990, amended section 190.2, subdivision (a)(18) (torture special circumstance), to delete the requirement of proof that a defendant inflicted *extreme* physical pain on the victim. Because the offenses herein were committed in May 1986, the applicable standard is the version of section 190.2, subdivision (a)(18), predating Proposition 115. (See *People v. Bemore* (2000) 22 Cal.4th 809, 840; *People v. Crittenden, supra*, 9 Cal.4th 83, 140, fn. 14.)

struggled with the noose. The ligatures also caused painful injuries to her ear drum. Additionally, a sharp instrument was used to tear Deeble's other eardrum, which Dr. Fukumoto opined would have been extremely pain. He also testified that the vaginal and rectal injuries were inflicted before death and were extremely painful due to the highly vascular nature of the area.

Edwards also claims that evidence was insufficient to show that he intended to inflict extreme pain. (AOB 207.) Edwards acknowledges that the expert testified that the ligatures around the neck would have been extremely painful, however, they "could have been self-inflicted, as she struggled to set herself free from her bindings," thus there was no indication of an intent to make the victim suffer. (AOB 207.) Additionally, Edwards argues that intent cannot be based simply on the severity of the wounds because severe wounds can also be indicative of an explosion of violence. (AOB 209-210.)

However, the trier of fact may find intent to torture based on *all* the circumstances surrounding the charged crime, including the nature and severity of the victim's wounds. (*People v. Bemore, supra*, 22 Cal.4th at p. 841 [torture-murder special circumstance]; *People v. Crittenden, supra*, 9 Cal.4th 83, 141 [same]; *People v. Proctor, supra*, 4 Cal.4th at p. 531 [same].) Contrary to Edwards' assertions, there was sufficient evidence that he committed the crime with a "sadistic intent to cause the victim to suffer pain in addition to the pain of death." (*People v. Davenport, supra*, 41 Cal.3d at p. 271.)

As discussed in more detail above, the position of Deeble, the condition of her body, as well as her injuries, and the evidence of the Hawaii murder support a finding that Edwards intended to inflict extreme pain. The elaborate bindings which Edwards used was indicative of an intent to inflict extreme pain. Deeble was suspended above the ground by a belt around her neck. The weight of her body and gravity would have surely caused Deeble to asphyxiate at some point. Evidence was provided the jury that Deeble struggled for breath

against the ligature, causing extreme pain. Edwards' argument that this was self-inflicted and thus not indicative of his intent to cause her extreme pain is absurd. He forced Deeble into the position where she had to struggle against the ligature to breathe. Moreover, as discussed above, the injuries Deeble suffered also were indicative of an intent to inflict extreme pain. Finally, the Delbecq murder was also admitted to prove Edwards' intent to torture and inflict great bodily harm on Deeble and a common plan and scheme to intentionally inflict pain. (II RT 1199-1200, 1205, 1215; VI RT 1942-1943, 1950.)

In his final argument, Edwards asserts that even if the jury could have found the wounds to be extremely painful, there was insufficient evidence that Edwards intended to kill Deeble. (ABO 211-212.) Once again, Edwards claims that he only intended to immobilize her, and not to kill her. (AOB 212.) Again, this argument should be rejected. Tying a noose fashioned from a belt around a person's neck and suspending that person above the ground by tying the other end to the credenza was an act which involved a high degree of probability of death by strangulation. If he only intended to immobilize her, Edwards would have only bound her hands and ankles. However, he tied a noose around her neck and suspended her in the air where the force of her weight and gravity would have surely caused her death. Thus, there was substantial evidence that Edwards intended to kill Deeble. The torture special circumstance allegation was supported by substantial evidence.

VIII.

SUFFICIENT EVIDENCE SUPPORTS THE FIRST DEGREE MURDER CONVICTION ON A FELONY MURDER THEORY AND ALSO SUPPORTS THE BURGLARY-MURDER SPECIAL CIRCUMSTANCE

Edwards contends in Arguments VII and VIII there was insufficient evidence to show that Deeble was murdered during a burglary and to support the true finding on the burglary special circumstance allegation. (AOB 212-220, 224-226.) Specifically, Edwards claims that there was insufficient evidence that a theft or penetration occurred, that Edwards was responsible, or that it was anything more than a spontaneous act, wholly incidental to the homicide itself. (AOB 224.) Edwards also argues in Argument VII.D that the evidence of burglary was insufficient as a matter of law to support the true finding on the burglary special circumstance allegation because no theft or penetration or intent to penetrate with a foreign object was proven, there was insufficient evidence that Edwards entered the residence with intent to commit a felony, that he intended to commit a felony at the time he killed Deeble and that it was part of a single continuous transaction, and finally that he had an intent to kill Deeble. (AOB 213-220.) Edwards' arguments should all be rejected, as substantial evidence supports his conviction of murder during a burglary and the jury's true finding as to the burglary special circumstance.

The standard of review for issues involving sufficiency of evidence is set forth in Argument VII above. Under the felony-murder rule, a murder "committed in the perpetration of, or attempt to perpetrate" one of several enumerated felonies, including burglary and penetration with a foreign object, is first degree murder. (§ 189; *People v. Tafoya* (2007) 42 Cal.4th 147, 171.) Burglary requires an entry into a specified structure with the intent to commit theft or any felony. (*People v. Tafoya, supra,* 42 Cal.4th at p.170; *People v. Horning, supra*, 34 Cal.4th at p. 903; *People v. Davis* (1998) 18 Cal.4th 712,

723-724, fn. 7.) While the intent to commit any felony will support a burglary conviction, the felony-murder rule and the burglary-murder special circumstance do not apply to a burglary committed for the sole purpose of assaulting or killing the homicide victim. (*People v. Seaton* (2001) 26 Cal.4th 598, 646, citing *People v. Garrison* (1989) 47 Cal.3d 746, 788-789; *People v. Wilson* (1969) 1 Cal.3d 431, 442.)

"While the existence of the specific intent charged at the time of entering a building is necessary to constitute burglary in order to sustain a conviction, this element is rarely susceptible of direct proof and must usually be inferred from all of the facts and circumstances disclosed by the evidence." (*People v. Holt* (1997) 15 Cal.4th 619, 669-670 [internal quotations omitted]; *People v. Matson* (1974) 13 Cal.3d 35, 41.) When the evidence justifies a reasonable inference of felonious intent, the verdict may not be disturbed on appeal. (*People v. Cain, supra*, 10 Cal.4th at p. 47.)

The burglary-murder special circumstance applies to a murder committed while the defendant was engaged in the commission of, or attempted commission of burglary or penetration with a foreign object. (§ 190.2, subd. (a)(17)(G), (K); *People v. Tafoya, supra,* 42 Cal.4th at p. 170.) The burglary special circumstance is proven when there is evidence showing that (1) the defendant intended to commit the burglary when he killed, and (2) the killing and burglary were part of one continuous transaction. (*People v. Hayes* (1990) 52 Cal.3d 577, 632.) "[T]o prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder." (*People v. Mendoza* (2000) 24 Cal.4th 130, 182; *People v. Tafoya, supra*, 42 Cal.4th at p. 170.) Under California law, concurrent intent to kill and to commit an independent felony

will support a felony-murder special circumstance. (*People v. Clark* (1990) 50 Cal.3d 583, 608-609.)

There is substantial evidence to support both the felony murder conviction and the true finding on the burglary special circumstance allegation. An entry was made into Deeble's home. When police arrived, the front door was open approximately four inches. (VI RT 1991.) The screen to the window of the bedroom in the hallway was missing, and a screen was found lying on the ground. (VI RT 1992.) Deeble's bedroom was ransacked with garments, shoes and belts strewn around the room. (VI RT 2006.) Drawers were open. (VI RT 2006.) The contents of Deeble's purse were scattered about the floor. (VI RT 2006.) Deeble's daughter also identified several pieces of jewelry which her mother was photographed wearing. (VII RT 2080-2083.) Valentine recalled that on Monday morning before Deeble's murder, Deeble was wearing a diamond pendant. (VII RT 2105.) Valentine testified that she did not ever see those items of jewelry again after Deeble's murder. (VII RT 2080-2083, 2102-2105.) The condition of Deeble's apartment and her ransacked bedroom, and the fact that jewelry in which Deeble was known to have worn were never seen again after the murder indicate that Edwards entered Deeble's home with the intent to commit a theft.

In addition, the jury reasonably could have inferred that Edwards intended to commit larceny by considering the circumstances of the other charged offense. (*People v. Ramirez* (2006) 39 Cal.4th 398, 463.) As discussed *ante*, Evidence Code section 1101, subdivision (b), permits "the admission of evidence that a person committed a crime . . . when relevant to prove some fact (such as . . . intent . . .) other than his or her disposition to commit such an act." In order to be relevant to prove intent, the other crime "must be sufficiently similar to support the inference that the defendant 'probably harbor[ed] the same intent in each instance.' [Citations.]" (*People v.*

Ewoldt, supra, 7 Cal.4th at p. 402.) In the Hawaii murder, Delbecq's bedroom was also ransacked with articles of clothing and personal effects strewn on the floor. (VII RT 2208-2209.) Delbecq's daughter testified that Delbecq always wore her wedding ring, and never took it off. However, after the murder, Delbecq's wedding ring was missing. (VII RT 2196.) As discussed in Argument III above, the present murder and the Hawaii murder were sufficiently similar to support the inference that Edwards probably harbored the same intent, to commit a theft, in both instances.

There was also substantial evidence that Deeble's murder was committed in the perpetration of, or attempt to perpetrate the felony of penetration with a foreign object.[26/] Criminalist Reed testified that a hair mousse can was found on Deeble's bed. Reed noticed what appeared to be

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26. The jury was instructed on the crime of penetration with a foreign object, a violation of Penal Code section 289, subdivision (a), with CALJIC 10.30 as follows:

> Every person who for the purpose of sexual arousal, gratification or abuse, causes the penetration, however slight, of the genital or anal opening of another person by any foreign object, substance, instrument or device against the will of that person by the use of force, violence, duress, menace or fear of immediate and unlawful bodily injury to such person is guilty of the crime of unlawful penetration by a foreign object, in violation of section 289 (a) of the Penal Code. [. . .]
>
> In order to prove such crime, each of the following elements must be proved: [¶] 1. A person caused the genital or anal opening of another person, however slightly, to be penetrated by a foreign object, substance, instrument or device. [¶] 2. The penetration was against the will of such person. [¶] 3. The penetration was accomplished by the use of force, violence, duress, menace or fear of immediate and unlawful bodily injury to that person, and [¶] 4. The penetration was done with the purpose and specific intent to cause sexual arousal, gratification or abuse.

(III CT 952, XI RT 3130-3132)

blood underneath the ridge around the top of the can. A presumptive test to determine if the substance was blood was positive. (VII RT 2046.) A cap that fit the mousse can was found on the floor next to Deeble. The cap appeared to have blood on it as well. (VII RT 2046-2047.) Dr. Fukumoto testified that Deebles had hemorrhages, lacerations and tears in the vaginal area, as well as lacerations and tearing of the rectum. (VII RT 2137.) He opined that the mousse can would be "consistent with an object that could have caused these various injuries" because the item that caused the injuries did not have any sharp edges. (VII RT 2138.) There was substantial evidence that Edwards assaulted Deeble with the mousse can.

Edwards' intent to penetrate Deeble with a foreign object when he entered her home was shown by circumstantial evidence. Testimony was presented that there was "bad blood" between Deeble and Edwards because of an argument regarding Valentine's truck. (VII RT 2075.) In addition, Edwards similarly entered Delbecq's apartment with the intent to penetrate her vagina and rectum with a mousse can. Likewise, an inference can be made that Edwards' intended to commit the felony of penetration with a foreign object when he entered Deeble's home.

Additionally, there was substantial evidence that Edwards intended to commit the felony at the time he killed Deeble and it was part of a single continuous transaction. Once again, the elaborate binding of Deeble, the use of the mousse can to assault her, and placing the noose around her neck causing her to struggle all show that Edwards intended to kill Deeble while he committed the felony of penetration with an object. It was reasonable to infer that the bindings and having Deeble suffer and struggle with the belt noose during the same course of conduct wherein he penetrated Deeble's genitals with a mousse can added to his sexual gratification, arousal or abuse, as it did in committing the murder of Delbecq in Hawaii.

Finally, as discussed in Argument VII, there was substantial evidence that Edwards intended to kill Deeble when he suspended her by a noose around her neck.

It is clear from the record that substantial evidence supports both the felony murder conviction and the burglary special circumstance allegation. Substantial and credible evidence supports the jury's finding that Edwards killed during the commission of a burglary. (See *People v. Lewis, supra*, 26 Cal.4th at p. 366; *People v. Kraft, supra*, 23 Cal.4th at p. 1054; *People v. Mayfield, supra*, 14 Cal.4th at p. 791.) The jury made that decision, and that decision is supported by substantial evidence. Acordingly, Edwards' claims should be rejected.

IX.

THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT

Edwards contends that the prosecutor's pervasive pattern of presenting alleged inadmissible evidence before the jury, allegedly presenting evidence that was either false or without foundation, allegedly misstating the evidence, and allegedly disregarding the court's admonitions against improper questions constituted reversible misconduct resulting in a denial of his rights to due process. (AOB 226-268.) Edwards' claims are without merit. The prosecutor's actions did not constitute prejudicial misconduct.

A. The Questions the Prosecutor Asked Sgt. Jessen During Rebuttal Did Not Constitute Misconduct

Edwards argues that the prosecutor committed misconduct because he falsely suggested to the jury that scientific testing of DNA had excluded all suspects but Edwards by asking Sgt. Jessen a leading question with no foundation. (AOB 229-237.) The record shows that the prosecutor's question was based on evidence which showed that the individuals who the defense emphasized gave inadequate hair samples were not within the possible donors of the semen stains found on Deeble's thighs and bed.[27/] Moreover, as discussed more fully in Argument VI.C.2, *ante*, the evidence the prosecutor was seeking to elicit was not being offered for the truth of the matter, but solely to show Sgt. Jessen's then existing state of mind and to rebut the defense theory that the police improperly targeting Edwards as a suspect, to the exclusion of others.

The applicable federal and state standards regarding prosecutorial misconduct are well established and are as follows:

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27. The factual basis for this argument is more fully set forth in Argument VI.C.1, *ante*.

> A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, . . . when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]

(*People v. Morales* (2001) 25 Cal.4th 34, 44; see *People v. Guerra* (2006) 37 Cal.4th 1067, 1124; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

"To constitute a due process violation, the prosecutorial misconduct must be "'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" (*Greer v. Miller* (1987) 483 U.S. 756, 764 [107 S.Ct. 3102, 97 L.Ed.2d 618], quoting *United States v. Bagley* (1985) 473 U.S. 667, 676 [105 S.Ct. 3375, 87 L.Ed.2d 481], quoting *United States v. Agurs* (1976) 427 U.S. 97, 108 [96 S.Ct. 2392, 49 L.Ed.2d 342].) Bad faith is not a prerequisite to finding prosecutorial "misconduct." (*People v. Hill, supra*, 17 Cal.4th at pp. 822-823.) "Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted." (*People v. Seaton, supra*, 26 Cal.4th at p. 647, citing *Giles v. Maryland* (1967) 386 U.S. 66 [87 S.Ct. 793, 17 L.Ed.2d 737]; *Napue v. Illinois* (1959) 360 U.S. 264 [79 S.Ct. 1173, 3 L.Ed.2d 1217]; *People v. Sakarias* (2000) 22 Cal.4th 596, 633.)

When prosecutorial misconduct has occurred, the defendant must demonstrate that it was prejudicial. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1019.) The standard for reviewing prosecutorial remarks or comments to determine misconduct is whether there is a reasonable likelihood the jury

misconstrued or misapplied the prosecutor's words in violation of the United States or California Constitutions. (*People v. Clair* (1992) 2 Cal.4th 629, 662-663.) Criminal trials are rarely perfect, and a judgment will not be reversed unless upon a consideration of the entire record, the misconduct resulted in prejudice amounting to a miscarriage of justice. (*People v. Hill, supra*, 17 Cal.4th at pp. 844-845.)

Here, the prosecutor did not present "false evidence." (AOB 235.) The prosecutor's brief reference to DNA was sustained, Sgt. Jessen did not answer the question, the trial court later struck the answer, and then the jury was admonished to disregard the question. (X RT 2819-2820, 2826, 2831, 2837-2838.) Moreover, the prosecutor's later questioning of Sgt. Jessen in which he asked if in Sgt. Jessen's mind, "based upon information [he] had received from other people, lab personnel, that this list of people that the defense had mentioned who had provided inadequate samples were eliminated as donors of semen and fluids at the crime scene" was not false, but rather, based on fact. In *People v. Chatman, supra*, 38 Cal.4th at pages 379-380, this Court explained: "'Although it is misconduct for a prosecutor *intentionally* to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct. Defendant's real argument is that the evidence was inadmissible.' [Citation.]" This Court concluded in *Chatman* that "[a]lthough the prosecutor in this case certainly asked the questions intentionally, nothing in the record suggests he sought to present evidence he knew was inadmissible." (*People v. Chatman, supra*, 38 Cal.4th at p. 380.) The prosecutor never sought to introduce the results of the DNA testing into evidence. As discussed in Argument VI above, the question was intended to show Sgt. Jessen's state of mind; it was not admitted for the truth of the matter asserted. While there was no hearing on the admissibility of DNA evidence, the factual basis for the prosecutor's questions to Sgt. Jessen were made clear during side bar conferences between the parties.

The trial court asked the prosecutor how the other individuals had been eliminated. (X RT 2827.) The prosecutor explained that they were eliminated by DNA testing on the semen stain on Deeble's thigh and other stains on the bed. (X RT 2827.) The trial court asked, "And then you have two who are 1 in 20?" (X RT 2827.) The prosecutor replied, "No. On the semen stain Edwards is, but eventually the other one, the son, he is eliminated altogether. The only person left is Edwards." (X RT 2827.) Defense counsel Bates then elaborated. According to Mr. Bates,

> They [Edwards and Steve Deeble] are both in the semen stain on the thigh. They are both part of 1 in 20. They could have put that stain there. There is another stain in the bed that Rob [Edwards] could be in and Steve Deeble could not be in.... But there is no showing that those two stains were put there by the same person. There is only – the semen stain to her thigh has two guys in it, and those are the two.

(X RT 2827.) The prosecutor then explained that because of this evidence, the other individuals regarding whom the defense had questioned Sgt. Jessen and Brown about inadequate hair samples, were eliminated as suspects in the police investigation because they were not found to be possible donors of the stains on the thigh and bed. (X RT 2828.) Only Edwards and Steve Deeble were included as possible donors to the stains on the thigh and bed. Steve Deeble was then found not to be a possible donor of the stain on the bed, so only Edwards was left as a possible donor to both the stains. The trial court later clarified, that the other individuals were "just not tied into a semen stain." (X RT 2831.)

The prosecutor's question that in Sgt. Jessen's mind, based on information that he received from lab personnel, the list of people the defense mentioned were not within the possible donors of the semen and fluid at the crime scene was based entirely on the evidence that was discussed at side bar. (X RT 2838.) While the question may have been better asked if the prosecutor

did not use the word, "eliminate," it is clear from the line of questioning that the prosecutor meant to elicit from Sgt. Jessen whether these individuals had been eliminated as suspects in the investigation and that is why the focus of the investigation was on Edwards. The prosecutor was merely trying to rebut the defense theory. He was not attempting to admit through the back door evidence which he never even sought to admit. "A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (*Boyde v. California* (1990) 494 U.S. 370, 385 [110 S.Ct. 1190, 108 L.Ed.2d 316]; see *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21.) Because the testimony was not false since it was based on facts, the prosecutor did not commit misconduct by asking Sgt. Jessen those questions in rebuttal. (*People v. Marshall* (1996) 13 Cal.4th 799, 830.)

Assuming without conceding that prosecutorial misconduct has occurred, the defendant must demonstrate that it was prejudicial. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1019.) Here, Edwards fails to establish that any misconduct was prejudicial. As noted above, when the prosecutor asked the question which referred to DNA, the defense immediately objected. The objection was sustained. (X RT 2819-2820.) Generally, a defendant cannot show prejudice when the court sustained an objection to claimed misconduct. (See *People v. Price* (1991) 1 Cal.4th 324, 482; *People v. Pinholster* (1992) 1 Cal.4th 865, 943.) Furthermore, the jury was instructed that the question was stricken and the jury was ordered to disregard it. (See *People v. Smithey, supra*, 20 Cal.4th at p. 960 [no prejudice where the prosecutor's improper question "constituted an isolated instance in a lengthy and otherwise well-conducted trial" and was followed by an admonition].) The trial court also admonished the jury that the evidence was being offered for

the limited purpose of what was in the officer's state of mind. (X RT 2837-2838.) Thus, the evidence was not intended to have any substantive weight. It was only admitted to show why police focused on Edwards at that time. The jury is presumed to abide by the court's instructions. (*People v. Delgado, supra*, 5 Cal.4th at p. 331.) Finally, as noted above, the evidence of Edwards' guilt was overwhelming. Thus, prejudicial prosecutorial misconduct was not committed.

B. The Prosecutor Did Not Commit Misconduct During Cross-Examination of Several Defense Witnesses

Edwards also contends that the prosecutor repeatedly denigrated defense witnesses; namely, Dr. Wolf, Edwards, Janis Hunt, and Dr. Stalcup. (AOB 238-246.) This claim should be rejected, as it is waived on appeal, and because defense witnesses are properly subject to attack as long as the prosecutor's arguments are based upon an inference that may be drawn from the witness's testimony or other evidence. Moreover, there was no prejudice.

Generally, a defendant forfeits a prosecutorial misconduct claim on appeal unless he timely objected on the same ground and the requested that the jury be admonished to disregard the misconduct. (*People v. Guerra, supra*, 37 Cal.4th at p. 1124; *People v. Ayala* (2000) 23 Cal.4th 225, 284; *People v. Hill, supra*, 17 Cal.4th at p. 820.) The requirement is waived only when the objection and/or the request for an admonition would have been futile or a prompt admonition would not have cured the harm caused by the misconduct. (*People v. Panah, supra*, 35 Cal.4th at p. 462; *People v. Bradford, supra*, 15 Cal.4th at p. 1333; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on other grounds in *People v. Hill, supra*, 17 Cal.4th at p. 823, fn. 1.)

Here, while Edwards objected to all of the contested statements or questions, Edwards never requested that the jury be admonished. Nothing in the record indicates, nor has Edwards argued, that an admonition would

not have cured any harm caused by the alleged misconduct. Defense only requested once that the question to Edwards regarding the whole point of Dr. Stalcup's testimony be stricken, and the trial court did so, and told the jury to disregard the question. (IX RT 2622.) In any event, Edwards never, at any point during the contested exchanges, asked for an admonition. Thus, these issues are waived on appeal.

Even assuming that the arguments are not waived, the claims should be rejected on the merits, as the prosecutor did not commit misconduct by his questioning of the defense witnesses. A trial court must control cross-examination "to protect the witness from undue harassment or embarrassment." (Evid. Code, § 765, subd. (a).) On the other hand, as we have observed, the permissible scope of a prosecutor's cross-examination of a defendant is "very wide." (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 755; *People v. Cooper* (1991) 53 Cal.3d 771, 822.) Here, the substance of many of the prosecutor's questions was to urge the inference that the witnesses were biased or untruthful, all of which would be a proper subject for later argument. Witnesses who have testified and provided evidence at trial are subject to denigration as long as the argument is based upon an inference that may be drawn from the witness's testimony or other evidence. (*People v. Huggins* (2006) 38 Cal.4th 175, 253; *People v. Arias* (1996) 13 Cal.4th 92, 162.) Therefore, the prosecutor is permitted to remind jurors that an opposing witness was not credible and may be biased in favor of the defense. (*People v. Arias, supra,* 13 Cal.4th at p. 162.) Here, the prosecutor's attacks on Dr. Wolf, Edwards and Janis Hunt's credibility were not misconduct.

During the cross-examination of defense expert witness, Dr. Wolf, the prosecutor asked the doctor the following questions:

> Q. Now, from what I have heard you told us these women were really both pretty darn lucky because neither of them really suffered or felt any pain before they died?

Mr. BATES: Objection, misstates the witness, argumentative.

THE COURT: It is argumentative, sustained.

Q. BY Mr. BRENT: Didn't you, in response to Mr. Bates' series of questions, basically have both of these women unconscious and not feeling any pain before they died?

A. Yes.

Q. And so if I were to show you then Exhibits 1, a photograph of Mrs. Deeble in death, and Exhibit 33, a photograph of Mrs. Delbecq in death, you are going to tell us, doctor, that these women did not feel any pain before they died?

A. Yes.

Q. They were fortunate, indeed, weren't they?

Mr. BATES: Your honor, that is argumentative, your honor.

THE COURT: Sustained.

(VIII RT 2516-2617.)

On direct examination, Dr. Wolf testified that a blow to the head may cause immediate unconsciousness, and if a person is knocked unconscious, a person doesn't feel any pain. (VIII RT 2484-2485.) Dr. Wolf also opined that ligature strangulation is not necessarily consistent with extreme or prolonged pain and the ligature marks around Deeble's ankles, were fairly light marks and not consistent with extreme or prolonged pain (VIII RT 2486.) The prosecutor, in cross examining Dr. Wolf, was properly focused on eliciting evidence of bias. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1165 [the prosecutor was entitled to expose bias in the witness].) The testimony of Dr. Fukumoto and the photos at the crime scene challenged Dr. Wolf's opinion that Deeble did not suffer any pain from the ligatures. The prosecutor's questioning pertaining to Dr. Wolf's credibility and content of his testimony were not improper.

During the cross-examination of Edwards, the following exchange occurred between Edwards and the prosecutor regarding Valentine's testimony:

Q. By Mr. Brent: What I am wondering, Mr. Edwards, is with people in your condition losing inhibitions and becoming more aggressive, progressively losing fine motor coordination and then gross motor coordination, if you were under these conditions all the time, how you could have hidden that from Kathy Deeble? . . .

A. I didn't hide it from her. She knew my drinking and my using.

Q. But she testified that other than having a few beers one time and seeing you inject, she never saw you under the influence of anything?

A. I thought that was interesting when she testified to that.

Q. She lied right?

A. Evidently.

Q. Do you know why she would lie against you?

A. Well maybe because I am accused of murdering her mother. I don't know.

Q. Do you think the accusation is enough for her to come in here and lie in a serious crime?

Mr. SEVERIN: Objection, speculation.

THE COURT: Sustained.

Q. BY Mr. BRENT: Is that what you are saying the reason they came in here to lie?

A. I don't know why she answered the – what she did the other day.

Q. She testified you were aware of a key at her mother's residence and of a screen. Was that the lie or the truth?

A. It is not the truth.

Q. Do you know why she would lie about that?

A. No, sir, I do not.

Q. She didn't seem to paint you in a particularly awful light when she testified, did she?

A. Pardon?

Q. She didn't seem to paint you in a particularly awful light when she testified, did she?

Mr. SEVERIN: Objection, this calls for speculation. It is an improper question.

THE COURT: Sustained.

BY Mr. BRENT: Did she come in here and make up a story that she admitted that you killed –

Mr. SEVERIN: Objection, improper question.

THE COURT: Sustained.

Q. BY Mr. BRENT: I am just wondering, Mr. Edwards, why you think she came in here and lied?

Mr. SEVERIN: I am going to object, improper question, speculation.

THE COURT: Sustained.

Q. BY Mr. BRENT: If you know.

Mr. SEVERIN: Objection, it is the same objection.

THE COURT: Sustained.

(IX RT 2622-2624.)

The prosecutor also cross-examined Edwards regarding Dr. Stalcup's testimony as follows:

Q. He [Dr. Stalcup] talked about some of the things in the body, the loss of inhibition takes place as one begins to drink and get above a .08. Do you recall that?

A. Yes, sir.

Q. Your fine motor coordination begins to go away where it would be difficult to tie things or use your fingers to do fine type work. Do you recall that?

A. Yes, sir.

Q. And that eventually – it is only eventually that the gross motor coordination, stumbling and staggering takes place?

A. Uh-huh.

Q. Dr. Stalcup never said that you as an addict or a user of alcohol didn't go through those stages, did he?

A. No. I don't re – he doesn't know me.

Q. He doesn't know you?

A. Dr. Stalcup, he has never interviewed me.

Q. Okay. And he talked about people in your condition, did he not?

A. Yes.

Q. That was the whole point of his testimony, wasn't it?

A. Yes.

Mr. SEVERIN: Objection, calls for speculation.

THE COURT: Sustained.

Mr. SEVERIN: Motion to strike the answer.

THE COURT: If there was an answer, it is stricken. The jury is ordered to disregard it.

(IX RT 2621-2622.)

With respect to the cross-examination of Edwards, Edwards claims that the prosecutor committed misconduct because the prosecutor asked Edwards questions regarding whether another witness, Valentine, had lied. (AOB 240-241.) However, a closer look at the exchange between Edwards and the prosecutor indicates, not a challenge to Valentine's credibility, but rather, Edwards' credibility. The prosecutor was disputing defense evidence, through Edwards and Dr. Stalcup, that Edwards was an alcoholic and drug addict. (VIII RT 2458; IX RT 2545-2552, 2563, 2602.) The prosecutor was focused on how, if Edwards was a drug addict and alcoholic who was losing coordination, would Valentine not have noticed it. The prosecutor was not trying to denigrate Valentine in asking the question, but rather, to focus on an inconsistency in the defense theory, and give Edwards an opportunity to explain that inconsistency. (See *People v. Chatman*, *supra*, 38 Cal.4th at p. 382 [a defendant who is a percipient witness to the events at issue has personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately; therefore, prosecutor's questions were not impermissible].) While the questioning may have been harsh, it was based on valid

inference drawn from the evidence presented at trial. (*People v. Huggins, supra*, 38 Cal.4th at p. 253; *People v. Arias, supra,* 13 Cal.4th at p. 162.) No misconduct occurred.

Similarly, the questioning of Hunt regarding her obvious affection for and bias toward Edwards was proper. (IX RT 2668; *People v. Zambrano, supra*, 41 Cal.4th at p. 1165.) The following is an excerpt of the cross-examination of defense witness Janis Hunt and the prosecutor:

> Q. BY Mr. BRENT: Miss Hunt, I noticed that when you were breaking at the lunch break that you looked over at Mr. Edwards and gave him a big wave and a big smile. Do you remember doing that?
>
> A. Yes.
>
> Q. You still carry a little bit of a torch for him?
>
> A. I still feel he is innocent.
>
> Q. That is not my question, ma'am.
>
> A. I am sorry.
>
> Q. You wanted to say that, didn't you?
>
> Mr. BATES: I will object, hostile and argumentative.
>
> THE COURT: It is argumentative, sustained.

(IX RT 2668.)

The prosecutor is permitted to expose bias in the defense witnesses (*People v. Zambrano, supra*, 41 Cal.4th at p. 1165) and to ask Edwards if a witness was lying (*People v. Chatman, supra*, 38 Cal.4th at p. 382). For these reasons, the questioning of defense witnesses did not constitute misconduct by the prosecutor. In any event, Edwards did not suffer prejudice from the prosecutor's alleged misconduct, if any. When prosecutorial misconduct has occurred, the defendant must demonstrate that it was prejudicial. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1019.) The standard for reviewing prosecutorial remarks or comments to determine misconduct is whether there is a reasonable likelihood the jury misconstrued or misapplied the prosecutor's

words in violation of the United States or California Constitutions. (*People v. Clair*, *supra*, 2 Cal.4th at pp. 662-663.) Even if genuine misconduct is established, the ultimate question in each case is whether it is reasonably probable that a result more favorable to the defendant would have occurred in the absence of such misconduct. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Criminal trials are rarely perfect, and a judgment will not be reversed unless upon a consideration of the entire record, the misconduct resulted in prejudice amounting to a miscarriage of justice. (*People v. Hill, supra*, 17 Cal.4th at pp. 844-845.)

Here, the trial court sustained all of Edwards' objections, and in one instance, struck the question and ordered the jury to disregard it. Thus, there was no prejudice suffered. (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 755, citing *People v. Pinholster, supra*, 1 Cal.4th at p. 943 [generally a party is not prejudiced by a question to which an objection has been sustained].) Moreover, the trial court instructed the jury regarding objections, that they should not guess the answer to sustained objections, that evidence stricken by the court should not be considered, and that questions or statements by attorneys are not evidence.[28/] (XI RT 3113.) Finally, as discussed above,

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28. The jury was specifically instructed as follows:

> Statements made by the attorneys during the trial are not evidence. . . .
>
> If an objection was sustained to a question, do not guess what the answer might [sic] been. Do not speculate as to the reasons for the objection. Do not assume to be true any insinuation suggested by a question asked a witness.
>
> A question is not evidence and may be considered only as it enables you to understand the answer.
>
> Do not consider for any purpose any offer of evidence that was rejected or any evidence that was stricken by the court.

(continued...)

the evidence of Edwards' guilt was overwhelming. Thus, it is not reasonably probable that a result more favorable to the defendant would have occurred in the absence of such misconduct. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839; *People v. Hill, supra*, 17 Cal.4th at pp. 844-845.)

C. The Prosecutor Did Not Denigrate Defense Counsel

Additionally, Edwards argues that the prosecutor committed misconduct by denigrating defense counsel when the prosecutor allegedly suggested that defense counsel, by discussing Deeble's possible unconsciousness, was creating an irrelevancy for the jury to consider (AOB 246-248), and because the prosecutor impugned the integrity of defense counsel by the prosecutor's argument in rebuttal (AOB 250-253). These claims are waived because Edwards failed to request admonitions which would have cured any conceivable harm. The arguments should also be rejected on the merits because the prosecutor did not denigrate defense counsel. Finally there was no prejudice and any misconduct was harmless.

During closing arguments, defense counsel argued as follows:

> What about unconsciousness? Any of you who have seen a boxing match knows when a knock-out blow lands, there is no lapse of time. And that is what Dr. Wolf said. And again that is why Dr. Fukumoto was not called back on rebuttal to refute him. Dr. Fukumoto isn't going to say anything different from him –

(X RT 2983.) At this point, the prosecutor objected, stating, "That is not true, your honor, and in fact that [sic] unconsciousness is irrelevant and Mr. Bates knows it." (X RT 2983.) Defense counsel objected to the prosecutor's "constant" objections. (X RT 2983.) The trial court sustained the prosecutor's objection. (X RT 2983.) Edwards now argues that "regardless of whether

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28. (...continued)
Treat it as though you had never heard it.

(XI RT 3113.)

defense counsel's argument was legally sound, it is improper for the prosecutor to suggest to the jury that he was intentionally raising an irrelevancy to consider." (AOB 248.) Edwards claims that defense counsel was improperly attacked by the prosecutor. (AOB 246.) Preliminarily, it bears noting that Edwards neither objected on grounds of misconduct nor requested an admonition that would have cured any conceivable harm. Thus, the issue is waived on appeal. (*People v. Guerra, supra*, 37 Cal.4th at p. 1124.) In any event, contrary to Edwards' argument, the prosecutor was not attacking defense counsel's integrity, but was rather pointing out that the defense argument was misleading in that it was focusing on a matter that had nothing to do with the issue of whether Edwards committed a torture murder.

It is improper for a prosecutor to denigrate a defense attorney. (See *People v. Young, supra*, 34 Cal.4th at p. 1189; *People v. Frye, supra*, 18 Cal.4th at p. 978.) The reason it is improper for a prosecutor to denigrate defense counsel is that a defendant's conviction should be based on the evidence adduced at trial and not on the purported improprieties or other deficits of his attorney. (*People v. Sandoval* (1992) 4 Cal.4th 155, 183.) "Casting uncalled for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom." (*People v. Thompson* (1988) 45 Cal.3d 86, 112.) However, the prosecutor may vigorously attack the defense case and argument if that attack is based on the evidence. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.) Thus, for example, if based on the evidence, the prosecutor may argue that the defense's argument was incorrect, speculative, or misleading. (*Id.*) In assessing a claim that the prosecutor made improper disparaging remarks about defense counsel, this Court must view the prosecutor's comments in relation to the remarks of defense counsel, and inquire whether the

former constitutes a fair response to the latter. (*People v. Frye, supra*, 18 Cal.4th at p. 978.)

Here, as discussed in Arguments VII.A, *ante*, and X.A, *post*, awareness of pain by the victim is not an element of murder by torture. Thus whether Deeble was aware of the pain because she may have received a knock out blow was irrelevant. The prosecutor's argument pointing out that defense counsel's argument involved an irrelevant matter was entirely proper. Moreover, the prosecutor's comment that defense counsel "knows" that the argument was irrelevant was not a personal denigration of defense counsel, but a fair response to defense counsel's attempt to interject an irrelevant matter into the jury's consideration of the evidence of torture murder. (*Ibid.*) There was no misconduct.

Edwards also claims that the prosecutor denigrated defense counsel during rebuttal argument. (AOB 249-253.) Again, while Edwards objected to these comments, he did not request an admonition. Thus, the argument is waived on appeal. Moreover, the prosecutor's comments did not disparage defense counsel, but were rather comments about the evidence presented at trial or proper critiques about defense strategy. There was no prejudicial prosecutorial misconduct.

During defense argument, counsel described the prosecutor's argument that Dr. Wolf had not done enough trauma autopsies as "derisory." In rebuttal, the prosecutor discussed being personally called "derisory" or the object of ridicule or scorn. (XI RT 3091.) The prosecutor stated, "That is what they think of me. That is what they think of this case." (XI RT 3091-3092.) Later during the argument, the prosecutor responded to defense arguments that the prosecution's case was like fake fronts or facades in fake western towns. (XI RT 3097.) The prosecutor then discussed how in Westerns, a person would light little fires around a property to get the people out of the house and attack

them. (XI RT 3097.) The prosecutor analogized that this was the defense strategy to "try to create fires by never really responding to the other challenge [the prosecution] made." (XI RT 3098.) The prosecutor continued:

> What is the defense, I asked? What is your defense? Is your defense that your client didn't do it, or is your defense that your client did it but there was no crime, there was no torture? These women – this woman, Mrs. Deeble was not tortured? [¶] Or is your defense that because of alcohol, you had a blackout and, therefore, you aren't responsible? . . . . [¶] They don't know what the defense is. They are defending the defendant without knowing the defense. [¶] They are hoping that by attacking the police, by attacking the crime scene, by attacking me, that is the old – you know, you know, I am sure Judge Ryan has heard this hundreds of times, a thousand times, the old law school deal; we heard Mr. Bates or Mr. Severin quote a law school professor, you used to hear this all the time: 'If the facts are on your side, you argue the facts. If the law is on your side, you argue the law. If neither is on your side, you attack your opponent.' [¶] That is the only way I can explain. . . . I don't know why Mr. Bates had to get up here and start this attack.

(XI RT 3098-3099.) Edwards objected on grounds that the prosecutor's argument was a personal attack and an improper argument. (XI RT 3099-3100.) The trial court overruled the objection. (XI RT 3100.)

The prosecutor's arguments did not denigrate defense counsel. In assessing a claim that the prosecutor made improper disparaging remarks about defense counsel, a reviewing court must view the prosecutor's comments in relation to the remarks of defense counsel, and inquire whether the former constitutes a fair response to the latter. (*People v. Frye, supra*, 18 Cal.4th at p. 978.) It is clear that the prosecutor was responding to defense arguments that the prosecutor's case was derisory and without substance underneath a false facade. The prosecutor was not making personal comments about defense counsel, but was, rather, making a comment about the state of the evidence and criticizing the defense strategy of throwing multiple defense theories against the wall to see if anything sticks. Moreover, the prosecutor's arguments that when

the law or facts are not on your side, one should attack one's opponent, has been found by this Court to not constitute misconduct. (*People v. Breaux* (1991) 1 Cal.4th 281, 305 [no misconduct to refer to law school trial tactics class where students are taught that if they do not have either the law or the facts on their side, "try to create some sort of a confusion with regard to the case because any confusion at all is to the benefit of the defense.'"]) Additionally, since defense counsel impugned the prosecutor in the defense argument, the prosecutor was entitled to argue the reason underlying that attack. Here, the prosecutor did no more than tell the jurors not to be fooled by smoke and mirrors. (*People v. Hill, supra,*17 Cal.4th at p. 819; *People v. Bemore*, *supra*, 22 Cal.4th at p. 846 [a prosecutor has wide latitude in criticizing the defense theory]; *People v. Taylor* (2001) 26 Cal.4th 1155, 1166-1167 [it is not improper for a prosecutor to argue that defense counsel has used "tricks" to confuse a witness].) There was no prosecutorial misconduct.

Even if this Court were to determine that the prosecutor's comments were not fair comments on the evidence but a denigration of defense counsel, the prosecutor did not use deceptive or reprehensible methods to attempt to either persuade the jury (*People v. Hill, supra*, 17 Cal.4th at p. 819; *People v. Milner* (1988) 45 Cal.3d 227, 245), or infect the trial with such unfairness as to make the conviction a denial of due process (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed.2d 431]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214). Thus, under either state or federal law, there was no misconduct. If, however, this Court determines the prosecutor engaged in misconduct, and it was of a constitutional magnitude, reversal is not required if the reviewing court determines beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*Donnelly v. DeChristoforo, supra,* 416 U.S. at pp. 642-643; *Chapman, supra*, 386 U.S. at p. 18.)

The comment about counsel knowing unconsciousness was irrelevant and comments that defense counsel called the prosecutor derisory were very brief, and defense counsel went on with his argument. The jury was also instructed that statements of attorneys are not evidence. (XI RT 3113.) It is presumed that the jury abided by the court's admonitions and instructions, and thereby avoided any prejudice. (*People v. Stitely* (2005) 35 Cal.4th 514, 559.) For these reasons, and in light of the overwhelming evidence of his guilt, even if the prosecutor had not made the complained of comments, it is clear beyond a reasonable doubt that Edwards would not have enjoyed a more favorable outcome. Thus, any misconduct is harmless.

D. There Was No Prejudicial Prosecutorial Misconduct During Closing Argument

Edwards claims that the prosecutor committed misconduct during closing arguments by lessening the prosecution's burden of proof (AOB 254-258), and by suggesting that the Deeble and Delbecq murders were similar and if they were not, the defense would have introduced evidence to the contrary. (AOB 258-259.) These claims should be rejected, as the prosecutor's comments in closing argument did not constitute prejudicial misconduct.

Edwards claims that the prosecutor lessened the burden of proof by arguing in closing that "it is fair not to give him the benefit of any factual or mental, anything to his benefit." (X RT 2932.) Taken in context of his argument, the prosecutor's argument did not lessen the prosecution's burden of proof. In discussing the similarities and dissimilarities between the Los Alamitos and Hawaii crime scenes during closing arguments, the prosecutor pointed out that an object found at the scene was used to penetrate both women and telephone cords at the scene used to bind them. (X RT 2930.) The prosecutor then discussed how the cans of mousse were the same size, but they were not used in the same way because Edwards graduated to a

more sadistic level a few years later in the Hawaii case. (X RT 2931.) The prosecutor also theorized that perhaps Deeble died too quickly, so he did not have a chance to ram the mousse can all the way into Deeble's abdominal cavity, as he had done in the Delbecq case. (X RT 2931.) The prosecutor then stated:

> Would you give him – would you give him the benefit of the doubt on that? Would you think it was – now I am talking about something different than proof beyond a reasonable doubt okay? I am talking about knowing this man as you know him, is there a reason that a person who is brutally torturing women, are you going to give him a benefit as to his motivation? Are you going to say he probably did it differently because it is not the same guy? [¶] Or are you going to assume the worst? Would it be fair in this case to assume the worst that the motivation, that the reason he couldn't get more sexually involved with these mousse cans was because he killed her too fast? [¶] I say it would be fair. You will ultimately determine whether it would be fair or not; it is true or not. [¶] I submit under these facts it is fair. I submit it is, it is fair not to give him the benefit of any factual or mental, anything to his benefit.

(X RT 2931-2932.) Edwards objected on grounds that the argument improperly lessened the prosecution's burden of proof, and he requested an admonition. (X RT 2932.) The trial court indicated that it would instruct the jury. Additionally, the defense would "get a chance to rebut, and the jury will follow the court's instructions." (X RT 2932.) The prosecutor continued his argument, and made clear, ". . . I am not talking about the burden of proof." (X RT 2932.)

The law is well established that it is improper for the prosecutor to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. (*People v. Marshall*, *supra*, 13 Cal.4th at p. 831; *People v. Hill, supra,* 17 Cal.4th at pp. 829-830.) "Although defendant singles out words and phrases, or at most a few sentences, to demonstrate misconduct, we must view the statements in the context of the argument as a

whole. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 522; *People v. Lucas*, *supra*, 12 Cal.4th at p. 475.)

Viewed in its entirety, it is clear that the prosecutor was not arguing that the prosecution had a lesser burden of proof. To the contrary, the prosecutor specifically pointed out twice in that same argument that he was not talking about the burden of proof. (X RT 2931, 2932.) Rather, the prosecutor was arguing that while there were some dissimilarities in the two cases because Edwards did not force the mousse can up into Deeble's body far enough to penetrate the abdominal cavity through the vaginal wall and rectum, as he had done to Delbecq, the jury should not assume that the same person did not commit both crimes. Perhaps Edwards had graduated to a higher level of sadism by the time of Delbecq's murder, or perhaps Deeble died too quickly for him to reach the point in sexually assaulting her of forcing the can through her genital cavities into her abdominal cavity. As the prosecutor explained, these were fair inferences that could be drawn from the evidence. The jury was not required to assume that, as the defense urged, merely because of some dissimilarities, the same person could not have committed both crimes. The prosecutor was also arguing that Edwards' credibility could be questioned because he was a convicted murderer. (X RT 2932.) Taken in context, it is clear from the record that the prosecutor was not arguing that he had a lesser burden of proof.

Even assuming that this was misconduct, any prejudice was cured by the trial court's admonition. Moreover, the prosecutor and defense counsel discussed the burden of proof in their closing arguments, and finally, the jury was properly instructed on the burden of proof. Right after Edwards' objection, the trial court stated that it would instruct the jury, the defense could rebut, and the jury would follow the court's instructions. (X RT 2932.) Later during the defense argument, Edwards did address the prosecutor's alleged lessening of

the burden of proof. (X RT 2953.) After the prosecution's objection, the trial court clarified, "The people have the burden of proof. I don't recall anybody trying to lessen that. And if somebody did, ignore it. You will get the law. I will read it to you very carefully, and I am going to give it to you in writing. And what I tell you about the law is what counts." (X RT 2953-2954.) Defense counsel then argued and explained that the prosecutor had the burden of proving all elements beyond a reasonable doubt, and Edwards is presumed innocent. (X RT 2963-2964, 3004-3005; XI RT 3087-3088.) The prosecutor also explained to the jury that he had the burden of proof. (X RT 2949.) The trial court also instructed the jury with the instruction on burden of proof, CALJIC No. 2.90. (III CT 942; XI RT 3125.) For these reasons, and in light of the overwhelming evidence of Edwards' guilt, even if the prosecutor had committed misconduct, it is clear beyond a reasonable doubt that Edwards would not have enjoyed a more favorable outcome. Thus, any misconduct is harmless.

Lastly, Edwards claims that the prosecutor committed misconduct during closing argument because he argued facts that were not in evidence. In closing, the prosecutor argued that no defense witnesses explained how the mousse cans could have been found in both the Los Alamitos and the Hawaii crime scenes, despite "access to show us all the other murders out there that happened this same way." (X RT 2933.) The prosecutor did not commit misconduct because a prosecutor may comment that a defendant has not produced evidence. (*People v. Young, supra*, 34 Cal.4th at pp. 1195-1196.) A prosecutor may make vigorous arguments as long as it amounts to fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom. (*People v. Williams, supra*, 16 Cal.4th at p. 221.) In any event, because the objection to the statement was sustained and the statement stricken, there was no prejudice. (*See People v. Mayfield, supra*, 14 Cal.4th at p. 755.)

E. The Trial Court Acted Within Its Discretion in Denying the Motion for Mistrial Because the Brief and Inadvertent Mention of Edwards' Arrest in Hawaii in the Prosecutor's Opening Statement Was Not Prejudicial

Edwards argues that the trial court abused its discretion when it denied his motion for mistrial following the prosecution's breach of its promise not to disclose Edwards' arrest for the Delbecq murder to the jury. (AOB 259-261.) The trial court did not abuse its discretion, as Edwards suffered no prejudice by the brief mention of his arrest.

During his opening statements, the prosecutor, after briefly describing the facts of the Delbecq murder in Hawaii, stated, "In fact, when Mr. Edwards was ultimately arrested for this – when Mr. Edwards was found to be involved . . . ." (VI RT 1961.) Edwards did not object or request an admonition at the time the statement was made. After the prosecutor completed his opening statements, defense counsel moved for a mistrial because despite his assurance not to mention Edwards' Hawaii arrest, the prosecutor mentioned it during the opening statement. (VI RT 1965.) The trial court commented, "How would this jury not figure that out sooner or later?" (VI RT 1966.) The prosecutor explained that he had indeed informed the defense that he would not discuss the arrest, but his mention of the arrest during opening was inadvertent, unintentional, and he corrected himself immediately; therefore, there is no prejudice. (VI RT 1966.) The trial court denied the motion for mistrial because there was no prejudice, again pointing out that the jury would know since Edwards' fingerprints were found in the Delbecq home. The trial court also stated that an "arrest was a far cry from conviction," and the court would instruct the jury on the limited purpose of the evidence. (VI RT 1967.)

The standard of review for a trial court's ruling for a motion is whether there was an "abuse of discretion, and such a motion should be granted only when a party's chances of receiving a fair trial have been irreparably damaged."

(*People v. Ayala, supra*, 23 Cal.4th at p. 283.) "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]" (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) Thus, the trial court's denial of the mistrial motion constitutes an abuse of discretion only if the evidence is incurably prejudicial.

Here, there was no prejudice from the prosecutor's inadvertent and very brief reference to Edwards' arrest in Hawaii for murder. As the trial court pointed out, the jury would learn of Edwards' involvement in the Hawaii murder in any event because evidence that his hand and foot print were found in Delbecq's residence was presented at trial. (VII RT 2253, 2256, 2258.) Moreover, Edwards testified at trial, placing his credibility at issue. Edwards admitted to being convicted of the murder in Hawaii in 1994. (IX RT 2616.) Thus, the jury was eventually made aware of his arrest and conviction in the Hawaii murder. The trial court instructed the jury on the limited purpose of the felony conviction. (III CT 933; XI RT 3119.) The trial court did not abuse its discretion in denying the motion for mistrial because there was no prejudice from the brief and inadvertent mention of the Hawaii arrest.

F. The Prosecutor Did Not Vouch or Give a Personal Opinion When He Made Reference to a "Killer" in His Rebuttal Argument

Edwards contends that by stating in closing argument, "he is a killer," the prosecutor injected his belief as to Edwards' guilt and vouched improperly on the appropriateness of the verdict. (AOB 261-263.) Edwards' argument is waived, and fails on the merits.

In rebuttal argument, the prosecutor talked about Edwards' credibility and how the jury could consider his prior convictions of burglary and murder to determine his credibility. (XI RT 3107.) The prosecutor then asked the jury if after evaluating the evidence, namely, Edwards' access to both women, the similarities between the two crime scenes, the sexual motivation of both murders, "how is it possible with all of that that this defendant is not the killer?" (XI RT 3108.) The prosecutor continued that no member of the jury would be able to walk out of the jury room and say,

> these mousse cans and all this other stuff, well, they didn't really tell us that much. You know, we just – you know, any killer that knew both had access to these women, one knew her, one lived by, that is just what any killer would have done. [¶] See, when you come to that conclusion, when you arrive there, then whether or not pubic hairs got left or not or blown around or whatever doesn't mean very much. Because you know that, whereas maybe that evidence would be in a crime scene or maybe it wouldn't. You know it wasn't here, legitimately wasn't here. And that is just the way it was. Because he is the killer, and it just didn't happen. I hope you see what I am saying by that. The possibilities of interpretation go away when you know what happened.

(XI RT 3108-3109.)

Edwards' contention that the prosecutor was improperly vouching and expressing his opinion when he referred to Edwards as a "killer" several times is waived because he failed to object and request an admonition which would have cured any conceivable harm. (*People v. Hill, supra,* 17 Cal.4th at p. 820.) Edwards' complaint is also without merit. Impermissible prosecutorial vouching occurs when a prosecutor either (1) places the prestige of the government behind a witness through personal assurances of the witness's veracity, or (2) expresses a personal opinion or belief in a witness's credibility when there is substantial danger the jurors will interpret it as being based on information at the prosecutor's command other than evidence adduced at trial.

(*People v. Fauber* (1992) 2 Cal.4th 792, 822; *People v. Fierro* (1991) 1 Cal.4th 173, 211; *People v. Anderson, supra*, 52 Cal.3d at p. 479.) "It is not, however, misconduct to ask the jury to believe the prosecution's version of events as drawn from the evidence. Closing argument in a criminal trial is nothing more than a request, albeit usually lengthy and presented in narrative form, to believe each party's interpretation, proved or logically inferred from the evidence, of the events that led to the trial. It is not misconduct for a party to make explicit what is implicit in every closing argument. . . ." (*People v. Huggins, supra,* 38 Cal.4th at pp. 206-207.)

Here, the prosecutor did not improperly vouch for the credibility of a witness nor give his personal opinion about a witness's credibility. Taken in proper context, the prosecutor's reference to killer in his closing was the prosecutor's request of the jury to believe the prosecution's version of events drawn from the evidence. The prosecutor was saying that with all the similarities presented by both murders, it would not be possible to determine that the same person did not kill both Deeble and Delbecq. Since it is beyond question that Edwards killed Delbecq, it would be impossible to determine that Edwards did not also kill Deeble. The prosecutor did not give his personal opinion, but rather made an argument based on the evidence presented at trial and all inferences drawn therefrom. There was no misconduct.

In any event, as discussed above, there was no prejudice because of the overwhelming evidence of Edwards' guilt, and because the jury was instructed that the argument of counsel was not evidence.

G. Edwards Was Not Deprived of His Federal Constitutional Right to a Fair Trial or Due Process, Nor Was There Cumulative Error by the Prosecutor's Alleged Misconduct

Edwards also claims that the prosecutor's "continuing pattern or misconduct" deprived him of this federal constitutional right to a fair trial and

due process. (AOB 263-268.) As set out above, the prosecutor did not commit misconduct during the trial, thus there was no error to cumulate. Even if the prosecutor did engage in misconduct, the conduct was not so egregious that it infected the trial with such unfairness as to make Edwards' convictions a denial of federal due process, as set forth in each of the arguments above. (*Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643.) Reversal is not required because misconduct, if any at all, was harmless beyond a reasonable doubt in light of the nature of the claimed errors and the overwhelming evidence of Edwards' guilt. (*Chapman, supra*, 386 U.S. at p. 18.)

X.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN LIMITING THE SCOPE OF CLOSING ARGUMENT

Edwards argues that repeated interruptions of defense closing argument violated his state and federal rights to a fair trial. (AOB 268-275.) Specifically, Edwards claims that the trial court abused its discretion by sustaining an objection to his attempt to argue that a "knockout blow" which would have rendered Deeble unconscious was inconsistent with a finding of an intent to cause extreme and prolonged pain. (AOB 270-272.) Edwards also argues that the trial court erred in not allowing him to play, during closing argument, a videotape of a television program that depicted the striking similarities in the lives of two women. (AOB 272-275.) Edwards' claims should be rejected. The trial court did not abuse its discretion by limiting the scope of closing argument because argument regarding Deeble's possible unconsciousness was irrelevant and playing a tape of a television show about a subject unrelated to the case which was not a subject of common knowledge was irrelevant, confusing, and would have taken an undue amount of time.

A criminal defendant has a well-established constitutional right to have counsel present closing argument to the trier of fact. (*Herring v. New York* (1975) 422 U.S. 853, 856-862 [95 S.Ct. 2550, 45 L.Ed.2d 593]; *People v. Marshall*, *supra*, 13 Cal.4th at p. 854; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1184.) This right is not unbounded, however; the trial court retains discretion to impose reasonable time limits and to ensure that argument does not stray unduly from the mark or otherwise impede the fair and orderly conduct of the trial. (*Herring v. New York, supra,* 422 U.S. at p. 862; *People v. Marshall, supra*, 13 Cal.4th at pp. 854-855.)

Penal Code section 1044 states, in pertinent part, "It shall be the duty of the judge to control all proceedings during the trial, and to limit . . . the

argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." The trial court's decision is reviewed for an abuse of discretion. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1334.)

A. The Trial Court Acted Within Its Discretion In Finding Argument Regarding Deeble's Possible Unconsciousness Irrelevant

Here, the trial court did not err in sustaining the prosecutor's objection that reference to the unconsciousness of Deeble was irrelevant. Defense counsel argued in closing:

> What about unconsciousness? Any of you who have seen a boxing match knows when a knock-out blow lands, there is no lapse of time. And that is what Dr. Wolf said. And again that is why Dr. Fukumoto was not called back on rebuttal to refute him. Dr. Fukumoto isn't going to say anything different from him –

(X RT 2983.) At this point, the prosecutor objected, stating, "That is not true, your honor, and in fact that [sic] unconsciousness is irrelevant and Mr. Bates knows it." (X RT 2983.)

As Edwards acknowledges (AOB 271) and as set forth in Argument VII.A above, it has long been held that awareness of pain by the victim is not an element of first degree murder by torture. (*People v. Davenport, supra,* 41 Cal.3d at p. 268, citing *People v. Wiley, supra*, 18 Cal.3d at pp. 168-169, 173 [attempts to measure the amount of pain, if any, suffered by victims of torturous acts who may have been quickly rendered unconscious at the outset of the homicidal assault futile and unnecessary.]) As required by section 1044, a trial judge must control all proceedings and limit the argument of counsel to relevant and material matters. As is clearly established by case law, whether Deeble was aware of pain because she may have received a "knock out blow" and was rendered unconscious was irrelevant, and the trial court properly sustained the objection.

In any event, any error was harmless because there is no reasonable probability that Edwards would have received a more favorable result even if the objection had been denied. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) After all, defense counsel was able to argue that Deeble was strangled and would have been unconscious in less than a minute. (X RT 2983.) Even after the objection was sustained, defense counsel continued to argue, "No one intending to cause prolonged pain would ligature strangle their victims so fast that their brain swells up and they lose consciousness in less than a minute." (X RT 2984.) Thus, despite the trial court's ruling that argument about Deeble's possible unconsciousness was irrelevant, defense counsel was able to argue the same point on two other occasions. Any error was therefore harmless.

B. The Trial Court Acted Within Its Discretion in Ruling Under Evidence Code Section 352 That the Defense Could Not Play a Videotape of a Television Show During Closing Argument

Edwards contends the trial court erred in denying his request to play a five minute videotape of a television show which documented the similarities between two women who did not know each other. (AOB 272-275.) Apparently, the two women had the same maiden names, same social security number, same date of birth, their fathers were both named Robert Campbell, both of the women got married while in high school to military men, their children were born on the same years, and they share the same taste in food, perfume, paint medium, and authors. (X RT 3052-3053.) Before attempting to play this tape, defense counsel had already discussed, during closing argument, coincidences between two Illinois couples who lived in the same house and had won the state lottery, the similarities between the assassinations of President Lincoln and President Kennedy, and that the date of the murder in the O.J. Simpson case, when added up, equaled the number O.J. wore on his

jersey when he played football. (X RT 3039-3041.) Not surprisingly, when defense counsel tried to play this videotape and argue about the similarities about these two random women, the prosecutor objected pursuant to Evidence Code section 352 that this was not evidence, it was irrelevant, an undue consumption of time, and the material in the videotape was not common knowledge or widely known. (X RT 3042, 3044, 3049-3050.) The trial court sustained the prosecutor's objection, ruling that it would take a lot of time to play a videotape that might not even be accurate. (X RT 3052.) The trial court, however, ruled that defense counsel could discuss, in his argument, all the points of similarities between the women in the television program. (X RT 3044-3052.) Defense counsel did discuss all of the points of similarity in his closing argument to the jury. (X RT 3052-3053.) The trial court acted within its discretion in limiting the closing argument by not allowing the tape to be played.

Counsel's summation to the jury must be based upon facts shown by the evidence or known judicially. (*People v. Pelayo* (1999) 69 Cal.App.4th 115, 122; *People v. Mendoza* (1974) 37 Cal.App.3d 717, 725.) Counsel may refer the jury to non-evidentiary matters of common knowledge, or to illustrations drawn from common experience, history, or literature (*ibid.,* citing *People v. Love* (1961) 56 Cal.2d 720, 730, overruled on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2), but he may not dwell on the particular facts of unrelated, unsubstantiated cases.

Here, the trial court gave defense great latitude in making his argument about various coincidences in life; however, the trial court properly denied defense counsel free license to play a videotape of a television show about women unrelated to the case, which had no foundation regarding accuracy, which was not widely known or common knowledge, which could only confuse the jury with irrelevant facts, and take up undue consumption of time.

(*People v. Pelayo, supra*, 69 Cal.App.4th at p. 122; *People v. Mendoza, supra*, 37 Cal.App.3d at p. 725.) This television program certainly could not be considered an illustration drawn from common experience, history, or literature. (*People v. Love, supra*, 56 Cal.2d at p. 730; *People v. Mendoza, supra*, 37 Cal.App.3d at p. 725.) Defense counsel had already gone on at length about a variety of subjects that he argued shared similarities such as Illinois lottery winners, the assassinations of presidents, and how the dates of the O.J. Simpson murder case and the present case, when each were added up equaled the number of Simpson's football jersey. The trial court did not abuse its discretion in limiting defense argument to a summation of the similarities between these two women instead of playing the videotape of the entire program to the jury.

In any event, any error was harmless. Edwards was able to argue the same points to the jury by listing every similarity shared by these two random women. And as noted before, he also addressed this issue at length by discussing Illinois lottery winners, assassinations of presidents, and dates of murders. The jury was well aware of the defense arguments that the similarities between the Deeble and Delbecq murder could have just been sheer coincidence. There was no reasonable probability that playing the videotape would have resulted in a more favorable verdict.

XI.

THE JURY WAS PROPERLY INSTRUCTED

Edwards argues that his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated when the trial court to refused to instruct the jury with several instructions proposed by the defense. (AOB 84-93, 275-293.) Specifically, Edwards argues that the trial court erred: (1) by refusing to instruct the jury with a defense jury instruction that was necessary to adequately explain the limited use to which evidence of the uncharged Hawaii evidence could be considered (AOB 84-93); (2) by refusing to instruct the jury with a cautionary instruction about the limited use for which it could consider Sgt. Jessen's testimony that the investigation focused on Edwards after he was advised scientific testing had eliminated all other suspects (AOB 275-285); and (3) by instructing the jury with instructions on murder by torture and the torture-murder special circumstance which omitted an essential element that Edwards inflicted pain on a "living human being." (AOB 285-293.) Edwards' contentions should all be rejected, as the jury was properly instructed.

A. The Trial Court Properly Declined to Instruct the Jury With Defense Proposed Modifications to CALJIC No. 2.50 Because the Instructions Were Duplicative, Argumentative or Inaccurate Statements of Law

Edwards claims that the trial court erred in refusing to give the defense proposed modifications to the standard CALJIC No. 2.50 instruction on use of other crimes evidence. (AOB 84-93.) This argument should be rejected, as the proposed modifications to the instruction on other crimes evidence were duplicative, argumentative or incorrect assertions of law.

The trial court instructed the jury with a modified version of CALJIC No. 2.50 as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is

on trial. [¶] Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. [¶] Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:

The identity of the person who committed the crime, if any, of which the defendant is accused;

A characteristic design or plan in the commission of criminal acts similar to the design or plan or scheme used in the commission of the offense in this case.

The existence of the intent which is a necessary element of the crime charged.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose.

For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts.

(III CT 935; XI RT 3120-3121.)

Edwards' proposed instruction on the other crimes evidence was almost identical to the instruction given by the trial court, except it added two sentences. The first stated, "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity." (III CT 880.) The other sentence set forth, "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." (III CT 880.)[29/]

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29. Defense proposed instruction, in whole, set forth:

Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial. [¶] Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person

(continued...)

The trial court found that the sentence regarding a "signature" was somewhat argumentative. (X RT 2858.) The trial court explained that the word "signature,"

> are [sic] words attorneys can use in describing. For example, the prosecutor can say it is exactly a signature, and you could say, pooh pooh on that, and look at all this other stuff. [¶] But I have to give the jury words the jury can use in trying to figure out whether or not the similarities are close enough, and that is actually a difficult concept. [¶] So that is why I took the words from *Ewoldt* and just changed them a bit. 'The uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that

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29. (...continued)
of bad character or that he has a disposition to commit crimes. [¶] Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:

The identity of the person who committed the crime, if any, of which the defendant is accused;

The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. *The pattern and characteristics of the crimes must be so unusual and distinctive to be like a signature.*

A characteristic design or plan in the commission of criminal acts similar to the design or plan or scheme used in the commission of the offense in this case.

The existence of the intent which is a necessary element of the crime charged.

For the limited purpose for which you may consider such evidence, you must weight it in the same manner as you do all other evidence in the case.

You are not permitted to consider such evidence for any other purpose.

(III CT 880, italics added.)

the same person committed both acts.' I think that is the issue. And I think that is clear enough.

(X RT 2859.) Defense counsel argued that the jury would more likely know what a "signature" was than understand the words, "common features that are sufficiently distinctive to support the inference." (X RT 2861.) The trial court ruled, "I don't like the language. I don't think it helps – I don't think it would help the jury. You can use it. The prosecutor will probably use it. But I don't think it is something that guides the jury in their decision making. (X RT 2861-2862.)

With respect to the proposed language of the "greatest degree of similarity," the trial court rejected the defense instruction. The trial court reasoned that asking them to find the greatest degree of similarity "is asking them to compare." (X RT 2862.)

The trial court properly rejected both of the defense proposed instructions. The trial court was already instructing the jury that "for identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts." This language, taken directly from *People v. Ewoldt, supra,* 7 Cal.4tth at page 393, explained that the common features of the charged and uncharged misconduct had to be sufficiently distinctive. The defense proposed instruction, "the pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature," was repetitious of instructions already given, and the trial court properly refused it on this ground. (*People v. Bolden* (2002) 29 Cal.4th 515, 558-559 [a trial court need not give a pinpoint instruction if it merely duplicates other instructions]; *People v. Wright* (1988) 45 Cal.3d 1126, 1134-1135.)

Furthermore, the defense proposed instructions on the greatest degree of similarity and the signature language were argumentative because it invited the jury to draw inferences favorable to Edwards on disputed questions of fact,

namely the dissimilarity or similarity of the Deeble and Delbecq murders. "An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue." (*People v. Wright, supra*, 45 Cal.3d at pp. 1135-1136; *People v. Hill* (1946) 76 Cal.App.2d 330, 342; *People v. Slocum* (1975) 52 Cal.App.3d 867, 893.) Lastly, the language regarding "the greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity" would require the jury to perform a judicial function in that the jury would have to compare the degrees of similarities necessary to permit consideration of evidence on the issue of identity, intent and common plan. This would be beyond the jury's fact finding province, as it is the trial court that makes the determination whether the evidence is sufficiently similar so as to be admissible for the limited purpose being considered by the jury here. Thus, instructing with this defense proposed instruction would have been improper.

Edwards also proposed that the trial court instruct on other crimes evidence on the issue of intent as follows:

> If you have no doubt that the perpetrator of the Los Alamitos homicide was Mr. Edwards, then you may consider the evidence of the Hawaii homicide on the issue of intent in the Los Alamitos homicide.

(II CT 883.) The trial court rejected this proposed instruction because it was not the law and was argumentative. (X RT 2862.)

The trial court properly denied the defense request to instruct the jury with this instruction, as it was a misstatement of the law. Under Evidence Code section 1101, other crimes evidence is admissible when "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident . . .) other than his or her disposition to commit such and act." (*People v. Carter, supra*, 36 Cal.4th at p. 1147.) There is no conditional requirement that there must be no doubt as to the identity of the

perpetrator before other crimes evidence is admissible on the issue of intent. In fact, the Hawaii evidence was admissible to prove identity in the present case. A trial court need not instruct the jury pursuant to a requested defense instruction that misstates the law. (See *People v. Earp*, *supra*, 20 Cal.4th at p. 903 [trial court did not err in refusing to instruct the defense instruction because it was legally "inaccurate"].) Moreover, as discussed above, this instruction was argumentative because it would invite the jury to draw inferences favorable to Edwards on disputed questions of facts. Because the defense proposed instruction was inaccurate and argumentative, the trial court properly declined to instruct the jury with the instruction.

In any event, any error in giving the proposed instructions was harmless under any standard. (See *People v. Watson, supra,* 46 Cal.2d at p. 836; e.g., *People v. Earp*, *supra*, 20 Cal.4th at p. 887 [failure to give defense pinpoint instruction harmless]; but see *People v. Mayfield, supra*, 14 Cal.4th at p. 774, citing *Chapman, supra,* 386 U.S. at p. 24.) The trial court instructed the jury on a modified version of CALJIC No. 2.50 which added language similar to the language requested by defense counsel. Moreover, during closing arguments, both counsel did discuss at length the degree of similarity required, and whether the two crime scenes constituted a "signature." (X RT 2914-2936; 3022-3054; 3092-3096.) Thus, any error was harmless.

B. Instructing the Jury With Defense Proposed Instruction Regarding Sgt. Jessen's Testimony Would Have Been Duplicative and Argumentative

Edwards contends that the trial court should have given a second admonition to the jury to disregard the prosecutor's reference to DNA testing when the prosecutor asked Sgt. Jessen why he focused on Edwards as a suspect. (AOB 275-285.) The factual basis for this claim is set forth in more detail in Argument VI.C. above. In short, the prosecutor, in order to rebut the defense

theory that the police investigation was not thorough and focused on Edwards without a reason, asked Sgt. Jessen, "Okay, another reason, is it not true that these persons had been eliminated by DNA from providing the samples at the Deeble residence of semen and fluids and Mr. Edwards had not been eliminated, correct?" (X RT 2819.) The defense objection was promptly sustained and Sgt. Jessen never answered the question. (X RT 2820.) The trial court admonished the jury:

> Earlier in the trial we told you that certain evidence was being offered for a limited purpose. Well the last question by the way is stricken. The jury is ordered to disregard it. [¶] But these questions of this officer is being offered for a limited purpose, and the limited purpose is this officer's state of mind. And what that is relevant to, I think will become obvious by the questions and by any cross-examination on those questions. [¶] The letters 'DNA' were used in the last question. Don't assume or think about it. Those letters are stricken. They are meaningless as far as your duty is concerned. Is that understood? You can handle that all right?

(X RT 2837-2838.)

Despite the fact that the objection was sustained, the question was stricken, the jury was admonished and ordered to disregard the reference to DNA, Edwards requested that the jury be admonished a second time, and that the court instruct it with the following defense proposed instruction:

> A statement was made yesterday that requires a further admonition. Sergeant Jessen testified that the seven named individuals ere eliminated by 'DNA testing'. After consultation with the attorneys it appears that the statement was false. There never was DNA testing done regarding the seven named individuals. Other testing led Sergeant Jessen to believe that they were not viable suspects in his mind. This evidence is not admitted for the truth of the matter as to whether there was other testing or its results. It is only admitted to explain the officer's state of mind in not completing hair comparisons of these men with hair from the scene. Whether it does explain that state of mind, and what weight if any it should be given, is for you to determine.

(III CT 852; X RT 2885-2887.) Edwards reasoned that a second admonition was necessary because the prosecutor's statement was factually not true; other testing such as ABO typing was used to eliminate the other subjects, but DNA testing was never done. (X RT 2885-2887.) The prosecutor refuted the defense assertion, and claimed that DNA testing was done. (X RT 2887.) In any event, as the prosecutor pointed out, even if DNA testing was not done, any harm caused by the brief, one-time mention of DNA was quickly dispelled because the objection was sustained, Sgt. Jessen never answered the question, the question was stricken, the jury was ordered to disregard it, and the jury was admonished.

A trial court must give requested jury instructions that pinpoint the theory of the defense, but it can refuse instructions that highlight specific evidence as such. Because this type of instruction invites the jury to draw inferences favorable to one of the parties from specified items of evidence, it is considered argumentative and therefore should not be given. (*People v. Earp*, *supra*, 20 Cal.4th at p. 886; *People v. Wright*, *supra*, 45 Cal.3d at p. 1137.) Such matter "properly belongs not in instructions, but in the arguments of counsel to the jury." (*People v. Wright, supra*, 45 Cal.3d at p. 1135.) Furthermore, the trial court has no obligation to give pinpoint instructions that are incomplete or erroneous. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1021 [defendant's proposed instruction on premeditation properly denied because it was incorrect]; *People v. Weathington* (1991) 231 Cal.App.3d 69, 79-81.) Finally, a trial court need not give special instructions, even if legally correct, if they are duplicative of other properly given instructions. (*People v. Benson* (1990) 52 Cal.3d 754, 805, fn. 12; *People v. Farmer* (1989) 47 Cal.3d 888, 913, overruled on other grounds in *People v. Waidla, supra*, 22 Cal.4th at p. 724, fn. 6; *People v. Wright, supra*, 45 Cal.3d at p. 1134.) As this Court recently held in *People v. Cook* (2007)

40 Cal.4th 1334, 1362, "the court has no duty to give argumentative, duplicative, incomplete, or erroneous instructions. [Citations.]"

Here, Edwards' proposed defense instruction or admonition was duplicative of the admonition already given to the jury right after the question was asked. (X RT 2837-2838.) In addition, the defense instruction is argumentative because it makes unfounded assertions that no DNA testing had ever been done, when the record is not at all clear whether this was accurate or not, and the prosecutor insisted that DNA testing had in fact been conducted. (See *People v. Earp*, *supra*, 20 Cal.4th at p. 886; *People v. Mincey*, *supra,* 2 Cal.4th at p. 437.) This argument is more appropriate in closing arguments and not in an admonition given by the trial court.

In any event, error was harmless as there is no reasonable probability that Edwards would have enjoyed a more favorable outcome had the admonition been given. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) As noted previously, a defendant cannot show prejudice when the court sustained an objection to claimed misconduct and admonished the jury. (*See People v. Price, supra,* 1 Cal.4th at p. 482; *People v. Pinholster, supra*, 1 Cal.4th at p. 943; *People v. Smithey*, *supra*, 20 Cal.4th at p. 960.) Because the objection was sustained, the question stricken, and the jury was promptly admonished, it is not reasonably probable that Edwards would have received a more favorable outcome even if the jury had been admonished a second time in the court's final charge to the jury before deliberations.

C. Any Error in the Trial Court's Misreading of the Murder by Torture and the Torture Special Circumstance Allegation Was Harmless

Edwards argues that the oral instructions for murder by torture and the torture-murder special circumstance were erroneous because the trial court omitted the element that Edwards had to inflict pain on a "living" human being.

(AOB 285-293.) Edwards' contention should be rejected. Preliminarily, the argument is forfeited because Edwards explicitly agreed that the correct written instructions provided to the jury were sufficient. Moreover, in light of the fact that the jury was provided with correct written instructions, the jury was instructed that the written instructions should guide them, and because the closing arguments of both the prosecutor and defense counsel correctly set forth the element that Edwards had to inflict pain on a living human being, any error in the misreading of the instructions orally was harmless.

The trial court orally instructed the jury on murder by torture as follows:

> Murder which is perpetrated by torture is murder of the first degree. The essential element of murder by torture are: [¶] 1. One person murdered another person, and [¶] 2. The perpetrator committed the murder with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain upon a human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose, [¶] The acts or actions taken by the perpetrator to inflict extreme and prolonged pain were a cause of the victim's death. [¶] The crime of murder by torture does not require any proof that the perpetrator intended to kill his victim, or any proof that the victim was aware of pain or suffering. [¶] The word 'willful' as used in this instruction means intentional. [¶] The word 'deliberate means formed or arrived at or determined upon as a result of careful thought and weighing and considerations for and against the proposed course of action. [¶] The word 'premeditated' means considered beforehand.

(XI RT 3132-3133.) The trial court also verbally instructed the jury on the torture-murder special circumstance allegation as follows:

> To find that the special circumstance, referred to in these instructions as murder involving infliction of torture is true, each of the following facts must be proved: [¶] 1. The defendant intended to kill a human being. [¶] 2. The defendant intended to inflict extreme cruel physical pain and suffering upon a human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose, and [¶] 3. The defendant did, in fact, inflict extreme cruel physical pain and suffering upon a human being no matter how long its duration.

Awareness of pain by the deceased is not a necessary element of torture.

(XI RT 3138.) Right after the instructions were read, defense counsel told the court that he did not hear the word "living" on either of the torture instructions. (XI RT 3143.) Defense counsel stated, "Just so it is on that written form, that is all we care about." (XI RT 3143.) The trial court stated, "I am sure I said it. I remember saying it, but we can have –" (XI RT 3143.) Then defense counsel stated, "That is all right. Just so it is on the written form. . . . That was our only concern." (XI RT 3144.)

Edwards forfeited his right to make a claim of error in the verbal instructions on appeal because he specifically agreed that since the written instructions were correct, whether or not the trial court stated the word "living" in the torture by murder or torture special circumstance instruction was not significant. (*See People v Rodrigues*, *supra*, 8 Cal.4th at pp. 1134-1135.)

Regardless, misreading instructions is at most harmless error when the written instructions received by the jury are correct. (*People v. Prieto* (2003) 30 Cal.4th 226, 255; *People v. Box, supra*, 23 Cal.4th at p. 1212; *People v. Osband* (1996) 13 Cal.4th 622, 687; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 138.) "[A]s long as the court provides the jury with the written instructions to take into the deliberation room, they govern in any conflict with those delivered orally." (*People v. Osband*, *supra*, at p. 717; *People v. Crittenden*, *supra*, at p. 138.) It is presumed the jury was guided by the written instructions. (*People v. Davis* (1995) 10 Cal.4th 463, 542.) Thus, if the jury is given the written instruction for its consideration during deliberations, as is the case here, no prejudicial error occurs from deviations in the oral instructions. (*People v. Osband, supra*, at p. 717.)

Here, the written instructions for first degree murder by torture provided to the jury correctly set forth:

> Murder which is perpetrated by torture is murder of the first degree. The essential element of murder by torture are:
>
> 1. One person murdered another person, and
>
> 2. The perpetrator committed the murder with a willfull [sic], deliberate, and premeditated intent to inflict extreme and prolonged pain upon a *living* human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose[,]
>
> 3. The acts or actions taken by the perpetrator to inflict extreme and prolonged pain were a cause of the victim's death.
>
> The crime of murder by torture dos not require any proof that the perpetrator intended to kill his victim, or any proof that the victim was aware of pain or suffering. The word "willfull [sic]" as used in this instruction means intentional. The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing and considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.

(III CT 953, italics added.)

Additionally, the printed version of the torture-murder special circumstance instruction given to the jury correctly set forth:

> To find that the special circumstance, referred to in these instructions as murder involving infliction of torture, is true, each of the following facts must be proved:
>
> 1. The defendant intended to kill a human being;
>
> 2. The defendant intended to inflict extreme cruel physical pain and suffering upon a *living* human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose, and
>
> 3. The defendant did in fact inflict extreme cruel physical pain and suffering upon a living human being no matter how long its duration.
>
> Awareness of pain by the deceased is not a necessary element of torture.

(III CT 962, italics added.)

Moreover, any error was harmless in light of the other instruction provided by the trial court, both orally and in writing, that the jury is governed

by the instructions in its final wording. The trial court instructed the jury as follows:

> The instructions which I am not giving to you will be made available in written form for your deliberations. They must not be defaced in any way. [¶] You will find that the instructions may be typed, printed or handwritten. Portions may have been added or deleted. You must disregard any deleted part of an instruction and not speculate as to what it was or as to the reason for its deletion. You are not to be concerned with the reasons for any modification. [¶] Every part of the text of an instruction, whether typed, printed or handwritten, is of equal importance. You are to be governed only by the instruction in its final wording.

(III CT 965; XI RT 3140-3141.) This direction reminded the jurors that the carefully prepared and reworked written text should guide them. The error committed in misstating the instructions was harmless. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 139.)

Finally, any error was harmless because a different result was not reasonably probable in light of the closing argument by defense counsel and the prosecutor. (*Ibid.*) During closing arguments, the prosecutor specifically referred the jurors to look at page 33 of the printed California Jury Instructions that were provided to them in deliberations. (X RT 2900; X RT 953.) The prosecutor went on to read the instructions to the jury as follows:

> Murder which is perpetrated by torture is murder of the first degree. The essential elements of murder by torture are: 1. One person murdered another person. And, 2. The perpetrator committed the murder with a willful, deliberate and premeditated intent to inflict extreme and prolonged pain upon a *living* human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose. 3. The acts or actions taken by the perpetrator to inflict extreme and prolonged pain were a cause of the victim's death . . . .

(X RT 2901, italics added.) During his closing arguments, defense counsel discussed the torture special circumstance instruction. (X RT 2976.) Counsel stated:

> To find the special circumstance referred to in these instructions as murder involving infliction of torture is true, each of the following facts must be proved:
>
> Number 1, the defendant intended to kill and/or intended to aid in the killing . . . . The defendant intended to inflict extreme cruel pain, physical pain. Extreme physical pain and suffering upon a *living* human being for the purpose of revenge, extortion, persuasion or any sadistic purpose. [¶] The defendant did in fact inflict extreme cruel physical pain and suffering upon a *living* human being, no matter how long its duration. Awareness of pain by the deceased is not a necessary element of torture.

(X RT 2977, italics added.) Thus, the arguments of both parties informed the jury of the element of inflicting extreme pain on a living human being. Any error in the misreading of the oral instructions by the trial court was harmless in light of the correct written instructions provided, the instruction that the written instruction was to guide the jury, and the arguments of counsel which correctly set forth the elements of the murder by torture charge and the torture-murder special circumstance allegation.

For the foregoing reasons, there was no prejudicial instructional error. Thus, Edwards' claims of constitutional error fail as well. (*People v. Cole, supra*, 33 Cal.4th at p. 1210, fn. 13.)

XII.

THERE IS NO CUMULATIVE EFFECT OF ALLEGED ERRORS REQUIRING REVERSAL OF THE GUILT JUDGMENT

In his final guilt phase argument, Edwards contends that the cumulative effect of the multiple errors requires reversal of the guilt judgment. (AOB 293-298.) As demonstrated above, all of Edwards' various claims of guilt phase error lack merit. Accordingly, there is no error to cumulate. (*People v. Gray, supra*, 37 Cal.4th at p. 238; *People v. Koontz* (2002) 27 Cal.4th 1041, 1094.) To the extent that error is found in one or more of the claims as urged by Edwards, respondent has shown that any possible error was harmless. Consideration of the cumulative effect of any possible errors does not alter our analysis: Edwards received a fair trial and was not prejudiced by the asserted errors, whether considered individually or cumulatively. (See *People v. Bolden, supra*, 29 Cal.4th at pp. 567-568; *People v. Koontz, supra*, 27 Cal.4th at p. 594.)

XIII.

THE TRIAL COURT DID NOT IMPROPERLY RESTRICT JURY VOIR DIRE

Edwards claims that the trial court improperly restricted his voir dire examination of several prospective jurors regarding their views on the death penalty by not allowing defense counsel to question prospective jurors whether they would automatically return a verdict of death in a case involving specific facts likely to be presented by the prosecutor and whether the prospective juror would consider certain mitigation evidence likely to be presented at trial. (AOB 298-313.) Edwards claims that the alleged restriction of the voir dire in this case was reversible per se. (AOB 308-311.) The trial court acted within its discretion in sustaining objections to certain defense questions on voir dire because the questions invited the jurors to prejudge the penalty issue based on a summary of the aggravating or mitigating evidence, attempted to educate the jury as to the facts of the case, and sought to instruct the jury in matters of law. Moreover, any error would not invariably require reversal of the judgment of death, as Edwards contends.

Edwards contends that the trial court improperly refused to allow Edwards to ask two prospective jurors (Jurors Nos. 166 and 212), who were eventually selected to serve on the second penalty phase jury, whether they would automatically vote for death in a case involving specific facts likely to be presented by the prosecution. (AOB 299-302.) During the voir dire questioning of prospective juror number 166, defense counsel asked the following questions:

> Q. Can you, sir, see yourself returning a verdict of life without the possibility of parole for a person who has been convicted of first degree premeditated, intentional murder, torture, burglary, sexual assault, strangulation and there is another homicide in Hawaii of similar nature that you as a juror, I am just telling you factually, have found to be true that he is responsible for as well?

MR. BRENT: I am going to object, your honor. It calls for prejudgment and speculation as phrased.

THE COURT: Sustained.

Q. BY MR. SEVERIN: Can you see yourself returning a verdict of life without the possibility of parole, depending upon the evidence that has been presented to you for a person who has been convicted of first degree murder, torture and burglary and that that homicide involved a sexual assault, strangulation, and you find as a juror that Mr. Edwards is also responsible for a similar type of homicide in Hawaii?

MR. BRENT: Same objection.

THE COURT: Well, it is the same question.

MR. BRENT: Right.

THE COURT: Should I change the ruling?

MR. BRENT: I don't think so.

THE COURT: I don't either. Sustained.

Q. BY MR. SEVERIN: Are you open to considering the evidence in this case, mitigating factors that may be presented to you in this case and having the possibility of returning a verdict of life without the possibility of parole?

A. I am definitely open to considering all the facts before I render any type of decision.

Q. Okay. Would you vote for the death penalty in every case in a situation where you have found a person guilty of more than one homicide?

A. No, I would not.

(XIX RT 4876-4877.) With respect to another juror, Edwards' counsel, during voir dire, set out the following factual scenario before asking jurors specific questions.

MS. CEMORE: . . . Now I am going to ask you each this question, and I am going to give you some facts. It is something we talked about this morning. I want you to assume for purposes of this question that if you are to sit here as a juror, you are going to hear evidence. Okay? And the kind of evidence you are about to hear is about a murder that involves a strangulation; it involves a sexual assault with a foreign

object; it involves blows to the head; a second murder that involves sexual assault with a foreign object, blows to the head and strangulation. Okay. Now you haven't heard any facts in mitigation. You have heard some circumstances of the crime.

(XVII RT 4514-4515.) Defense counsel then asked the following questions to prospective juror number 212, who eventually sat on the jury:

MS. CEMORE: And you heard a little factual scenario that I have given. Those are really awful crimes.

PROSPECTIVE JUROR 212: Yes.

MS. CEMORE: And is that the kind of crime where you think that the death penalty is always going to be warranted?

MR. BRENT: Objection as phrased, asks to prejudge.

THE COURT: Sustained.

MS. CEMORE: Is that the kind of case where the death penalty would always be warranted in your mind without listening to any other evidence?

PROSPECTIVE JUROR 212: To answer your question, I don't think the death penalty is always warranted in any case.

(XVII RT 4520-4521.)

Edwards also argues that the trial court improperly restricted inquiry into whether prospective jurors would consider mitigation evidence that was likely to be presented at trial. (AOB 302.) Edwards' counsel asked prospective juror 286:

Q. Are you going to be moved or persuaded in any way about evidence that involves Mr. Edwards' childhood? Is that going to be the kind of evidence that would move you in any way?

A. No.

MR. BRENT: Objection, asks for prejudgment.

THE COURT: Sustained.

Q. BY MS. CEMORE: Are you going to be open – let me ask you, you said it's going to be hard to convince you. What would you need to hear to even get you to consider evidence that you would find mitigating in any way?

MR. BRENT: Objection, calls for speculation.

THE WITNESS: I don't know.

THE COURT: Sustained.

THE WITNESS: I don't know what you could present that would change the fact that he's killed.

The prosecutor and defense counsel stipulated that prospective juror number 286 be excused. (XVIII RT 4754.)

Edwards also claims that the trial court curtailed questioning of prospective juror number 113. (AOB 303.) Defense counsel asked prospective juror number 113 the following questions:

MS. CEMORE: Okay. If you were to sit as a juror and you were to be told that some of these factors that I've made reference to earlier, not so long ago, that we called aggravating and mitigating factors, if you were to be told that one of the factors you may be able to consider in aggravation, if there's evidence to support it, is alcohol and drug use, how do you feel about that? Because some people feel that that's an aggravating thing?

THE COURT: You may have misstated it.

MS. CEMORE: Do you want me to read it specifically?

MR. BRENT: You said aggravated, not mitigated.

MS. CEMORE: Did I misstate it? Thank you. I said aggravating; I meant mitigating, Okay? It's one of the factors that can only be mitigating okay? The reason I'm asking is because a lot of people find that to be aggravating, but the law is going to tell you if you hear that evidence, you can only consider it as mitigating. What do you think about that?

PROSPECTIVE JUROR 113: I think it's mitigating as far as he had the choice on whether to go on the drugs. Now if –whether he's under the influence of drugs at the time of the crime, well, then that's something we'll have to look at.

MS. CEMORE: Okay.

PROSPECTIVE JUROR 113: But other than that, I'm not –I've heard of a few people that were on drugs that handled it quite well and other don't handle it very well at all.

MS. CEMORE: Okay. And if his honor were to instruct you that that's a factor that you can use only as a mitigating factor, based on all the evidence you hear and depending how much weight –

MR. BRENT: Your honor, I'm going to object. Can we approach briefly? I'll just say misstates the law, what counsel just said.

THE COURT: Sustained.

MS. CEMORE: You'd follow the law?

PROSPECTIVE JUROR 113: I would.

(XXVII RT 4536-4537.) Edwards used a peremptory challenge to excuse prospective juror number 113. (XVIII RT 4775.)

In *People v. Cash* (2002) 28 Cal.4th 703, this Court set forth certain of the general principles governing jury selection in capital cases:

> Prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) The real question is 'whether the jurors views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror.' (*People v. Ochoa* (2001) 26 Cal.4th 398, 431 . . . quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1318 . . . quoting in turn *People v. Hill* (1992) 3 Cal.4th 959, 1003 . . . .) Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728 [112 S.Ct. 2222, 2228-2229, 119 L.Ed.2d 492]), it is equally true that the "real question" is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror.

(*People v. Cash, supra*, 28 Cal.4th at pp. 719-720.)

The *Cash* court "affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence." (*People v.*

Coffman, *supra*, 34 Cal.4th at p. 47, citing *People v. Cash, supra*, 28 Cal.4th at pp. 720-721.) However, this Court's "decisions have explained that death-qualification must avoid two extremes. One the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. In deciding where to strike the balance in a particular case, trial courts have considerable discretion." (*People v. Cash, supra,* at pp. 721-722; citations omitted; *People v. Coffman*, *supra*, at p. 69.)

The trial court acted within its discretion in sustaining the prosecutor's objections when defense counsel asked prospective jurors whether they would impose the death penalty after considering a rather detailed account of some of the facts of this case (XVII RT 4514-4515, XIX 4876-4877), and whether a prospective juror could return a verdict of life without parole if Edwards was also responsible for a similar type homicide in Hawaii (XIX 4876-4877), because these questions posed by defense counsel invited jurors to prejudge the case and attempted to educate the jury as to the facts of the case. "'There was no error in ruling that questions related to the jurors' attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered [death-qualification] voir dire.'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 991.) Defendant had no right to ask specific questions that invited prospective jurors to prejudge the penalty issue based on a summary of the aggravating or mitigating evidence (*People v. Cash*, *supra,* 28 Cal.4th at pp. 721-722), to educate the jury as to the facts of the case (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 991; *People v. Sanders* (1995) 11 Cal.4th 475, 538-539), or to instruct the jury in matters of law (*People v. Ashmus* (1991) 54 Cal.3d 932, 959,

disapproved on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117). (*People v. Burgener, supra*, 29 Cal.4th at pp. 865-866.)

Here the questions posed to prospective jurors numbers 166 and 212, improperly sought to educate the jury about facts of the case. Moreover, the sustained questions presented to prospective jurors numbers 286 and 113 invited the jurors to prejudge the penalty issue based on a summary of aggravating and mitigating evidence such as Edwards' childhood and his alcohol and drug use. (XVIII RT 4754; XXVII RT 4536; *People v. Cash, supra*, 28 Cal.4th at pp. 721-722.) Finally, defense counsel's question to prospective juror number 113 about evidence of drug use could only be considered as a mitigating factor also improperly sought to instruct the jury in matters of law. (XX VII RT 4536-4537; *People v. Burgener, supra*, 29 Cal.4th at pp. 865-866; *People v. Ashmus, supra*, 54 Cal.3d at p. 959.)

Nevertheless, the record of voir dire reveals that defense counsel had ample opportunity to ascertain if those jurors harbored bias, and to identify jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. (*People v. Coffman, supra*, 34 Cal.4th at p. 47.) With respect to prospective juror number 166, defense counsel asked the prospective juror if he or she would vote for the death penalty in every case where the defendant had been found guilty of more than one homicide (XIX RT 4877), and the juror answered in the negative. The juror also stressed that he or she was "definitely open to considering all the facts before [he or she] render[s] any type of decision." (XIX RT 4877.)

During the voir dire of prospective juror number 212, the trial court asked the jurors if they could objectively evaluate evidence of a sexual nature such as rape or sodomy. (XVII RT 4464.) The trial court also asked the jurors in the same group if he or she would automatically vote for death if Edwards committed sex acts on a victim of a homicide. (XVII RT 4465.) Prospective

juror number 212 did not raise his or her hand for any of these questions. When defense counsel asked if prospective juror 212 could be open minded if he or she heard that the crimes may be sexually motivated, juror 212 answered that he or she did not have problem with that. (XVII RT 4518-4519.) Juror number 212 also stated, after the objections to the contested questions were sustained, that the death penalty was not always warranted in any case. (XVII RT 4521.) Throughout the rest of voir dire, defense counsel was able to discuss specific facts about the case such as strangulation, blows to the head, sex with a foreign object, torture, and similar facts in Hawaii. (XVII RT 4550.) While these questions were not specifically directed to juror 212, he or she was still participating in voir dire at that point. Thus, it is clear from reviewing the record that despite the fact that the trial court sustained some of the prosecutor's objections, defense counsel had ample opportunity to ascertain if those jurors harbored bias, and to identify jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. (*People v. Coffman, supra,* 34 Cal.4th at p. 47.)

Assuming there was any error in the alleged restriction of voir dire of prospective jurors numbers 166 and 212 who actually sat on the penalty phase jury, "error in restricting death-qualification voir dire does not invariably require reversal of a judgment of death." (*People v. Cash, supra*, 28 Cal.4th at p. 722, citing *People v. Cunningham, supra*, 25 Cal.4th at p. 974.) This Court stated in *Cash* that any error may be deemed harmless if the defense was permitted to use voir dire to explore further the prospective jurors' responses to the facts and circumstances of the case or if the record establishes that none of the jurors had a view about the circumstances of the case that would disqualify the juror. (*People v. Cash, supra*, 28 Cal.4th at p. 722.) As discussed above, the voir dire of both prospective jurors 166 and 212, established that neither juror harbored bias or possessed views on the death

penalty views which would prevent or substantially impair the performance of their duties as jurors in the case being tried.

Additionally, with respect to prospective jurors 286 and 113, even though the questions posed to them were properly sustained as discussed above, these prospective jurors identified by Edwards did not even actually sit on the jury. Prospective juror number 286 was excused by stipulation. (XVIII RT 4754.) Edwards used a peremptory challenge to excuse prospective juror number 113. (XVIII RT 4775.) Because these jurors did not actually sit on the jury, the defense had peremptory challenges remaining when it accepted the jury, and Edwards did not express dissatisfaction with the jury as sworn on this ground (XIX RT 5014-5015), any possible error could not have been prejudicial. (*People v. Roldan*, *supra*, 35 Cal.4th at p. 692; *People v. Burgener*, *supra*, 29 Cal.4th at. pp. 865 -866; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 354.)

XIV.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN EXCUSING PROSPECTIVE JUROR NUMBER 180 FOR CAUSE AND DENYING THE DEFENSE REQUEST TO EXCUSE PROSPECTIVE JUROR NUMBER 254 FOR CAUSE

Edwards argues that the trial court violated his state and federal rights to an impartial jury by improperly ruling upon challenges for cause. (AOB 313-328.) Edwards claims that the trial court abused its discretion by excusing prospective juror number 180 for cause because she was somewhat unsure if she could vote for the death penalty. (AOB 314-322.) Edwards also contends that the trial court improperly denied Edwards' challenge against prospective juror number 254 for cause because the juror's views about the death penalty substantially impaired her ability to perform her duties as a penalty phase juror. (AOB 320-328.) Edwards' contentions are without merit. The trial court acted within its discretion in excusing prospective juror number 180 for cause and for denying the defense request to excuse prospective juror number 254 for cause.

A. Substantial Evidence Supports the Excusal for Cause of Prospective Juror Number 180

A prospective juror may be excluded for cause if the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and juror's oath. (*People v. Harrison* (2005) 35 Cal.4th 208, 227; *People v. Stewart* (2004) 33 Cal.4th 425, 440-441; *People v. Heard* (2003) 31 Cal.4th 946, 958; see *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) A prospective juror is properly excluded if he or she is unable to consider all of the sentencing alternatives, including the death penalty. (*People v. Stewart, supra*, 33 Cal.4th at p. 441; *People v. Heard, supra,* 31 Cal.4th at p. 958.) The critical question in each challenge is "whether the juror's view about capital punishment would

prevent or impair the juror's ability to return a verdict of death in the case before the juror." (*People v. Bradford, supra*, 15 Cal.4th at pp. 1318-1319, italics in original; *People v. Hill, supra*, 3 Cal.4th at p. 1003.) A prospective juror who has expressed an unwillingness to impose the death penalty may properly be excused for cause. (*People v. Jenkins, supra*, 22 Cal.4th at pp. 986-987.)

A juror's bias against the death penalty need not be proved with unmistakable clarity. (*People v. Haley, supra*, 34 Cal.4th at p. 306; *People v. Jones* (2003) 29 Cal.4th 1229, 1246.) Instead, it is sufficient that the trial court is left with the definite impression that the prospective juror would be unable to faithfully and impartially apply the law. (*People v. Haley, supra*, 34 Cal.4th at p. 306; *People v. Jones, supra*, 29 Cal.4th at pp. 1246-1247.)

If a prospective juror provides conflicting or equivocal answers to questions concerning his or her impartiality, the trial court's determination as to that person's true state of mind, which may include an evaluation of the juror's demeanor, is binding on the appellate court. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 975; *People v. Bradford, supra*, 15 Cal.4th at p. 1319; *People v. Mayfield, supra*, 14 Cal.4th at p. 727; see also *Wainwright v. Witt, supra*, 469 U.S. at pp. 425-426.) If the statements are consistent, the court's ruling will be upheld if supported by substantial evidence. (*People v. Schmeck* (2005) 37 Cal.4th 240, 261.) Furthermore, a trial court possesses wide discretion to excuse for cause a prospective juror (*People v. Jones, supra*, 29 Cal.4th at p. 1246), and such a decision must be upheld if supported by substantial evidence (*People v. Holt, supra*, 15 Cal.4th at p. 651).

Substantial evidence supported the trial court's decision to excuse prospective juror number 180 for cause because of her expressed unwillingness to impose the death penalty. When the trial court asked whether regardless of the evidence, any juror would in every case automatically vote for life

imprisonment without the possibility of parole and never vote for a verdict of death, juror 180 raised her hand, and stated, "I feel I would have a great deal of difficulty selecting the death penalty for a person." (XVII RT 4451.) Juror 180 became less equivocal when she stated that since filling out the juror questionnaire, "the more I think about it the less I think I could vote for the death penalty." (XVII RT 4451.) When the trial court asked the juror if she could ever vote for death depending on the evidence and the law, the prospective juror answered, "I really think I would have a very hard time living with that vote." (XVII RT 4454.) During later questioning, prospective juror number 180 reiterated that her opinion had not changed as to her ability to come up with an appropriate penalty in this case. The juror told the court that a sentence of life without the possibility of parole was "probably as high as [she] could go." (XVII RT 4491.) When defense counsel asked juror 180 if she could consider both death and life without the possibility of parole in making her decision, she answered that she did not think she could. (VII RT 4493-4494.) Finally, the prosecutor asked the juror, "If you are back in the jury room, and even in your own mind you are saying you know what, under the law this is a case that does deserve the death penalty, but you are not going to vote for the death penalty, are you? That is the bottom line here, correct?" The juror answered, "I think so." (XVII RT 4498.) Edwards argues that this answer was equivocal and that she did not assert her feelings about the death penalty with certitude. (AOB 314.) The record belies Edwards' claim. As set forth above, prospective juror 180 emphasized time and time again that she would not be able to vote for the death penalty even if she felt it was deserved.

Additionally, it was clear from her answers that prospective juror 180 was uncomfortable making any important decisions. She told the court that she "shouldn't be the one to decide that somebody should die. . . ." (XVII RT 4452.) Prospective Juror Number 180 also explained that while she might feel

a person deserved the penalty of death, she did not feel that it was "for [her] to decide that." (XVII RT 4491.) She expounded by disclosing that making that decision would be "extremely stressful" so she might not be able to make any decision at all. (XVII RT 4492.) The juror described that she "find[s] decision making extremely stressful. And it may be it might come to that. Sometimes [she] get[s] very depressed when [she] ha[s] to make hard decisions." (XVII RT 4492.) The prospective juror emphasized repeatedly that she did not "want to be the one to make that vote." (XVII RT 4495.) While she would consider the factors in aggravation and mitigation, she would not want to vote for it. (XVII RT 4496.) It is clear from the record that the juror became visibly upset just by answering the questions on voir dire. Defense counsel told her "don't be upset," and counsel had to reassure the juror that they were not there to make the juror feel bad. (XVII RT 4494.) Indeed, the trial court noted that the prospective juror was emotional and would have a difficult time voting for death, or even, making any decision. The trial court stated:

> This lady was very emotional and was to my questions, to Miss Cemore's questions and to Mr. Brent's questions, very emotional. And if you watched her walk back to the jury room, she was near tears. We are talking about a stressful event. [¶] There is no way, no matter what the evidence, no matter what the law, that this lady could ever vote for a penalty of death. No way. Or vote at all. That is another problem. She indicated or vote at all. Not in those words, but that is the concept.

(XVII RT 4499.)

The views expressed by prospective juror number 180 during the voir dire examination demonstrate an unalterable preference against the death penalty. Such views – especially that she opposed the death penalty and could not personally vote to impose the death penalty in any type of case – are sufficient and ample evidence to support the trial court's excusal for cause of this prospective juror since her views concerning capital punishment would "prevent or substantially impair the performance of [her] duties as a juror in

accordance with [her] instructions and [her] oath." (*Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Harrison, supra*, 35 Cal.4th at pp. 227-228 [trial court properly excused juror who said she could not impose the death penalty, but later said that "maybe" she could]; *People v. Haley, supra*, 34 Cal.4th at p. 307 [based on juror's "admitted inability to impose the death penalty, the trial court properly excused" her]; *People v. Griffin, supra*, 33 Cal.4th at pp. 558-561 [although at some point, each prospective juror "may have stated or implied that she would perform her duties as a juror," this did not prevent the trial court from finding, on the entire record, that each nevertheless held views that substantially impaired her ability to serve]; *People v. Welch* (1999) 20 Cal.4th 701, 747.) Moreover, the trial court's determination as to that person's true state of mind, which may include an evaluation of the juror's demeanor, is binding on the appellate court. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 975.) The trial court was in the best position to make that determination, and in this case, the trial court emphatically found that prospective juror number 180 would never vote for a penalty of death, no matter the evidence or law. In fact, the trial court indicated that making any decision would be very difficult for the juror who was visibly upset just by voir dire. Because there was substantial evidence that the juror clearly expressed an unwillingness to impose a death sentence, the juror was properly excused for cause.

B. The Trial Court Properly Denied the Defense Request to Excuse Prospective Juror 254 for Cause

Edwards also claims that his challenge to excuse juror 254 for cause was improperly denied. Edwards has failed to preserve this claim for appeal because Edwards did not exhaust his peremptory challenges and did not object to the jury as finally constituted. In any event, substantial evidence supports the trial court's ruling that prospective juror 254's views concerning capital

punishment would not have prevented or substantially impaired her performance as a juror. Furthermore, because the juror in question did not actually sit on Edwards' penalty phase jury, there can be no prejudice.

While Edwards challenged Juror 254 for cause below (XVIII RT 4822), he failed to preserve the challenge for appeal. Edwards did not exhaust all of his peremptory challenges when he accepted the jury without objection. (XIX RT 5014-5015.) "'To preserve a claim of error in the denial of a challenge for cause, the defense must exhaust its peremptory challenges and object to the jury as finally constituted.' [Citation.]." (*People v. Hinton*, *supra*, 37 Cal.4th 839, 860, quoting *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 487; *People v. Horton* (1995) 11 Cal.4th 1068, 1093-1094.) Since Edwards did neither, this Court should not reach the merits of his claim.

Even if the claim were cognizable, Edwards would not prevail. Whether the contention is that the trial court erroneously failed to exclude prospective jurors who exhibited a pro-death bias, or excluded prospective jurors who exhibited an anti-death bias, the same standard, which is set forth more fully above, has been held to apply. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 121; *People v. Pride* (1992) 3 Cal.4th 195, 227-228; *People v. Mincey*, *supra*, 2 Cal.4th at p. 456; *People v. Johnson* (1989) 47 Cal.3d 1194, 1224.) Under that standard, a juror may be challenged for cause based upon his or her views concerning capital punishment only if those views would "prevent or substantially impair" the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 121; *People v. Mincey*, *supra*, 2 Cal.4th at p. 456.) Furthermore, a trial court possesses wide discretion to excuse for cause a prospective juror (*People v. Jones, supra*, 29 Cal.4th at p. 1246), and such a decision must be upheld if supported by substantial evidence (*People v. Holt*, *supra,* 15 Cal.4th at p. 651).

Edwards claims that juror 254 should have been excused for cause because she felt that imprisonment for deliberate murder was a waste of time, and she would vote for death. Edwards also argues that the prospective juror held such strong views on drug and alcohol use that she would not be able to view use of them as anything but an aggravating factor. (AOB 322-323.) However, Edwards takes these statements out of context. A complete view of prospective juror 254's responses during voir dire supplied ample evidence of her impartiality and capacity to serve.

Prospective juror 254's views on the death penalty and life without the possibility of parole was impartial and showed a capacity to serve as a juror. Defense counsel questioned juror 254 regarding her answers on the questionnaire, asking, "You said [the death penalty] could be justified in cases where the perpetrator showed wanton disregard for human life. Someone who willfully and deliberately murders someone should not be given the opportunity to do so again, and to keep them in prison for the rest of their life is a waste of time." (XVIII RT 4813.) When asked if this was still her opinion, the juror answered, "In some perspectives." (XVIII RT 4813.) The juror did qualify her answer by pointing out that she was just basing her answer on the information provided to her thus far, but "I realize what I've heard is incomplete. I have not heard your side of it." (XVIII RT 4814.) Prospective juror 254 also stated that she thought she would be able to consider any defense evidence that was presented. (XVIII RT 4814.) When defense counsel asked her, "Do you think that life without possibility of parole is an appropriate alternative to the death penalty in a first degree murder case with special circumstances," the juror answered, "It's possible given the circumstances, yeah." (XVIII RT 4818.) The juror also agreed that life without the possibility of parole was an "appropriate alternative" that she would consider. (XVIII RT 4818-4819.) The juror's answers during voir dire regarding the possible

penalties exhibited that she was open minded and impartial. She explained that her answer on the questionnaire was based on limited information, she recognized that the defense would be presenting evidence as well, and she assured the court that she would consider the defense evidence. Her view on punishment would not prevent or substantially impair her performance as a juror as defined by the court's instructions and the juror's oath.

Defense counsel also asked juror 254 if she would consider specific defense mitigation evidence such as past childhood abuse and drug and alcohol addiction, and the juror answered that she would consider those mitigating factors. (XVIII RT 4814-4815.) While juror 254 did express a personal opinion that a person who makes the choice to get involved with drugs and alcohol is "responsible for their actions" (XVIII RT 4815), when asked if she would be able to envision herself viewing addiction as a mitigating factor, she answered, "I'm not absolutely locked on it. I can be, my opinion can be changed. I am open to it." (XVIII RT 4816-4817.) When the prosecutor asked her if she was open to listening to the defense evidence on alcohol and drugs, the prospective juror answered affirmatively. (XVIII RT 4821.) While the juror had strong opinions about alcohol and drug use, the voir dire showed that she would be open to considering defense mitigation evidence. It is clear that her views would not have prevented or substantially impaired her performance of her duties as defined by the court's instructions and the juror's oath. The trial court acted within its discretion in declining to excuse juror 254 for cause.

Moreover, in order to successfully claim error in the denial of a challenge for cause of a prospective juror, a defendant on appeal must demonstrate that the ruling affected his or her right to a fair and impartial jury. Because Edwards exercised a peremptory challenge to remove prospective juror 254 whom he unsuccessfully had challenged for cause, this prospective juror could not have possibly compromised the impartiality of the jury. Therefore,

under *Witt* he cannot claim constitutional error based upon the trial court's denial of those challenges for cause. (*People v. Horton, supra,* 11 Cal.4th at pp. 1093-1094; *People v. Johnson* (1992) 3 Cal.4th 1183, 1211; *People v. Mason* (1991) 52 Cal.3d 909, 954.) Where a prospective juror did not even serve on Edwards' jury, there is no merit to the claim that the trial court erred in failing to excuse the juror for cause. Thus, Edwards could not have possibly suffered prejudice as a result of the trial court's refusal to excuse prospective juror 254 for cause. (*People v. Hinton, supra*, 37 Cal.4th at p. 860, fn. 7.)

XV.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING THE PENALTY PHASE TRIAL

Edwards contends that the cumulative impact of the prosecutor's allegedly relentless pattern of objectionable questions and arguments violated his federal and state constitutional rights to a fair trial. (AOB 328-350.) Specifically, Edwards argues that the prosecutor committed misconduct: (1) by ignoring the trial court's ruling and eliciting inadmissible evidence from Dr. Dietz (AOB 330-337); (2) by explicitly telling the jury that he was privy to undisclosed evidence about Edwards' guilt (AOB 337-339); (3) by telling the jury that the death penalty was not an available punishment in Hawaii for the Delbecq murder (AOB 339-341); and (4) by making inflammatory remarks and making an argument about Edwards' future dangerousness during closing arguments. (AOB 342-347.) All of these issues are waived on appeal because Edwards did not object and ask for an admonition for any of the alleged instances of misconduct. Moreover, the prosecutor did not commit any misconduct. Edwards' claims should be rejected.

A. The Prosecutor Did Not Commit Misconduct in His Presentation of Dr. Dietz's Testimony in Rebuttal

Edwards argues that the prosecutor committed misconduct by presenting the opinion of Dr. Dietz on rebuttal that when Edwards placed a comforter over the window in Delbecq's apartment, he knew what he was doing was wrong, in violation of the trial court's ruling on the admissibility of Dr. Dietz's testimony. (AOB 330-337.)[30/] This argument is forfeited for failing to

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30. Edwards also argues that the trial court improperly admitted the testimony of Dr. Dietz on rebuttal. This issue is addressed in Argument XVI. A. below.

object or request an admonition. Moreover, the prosecutor did not commit misconduct.

The standard of review for claims involving prosecutorial misconduct is set forth more fully in Argument IX, above. As set forth in Argument IX, a defendant forfeits a prosecutorial misconduct claim on appeal unless he timely objected on the same ground, and he requested that the jury be admonished to disregard the misconduct. (*People v. Guerra, supra*, 37 Cal.4th at p. 1124; *People v. Ayala*, *supra*, 23 Cal.4th at p. 284; *People v. Hill, supra*, 17 Cal.4th at p. 820.) The requirement is waived only when the objection and/or the request for an admonition would have been futile or a prompt admonition would not have cured the harm caused by the misconduct. (*People v. Panah, supra*, 35 Cal.4th at p. 462; *People v. Bradford, supra,* 15 Cal.4th at p. 1333.) In the present case, Edwards did not object on grounds of prosecutorial misconduct. Rather, Edwards objected on grounds of speculation and lack of foundation. (XXV RT 6344.) Moreover, Edwards never requested an admonition to cure any harm caused by the alleged misconduct. Edwards' claim that an objection and request for admonition would have been futile is without merit. (AOB 347-348.) Nothing in the record indicates that the trial court would not have ruled on a defense objection fairly. Indeed, when the prosecutor tried to ask Dr. Dietz to list specific circumstances of the crime scene to support his opinion, the trial court called for a side bar conference and ruled that the prosecution would not be able to introduce this evidence. Edwards' argument that it did not want the jury to view the defense as obstructionist by objecting too often is also not well taken. Here, the defense did in fact object and ask for a side bar. Objecting on proper grounds and requesting an admonition at that time would not have been viewed as obstructing the trial. Because Edwards failed to object on proper grounds and request an admonition, this claim should be deemed waived.

Even assuming that the arguments are not waived, the claims should be rejected on the merits, as the prosecutor did not commit misconduct by asking Dr. Dietz if Edwards, whether or not in a blackout, knew what he was doing was wrong when he put a comforter over Delbecq's window.

After Edwards presented many defense witnesses regarding alcoholic blackouts in general and that Edwards had suffered from blackouts in the past, the prosecutor sought to rebut the evidence through the testimony of Dr. Dietz. Preliminarily, the trial court ruled that "I think it is appropriate to rebut evidence of a blackout as to whether or not there was one. That is an important part of the mitigating evidence offered by counsel for Mr. Edwards for lots of reasons, by the way." (XXV RT 6309.) Dr. Dietz then testified during a section 402 hearing. He discussed the definition of alcoholic blackouts, the transfer of memory from short to long term memory while under the influence of alcohol, how a crime scene would provide evidence of the person's true mental state during the crime, the reacquiring of memory, and how specific facts of both crimes, such as use of force, tying the victims, insertion of the mousse can, asphyxiation as the method of killing, and taking property, show that the person was acting voluntarily and intentionally during the crime regardless of whether the person remembered later. (XXV RT 6314-6320.) He opined that at the time of committing the murders, Edwards was not in a blackout state. (XXV RT 6314.) Dr. Dietz also testified about sexual sadism and how the totality of the circumstances in the present case suggest that Edwards was a sexual sadist. (XXV RT 6320-6321.)

The trial court allowed the prosecutor to present Dr. Dietz to testify that Edwards was not in a blackout at the time of the crime and knew what he was doing at he time of the crimes. The trial court stated, "I mean, if you want to put Dr. Dietz on to testify that the individual would have known what the individual was doing during those crimes, that is probably proper to rebut some

of the references from the blackout testimony." (XXV RT 6326.) However, the trial court ruled that Dr. Dietz could not testify about sexual sadism and reacquiring memory. (XXV RT 6326.)

Before Dr. Dietz testified on rebuttal, defense counsel requested the trial court clarify its ruling. Defense counsel asked, "Is the court saying that he can talk about the specific crime scenes that he viewed in this case and he can render an opinion that the acts in this case were voluntary and intentional? Or are we talking about in the abstract, that during a blackout state that an individual would have present memory and their acts would be conscious, intentional and meaningful in making choices?" (XXV RT 6326.) The trial court reiterated, "Generally. The latter parts he was specific, and it was the latter parts I found not to be rebuttal." (XXV RT 6327.)

Dr. Dietz, on rebuttal, testified generally about alcoholic blackouts. He also opined that as Edwards was committing both homicides, Edwards was acting intentionally and voluntarily. (XXV RT 6343.) He knew where he was, what he was doing, who he was with, why he was engaging in each action, what he wanted to do next, and which thing did and did not please him. (XXV RT 6343.) The prosecutor then asked, "And, again, assuming that the defendant later suffered a blackout of these murders and you mentioned that doesn't affect him knowing what he is doing, an example of that would be, for example, in the Maui homicide, that there was a comforter placed over the window that – so whether he ever suffered a blackout or not clearly at that moment he knows what he is doing is wrong. He is trying to hide it from the outside world, correct?" (XXV RT 6344.) The court overruled a defense objection on speculation and lack of foundation. (XXV RT 6344.) After Dr. Dietz answered affirmatively to that question, the prosecutor asked, "Were there – was there evidence that actually indicated to you that this defendant did not suffer a blackout?" Dr. Dietz answered, "Yes." (XXV RT 6344.)

A sidebar conference was then held. The prosecutor then tried to explain that he wanted to admit the evidence of jewelry and blood not being present as an indication that Edwards did not suffer a blackout. (XXV RT 6345.) The trial court ruled that was highly speculative because he could have disposed of the items afterwards and still had no memory of it, so that was inadmissible pursuant to the earlier hearing. (XXV RT 6345.) Only one other question on an unrelated topic was posed to Dr. Dietz after the side bar conference.

It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839; *People v. Silva*, *supra*, 25 Cal.4th at p. 373.) However, in the present case, Edwards cannot demonstrate that the court's order was violated by the prosecutor's question. When the trial court responded to defense trial counsel's request for clarification, the trial court stated that the prosecutor could only talk about whether appellant knew what he was doing during the crimes in the abstract. However, in the side bar discussion after the contested question, it was clear the trial court was focused on avoiding questioning regarding evidence that Edwards was not in possession of stolen jewelry or that he had no blood on him after the crimes. The absence of any violation of the trial court's ruling is also evident from the fact that the trial court overruled the defense objection to the question regarding the comforter having been placed over the victim's bedroom window. Accordingly, Edwards has not shown a violation of the trial court's order limiting the scope of questioning of Dr. Deitz.

Moreover, "conduct by a prosecutor that does not violate a court ruling is misconduct only if it amounts to 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury' [citations] or 'is so egregious that it infects the trial with such unfairness as to make the conviction

a denial of due process' [citation]." (*People v. Silva*, *supra,* 25 Cal.4th at p. 373.) Here, there is no evidence that the prosecutor sought to use deceptive or reprehensible methods. As soon as they were in sidebar, the prosecutor informed the court that he specifically instructed Dr. Dietz "not to talk about the re-remembering later on." (XXV RT 6345.) In its ruling, the trial court only specified that the expert could not testify about reacquiring memory and sexual sadism. (XXV RT 6326.) The record certainly does not support a finding that the prosecutor acted in a deceptive or reprehensible way.

In any event, the prosecutor only asked one question, and when he sought to ask Dr. Dietz what evidence actually indicated that Edwards did not suffer a blackout, the trial court called for a sidebar conference. No evidence about what specifically in the crime scene Dr. Dietz relied to form his opinions were admitted thereafter. Moreover, testimony that a comforter over a window indicated that a person knew what he was doing was wrong was not evidence that "is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process' [citation]." (*People v. Silva*, *supra,* 25 Cal.4th at p. 373.) Rather, this is something that an average juror could have inferred themselves from the evidence. Thus, Dr. Dietz's testimony on this point was not prejudicial.

Even where a defendant shows prosecutorial misconduct occurred, reversal is not required unless the defendant can show he suffered prejudice. (*People v. Arias*, *supra*, 13 Cal.4th at p. 161.) Error with respect to prosecutorial misconduct is evaluated under the standards enunciated in *Chapman*, *supra,* 386 U.S. at page 24, to the extent federal constitutional rights were implicated, and under *People v. Watson, supra,* 46 Cal.2d at page 836, to the extent only state law issues were involved. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1074.) The federal standard is implicated where the prosecutor's conduct renders the trial so fundamentally unfair that due process

is violated. (*People v. Gionis, supra,* 9 Cal.4th at pp. 1214-1216; *People v. Harris* (1989) 47 Cal.3d 1047, 1084.) The state standard applies where the prosecutor uses "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Gionis, supra,* at p. 1215; see also *People v. Roldan, supra*, 35 Cal.4th at p. 719.) Criminal trials are rarely perfect, and a judgment will not be reversed unless upon a consideration of the entire record, the misconduct resulted in prejudice amounting to a miscarriage of justice. (*People v. Hill, supra*, 17 Cal.4th at pp. 844-845.) As noted above, the prosecutor's comment was brief, and the trial court did not allow the expert to go into further specifics about the crime scene that supported his opinion. Moreover, even assuming misconduct, it was mitigated because the trial court instructed the jury that statements made by attorneys were not evidence, if an objection was sustained, they should not guess what the answer might have been, not to assume to be true any insinuation suggested by a question asked a witness, and a question was not evidence. (V CT 1631; XXV RT 6484; *People v. Prince* (2007) 40 Cal.4th 1179, 1295.) Furthermore, evidence of the circumstances of the present crime, including the brutal way Deeble was hogtied and suspended by a belt noose, and the injuries inflicted to her genital areas by a mousse can for Edwards' sadistic purposes, the very powerful victim impact testimony, and the compelling evidence of Edwards' criminal activity including possession of the shank while in custody, his attempted insertion of a wine bottle in the genital area of an ex-girlfriend, and the gruesome details of the Delbecq murder were overwhelming factors in aggravation. Thus, the prosecution's question, even if it did constitute misconduct, did not amount to a miscarriage of justice.

B. The Prosecutor Did Not Commit Misconduct During His Opening Statement by Asserting That He Had Undisclosed Evidence of Edwards' Guilt

Edwards contends that the prosecutor committed prejudicial misconduct by explicitly telling the jury, during his opening statement, that he had undisclosed knowledge of Edwards' guilt. (AOB 337-339.) This claim is waived because Edwards neither objected nor requested an admonition which would have cured any harm. Moreover, reading the prosecutor's statement in full reveals that he was not asserting that he was privy to certain undisclosed facts. Finally, even assuming arguendo prosecutorial misconduct, there was no prejudice.

Once again, this issue is waived because Edwards neither objected nor requested an admonition. For the reasons set forth above, an admonition would have cured any harm caused by the prosecutor's opening statement. Thus, the claim is forfeited. (*People v. Guerra, supra*, 37 Cal.4th at p. 1124; *People v. Ayala, supra*, 23 Cal.4th at p. 284; *People v. Hill, supra*, 17 Cal.4th at p. 820.)

During opening statements, the prosecutor described the different factors in aggravation including the circumstances relating to the present crimes and special circumstances. (XX RT 5099.) The prosecutor then briefly described the facts of the Deeble murder by describing the crime scene, the position of Deeble's body, and the injuries Deeble suffered. (XX RT 5099-5102.) The prosecutor next stated that the police had not solved this case from 1986 to 1992 because there was no evidence at the crime scene that indicated who was her killer. (XX RT 5102-5103.) The prosecutor explained that the police knew about Edwards, but nothing linked him to the present case. (XX RT 5103.) The prosecutor then continued:

> And I am telling you this for a couple reasons. Number one, I am not going to retry, as I mentioned to you folks early on, I am

> not going to retry the guilt phase of this case. And you have accepted that he has been proven guilty. I am not going to bring in every bit of evidence. But I don't want to mislead you either. And I won't do that. So although I am not bringing in all the evidence, I am not going to tell you that there was something there that wasn't or leave you with that inference. I don't want you to infer that either because all these years I mentioned to you that the case was unsolved.

(XX RT 5103.) The prosecutor then went on to talk about the Delbecq murder in 1993 and how that was a lucky break for the police in solving the Deeble murder. (XXRT 5103.)

Taken in its proper context, it is evident that the prosecutor was not at all trying to imply, nor did he explicitly assert, that he possessed undisclosed knowledge of Edwards' guilt, as Edwards asserts. To the contrary, the prosecutor told the jury that the police had no evidence linking Edwards to the Deeble murder, so it remained unsolved from 1986 until 1993. The prosecutor was also explaining that for the penalty phase trial, the jurors had to accept that Edwards had been found guilty of the Deeble murder. The circumstances of the Deeble murder is a factor for the jurors to consider in aggravation but this was not a retrial of the guilt phase. Thus, the prosecutor was only going to present an abbreviated version of the evidence at the penalty phase because Edwards' guilt had already been determined by the guilt phase jury. At no point did the prosecutor imply that he was privy to undisclosed evidence of Edwards' guilt.

The case cited by Edwards, *People v. Hill*, *supra*, 17 Cal.4th at pages 828-829 (AOB 338-339), is inapposite because in that case the prosecutor clearly referred to facts not in evidence thereby "mak[ing] the prosecutor his own witness--offering unsworn testimony not subject to cross-examination." (*Ibid.* [prosecutor committed misconduct "by asserting she could have called an expert to establish the nature of the substance found in (victim's truck)"].)

Here, as argued above, the prosecutor did not make reference to any facts not in evidence, nor did he act as his own witness.

Finally, prosecutorial misconduct in an opening statement is not grounds for reversal unless the misconduct was prejudicial or the conduct of the prosecutor so egregious as to deny the defendant a fair trial. (*People v. Wrest* (1992) 3 Cal.4th 1088, 1109.) Here, as discussed above, the prosecutor's conduct was not so egregious as to render the trial fundamentally unfair. Moreover, any possible prejudice was mitigated by the court's instruction to the jury that "[s]tatements made by the attorneys during trial are not evidence." (*People v. Valdez*, *supra*, 32 Cal.4th at p. 133; see *People v. Cash, supra,* 28 Cal.4th at p. 734; V CT 1635; XXV RT 6484 [CALJIC No. 1.02].) A jury is presumed to follow a court's instructions. (*People v. Young*, *supra*, 34 Cal.4th at p. 1214.)

In sum, the issue is waived for failing to object or request a curative admonition. Moreover, taken in context as an explanation of the gap in time from the date of the murder to Edwards' arrest and of the process of penalty determination where Edwards had already been found guilty of the crime and the special circumstances found true, it is not reasonably possible the prosecutor's remarks could be taken as an inference that he was privy to outside information about Edwards' guilt. Furthermore, the court's instruction that the lawyers' opening and closing statements were not to be considered evidence by the jury mitigated any allegedly misleading effect of any remarks by the prosecutor. Thus, Edwards' claim should be rejected.

C. Edwards' Argument That the Prosecutor Committed Misconduct by Asking a Defense Witness if the Death Penalty Was Available in Hawaii Is Waived

Edwards claims the prosecutor committed misconduct by telling the jury Edwards could not have received the death penalty in Hawaii. (AOB 339-341.)

This issue is waived because Edwards failed to request an admonition. Moreover, because Edwards' objection was sustained, Edwards was not prejudiced.

During the cross examination of Jimmy Edstrom, a former inmate at Maui Community Correctional Center who Edwards befriended and helped, the prosecutor questioned the witness about his previous conviction of vehicular manslaughter. (XXIII RT 6030.) The witness testified that this was a felony conviction for which he spent six months in jail. (XXIII RT 6030.) The prosecutor then asked Edstrom, "There's no death penalty in Hawaii, is there?" (XXIII RT 6030.) Edwards' objection to the question was sustained, and there were no further questions asked. (XXIII RT 6030.)

Edwards forfeits this prosecutorial misconduct claim on appeal because he did not request that the jury be admonished to disregard the prosecutor's question. (*People v. Guerra, supra*, 37 Cal.4th at p. 1124; *People v. Ayala, supra*, 23 Cal.4th at p. 284; *People v. Hill, supra*, 17 Cal.4th at p. 820.) Contrary to his assertions, a prompt admonition would have cured the harm caused by any misconduct. (*People v. Panah, supra*, 35 Cal.4th at p. 462; *People v. Bradford, supra,* 15 Cal.4th at p. 1333.) Since Edwards did object and it was sustained, Edwards would not have been viewed as an obstructionist by requesting the trial court instruct the jury to disregard the question. Moreover, a request for an admonition would not have been futile since the trial court did sustain Edwards' objection. Thus, the issue is waived on appeal.

In any event, Edwards was not prejudiced by the question. Here, the trial court sustained Edwards' objection. The witness did not answer, and no other questions were asked of this witness. The matter was never brought up again. Thus, there was no prejudice. (*People v. Mayfield, supra*, 14 Cal.4th at p. 755, citing *People v. Pinholster, supra*, 1 Cal.4th at p. 943 [generally a party is not prejudiced by a question to which an objection has been sustained].)

Moreover, any misconduct was mitigated because the trial court instructed the jury that statements made by attorneys were not evidence, if an objection was sustained, they should not guess what the answer might have been, not to assume to be true any insinuation suggested by a question asked a witness, and a question was not evidence. (V CT 1631; XXV RT 6484.) (*People v. Prince, supra*, 40 Cal.4th at p. 1295.) Finally, as discussed above, the aggravating factors were overwhelming in comparison to the evidence in mitigation. Thus, the prosecution's question did not amount to a miscarriage of justice.

D. The Prosecutor Did Not Commit Prejudicial Misconduct During His Penalty Phase Closing Argument

According to Edwards, the prosecutor committed prejudicial misconduct by making impermissibly inflammatory remarks about Edwards' character and future dangerousness during closing argument. (AOB 342-347.) These claims are waived because Edwards neither objected nor requested an admonition. Moreover, the prosecutor did not commit misconduct during closing arguments. His use of epithets and the arguments on Edwards' future dangerousness were supported by the evidence. In any event, there was no reasonable possibility that any misconduct influenced the penalty verdict.

At closing argument, a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom. (*People v. Morales, supra*, 25 Cal.4th at p. 44.) "The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Hill*, supra, 17 Cal.4th at p. 819, internal quotation marks omitted; *People v. Hillhouse, supra*, 27 Cal.4th at p. 502 [prosecutor may "vigorously attack the defense case and argument if that attack is based on the evidence"].) During argument, a prosecutor may "state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history, or

literature[,]" and he may vigorously argue his case. (*People v. Hill, supra*, 17 Cal.4th at p. 819; *People v. Wharton* (1991) 53 Cal.3d 522, 567.) Even the use of "opprobrious epithets" is not necessarily misconduct when they are reasonably warranted by the evidence. (*People v. Hawkins* (1995) 10 Cal.4th 920, 961, disapproved on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

Although appeals to the sympathy or passions of the jury are inappropriate at the guilt phase:

> at the penalty phase the jury decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience. [Citations.] In this process, one of the most significant considerations is the nature of the underlying crime. . . . On the one hand, [the court] should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.

(*People v. Haskett, supra*, 30 Cal.3d at pp. 863-864.) Given all of the foregoing, "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretation." (*Boyde, supra*, 494 U.S. at p. 385; see *People v. Gonzalez, supra*, 51 Cal.3d at p. 1224, fn. 21.)

In this case, the prosecutor, in discussing the murder of Delbecq, argued in closing:

> What happened? So what happens during this murder? Is it quick, defendant seeing the victim and "I don't like you" and pulling a gun out and shooting her and that's it? As awful as that

> would have been, was it that merciful? Or does he, in fact, engage in toying with his prize? Almost a cat-and-mouse situation where he begins a – I don't know – I want to say a night of terror.

(XXV RT 6408.) The prosecutor continued his discussion of Delbecq as follows:

> She did nothing to deserve what happened to her. Nothing. And before he thrust this mousse can deep through her vagina, up into her abdominal cavity – can any of us conceive the unimaginable terror of this? No we can't. But please don't hold that against the memory of these victims. [¶] Do your best to imagine it as you're determining this penalty. We can't, but give it a shot, would you? This terror is beyond comprehension. It is. It's unimaginable terror, is it not?

(XXV RT 6410.)

Edwards also claims that the prosecutor's argument about Deeble was inflammatory. The prosecutor argued:

> She wasn't your daughter. She wasn't your mother. She wasn't you. But she was a human being. She deserved for this defendant to make a different choice. She did nothing to invite or to encourage this murderer to come into her life. She did nothing. She was not given a penalty phase. She was not allowed to present mitigating evidence. Whether or not she pled and begged for mercy, we'll never know. But if she did, her pleas were unanswered. She was shown no sympathy whatsoever. [¶] He showed Marjorie Deeble no sympathy. He brutally raped and murdered her in such a fashion to satisfy his sadistic desires. To feel better himself. To make himself feel good and pleasure, he did the things to her he did. And he left her there lying like so much garbage.

(XXV RT 6415.)

Edwards' claim that these arguments by the prosecutor were inflammatory and aimed only at arousing the passions of the jury should be rejected. The prosecutor is entitled to make vigorous arguments drawn from the evidence and from common experience. Here, at the penalty trial where the jury's decision on punishment is based not only on the facts, but on the jury's moral

assessment of those facts as they reflect on whether the defendant should receive the death penalty, the prosecutor properly argued the case from the point of view Deeble and Delbecq. (*People v. Haskett, supra*, 30 Cal.3d at pp. 863-864.) "[B]ecause of its obvious relevance to a moral assessment of the crime, the prosecution's invitation to the jurors to project themselves into the role of the surviving victim in this case was insufficiently inflammatory to justify reversal." (*Id.*, at p. 864.) Although the prosecutor's arguments regarding Deeble and Delbecq no doubt evoked an emotional response, that reaction is attributable more to the gruesome nature of the crimes than to the perspective from which it was portrayed. *(Ibid.)*

Moreover, the prosecutor's argument that Edwards is not entitled to sympathy because he showed Deeble no sympathy did not constitute misconduct. This Court has repeatedly rejected claims that a prosecutor commits misconduct in asking the jury to show the same sympathy to the defendant that the defendant showed to his victims. (*People v. Vieira* (2005) 35 Cal.4th 264, 296; *People v. Navarette* (2003) 30 Cal.4th 458; *People v. Ochoa* (1998) 19 Cal.4th 353, 464-465.)

Finally, Edwards complains that the prosecution's "characterization of Edwards as less than human," as a "monster," and as an "animal" were improper arguments aimed at arousing the passions of the jury and "improperly lightened the jury's sense of responsibility in deciding whether to impose death on a fellow human being." (AOB 343-345.) The use of "opprobrious epithets" are not necessarily misconduct when they are reasonably warranted by the evidence. (*People v. McDermott* (2002) 28 Cal.4th 946, 1002; *People v. Hawkins*, *supra*, 10 Cal.4th at p. 961.) Here, the prosecutor's description of Edwards as a "animal" and a "monster," because his conduct was inhumane, did not exceed the permissible scope of closing argument in view of the evidence presented of, among other things, Edwards' cruel and sadistic murders

of Deeble and Delbecq where he bound the women, beat them, tortured them, thrust mousse cans into their genital areas, and eventually strangled them. (See, e.g., *People v. Hawkins, supra,* 10 Cal.4th at p. 961 [finding no prosecutorial misconduct in describing the defendant as "coiled like a snake" and in comparing the act of sentencing defendant to life in prison as akin to "putting a rabid dog in the pound"]; *People v. Farnam* (2002) 28 Cal.4th 107, 199-200 [the prosecutor's reference to defendant as a "monster," an "extremely violent creature," and the "beast who walks upright" constituted fair comment on the evidence presented]; *People v. Sully* (1991) 53 Cal.3d 1195, 1249 [reference to the defendant as a "human monster" and a "mutation"].) For these reasons, the prosecutor did not commit misconduct during closing argument.

Edwards also claims that the prosecutor committed misconduct by urging the jury, during closing arguments, to consider his future dangerousness. (AOB 345-346.) Edwards claims that while he had access to a homemade weapon in prison, there was utterly no evidence to support a reasonable conclusion that he posed a danger of an unprovoked assault on prison guards or inmates if his life was spared. (AOB 346.) Again, this issue is waived for failing to object or request an admonition. In any event, the prosecutor did not commit misconduct by his comments on Edwards' future dangerousness because the comments were supported by the evidence.

In his closing argument, the prosecutor argued:

> Can you, ladies and gentlemen, as representatives of the community, as the conscience of this community, can you take a chance that this defendant is not going to use a weapon when he wants to? That he's going to kill some innocent guard; that he's going to kill some innocent, frankly, inmate. Can you take that chance with this man? Because by giving him life without parole, you are. You would give him that freedom of choice, and he doesn't deserve it any longer.
>
> And that is why this evidence is so powerful. I'm sorry that it happened this way. And I'm going to tell you, in a certain

> sense, he forces your hand with this. He's trying to force you a little bit to determine who's going to raise his son. but he forces your hand a little bit here, too.
>
> He is a danger. He is a danger to prison. He should not be allowed to have the chances to kill somebody there. You can't believe that he would only use this when he's attacked. You can't believe that. You can't believe that he could prevent a weapon such as this from getting into somebody else's hands. You can't take that chance. I submit to you, as sad as it is, he seals his fate when he decides to start manufacturing weapons in prison.

(XXV RT 6405-6406.)

It is well established that although the prosecutor may not introduce at the penalty phase of a capital trial, expert testimony forecasting that, if sentenced to life without the possibility of parole, a defendant will commit violent acts in prison (*People v. Murtishaw* (1981) 29 Cal.3d 733, 779, overruled on other grounds in *People v. Boyd* (1985) 38 Cal.3d 762, 773), this Court has never held that in closing argument a prosecutor may not comment on the possibility that if the defendant is not executed he or she will remain a danger to others. Rather, this Court has concluded that the prosecutor may make such comments when they are supported by the evidence. (*People v. Michaels* (2002) 28 Cal.4th 486, 540-541.)

In the present case, the prosecutor properly pointed out during closing argument that Edwards would remain a danger to others if he was sentenced to life without parole because his future dangerousness was supported by the evidence presented at the penalty phase trial. Officer Martin testified that while doing a security check, he witnessed Edwards sharpening a piece of metal by rubbing it on the concrete basin which separated the showers. (XX RT 5263.) Contrary to Edwards' assertions that there was no evidence to support a reasonable inference that he posed a danger to a guard or inmate if his life was spared (AOB 346), Edwards acknowledged on cross-examination that

he was trying to make the edge of the shank sharp and as similar to a knife as possible. (XXI RT 5504.) Both sides of the shank were sharpened. (XXI RT 5504.) Edwards also admitted that the shank was being sharpened so that it could cut skin and could do damage to somebody if necessary. (XXI RT 5503.) The fact that Edwards was making a shank to be as similar to a knife as possible and sharp enough to cut skin was certainly evidence which supported the prosecutor's argument that Edwards would still pose a danger to guards and inmates alike if his life was spared. While Edwards insisted he would never be the aggressor, he acknowledged that he would be the one to decide when and if he used the weapon and on whom he would need to use the weapon. (XXI RT 5505-5509.) Moreover, Edwards' self-serving explanation for his actions does not limit the argument of the prosecutor and the inferences that can be drawn from the evidence regarding future dangerousness. The prosecutor did not commit misconduct by arguing Edwards' future dangerousness.

Assuming, for the sake of argument, that these claims have not been forfeited and any of the prosecutor's arguments were in some way improper, the defendant must demonstrate that the arguments were prejudicial. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1019.) To be prejudicial, there must be a reasonable possibility that the misconduct influenced the penalty verdict. (*Ibid.*) Juries recognize a prosecutor's argument is merely the statement of an advocate and that it does not constitute evidence (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1224, fn. 21 ["Prosecutorial commentary should not be given undue weight"]); and the jurors here were so instructed (V CT 1631; XXV RT 6484). The ultimate question to be asked is had the prosecutor refrained from the misconduct, is it reasonably possible that a result more favorable to the defendant would have occurred? (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) The answer in this case is no. Here, the court properly instructed the jury on how to reach the ultimate penalty determination. (V CT 1647; XXV RT

6492-6493.) There is no evidence in this case that the jurors disregarded the court's instructions or that their penalty determination was based on anything other than the facts and the applicable law. As set forth above, the evidence in aggravation was overwhelming. It is not reasonably possible that the jury would have reached a result more favorable to Edwards absent the prosecutor's alleged misconduct. (See *People v. Jackson, supra,* 13 Cal.4th at p. 1232.) For the same reasons, the prosecutor's argument could not have infected the trial with such unfairness as to make Edwards' conviction a denial of due process or to render the death verdicts unreliable. (*Ibid.*; *People v. Hardy* (1992) 2 Cal.4th 86, 173.)

E. There Is No Cumulative Effect of Alleged Prosecutorial Errors

Edwards claims cumulative prejudice from all alleged errors and misconduct at the penalty phase. (AOB 348-349.) As discussed above, there was no error, or even if there was misconduct, it was not prejudicial. Hence, Edwards' assertion of cumulative prejudice must fail. (*People v. Zambrano, supra*, 41 Cal.4th at p. 1187.)

XVI.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ADMITTING THE TESTIMONY OF DR. DIETZ IN REBUTTAL, PHOTOGRAPHS OF DEEBLE WITH HER FAMILY, THE VICTIM IMPACT TESTIMONY OF DEEBLE'S SISTER AND DAUGHTER, EVIDENCE THAT HE ATTEMPTED SEXUAL ASSAULT WITH A FOREIGN OBJECT UPON A FORMER GIRLFRIEND AND EVIDENCE THAT EDWARDS POSSESSED A SHANK WHILE IN CUSTODY

Edwards contends that the trial court's admission of allegedly irrelevant and highly prejudicial testimony and exhibits violated his state and federal rights to due process as well as a heightened reliability of the determination of penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 350-369.) Edwards specifically argues that: (1) the trial court committed reversible error when it admitted expert testimony on rebuttal regarding "blackouts" and Edwards' mental state at the time of homicides (AOB 351-355); (2) the trial court improperly admitted the testimony of Naomi Lindeman Titus that four years after the charged offense, Edwards, while intoxicated, woke her up trying to insert a bottle into her vagina and rectum (AOB 355-360); (3) the trial court improperly admitted victim impact testimony (AOB 360-366); and (4) the trial court abused its discretion when it admitted evidence that Edwards possessed a shank while in custody (AOB 366-369.) Edwards' claims should all be rejected. The trial court properly admitted the contested evidence.

A. The Trial Court Properly Admitted the Testimony of Dr. Dietz on Rebuttal

Edwards argues that the trial court improperly admitted Dr. Dietz's testimony because his testimony consisted of "influences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness." (AOB 353.) Moreover, because no defense expert testified that

Edwards was in a blackout state during the crimes, allowing the prosecution to do so in rebuttal was impermissible. (AOB 353.) Finally, Edwards claims that the testimony was more prejudicial than probative under Evidence Code section 352. (AOB 354.) The trial court properly admitted Dr. Deitz's opinion that Edwards was not suffering from an alcoholic blackout at the time he committed the murders.

The prosecutor sought to rebut the defense theory that Edwards was in an alcoholic blackout during the Deeble and Delbecq murders. (XXV RT 6300.) During a 402 hearing, Dr. Dietz testified that at the time of the murders, Edwards was not in a blackout state. Edwards knew where he was, what he was doing, the actions he engaged in, the purpose of each action, and his choice among those actions. (XXV RT 6314-6315.) If Edwards indeed suffered a blackout, he would not remember the events later because they would not have been stored into his long-term memory. However, at the time of the crimes, he would know what he was doing. (XXV RT 6315-6316.) The prosecutor also sought to admit Dietz's opinion that based on the crime scenes and Edwards' other relationships, he was a sexual sadist who enjoyed watching someone suffer. (XXV RT 6300, 6319.) Dietz also testified at the 402 hearing that a sexual sadist would not have wanted the victim to be unconscious. The trial court denied Edwards' objections to Dr. Dietz's testimony and ruled that Dr. Dietz could testify about whether Edwards knew what he was doing during the crimes, but Dr. Dietz could not testify about sexual sadism or reacquiring memory. (XXV RT 6326.)

At trial, Dr. Dietz testified that an "alcoholic blackout" was a period for which an individual no longer has memory of an incident because while doing the action, the brain did not permanently record the information into long term memory. (XXV RT 6340.) Dr. Dietz was asked to assume that Edwards committed both murders, that Edwards has no memory of either homicide

because he was under the influence of alcohol. (XXV RT 6341.) Dr. Dietz opined that Edwards might have been in an alcoholic blackout for both murders, but that did not explain Edwards' mental state at the time of the homicides except that he was drunk at those times. (XXV RT 6341.) According to Dr. Dietz, the things Edwards did to gain access to the victims, the things done to the victims and their property, and how Edwards left both crime scenes indicate that Edwards was

> behaving intentionally voluntarily [sic]. He knows where he is, what he is doing, who he is with, why he is engaging in each action, what he wants to do next, which things please him and which things don't. All of those are known to him, and he also knows what he just did before that, moments before that.
>
> Now, he may not know what he did five minutes ago or ten minutes ago. He may be in a blackout already for those. But for what he just did and what he is going to do next, he is not in any blackout at all. He is right there in the present tense in the moment doing as he pleases.

(XXV RT 6343.) Dr. Dietz explained that the comforter that Edwards put over the window in Delbecq's residence showed that while Edwards may or may not have suffered an alcoholic blackout later, at the time of the crimes, Edwards knew that what he was doing was wrong because he was trying to hide his actions from the world by covering the window. (XXV RT 6344.)

Contrary to Edwards' assertions that Dr. Dietz's testimony consisted of "conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness" (AOB 353), the trial court did not abuse its discretion because Dr. Dietz's testimony was beyond common experience and assisted the trier of fact.

An expert witness is simply someone with "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720.) An expert witness may testify if the testimony is "[r]elated to a subject that is sufficiently

beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a); *People v. Gardeley, supra,* 14 Cal.4th at p. 617.) The admissibility of expert opinion is a question of degree. When

> "the jury has some knowledge of the matter, expert opinion may be admitted [if] it would 'assist' the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.'" [Citation.]

(*People v. McAlpin, supra,* 53 Cal.3d at pp. 1299-1300.) A claim that expert opinion evidence improperly has been admitted is reviewed on appeal for abuse of discretion. (*People v. Davenport, supra,* 11 Cal.4th at p. 1207.) In this case, the trial court properly admitted the rebuttal testimony of Dr. Dietz.

Dr. Dietz was a highly qualified expert in forensic psychiatry. He testified at length about his qualifications. (XXV RT 6332-6337.) Dr. Dietz did extensive research, writing and served as a consultant for several noteworthy cases which dealt with claims of alcoholic blackouts. (XXV RT 6336-6337.) In this case, Dr. Dietz reviewed the reports, photographs, and witness statements, autopsy reports and photographs from both the Los Alamitos and the Hawaii homicides, and read the testimony of Edwards at various proceedings. (XXV RT 6337-6338.) Dr. Dietz was uniquely qualified to testify in the present case because he was a forensic psychiatrist as opposed to a clinical psychiatrist. (XXV RT 6338.) In clinical psychiatry, the purpose is to help the patient, whereas in forensic psychiatry, the focus is to find out the truth regardless of whether or not it hurts the client. (XXV RT 6339.)

Here, Dr. Dietz testified to subjects outside the common experience of a jury. He explained how memory is transferred from long term to short term memory. Dr. Dietz also discussed what a person's mental state was at the time of the act if under the influence of alcohol, and whether the fact that the person did not remember the event indicated that that person did not know what he or

she was doing at the time. Finally, the expert testified when the lack of memory took place. These are all subjects that are not "common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." (*People v. McAlpin*, *supra*, 53 Cal.3d at pp. 1299-1300.)

Moreover, rebuttal on the subject of whether Edwards was in a blackout at the time of the crime was proper. Edwards claims that since no defense expert testified about Edwards was in a blackout state at the time of the crimes, it was improper for Dr. Deitz to opine that Edwards was not in a blackout state at that time. (AOB 353.) However, one of the prevailing defense themes throughout the entire penalty phase trial was that Edwards, in the past, had suffered from alcoholic blackouts, and he suffered from one during the commission of the Deeble murder. As defense counsel argued in closing arguments, "You heard about alcoholic blackouts. Ladies and gentlemen, that the state Rob Edwards had to have been in during the commission of this particular crime." (XXV RT 6449.)

Edwards himself testified that after heavy drinking, there were times when he did not recall what had happened earlier, implying that he had suffered an alcoholic blackout during those incidents. For instance, on the night of the Deeble murder, Edwards claimed that he went to a concert to sell fake LSD. (XXI RT 5438-5441.) Afterward, he picked up drugs and alcohol and returned to his grandmother's home. (XXI RT 5442-5443.) The next morning, he woke up at his grandmother's house, and he had no recollection of going to Deeble's house and killing her. (XXI RT 5445.) Additionally, Edwards testified that on the night of the Delbecq murder, he drank and took drugs after he learned that his dog died, and the next thing he remembered was Janice waking him up. He did not remember anything strange or different and he did not have any strange objects or possessions with him. (XXI RT 5455-5457, 5520-5521.) Edwards agreed on cross-examination that he had absolutely no recollection of

committing these murders. (XXI RT 5520.) Edwards also testified that he was in a blackout in 1988 when he stole a car. (XXI RT 5528-5529.)

Moreover, several defense witnesses testified about alcoholic blackouts in general. Dr. Alex Stalcup, a defense expert witness on the subject of addiction medicine, explained what alcoholic blackouts are and how a person experiencing a blackout might not look intoxicated and might still possess fine motor and gross motor skills. Dr. Stalcup also testified that blackouts are a common occurrence. (XXI RT 5576-5581.) Linda Lauer, a nurse and certified substance abuse counselor, testified that alcoholic blackouts are common, and she described it as "walking amnesia." (XXIII RT 5928.) Father John McAndrew also testified about his experience with alcoholic blackouts and that he probably drove numerous times while in an alcoholic blackout. (XXIV RT 6126.)

Other defense witnesses also testified about specific times when Edwards purportedly suffered from an apparent alcoholic blackout. For instance, William Farmer, with whom Edwards lived for a short time, testified that one night Edwards came home drunk, and Farmer kicked him out of his house. The next morning, Farmer reminded Edwards that he had been kicked out of the house, and Edwards had no recollection of the night before and he was shocked and surprised. (XXII RT 5838.) Janice Hunt, Edwards' ex-girlfriend, described the time when Edwards, after a day of heavy drinking, did not remember leaving groceries outside of the car. (XXIII RT 5962-5964.) Hunt also testified that on the night of the Delbecq murder, Edwards was very distraught about the death of his dog. He drank a lot of rum, and then he told Hunt later that he was going to get some drugs. (XXXII RT 5873-5974, 5977.) The next morning after she told Edwards that someone down the street had been murdered, Edwards acted surprised and said, "Wow, no way." (XXIII RT 5980.) It is reasonable to infer from the testimony of all of these witnesses that

it was the defense position that Edwards was allegedly suffering from an alcoholic blackout when Farmer kicked him out of the house, when he left the groceries out, and when he murdered Delbecq.

Contrary to Edwards' assertions that no defense evidence was presented that Edwards suffered from an alcoholic blackout during the commission of the Deeble murder, numerous instances in the record show that the defense was contending that because Edwards suffered from blackouts in other instances, it is reasonable to infer that he suffered from one during the Deeble murder. It was thus proper for the prosecution to rebut this evidence, and present Dr. Dietz to testify that Edwards was not suffering from a blackout at the time of the Deeble murder.

Finally, Edwards argues that admission of the expert's opinion was an abuse of discretion because it was more prejudicial than probative. (AOB 354.) As stated *ante*, Evidence Code section 352 permits a court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.) A trial court's rulings under Evidence Code section 352 are reviewed on appeal for an abuse of discretion. (*People v. Cole, supra,* 33 Cal.4th at p. 1195; *People v. Lewis*, *supra*, 25 Cal.4th at p. 637.) As set forth above, Dr. Dietz's testimony was highly relevant and probative to rebut the defense theory that Edwards was in an alcoholic blackout during the commission of the murder. Moreover, Dr. Dietz's testimony was relatively brief, and the trial court substantially narrowed his testimony to only discuss whether at the time of the crime, Edwards knew what he was doing despite the assumption that he did not remember doing it. (XXV RT 6326.)

In any event, any error is harmless. A due process violation occurs when the erroneous admission of evidence renders a trial fundamentally unfair. (*People v. Holloway, supra,* 33 Cal.4th at p. 128.) Here, any error did not render Edwards' trial fundamentally unfair. Thus, any error here involved only the misapplication of ordinary rules of evidence and Evidence Code section 352. Application of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights. (*People v. Pollock, supra,* 32 Cal.4th at p. 1173; *People v. Kraft, supra,* 23 Cal.4th at p. 1035.) Because the "application of ordinary rules of evidence . . . does not implicate the federal Constitution," this Court has reviewed "allegations of error under the 'reasonable probability' standard of *Watson*[.]" (*People v. Marks, supra,* 31 Cal.4th at p. 227.)

In the present case, even if Dr. Dietz's testimony would have been excluded, it is not reasonably probable that Edwards would have enjoyed a more favorable outcome, because the substance of Dr. Dietz's testimony had already been presented during the cross-examination of Dr. Stalcup. Dr. Stalcup acknowledged that when one is engaged in activity in a blackout, the immediate knowledge of the activity is there, but then the effects of alcohol prevent the activity from being stored into long-term memory. The acts themselves are immediately remembered and intentionally done, but are ultimately forgotten. (XXI RT I RT 5592-5593.) Thus, any error in the admission of Dr. Dietz's rebuttal testimony was harmless.

B. Evidence That Edwards Tried to Shove a Bottle Up the Vagina and Rectum of an Ex-Girlfriend Was Properly Admitted as Criminal Activity Which Involved the Attempted Use of Force or Violence

Edwards argues that the trial court improperly admitted testimony by Naomi Lindeman Titus because no rational trier of fact would have found

beyond a reasonable doubt that Edwards tried to put a bottle in her genital area while she slept. (AOB 355-360.) This claim should be rejected.

Titus testified that she met Edwards in 1990 in Maui. (XX RT 5209-5210.) At some point in 1990, they broke up. (XX RT 5210.) Edwards called her one night asking to come over. (XX RT 5211.) Titus refused to have him come over because Edwards sounded drunk, and they were broken up. (XX RT 5211.) Titus went back to sleep. (XX RT 5211.) Suddenly, she was awakened by Edwards who was trying to insert a wine bottle into her vaginal and anal area. (XX RT 5212.) This "pissed" off Titus, and she told him to "get the fuck out of the house." (XX RT 5213.) Edwards either left the house or went into the living room and fell asleep on the couch. (XX RT 5213.) Titus never called the police. (XX RT 5215.)

In determining whether to impose the death penalty, the jury may consider as an aggravating factor "criminal activity by the defendant which involved the use or attempted use of force or violence or . . . the express or implied threat to use force or violence." (Pen. Code, § 190.3, factor (b).) A trial court's decision to admit evidence under factor (b) is reviewed for abuse of discretion. (*People v. Lancaster*, *supra*, 41 Cal.4th at p. 93.) Section 190.3, factor (b) requires the trier of fact to take into account, if relevant," [t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Under this factor, the term "criminal activity" is "limited to conduct that violates a penal statute." (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1169; *People v. Wright* (1990) 52 Cal.3d 367, 425.) Before an individual juror may consider evidence of other violent criminal activity in aggravation, he or she must find the existence of such activity beyond a reasonable doubt. (*People v. Griffin*, *supra*, 33 Cal.4th at p. 584; *People v. Benson*, *supra*, 52 Cal.3d at pp. 809-811.) Substantial evidence of other violent criminal

activity is evidence that would allow a rational trier of fact to find the existence of such activity beyond a reasonable doubt. (*People v. Griffin, supra*, 33 Cal.4th at p. 584; *People v. Rodrigues, supra*, 9 Cal.4th at pp. 1167-1168.)

Here, the trial court reasonably determined that substantial evidence existed to prove other violent criminal activity by defendant involving Titus. A rational trier of fact could have credited Titus's testimony, which was generally detailed, internally consistent, and not in conflict with any other evidence presented, and was sufficient to support a finding beyond a reasonable doubt that Edwards tried to insert a bottle into her vaginal and anal areas. Edwards argues that she did not remember the incident clearly and she was motivated to lie because she was an ex-girlfriend who "display[ed] obvious distain [sic] and anger towards Edwards during her testimony." (AOB 357.) However, it is obvious that her anger was towards having to remember and testify about an incident she would rather forget. (XX RT 5211.) While Titus was not clear on minor things like whether Edwards slept on the couch or left the house, she was clear that Edwards attempted to insert a wine bottle in her vaginal and anal areas while she slept. (XX RT 5212, 5213, 5216.) The trial court did not abuse its discretion in finding that there was substantial evidence of other violent criminal activity that would allow a rational trier of fact to find the existence of such activity beyond a reasonable doubt. (*People v. Lancaster, supra,* 41 Cal.4th at p. 93; *People v. Griffin, supra*, 33 Cal.4th at p. 584.)

Even assuming that the Titus evidence was improperly admitted, the record does not demonstrate prejudice under California's penalty phase harmless error test, nor does it rise to the level of any federal constitutional violation. (*People v. Rodrigues, supra,* 8 Cal.4th at p. 1169; *People v. Brown* (1988) 46 Cal.3d 432, 449.) The jurors had heard all about the circumstances of the crime (§ 190.3, factor (a)), including the manner in which Edwards hog-tied Deeble, inserted a mousse can into her anal and vaginal areas and hung

her from a credenza with a noose fashioned from a belt, which caused her death by ligature strangulation. The jurors were also presented evidence of other incidents in aggravation, which included the violent murder of Delbecq in Hawaii (XX RT 5287-5357) and Edwards' possession of a shank fashioned from a sharpened metal outlet plate (XX RT 5264-5267). In light of all the evidence, it was not reasonably probable that the jurors could have drawn any more damaging inferences from the evidence of Edwards' attempted sexual assault of Titus with a wine bottle than had already been established by the circumstances of the underlying crimes and Edwards' history of violent and assaultive conduct. Therefore any erroneous admission of the evidence was harmless. (*People v. Rodrigues, supra,* 8 Cal.4th at p. 1170; *People v. Wright, supra,* 52 Cal.3d at pp. 428-429; *People v. Brown, supra,* 46 Cal.3d at p. 449.)

C. The Trial Court Properly Admitted Victim Impact Testimony

Edwards argues that victim impact testimony was improperly admitted because the testimony violated the ex post fact clause, because photographs of the victim and her family had little probative value, and because the testimony of Loraine Johnson and Valentine fell outside the parameters of admissible impact testimony. (AOB 361-366.) Edwards' claims are without merit.

1. The Admission of Victim Impact Testimony Did Not Violate the Ex Post Facto Clause

Edwards claims that victim impact evidence was inadmissible at the time of the murder in 1986, so its admission here violated ex post facto principles. (AOB 362-364.) Ex post facto principles were not violated because the law at the time of Edwards' offense (1986) and at the time of his trial (1996) allowed the admission of victim impact evidence. Moreover, any change in the decisional law was not unexpected. Finally, the application of a rule of evidence in a sentencing procedure does not violate ex post facto principles.

First, ex post facto principles do not apply here because the law in California, at the time of Edwards' trial and offense, permitted victim impact testimony. In California, victim impact evidence is admissible under Penal Code section 190.3, factor (a). (*People v. Taylor*, *supra*, 26 Cal.4th at pp. 1171-1172; *People v. Johnson*, *supra*, 3 Cal.4th at p. 1245; *People v. Raley*, *supra*, 2 Cal.4th at p. 916; *People v. Edwards* (1991) 54 Cal.3d 787, 835.) In *Payne v. Tennessee* (1991) 501 U.S. 808, 826-827 (111 S.Ct. 2597, 115 L.Ed.2d 720), the United States Supreme Court overruled its prior holdings in *Booth v. Maryland* (1987) 482 U.S. 496 (107 S.Ct. 2529, 96 L.Ed.2d 440), and *South Carolina v. Gathers* (1989) 490 U.S. 805 (109 S.Ct. 2207, 104 L.Ed.2d 876). In overruling those two holdings, the high Court specifically held that the Eighth Amendment did not bar the admission of victim impact testimony in the sentencing phase of a capital trial because that evidence is designed to show the victim's uniqueness as an individual human being and "whatever the jury might think the loss to the community resulting from his death might be." (*Payne, supra*, 501 U.S. at p. 823.) In *People v. Edwards, supra*, 54 Cal.3d 787, this Court addressed the impact of *Payne v. Tennessee* on California law. This Court noted that prior to *Booth* and *Gathers*, it had approved of argument addressing the issue of victim impact in the case of *People v. Haskett*, *supra*, 30 Cal.3d at pages 863-864. (*People v. Edwards, supra*, 54 Cal.3d at p. 834.) After *Haskett,* this Court continued to approve of victim impact evidence – although primarily in the context of the suffering of the murder victim. (See *People v. Heishman* (1988) 45 Cal.3d 147, 195 [proper for prosecutor to comment on effect defendant's crimes had on victims]; *People v. Allen* (1986) 42 Cal.3d 1222, 1278 [prosecutor's argument about victim suffering caused by crimes proper].)

This Court subsequently found victim impact evidence inadmissible based on *Booth* and *Gathers*. (See *People v. Gordon* (1990) 50 Cal.3d 1223,

1266-1267 [improper to comment on impact crimes had on victim's family].) However, this Court later found case law excluding victim impact evidence that had been based on *Booth* and *Gathers* was no longer binding in light of the United States Supreme Court's holding in *Payne v. Tennessee*. (*People v. Edwards, supra*, 54 Cal.3d at p. 835; accord, *People v. Raley, supra*, 2 Cal.4th at p. 915.) Thus, on November 25, 1991 (the date this Court's opinion in *Edwards* was filed) the law in California returned to the holding of *Haskett,* and victim impact evidence was admissible. *Payne* did not represent a departure from prior law in California; *Booth* and *Gathers* did. Moreover, this Court has since held that *Payne* and *Edwards* are fully retroactive. (*People v. Catlin, supra*, 26 Cal.4th at p. 175; *People v. Clair, supra*, 2 Cal.4th at p. 672.)

Moreover, since the victim impact evidence was admissible at the time of Edwards' crimes and trial, there is no ex post facto issue. Here, the Deeble murder occurred in 1986 and Edwards' penalty phase trial occurred in 1996. *Booth, supra*, 482 U.S. 496, and *Gathers, supra*, 490 U.S. 805, which barred the use of victim impact evidence, were not decided until 1987 and 1989 respectively. In 1991, the Supreme Court overruled the short -lived holdings of *Booth* and *Gathers*. (*Payne, supra,* 501 U.S. at p. 826.) Thus, the offense occurred before victim impact evidence was barred by *Booth* and *Gathers*, and the trial occurred after those decisions had been overturned.

Even if the law in California has changed since the time of Edwards' offense at trial, the change was not "unexpected and indefensible." (*Rogers v. Tennessee* (2001) 532 U.S. 451, 457 [121 S.Ct. 1693, 149 L.Ed.2d 697]; *People v. Davis* (1994) 7 Cal.4th 797, 811.) The decision in *Haskett* signalled the Court would allow victim impact evidence, not exclude it. The decisions in *Booth* and *Gathers* were the unexpected departure, not *Payne*. Indeed, the United States Supreme Court found that *Booth* and *Gathers* were "wrongly decided" (*Payne, supra*, 501 U.S. at p. 830), implying that the overruling of

those decisions was not "indefensible." Thus, any decisional change in allowing victim impact evidence did not implicate ex post facto principles because the change was not "unexpected and indefensible," as Edwards claims. (AOB 363.)

This Court in *People v. Huggins*, *supra*, 38 Cal.4th at page 238, noted that it previously rejected the ex post facto argument in *People v. Brown* (2004) 33 Cal.4th 382, 394-395, and it refused to reconsider that conclusion. (*People v. Huggins, supra*, 38 Cal.4th at p. 236.) *Brown* correctly holds that the case law amending victim impact evidence merely constituted a change in a type of admissible evidence and as such does not implicate the ex post facto doctrine. Edwards' argument should likewise be rejected.

2. The Victim Impact Evidence Which Included Photos of Deeble With Her Family and the Testimony of Two Family Members Was Properly Admitted

Edwards also argues that the admission of photographs of Deeble with some family members who did not testify "inflame[d] the jury with speculative imaginings." (AOB 365.) Edwards claims that the photographs held little probative value since the family members had testified about the impact of Deeble's death upon them. (AOB 364.) Edwards also contends that the testimony of Lorraine Johnson, Deeble's older sister, that she felt like Deeble's mother, and Deeble's daughter, Valentine, that she felt personal guilt about Deeble's death were outside the parameters of admissible impact testimony because they did not demonstrate "specific harm" nor balance any similarly expressed mitigation evidence introduced by the defense. (AOB 365.) Edwards' claims are without merit. The trial court did not abuse its discretion in admitting the photographs of Deeble with family members and the victim impact testimony of Johnson and Valentine.

Preliminarily, it bears noting that while Edwards objected to the admission of the family photographs, he did not object to the victim impact testimony of Johnson or Valentine. Thus the claim has not been preserved for appeal. (*People v. Jurado* (2006) 38 Cal.4th 72, 133; *People v. Robinson* (2005) 37 Cal.4th 592, 652; *People v. Benavides* (2005) 35 Cal.4th 69, 106.)

The Eighth Amendment to the federal Constitution permits the introduction of victim impact evidence, or evidence of the specific harm caused by the defendant, when admitted in order for the jury to assess meaningfully the defendant's moral culpability and blameworthiness. (*Payne*, *supra*, 501 U.S. at p. 825.) Such evidence violates the Fourteenth Amendment's due process clause only when it is so unduly prejudicial that it renders the trial fundamentally unfair. (*Ibid.*) Under California law, victim impact evidence is generally admissible as a circumstance of the crime pursuant to section 190.3, factor (a). (*People v. Harris*, *supra*, 37 Cal.4th at p. 351; *People v. Boyette*, *supra*, 29 Cal.4th at pp. 443-444; *People v. Stanley* (1995) 10 Cal.4th 764, 832.) "'On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'" (*People v. Edwards, supra*, 54 Cal.3d at p. 836, quoting *People v. Haskett, supra,* 30 Cal.3d at p. 864.) An Evidence Code section 352 ruling is reviewed for an abuse of discretion. (*People v. Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125.)

The photographs of Deeble with family members were properly admitted. Exhibits 20 through 27 were photographs of Deeble wearing various items of jewelry which Valentine testified were never recovered after Deeble's murder. (XX RT 5233-5236.) Three of those photographs also included images of other family members with Deeble. In exhibit 22, there were ten people in the photograph including Deeble, Valentine, Valentine's uncle, father, brothers, cousins, and her aunt. (XX RT 5235.) Deeble was wearing

a necklace and earrings which were never recovered in the photo. (XX RT 5235.) Exhibit 26 was a photo of Lorraine Johnson with Deeble wearing two necklaces and earrings which were missing. (XX RT 5236.) A photograph of Deeble wearing a missing opal ring with her daughter in law was marked as exhibit 27. (XX RT 5237.) Finally, exhibit 48 was a photograph of Deeble right before she was murdered in May 1986. (XX RT 5237.)

The photographs were highly probative and the trial court acted within its discretion in admitting them. The photographs of Deeble with family members were admitted, in part, to identify the jewelry that Deeble was wearing and were since missing. (XX RT 5226.) Moreover, the photographs were relevant to show Deeble while she was alive as a "circumstance of the crime" under the section 190.3, factor (a). This Court has recognized that

> the prosecution has a legitimate interest in rebutting the mitigating evidence that the defendant is entitled to introduce by introducing aggravating evidence of the harm caused by the crime, "reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

(*People v. Prince, supra*, 40 Cal.4th at p. 1286, quoting *Payne, supra*, 501 U.S. at p. 825.) The challenged photographs implied Deeble's family suffered grief and pain over her loss. The photograph of Deeble around May 1986, was also properly admitted as a photograph of a crime victim while she was alive under section 190.3, factor (a) as a "circumstance of the crime." (*People v. Edwards, supra*, 54 Cal.3d at p. 833; see also *People v. Stitely*, *supra*, 35 Cal.4th at pp. 564-565; *People v. Boyette*, *supra*, 29 Cal.4th at p. 444; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 401; *People v. Cox* (1991) 53 Cal.3d 618, 688.) Whatever the photographs suggested of the preciousness of [her] li[f]e[] was relevant to determining the proper punishment for taking [Deeble's life]." (*People v. Edwards, supra,* 54 Cal.3d at p. 836.) Thus, the jury properly

considered this evidence in determining whether death or life without possibility of parole was the appropriate sentence. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 564.)

The statements of Johnson that she felt like a mother to Deeble, who was the younger sister that she always wanted (XX RT 5207), and Valentine, who felt partly responsible for her mother's death by introducing Edwards into their lives (XX RT 5244), were not outside the parameters of admissible impact testimony, as Edwards suggests. (AOB 365.) This Court has found that "evidence of the specific harm caused by the defendant" is generally a circumstance of the crime admissible under factor (a) of Penal Code section 190.3. (*People v. Edwards, supra*, 54 Cal.3d at p. 833.) This Court explained that the word "circumstance," as it is used under factor (a), means the immediate temporal and spatial circumstances of the crime, as well as that "which surrounds materially, morally, or logically" the crime. (*Ibid.*) Factor (a), therefore, allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. (*Id.*, at p. 835; see also *People v. Johnson, supra*, 3 Cal.4th at p. 1245.)

A trial court must "strike a careful balance between the probative and the prejudicial." (*People v. Lewis* (1990) 50 Cal.3d 262, 284.) However, in the penalty phase of a capital trial, a trial court has less discretion to exclude evidence as unduly prejudicial than it has in the guilt phase because the prosecution is entitled to show the full moral scope of the defendant's crime. (*People v. Anderson* (2001) 25 Cal.4th 543, 591-592.) As part of the jury's normative role, the jury must be allowed to consider any mitigating evidence relating to the defendant's character or background. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973].) There is nothing unconstitutional about balancing that evidence with the most powerful victim evidence the prosecution can muster, because that evidence is most certainly

one of the circumstances of the crime. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017; *People v. Edwards, supra*, 54 Cal.3d at p. 836.)

This testimony of Johnson and Valentine in the present case was not "dissimilar from, or significantly more emotion-laden than, other victim impact testimony that has been held admissible." (*People v. Jurado, supra,* 38 Cal.4th at p. 133.) For instance, in *Payne, supra*, 501 U.S. 808, the defendant was convicted of murdering a 28-year-old woman and her two-year-old daughter. At the trial, when asked how the woman's three-year-old son had been affected by the murders of his mother and sister, the boy's grandmother replied: "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie." (*Id.* at pp. 814-815.) In *People v. Harris, supra*, 37 Cal.4th 310, the murder victim's mother "described how she learned of the murder, and of the emotional and financial costs involved in planning and attending the funeral." (*Id.* at p. 328; see also *id.* at pp. 351-352 [holding this evidence properly admitted].) In *People v. Panah, supra*, 35 Cal.4th 395, the murder victim's father testified that before the victim's death, her 16-year- old brother "was the family athlete, and was a '4.0 student,'" but, following her death, his grades deteriorated, "he is drinking a lot and doing drugs,and would not talk about his sister but 'kept it all inside himself,' and refused to go to counseling." (*Id.* at p. 495.) The court concluded that this testimony was "neither irrelevant nor prejudicial but, in context, depicted the 'residual and lasting impact' he 'continued to experience' as a result of [the victim's] murder." (*Ibid.*) As in those cases, the victim impact evidence here did not suprass constitutional limits. (*People v. Jurado, supra,* 38 Cal.4th at p. 134.)

During the penalty phase of the trial, Edwards presented more than 45 defense witnesses including himself, his mother, his sister, cousins, an

ex-girlfriend, numerous friends, fellow inmates, prison guards, substance abuse counselors, educators, a priest, and child therapists. These witnesses testified, among other things, about Edwards' childhood, his life, his struggles with alcoholism and substance abuse, his helpfulness to others in recovery, and his role as a parent. In light of all of Edwards' sympathetic witnesses, the prosecution's victim impact evidence was appropriate in order to allow the jury to meaningfully assess Edwards' moral culpability. (See *Payne*, *supra*, 501 U.S. at p. 809.) Contrary to Edwards' assertions, the brief victim impact evidence of two witnesses in this case was not unusual or unduly prejudicial in any respect. The testimony was brief, consisting of eight pages of Reporter's Transcript, and limited to the permissible subject of how Deeble's murder affected their lives. (*People v. Raley, supra*, 2 Cal.4th at p. 915; *People v. Johnson, supra,* 3 Cal.4th at p. 1245.) Johnson testified that she was like a mother to Deeble and watched over her. (XX RT 5206.) They had a wonderful relationship in which they talked on the phone and wrote letters a lot. Deeble's death made Johnson feel hurt, pain and anger. She went through counseling and was physically ill. (XX RT 5207-5208.) Valentine testified that when she found out about Deeble's death, "her life stopped momentarily." (XX RT 5241.) At the time, she was only 23 or 24 years old, and she had just established a friendship with her mother. They took trips, talked on the phone, and got together for coffee. (XX RT 5241.) Valentine also felt a certain amount of guilt about the murder because she brought Edwards into their family. (XX RT 5244.) While the testimonies of Johnson and Valentine were powerful, there was nothing in the testimonies that was so inflammatory that it diverted the jury from its proper role. (*Payne, supra*, 501 U.S. at p. 809; *People v. Edwards, supra,* 54 Cal.3d at p. 836.) The specific harm to Deeble's family that Edwards caused when he murdered Deeble was relevant to the jury's meaningful assessment of his "moral culpability and blameworthiness."

(See *Payne, supra*, 501 U.S. at p. 809.) The evidence of the impact of Edwards' crimes on Deeble's family advanced the prosecution's interest in "counteracting the mitigating evidence which the defendant is entitled to put in." (*Id.*, at p. 825.) Fairness demands that evidence of the harm suffered by Deeble's family be considered along with the "parade of witnesses" praising the "background, character and good deeds" of the defendant. (*Id.*, at p. 826.)

Regardless, assuming arguendo there was any error in the admission of victim impact evidence, reversal is not required. Erroneous admission of victim impact evidence is subject to a harmless-error analysis. (*People v. Lewis* (2006) 39 Cal.4th 970, 1058; *People v. Johnson, supra*, 3 Cal.4th at p. 1246.) There is no reasonable probability that Edwards would have enjoyed a more favorable outcome, absent the victim impact evidence. (*People v. Jones, supra*, 29 Cal.4th at p. 1264, fn.11.) Moreover, any federal constitutional error would also be harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.)

First, the testimony was very brief, consuming no more than eight pages of transcript (XX RT 5204-5208, 5235, 5241-5242, 5244), while the prosecution's remaining case in aggravation (recounting the facts of the present case and Edwards' other violent conduct) consumed approximately 200 pages. (XX RT 5125-5203, 5209-5216, 5217-5224, 5234-5240, 5243-5244, 5246-5357.) In contrast, Edwardss' evidence in mitigation consumed over 870 pages. (XXI RT 5370-XXIV RT 6241.)

Second, the victim impact evidence "paled in comparison to other evidence in aggravation," i.e., the horrific and uniformly horrible circumstances of the capital crime, Edwards' vicious murder in Hawaii, his attempted violent act against Naomi Titus and Edwards' continued violent conduct of possessing a shank while in county jail. (*People v. Lewis, supra*, 39 Cal.4th at p. 970.)

In sum, "[t]he challenged evidence could not have tipped the balance in favor of death." (*People v. Lewis, supra,* 39 Cal.4th at p. 1058.)

Finally, the trial court instructed the jury not to be swayed by bias or prejudice against Edwards. (V CT 1634; XXV RT 6483 [CALJIC No. 8.84.1].) The trial court also instructed the jury they were "free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider." (V CT 1665; XXV RT 6508 [CALJIC No. 8.88].) The jury is presumed to have followed these instructions. (*People v. Delgado*, *supra,* 5 Cal.4th at p. 331.)

In light of the relative brevity of the victim impact evidence, the considerable evidence in aggravation, and the instructions given, it is clear the admission of the victim impact testimony did not undermine the fundamental fairness of the penalty determination. Even if the victim impact evidence had been excluded, the outcome would have remained the same. Edwards' death sentence does not rest with unduly prejudicial victim impact evidence; rather, the sentences rest squarely with the evidence in aggravation, including the circumstances of his senseless and brutal crime.

D. The Trial Court Acted Within Its Discretion in Admitting Evidence That Edwards Possessed a Piece of Metal Fashioned Into a Shank While in Custody

Edwards claims that the trial court should have exercised its discretion by excluding evidence that Edwards possessed a metal shank while in custody because he only possessed the shank for self-defense. (AOB 366-369.) Edwards' claim is without merit; the trial court acted within its discretion in admitting the evidence as an aggravating factor.

Edwards does not argue that evidence of possessing a shank is inadmissible under section 190.3, factor (b) as "an implied threat." Nor can he. The law is well established that possession of weapons while incarcerated

satisfies the statutory requirement of an implied threat. (*People v. Martinez* (2003) 31 Cal.4th 673, 693, *People v. Smithey*, *supra*, 20 Cal.4th at pp. 1002-1003; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187.) Rather, Edwards contends that since he had no intent to use the shank, but rather just possessed it in order to "fake" an aggressor out by simply displaying the shank if he was ever attacked (XXI RT 5384-5385), the trial court should have excluded the evidence. (AOB 368-369.)

The trial court properly admitted the evidence. Edwards' self-serving statements were neither controlling in terms of admissibility nor credible. Edwards acknowledged on cross-examination that he was trying to make the edge of the shank sharp and as similar to a knife as possible. (XXI RT 5504.) Both sides of the shank was sharpened. (XXI RT 5504.) Edwards also admitted that the shank was being sharpened so that it could cut skin and could do damage to somebody if he deemed it necessary. (XXI RT 5503.) Edwards also never expressed to the guards that he feared for his life, nor did he ask to be put into protective custody. (XXI RT 5510.) Edwards' claim that he had no intent to use the shank was incredible, since he was sharpening it so it would be able to injure a person.

In any event, mere possession of a potentially dangerous weapon in custody "'involves an implied threat of violence even where there is no evidence defendant used or displayed it in a provocative or threatening manner.' [Citation.]" (*People v. Martinez, supra*, 31 Cal.4th at p. 694; *People v. Smithey*, *supra*, 20 Cal.4th at p. 1002.) Thus, the admission of the evidence was proper.

Even assuming error in admitting the challenged evidence, Edwards cannot establish prejudice. (*People v. Combs* (2004) 34 Cal.4th 821, 860-861; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 591.) As discussed in more detail above, the jury learned with great specificity how Edwards brutally killed

Deeble and Delbecq, how he attempted to insert a bottle into Titus, and how Deeble's murder affected her family. The challenged evidence pales in comparison to the other evidence before the jury, and thus any error was harmless beyond a reasonable doubt.

XVII.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN EXCLUDING SOME OF EDWARDS' STATEMENTS OF REMORSE, AND SCOTT DEEBLE'S OPINION ON THE PROPER PUNISHMENT IN THIS CASE

Edwards claims that the trial court erred when it prevented him from introducing evidence of remorse and mitigating testimony from the victim's son. Edwards' contentions should be rejected, as the trial court acted within its discretion in excluding the proffered testimony. Additionally, any error in their exclusion was harmless.

First Edwards argues that the trial court erred in excluding Edwards' statements about why he did not attempt to escape from jail, Edwards' statements of remorse to Father McAndrew, and Edwards' statements to Farmer that he did not remember committing the crimes. The trial court acted within its discretion in excluding these statements as either inadmissible hearsay or because they were cumulative.

Robert Morris, a Sergeant at Maui Community Correctional Center, testified that Edwards was an ideal inmate. (XXII RT 5800.) Morris recounted two escape attempts in the area of the jail where Edwards was housed. (XXII RT 5803.) Edwards was still in the jail even after other inmates had escaped. (XXII RT 5803.) Defense counsel asked Morris, "Did you ever discuss that with him?" Morris answered, "I talked to him, he says, I am going to do my time." (XXII RT 5803.) The prosecutor objected on hearsay grounds, and the court sustained the objection. (XXII RT 5803.) Another correctional officer, Herbert Aguiar also testified about the escape attempt where four inmates escaped through a window. (XXII RT 5813.) Edwards remained behind in his locked cell. (XXII RT 5814.) Defense counsel asked Aguiar, "Did he say anything at that time?" (XXII RT 5814.) The prosecutor objected on relevance

and hearsay grounds, and the trial court sustained the objection. (XXII RT 5814.)

William Farmer, Edwards' friend and former employer, testified that he visited Edwards at the Maui jail after Edwards' arrest. (XXII RT 5839.) Defense counsel asked Farmer:

> Q. Without telling us exactly what the words spoken were, can you tell us what the conversation had to do with?
>
> A. I asked him if he committed the crime.
>
> Q. You wanted to know something about the crime?
>
> A. Yes, I wanted to know if he, if he – if he knew that he did it, if he knew that he committed these crimes.
>
> Q. And what was his response?

(XXII RT 5840.) The prosecutor objected on grounds that the question called for hearsay and was cumulative. The trial court sustained the objection. Defense counsel protested claiming, "This is the same issue we had this morning, state of mind." The trial court pointed out that Edwards had already gotten this evidence in that morning and sustained the objection. (XXII RT 5840.)

Father McAndrew, a priest, visited Edwards in jail numerous times and worked with Edwards on his drug and alcohol recovery. (XXIV RT 6128-6129.) Defense counsel asked Father McAndrew, "In the conversations you had with Mr. Edwards, did he express to you any remorse for the homicide that he was in custody here on?" (XXIV RT 6132.) The trial court sustained the prosecution's objection that the question called for hearsay. (XXIV RT 6132-6133.) Defense counsel next asked, "With respect –just with respect to the homicide in Los Alamitos that occurred in 1986, did he ever express any remorse to you?" (XXIV RT 6133.) The trial court again sustained the objection. (XXIV RT 6133.)

In each of these three instances, the proffered statements constituted inadmissible hearsay evidence because they were statements that were made other than by a witness while testifying at the hearing and that were offered to prove the truth of the matter stated. (Evid. Code, § 1200.) Additionally, the statement to Farmer Edwards sought to admit, presumably that he didn't remember committing the crime, but if he did, he should be punished is also the type of statement is strictly excluded from the hearsay exception under Evidence Code section 1250, subdivision (b), which states, "This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed." The statement in question here indicated that Edwards believed that events had occurred in the past that he did not remember, and was being offered to prove the truth of the matter asserted-that Edwards had suffered such memory lapse.

The proffered statement to Farmer was properly excluded as cumulative as well as on hearsay grounds. (Evid. Code, § 352, subd. (a).) As the trial court noted, this evidence had already been presented earlier by another witness. (XXII RT 5840.) Indeed, denying the prosecution's hearsay objections, the trial court admitted the testimony of Bridgett Briggs, a friend of Edwards, on grounds that it went to Edwards' state of mind and relevant to show his remorse for the crime. (XXII RT 5751.) Briggs testified that Edwards told her "that he didn't remember doing any of the things that they were saying that he did. But if he did, that he should be punished accordingly, and he was going to wait and see what they do." (XXII RT 5752.) Diane Winter, who taught many classes at the Maui Community Correctional Center, testified that Edwards would break down and cry because he did not remember what he had done. According to Edwards, if he had in fact done what he was charged with doing, he was "horrible" and "shouldn't be allowed to live in society." (XXII RT 5771.) Thus, the proffered evidence was cumulative.

While evidence of Edwards' remorse for the crimes is an admissible mitigation evidence, Edwards improperly suggests that the trial court should have abandoned all rules of evidence and admit the evidence simply if it is relevant. (AOB 370-370.) Here, the trial court properly excluded Edwards' statements to correctional officers about wanting "to do his time," his statement to Farmer that he didn't remember committing the crimes, and his statements to Father McAndrew expressing remorse for his crimes. In each case, the evidence was inadmissible hearsay, and Edwards does not suggest otherwise. Rather, he claims that the trial court's rigid application of the hearsay rule defeated the ends of justice. (AOB 373.) However, "[n]either this court nor the high court has suggested that the rule allowing all relevant mitigating evidence has abrogated the California Evidence Code." (*People v. Phillips* (2000) 22 Cal.4th 226, 238, quoting *People v. Edwards*, *supra*, 54 Cal.3d at p. 837.) "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Phillips, supra,* 22 Cal.4th at p. 238, quoting *People v. Hall*, *supra*, 41 Cal.3d at p. 834.) Morever, due process does not guarantee defendant the right to introduce relevant hearsay evidence. (*Montana v. Egelhoff*, *supra* 518 U.S. at p. 42 ["the proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible"].) "'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.' *Taylor v. Illinois, supra*, 484 U.S. at p. 410, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988)." (*Montana v. Egelhoff, supra,* 518 U.S. at p. 42.)

Edwards cites *Green v. Georgia* (1979) 442 U.S. 95, 97 (99 S.Ct. 2150), to support his position that despite the rules of evidence, the hearsay evidence should have been admitted at the penalty phase. (AOB 371.) The facts of *Green* are distinguishable from the present case, however. In *Green*, the

defendant was able to demonstrate that the hearsay evidence was highly relevant and substantial reasons existed to assume its reliability. (*Ibid.*) There, the hearsay statement was made spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of declarant and a capital sentence. The statement was against interest, and there was no reason to believe that the declarant had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against the declarant and to base a sentence of death upon it. The court in *Green* thus held that in these "unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.' [Citation.]" (*Ibid.*)

In the present case, Edwards has not and cannot show that substantial reasons existed to assume the reliability of Edwards' hearsay evidence of remorse. Unlike the statement in *Green*, in each of the three contested instances here, Edwards' statements were self-serving, made after he was already arrested or convicted and awaiting sentencing. There was possibly an ulterior motive in making these statements of remorse because Edwards knew they would be helpful in the penalty phase of trial. Moreover, unlike the statements in *Green*, there is no evidence to corroborate his statements. There was no substantial reason to assume the reliability of Edwards' self-serving hearsay statements. Thus, while the evidence may have been admissible to show Edwards' remorse, this was not a "unique circumstance" in which the rules of evidence should have been set aside. The trial court properly excluded the proffered evidence.

Edwards also contends that the trial court erroneously prevented him from presenting mitigating victim impact testimony of Deeble's son, Scott Deeble. The trial court properly excluded Scott Deeble's proffered testimony because it was irrelevant as mitigating evidence under factor (k) and it was an

attempt to voice an opinion about the proper punishment to be imposed in this case. Moreover, because Scott Deeble was not a significant person in Edwards' life, it was improper for him to request that Edwards' life be spared. (*People v. Smith*, *supra*, 30 Cal.4th at pp. 622-623, citing *People v. Ervin* (2000) 22 Cal.4th 48, 102.)

Edwards sought the testimony of Scott Deeble to discuss the impact of his mother's murder on him. (XXII 5651-5659.) Before his testimony, the trial court ruled that Scott Deeble could not express an opinion on the death penalty. (XXII RT 5650.) Scott Deeble testified that Deeble's death had changed his life. He stated, "I have learned the big lesson of the blessing of grief, in that I cannot appreciate the ecstacy of my joy if I do not embrace the depth of my grief. I have learned the big lesson in forgiveness." (XXII RT 5653.) Defense counsel asked Scott what he meant by forgiveness, the prosecution objected, and the trial court sustained the objection. (XXII RT 5653.) Defense counsel then asked, "Do you feel forgiveness for Mr. Edwards?" (XXII RT 5653.) The trial court sustained the prosecution's objection. (XXII RT 5653.) At a side bar conference, the prosecution asked that Scott Deeble's testimony be stricken because Scott was attempting to express his opinion on the death penalty. (XXII RT 5654.) The trial court denied the motion to strike the entire testimony, but it did sustain the prosecution's objection to "anything that sounds like he's asking this jury not to impose the death penalty." (XXII RT 5655-5656.) The trial court also ruled that "forgiving someone who is on trial for his life is not relevant" to victim impact. (XXII RT 5658.) In response to how he had personally been affected by his mother's death, Scott Deeble testified, "But I've had to search for, for meaning. I've had to, to find what I need in life. I need compassion and I need forgiveness. And I'm only entitled if I don't deny someone else the same." (XXII RT 5657-5658.) The trial court struck the last portion of Scott's answer. (XXII RT 5658.)

As this Court held in *People v. Smith*, *supra*, 30 Cal.4th at page 622, although victim impact testimony is admissible, the victim's view as to the proper punishment is not. "[T]he admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." (*Ibid.*, quoting *Payne*, *supra*, 501 U.S. at p. 830, fn. 2.) The views of a victim's family member regarding the proper punishment has no bearing on the defendant's character or record or any circumstance of the offense. (*People v. Smith*, *supra*, 30 Cal.4th at p. 622, citing *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [106 S.Ct.1669, 90 L.Ed.2d 1].)

Here, it was reasonable to infer from Scott Deeble's references to "forgiveness" and "compassion" that he was attempting to convey to the jury that he did not want the jury to impose the death penalty. In his last statement, he said that in order to be entitled to forgiveness and compassion himself, he could not "deny someone else the same." (XXII RT 5658.) Clearly, Scott's testimony was an opinion about the proper punishment in this case. It had no bearing on any circumstance of the case or Edwards' character. It was thus inadmissible as a victim's view on the proper punishment.

Moreover, Scott Deeble could not testify or imply that Edwards deserved to live because he did not have a significant relationship with Edwards. This Court has held that testimony from somebody "with whom defendant assertedly had a significant relationship, that defendant deserves to live, is proper mitigating evidence as 'indirect evidence of the defendant's character.'" (*People v. Smith*, *supra*, 30 Cal.4th at pp. 622-623, quoting *People v. Ervin*, *supra*, 22 Cal.4th at p. 102.) Scott Deeble did not have any relationship with Edwards except that his mother was Edwards' victim; thus, Scott Deeble could not "provides insight[] into the defendant's character." (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 456.) Neither Edwards nor Scott Deeble

suggested that his opinion that Edwards was entitled to forgiveness and compassion was based on defendant's character, or, indeed, on anything involving Edwards personally, rather than his general views on the death penalty. (*People v. Smith*, *supra*, 30 Cal.4th at p. 623.) The court properly precluded Scott Deeble from expressing his view on the correct punishment, that Edwards was entitled to "foregiveness" and "compassion."

Assuming the trial court erred in excluding Edwards' statements of remorse and Scott Deeble's opinion about the proper penalty, any error was harmless. A judgment will be reversed on the grounds of erroneously admitted or excluded evidence only where it is reasonably probable a result more favorable to the defendant would have been obtained. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) Here, evidence of Edwards' remorse was presented to the jury. Even though Edwards' statements of why he did not escape were excluded, the fact that he did not in fact attempt to escape was admitted and thus circumstantially showed his remorse. Also, the trial court admitted the testimony of Briggs who stated that Edwards told her "that he didn't remember doing any of the things that they were saying that he did. But if he did, that he should be punished accordingly, and he was going to wait and see what they do." (XXII RT 5752.) Diane Winter also testified that Edwards cried because he did not remember what he had done. And Edwards apparently claimed that if he had in fact done what he was charged with doing, he was "horrible" and "shouldn't be allowed to live in society." (XXII RT 5771.) Because this evidence was already before the jury, and necessarily rejected as a basis for rejecting death as the appropriate punishment, it is not reasonably probable that Edwards would have received a more favorable result if the other statements of remorse and Scott Deeble's testimony had been admitted into evidence.

XVIII.

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY WITH A LINGERING DOUBT INSTRUCTION, WITH CALJIC NO. 2.01, AND TO SPECIFY THAT CERTAIN FACTORS COULD ONLY BE VIEWED AS FACTORS IN MITIGATION

Edwards contends that his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated because the trial court refused to instruct the jury with Edwards' proposed instruction on lingering doubt, because the trial court failed to instruct, sua sponte, with CALJIC No. 2.01, and because the trial court refused to specify to the jury that factors (d), (h), and (k) could only be considered as factors in mitigation. Each of Edwards' claims should be rejected. The jury was properly instructed, and Edwards cannot demonstrate a reasonable possibility that the foregone instructions affected the verdict.

A. The Trial Court Properly Refused to Give a Lingering Doubt Instruction

Edwards argues that the trial court erred when it refused to deliver a lingering doubt instruction. (AOB 378-385.) The trial court properly refused to give Edwards' proposed lingering doubt instruction because the theory was sufficiently encompassed in other instructions given in this case.

Edwards requested that the jury be instructed with a special defense instruction on lingering doubt as follows:

> Although the defendant has been found guilty of murder in the first degree, and the special circumstances of torture and burglary have been found to be true, by proof beyond a reasonable doubt the jury may demand a greater degree of certainty of guilt for the imposition of the death penalty. It is appropriate to consider in mitigation any lingering doubt you may have concerning the defendant's guilt. Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt.

(V CT 1594, 1596, 1629; XXIV RT 6273.) The prosecutor objected to the instruction because it was confusing and the trial court was not required to give the instruction. (XXIV RT 6274.) The trial court denied Edwards' request to instruct on lingering doubt because the theory was already covered in instructions on factor (k) and because recent case law indicated that the instruction was not necessary. (XXIV RT 6277.) The trial court properly refused to give the instruction on lingering doubt.

This Court has explained:

> [T]he standard CALJIC penalty phase instructions "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." [Citation.] Moreover, the general rule is that a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative. [Citation.] Instructions should also be refused if they might confuse the jury. [Citation.]

(*People v. Gurule*, *supra*, 28 Cal.4th at p. 659; accord *People v. Cook*, *supra*, 40 Cal.4th at p. 1362.) "Although instructions pinpointing the theory of the defense might be appropriate, a defendant is not entitled to instructions that simply recite facts favorable to him. [Citation.]" (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1159, original italics omitted.)

A capital defendant has no federal or state constitutional right to have the penalty phase jury instructed to consider residual lingering doubt about his or her guilt. (See, e.g., *People v. Panah*, *supra,* 35 Cal.4th at p. 497; *People v. Harris, supra*, 37 Cal.4th at p. 359; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1218, citing *People v. Staten*, *supra*, 24 Cal.4th at p. 464; *People v. Cox, supra,* 53 Cal.3d at p. 677; *Oregon v. Guzek* (2006) 546 U.S. 517 [126 S.Ct. 1226, 1231-1232, 163 L.Ed.2d 1112] [noting that the Court has never held that such a right exists]; *Franklin v. Lynaugh* (1988) 487 U.S. 164, 172-176 [108 S.Ct. 2320, 101 L.Ed.2d 155].) The lingering doubt concept is sufficiently encompassed in other instructions ordinarily given in capital cases.

(*People v. Harris, supra*, 37 Cal.4th at p. 359.) For instance, an instruction on section 190.3, factor (k), is sufficiently broad to encompass any residual doubt any jurors might have entertained. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1272; *People v. Davis*, *supra*, 10 Cal.4th at p. 545; *People v. Sanchez* (1995) 12 Cal.4th 1, 77-78 *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1187.)

Here, the instructions provided under CALJIC Nos. 8.85 and 8.88 affirmatively required the jury to consider any mitigating circumstances, namely "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspects of a defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (V CT 1647-1648, 1665-1666; CALJIC 8.85.) This was sufficient to encompass any lingering doubt the jurors might have entertained. Moreover, defendant's trial counsel argued before the jury at closing that, in reaching an appropriate penalty, they could consider any lingering doubt with respect to defendant's guilt.

Finally, the particular instruction proposed by Edwards was argumentative and speculative in that it invited the jury to consider the possibility evidence exists which exculpates Edwards but was, for some reason, not presented. It would have been properly refused on this basis as well. (*People v. Gurule*, *supra*, 28 Cal.4th at p. 659.) Accordingly, the trial court properly refused to give Edwards' special defense instruction on lingering doubt.

Even if a lingering doubt instruction should have been given, based on the instructions given and the arguments of counsel, there is no reasonable possibility that Edwards was prejudiced from the lack of the instruction. (*People v. Carter* (2003) 30 Cal.4th 1166, 1221-1222.) As previously stated, CALJIC penalty phase instructions "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional

standards." (*People v. Gurule, supra*, 28 Cal.4th at p. 659.) The jury was instructed using CALJIC No. 8.85. This was sufficient to encompass any lingering doubt the jurors might have entertained. Moreover, defendant's trial counsel argued before the jury at closing that, in reaching an appropriate penalty, they could consider any lingering doubt with respect to defendant's guilt. Thus, even assuming error, it was harmless.

B. The Trial Court Did Not Err in Failing to Instruct, Sua Sponte, With CALJIC No. 2.01 During the Penalty Phase

Edwards argues that the trial court erred in failing to instruct the jury, sua sponte, with CALJIC No. 2.01. This argument is waived because Edwards specifically requested the trial court to instruct with the alternative instruction, CALJIC No. 2.02. In any event, because the prosecution did not rely on circumstantial evidence to prove unadjudicated violent criminal conduct during the penalty phase, CALJIC No. 2.01 was not required.

In discussing which instructions to the give the jury, the trial court asked counsel if CALJIC Nos. 2.01 and 2.02 need be given. (XXIV RT 6259.)[31] The

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31. CALJIC 2.01 Sufficiency of Circumstantial Evidence--Generally provides:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

(continued...)

prosecutor agreed that they should not be given, but Edwards asked if he could think about it. (XXIV RT 6259.) When the issue was revisited, defense counsel stated that CALJIC No. 2.02 should be given "because of the Hawaii crime and the fact that it has to be proved beyond a reasonable doubt and there is a mental state." (XXV RT 6479-6480.) The trial court agreed to give CALJIC No. 2.02, stating, "I don't mind giving it if it is your request. It doesn't hurt anything." (XXV RT 6480.)[32/]

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31. (...continued)
Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

32. The jury in this case was instructed with CALJIC No. 2.02 as follows:

The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find a crime involving violence to have occurred unless the proved circumstances are not only, one, consistent with the theory that the defendant had the required specific intent or/and mental state, but, two, cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence.

If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the

(continued...)

Now Edwards claims that the trial court should have instructed the jury with CALJIC No. 2.01 instead of CALJIC 2.02 because the latter is a narrower instruction limited to mental state. (AOB 387.) The doctrine of invited error generally bars challenging this instructional issue on appeal when the defense acquiesces in an instruction, provided it is clear that counsel acted for tactical reasons and not out of ignorance or mistake. "In cases involving an action affirmatively taken by defense counsel, we have found a clearly implied tactical purpose to be sufficient to invoke the invited error rule. [Citations.]" (*People v. Coffman, supra*, 34 Cal.4th at p. 49.) Here, defense counsel clearly requested that the trial court give CALJIC No. 2.02 specifically because of the mental state involved in the Hawaii crime. (XXV RT 6479-6480.) Accordingly, Edwards' present complaint is barred by the invited error doctrine.

In any event, neither CALJIC Nos. 2.01 nor 2.02 needed to be given in this case. Such instructions are required only when the prosecution substantially relies on circumstantial evidence to prove unadjudicated violent conduct evidence. (*People v. Brown* (2003) 31 Cal.4th 518, 563.) When "circumstantial inference is not the primary means by which the prosecution seeks to establish that the defendant engaged in criminal conduct, the instruction may confuse and mislead, and thus should not be given." (*People v. Dunkle* (2005) 36 Cal.4th 861, 927-928, quoting *People v. Anderson, supra*, 25 Cal.4th at p. 582.) Here, to prove the section 190.3, factor (b) offenses, which were unadjudicated, the prosecution relied primarily on direct evidence: testimony of Officer Martin that he witnessed Edwards sharpening a piece of metal into a shank, Edwards' admissions that he possessed the shank and that he believed he killed Delbecq, and eyewitness testimony of Naomi Titus that Edwards tried

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32. (...continued)
reasonable interpretation and reject the unreasonable.

(V CT 1637; XXV RT 6486.)

to shove a wine bottle in her genital area. These were all direct evidence that Edwards engaged in criminal conduct. Hence, the trial court did not err in declining to instruct with CALJIC No. 2.01.)

C. The Trial Court Did Not Err in Instructing the Jury That Factors (d), (h) and (k) Could Not Be Considered as Aggravating Factors

Edwards claims that the trial court erred when it refused to deliver an instruction that factors (d), (h) and (k) can only be considered as evidence in mitigation. (AOB 388-389.) However, it is well established that the trial court had no obligation to advise the jury which statutory factors are relevant solely as mitigating circumstances and which are relevant solely as aggravating. (*People v. Brasure* (Feb. 7, 2008, No. S072949) ___ Cal.4th ___ [2008 WL 323417]; *People v. Mendoza* (2007) 42 Cal.4th 686, 708; *People v. Farnam*, *supra*, 28 Cal.4th at pp. 191-192; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 420.) Furthermore, the United States Supreme Court has held in *Tuilaepa v. California* (1994) 512 U.S. 967, 979 (114 S.Ct. 2630, 129 L.Ed.2d 750), that a capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision. Edwards provides no compelling reason for this Court to reconsider its long-standing conclusion on this issue.

Nonetheless, the trial court here instructed the jury that "all evidence related to factors (d), (h) and (k) cannot be considered as aggravating factors." (XXV RT 6494; V CT 1647.) In essence, the jury was informed that those factors can only be considered as evidence in mitigation. Thus, there was no error.

D. Assuming Arguendo the Trial Court Erroneously Refused Any of Edwards' Proposed Instructions, the Alleged Errors Were Harmless

Because the Constitution does not require instruction with Edwards' proposed instructions, as discussed above, this Court should apply state harmless error analysis in determining the effect of their omission. In other words, even assuming arguendo error, this Court should affirm the death verdicts unless Edwards demonstrate a reasonable possibility that the foregone instruction affected the verdicts. (*People v. Rogers* (2006) 39 Cal.4th 826, 901; *People v. Brown*, *supra*, 46 Cal.3d at pp. 446-447.) The "reasonable possibility" standard is "'the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].'" (*People v. Rogers, supra*, 39 Cal.4th at p. 901, quoting *People v. Jones*, *supra*, 29 Cal.4th at p. 1264, fn. 11, italics omitted.) Edwards has not made this showing, nor can he.

As already discussed above, the evidence of circumstances in aggravation in this case overwhelmingly supported the death sentence the jury meted out. The circumstances of the crime was uniformly horrible, involving the unprovoked, brutal sexual assault and torture of Deeble. Edwards continued his violence by committing an equally horrid rape and murder of Delbecq in Hawaii, attempting to thrust a wine bottle inside Titus's genital area, and by fashioning a shank out of a piece of metal while in custody. While Edwards presented evidence of childhood abuse and a family history of drug and alcohol abuse, the evidence also showed that Edwards had a loving family including his mother, sister and cousins, as well as many friends who supported him during his attempts at recovery. On this record, no reasonable possibility exists that Edwards would have received anything other than a death sentence absent any alleged instructional error. (*People v. Rogers, supra*, 39 Cal.4th at p. 901.)

XIX.

THERE WAS NO CUMULATIVE ERROR

Edwards contends his sentence of death must be reversed based upon cumulative error. (AOB 389-391.) The record demonstrates Edwards received a fair trial and there is no basis upon which to reverse the death judgment based on error, individually or cumulatively.

Even a capital defendant is entitled to only a fair trial, not a perfect one. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 522; *People v. Box*, *supra*, 23 Cal.4th at p. 1214; see also *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial."]; *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340].) Since every claim of error raised by Edwards was either not error, invited, forfeited, or harmless, there is no prejudice to Edwards, and thus no cumulative effect. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1141.)

Accordingly, the sentence of death should be affirmed. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1038.)

XX.

EDWARDS' NUMEROUS UNITED STATES CONSTITUTIONAL CHALLENGES TO CALIFORNIA'S DEATH PENALTY SCHEME SHOULD BE REJECTED

Recognizing this Court has repeatedly rejected most of his federal constitutional challenges to California's death penalty scheme, Edwards' nevertheless makes 13 separate constitutional challenges to California's death penalty scheme. (AOB 391-430.) To the extent Edwards did not assert any of these particular constitutional grounds at trial, he has waived them on appeal. (*See People v. Earp, supra*, 20 Cal.4th at p. 893; *People v. Carpenter, supra*, 15 Cal.4th at p. 385.) Because Edwards fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should all be rejected without additional legal analysis. (*People v. Schmeck, supra*, 37 Cal.4th at pp. 303-304; *People v. Welch, supra*, 20 Cal.4th at pp. 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Edwards contends the failure of California's death penalty law to meaningfully distinguish those murders in which the death penalty is imposed from those in which it is not requires reversal of the death judgment in this case. Specifically, Edwards argues his death sentence is invalid because Penal Code section 190.2 is impermissibly broad and fails adequately to narrow the class of persons eligible for the death penalty. (AOB 394-396.) The Supreme Court has found that California's requirement of a special-circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29].) Likewise, this Court has repeatedly rejected, and continues to reject, the claim raised by Edwards that California's death penalty law contains so many special circumstances that it fails to perform the narrowing function required

under the Eighth Amendment, or that the statutory categories have been construed in an unduly expansive manner. (*People v. Beames* (2007) 40 Cal.4th 907, 933-934; *People v. Burgener*, *supra*, 29 Cal.4th at p. 884 ["Section 190.2, despite the number of special circumstances it includes, adequately performs its constitutionally required narrowing function."]; *People v. Crittenden*, *supra*, 9 Cal.4th at pp. 155-156.) Edwards' claim should similarly be rejected.

B. Penal Code Section 190.3, Factor (a), as Applied, Does Not Permit the Arbitrary and Capricious Imposition of Death

Edwards contends his death sentence must be set aside because Penal Code section 190.3, factor (a), as applied, allows the arbitrary and capricious imposition of death in violation of the Eighth Amendment to the United States Constitution. (AOB 396-398.) Specifically, Edwards contends factor (a) has been applied in a manner such that almost all features of every murder have been found to be "aggravating" within the meaning of the statute. (AOB 398.) This argument, as this Court has held, is without merit.

As Edwards acknowledges, the United States Supreme Court rejected an Eighth Amendment facial challenge to factor (a) more than a decade ago. (AOB 397, citing *Tuilaepa*, *supra*, 512 U.S. at pp. 975-976.) In so doing, the Supreme Court wrote:

> We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.* at p. 976.)

Similarly, this Court has repeatedly rejected the claim that factor (a), as applied, allows for the arbitrary and capricious imposition of the death penalty. (See, e.g., *People v. Geier*, *supra*, 41 Cal.4th at p. 620; *People v. Cook*, *supra*, 40 Cal.4th at p. 1366; *People v. Panah, supra,* 35 Cal.4th at p. 499; *People v. Turner* (2004) 34 Cal.4th 406, 438; *People v. Brown, supra,* 33 Cal.4th at p. 401; *People v. Pollock, supra,* 32 Cal.4th at p. 1196; *People v. Lewis*, *supra*, 26 Cal.4th at p. 394; *People v. Wader* (1993) 5 Cal.4th 610, 663.) This Court's comments in *Brown* apply with equal force to Edwards' argument here:

> Defendant's argument that a seemingly inconsistent range of circumstances can be culled from death penalty decisions proves too much. What this reflects is that each case is judged on its facts, each defendant on the particulars of his offense. Contrary to defendant's position, a statutory scheme would violate constitutional limits if it did not allow such individualized assessment of the crimes but instead mandated death in specified circumstances. (See generally *Lockett v. Ohio* (1978) 438 U.S. 586, 602-606, 98 S.Ct. 2954, 57 L.Ed.2d 973.)

(*People v. Brown, supra*, 33 Cal.4th at p. 401.) For these reasons, Edwards' argument should be rejected.

C. The California Death Penalty Statute and Instructions Do Not Violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution

Edwards argues California's death penalty statute and its implementing jury instructions are constitutionally deficient for failing to require: (1) aggravating factors be proven beyond a reasonable doubt; (2) factors in aggravation be proven to outweigh factors in mitigation beyond a reasonable doubt; (3) death found to be the appropriate penalty beyond a reasonable doubt; (4) that the jury make those findings unanimously; (5) written findings regarding aggravating factors; and (6) intercase proportionality review. (AOB 398-421.) Edwards also argues that the prosecution should not be able to rely on unadjudicated criminal activity; the instructions unconstitutionally used

restrictive adjectives in the list of potential mitigating factors, and the trial court failed to advise the jury that mitigating factors could only be considered in mitigation. (AOB 421- 425.) This Court has repeatedly rejected all of these claims and should likewise reject the similar claims presented here.

This Court has consistently and repeatedly held that "neither federal nor state Constitution requires the jury to unanimously agree as to aggravating factors." (*People v. Panah*, *supra*, 35 Cal.4th at p. 499; *People v. Combs, supra*, 34 Cal.4th at p. 868; accord *People v. Monterroso* (2004) 34 Cal.4th 743, 795; *People v. Morrison*, *supra,* 34 Cal.4th at p. 730; *People v. Pollock*, *supra*, 32 Cal.4th at p. 1196; *People v. Yeoman*, *supra*, 31 Cal.4th at p. 157; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1053; *People v. Howard* (1992) 1 Cal.4th 1132, 1196.) Similarly, proof beyond a reasonable doubt does not apply to those determinations. (*People v. Dunkle, supra,* 36 Cal.4th at p. 939; *People v. Stitely, supra,* 35 Cal.4th at p. 573; *People v. Panah*, *supra*, 35 Cal.4th at p. 499; *People v. Monterroso*, *supra*, 34 Cal.4th at p. 796; *People v. Morrison, supra*, Cal.4th at p. 730; *People v. Welch, supra*, 20 Cal.4th at pp. 767-768.) Moreover, the decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (120 S.Ct. 2348, 147 L.Ed.2d 435), and its progeny do not change that conclusion. (*People v. Stitely, supra*, 35 Cal.4th at p. 573 [*Blakely*,[33/] *Ring*,[34/] and *Apprendi*, *supra*, "do not require reconsideration or modification of our long-standing conclusions in this regard"]; *People v. Gray, supra,* 37 Cal.4th at p. 237; *People v. Morrison, supra*, 34 Cal.4th at pp. 730-731; *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263, 271-272; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; see *People v. Smith*, *supra*, 30 Cal.4th

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33. *Blakely v. Washington* (2004) 542 U.S. 296 (124 S.Ct. 2531, 159 L.Ed.2d 403).

34. *Ring v. Arizona* (2002) 536 U.S. 584 (122 S.Ct. 2428, 153 L.Ed.2d 556).

at p. 642.) Likewise, because of the individual and normative nature of the jury's sentencing determination, the trial court need not instruct that the prosecution has the burden of persuasion on the issue of penalty. (*People v. Combs*, *supra*, 34 Cal.4th at p. 868; *People v. Lenart*, *supra*, 32 Cal.4th at pp. 1135-1136; *People v. Steele*, *supra*, 27 Cal.4th at p. 1259; *People v. Bemore*, *supra*, 22 Cal.4th at p. 859.)

Edwards also claims California's capital sentencing scheme violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution because it does not require a jury to render written findings as to the aggravating circumstances it has relied upon, nor does it require any reasons for the choice of sentence. (AOB 416-419.) This Court has held, and should continue to hold, that the jury need not make written findings disclosing the reasons for its penalty determination. (*People v. Dunkle, supra,* 36 Cal.4th at p. 939; *People v. Young*, *supra*, 34 Cal.4th at p. 1233; *People v. Maury* (2003) 30 Cal.4th 342, 440; *People v. Hughes* (2002) 27 Cal.4th 287, 40[illegible], *People v. Welch*, *supra*, 20 Cal.4th at p. 772; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 479; *People v. Frye*, *supra*, 18 Cal.4th at p. 1029.) The above decisions are consistent with the United States Supreme Court's pronouncement that the federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S.Ct. 1441, 108 L.Ed.2d 725], citing *Hildwin v. Florida* (1989) 490 U.S. 638 [109 S.Ct. 2055, 104 L.Ed.2d 728].)

Additionally, Edwards contends lack of intercase proportionality review violates the right to a fair trial, due process, equal protection, and protection from the arbitrary and capricious imposition of capital punishment guaranteed by the Fifth, Eighth, and Fourteenth Amendments. (AOB 419-421.) To the contrary, intercase proportionality review is not constitutionally required and this Court has consistently declined to undertake it. (*Pulley*, *supra*, 465 U.S. at

pp. 50-54 [California's death penalty statute not rendered unconstitutional by the absence of a provision for comparative proportionality review]; *People v. Dunkle, supra,* 36 Cal.4th at p. 940, citing *People v. Horning*, *supra*, 34 Cal.4th at p. 913, and *People v. Morrison, supra,* 34 Cal.4th at p. 731.) Nor does equal protection require that capital defendants be afforded the same sentence review afforded other felons under the determinate sentencing law. (*People v. Dunkle, supra,* 36 Cal.4th at p. 940; *People v. Cox*, *supra*, 53 Cal.3d at p. 691; *People v. Allen*, *supra*, 42 Cal.3d at pp. 1286-1288.)

Edwards next claims that reliance on previously unadjudicated criminal activity under Penal Code section 190.3, factor (b), both as written and as applied in this case, violates the Constitution. (AOB 421-422.) This Court has repeatedly upheld the admission of unadjudicated criminal activity as evidence in aggravation. (*People v. Hinton*, *supra*, 37 Cal.4th at p. 913; *People v. Dunkle, supra,* 36 Cal.4th at p. 940; *People v. Brown*, *supra*, 33 Cal.4th at p. 402; *People v. Avena* (1996) 13 Cal.4th 394, 428; *People v. Hawthorne* (1992) 4 Cal.4th 43, 76-77; *People v. Balderas* (1985) 41 Cal.3d 144, 201; see also *Tuilaepa*, *supra*, 512 U.S. at p. 976.) There is no requirement that the jury unanimously agree on the unadjudicated criminal activity. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1061.)

With regard to instruction on mitigation evidence, Edwards claims the use of restrictive adjectives in several of the mitigation factors imposed an unconstitutional barrier to the jury's consideration of relevant mitigating evidence. (AOB 422.) This same complaint has been repeatedly rejected by this Court. (*People v. Moon* (2005) 37 Cal.4th 1, 42; *People v. Dunkle, supra,* 36 Cal.4th at p. 939, citing *People v. Monterroso*, *supra*, 34 Cal.4th at p. 796.) Edwards also contends the trial court failed to advise the jury that mitigating factors could only be considered mitigating and therefore violated the Constitution. (AOB 422-425.) This Court has repeatedly found no error in this

regard. (*People v. Moon, supra,* 37 Cal.4th at p. 42, citing *People v. Morrison, supra,* 34 Cal.4th at p. 730.) Moreover, the trial court here instructed that factors (d), (h) and (k) could not be considered aggravating factor. (XXV RT 6494; V CT 1647.).)

D. The California Death Penalty Law Does Not Violate the Equal Protection Clause

Edwards contends that California's death penalty scheme violates equal protection because it provides significantly fewer procedural protections to those facing a death sentence than those charged with non-capital crimes. (AOB 426-428.) Edwards claims that capital defendants receive disparate treatment. Edwards' arguments should be rejected. This Court noted in *People v. Brown, supra,* 33 Cal.4th 382, "Death penalty defendants are not denied equal protection because the statutory scheme does not contain disparate sentence review." (*People v. Brown, supra,* 33 Cal.4th at p. 402, citing *People v. Jenkins, supra,* 22 Cal.4th at p. 1053, and *People v. Allen*, *supra*, 42 Cal.3d at pp. 1286-1288). Because this Court has repeatedly foreclosed Edwards' argument, the claim should be summarily rejected. (*People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Smith* (2005) 35 Cal.4th 334, 374.) Edwards' death sentence is constitutional.

E. Edwards' Death Sentence Does Not Violate International Law or the Eighth Amendment's Ban on Cruel and Unusual Punishment

Edwards asserts that imposing the death penalty in his case violates international norms of humanity and decency. In this regard, he notes all Western European countries have abolished the death penalty. (AOB 428-430.) He argues that because international norms are part of the evolving standards of decency incorporated within the Eighth Amendment to the United States Constitution, imposition of the death penalty on Edwards also violates the

Eighth Amendment. (AOB 428-430.) The problem with Edwards' argument is that it is not the international community's views that are relevant to the Eighth Amendment analysis; "it is *American* conceptions of decency that are dispositive[.]" (*Stanford v. Kentucky* (1989) 492 U.S. 361, 370 [109 S.Ct. 2969, 106 L.Ed.2d 306], abrogated by *Ropers v. Simmons* (2005) 543 U.S. 551 [125 S.Ct 1183, 161 L.Ed.2d 1].)

While "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," (*Thompson v. Oklahoma* (1988) 487 U.S. 815, 868-869, fn. 4 [108 S.Ct. 2687, 2716-2717, fn. 4, 101 L.Ed.2d 702] (Scalia, J., dissenting), quoting *Palko v. Connecticut* (1937) 302 U.S. 319, 325 [58 S.Ct. 149, 152, 82 L.Ed. 288] (Cardozo, J.), overruled by *Benton v. Maryland* (1969) 395 U.S. 784 [89 S.Ct. 2056, 23 L.Ed.2d 707]), they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.

Because Edwards has failed to show there is a national consensus against imposing a sentence of death in cases like his, his Eighth and Fourteenth Amendment claim fails. (Compare *Atkins v. Virginia* (2002) 536 U.S. 304, 314-316, 321 [122 S.Ct. 2242, 153 L.Ed.2d 335] [holding the execution of a mentally retarded prisoner violates the Eighth Amendment's ban on cruel and unusual punishment after noting a national consensus against this practice had emerged].) This Court has repeatedly rejected this claim and should continue to do so. (*People v. Perry* (2006) 38 Cal.4th 302, 322; *People v. Dunkle, supra,* 36 Cal.4th at p. 940, citing *People v. Brown*, *supra*, 33 Cal.4th at pp. 403-404.) Furthermore, for the reasons explained throughout Respondent's Brief, death is the appropriate punishment for Edwards' brutal and torturous

murder of Deeble. (See *Enmund v. Florida* (1982) 458 U.S. 782, 797-801 [102 S.Ct. 3368, 73 L.Ed.2d 1140].)

CONCLUSION

For the forgoing reasons, Edwards' convictions and the judgment of death should be affirmed in its entirety.

Dated: February 27, 2008.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached DOCUMENT TITLE uses a 13-point Times New Roman font and contains 81178 words.

Dated: February 27, 2008.

Respectfully submitted,

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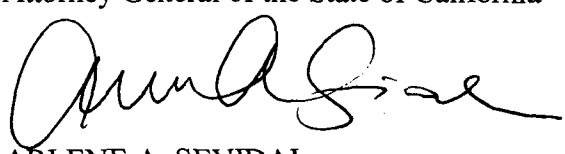

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DECLARATION OF SERVICE BY MAIL

I declare that I am employed in the County of San Diego, California; that I am over 18 years of age and am not a party to the within-entitled cause; that my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, California 92186-5266; and that on **February 28, 2008**, I served the attached

RESPONDENT'S BRIEF	***People v. Edwards*** California Supreme Court S073316 **CAPITAL CASE**

by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General, for deposit in the United States Postal Service that same day in the ordinary course of business, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Diego, California, on **February 28, 2008**.

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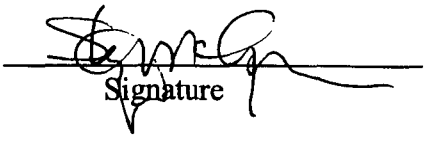
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